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, 1879.

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.

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HON. JOHN R. EAKIN, }

Attorney General.....W. F. HENDERSON.

Clerk.....LUKE E. BARBER.

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CHANCELLOR,

HON. DAVID W. CARROLL.

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10th Circuit	Hon. T. F. SORRELLS.
11th Circuit	Hon. X. J. PINDALL.
12th Circuit	Hon. J. H. ROGERS.

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CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF ARKANSAS,

AT THE

MAY TERM, 1879.

COLLINS, TRUSTEE, VS. WASSELL.

34 17
68 397

1. MARRIED WOMAN: *May mortgage or sell her property for husband's debts.*

The rule that a wife can charge her separate estate only for its, or her personal benefit, does not prevent her from mortgaging or selling it absolutely for her husband's debts. She is for most purposes, in equity, a *femme sole*, as to her separate property, when not restricted by the deed of settlement, in terms or by implications equivalent to express provisions.

2. SAME: *Need not acknowledge assignment of rents.*

She may assign or transfer rents and profits accruing to her under a deed of trust, without conforming to the requirements and formalities prescribed for the alienation of real property.

APPEAL from *Pulaski* Chancery Court.
Hon. J. R. EAKIN, Chancellor.
M. Collins, for appellant.
Wassell & Moore, for appellees.

TURNER, Sp. J. The original bill states, that on the thirteenth day of September, 1867, Noah H. Badgett, conveyed to his son, William B. Badgett, certain real estate situate in the city of Little Rock, and described as lots No. five (5) and six (6) and part of lot No. four (4) constituting a part of what is known as the Badgett Block, in trust, first: to rent or lease the same and to take and collect and receive the rents, issues and profits, and out of the same to keep the premises in good order and repair, and properly insured, and pay all taxes and assessments and charges that might be legally imposed thereon. And in trust, secondly, to pay the residue of such rents, issues and income, to Lucetta S. Badgett, wife of the said Noah H., and mother of the said William B. Badgett, upon her sole receipt, free from the contract and liability of her then or future husband. And it was further provided that upon the death of the said Lucetta S., the trust thereby created, should be deemed executed, and the said real estate, divested of the trust, belong in fee simple to the children and heirs at law of the said Lucetta S.

That on the fifteenth day of March, 1870, the said trustee died, and that no successor was appointed until in March, 1876, previous to which time Lucetta S. Badgett filed a bill in the Pulaski chancery court against her heirs, setting forth that there was a large amount of taxes then due upon the houses and lots; that she had no funds to pay the same, and that the whole was about to be sold. The matter was submitted to the direction and control of the chancellor, who ordered and superintended the sale of one of the lots to save the balance.

On the eleventh day of March, 1876, the chancellor appointed Charles S. Collins, trustee in place of William B.

Badgett, deceased, and on the twenty-ninth of May, following, he filed the bill under consideration in behalf of his *cestui que trust*, and himself as trustee, against the said John Wassell; the objects being to have an account taken of the rents and profits of the trust estate, it being alleged that the same had been improperly taken and diverted from the purpose of paying taxes and charges on the trust estate, and by the said Wassell appropriated to his own use, on a claim of a debt alleged to be due him from Noah H. Badgett and his wife, the *cestui que trust*, whereby the necessity arose of applying to the court of chancery for an order to sell a part of the property to save the residue, and to compel a return of the misapplied rents, or an appropriation of them to the benefit of the *cestui que trust*, by crediting them on certain notes held by the said John Wassell by assignment of E. Darwin Ayres, secured by a vendor's lien on certain other real estate, it being the homestead of the said Lucetta S.

That on the twelfth day of July, 1872, the defendant, representing that it was for the benefit of her separate estate, induced the said Lucetta, the *cestui que trust*, to join her husband Noah H. Badgett, in the execution of a certain promissory note, payable to the defendant, for $1,000, due January 1, 1873, with interest at the rate of twenty-four per cent. per annum, and at the same time, as security therefor, to assign the rents, issues and profits of the trust estate to the said defendant, which note and assignment are exhibited with, and made part of, the bill.

That, contrary to said representations, no part of said $1,000 note was for the benefit of the separate estate of the *cestui que trust;* that the true nature of the transaction was concealed from the said *cestui que trust*; that, instead of be-

ing executed and delivered in consideration of a present advance for the benefit of her separate estate, said promissory note was made to embrace and take up certain previously-existing claims in favor of the defendant and the firm of Wassell & Moore, and against Noah H. Badgett.

That again, on the fifteenth day of April, 1874, the defendant induced the said *cestui que trust* to join in a certain other promissory note for $1,523.80, and to secure the same, induced her to make a certain other assignment of the rents and profits of the trust estate with power to collect the same after the note matured, which said last note and assignment are exhibited with and made part of the bill.

That notwithstanding at the time of the execution of said note and assignment, the defendant represented to said *cestui que trust* that the same was for an advance then made to her for the benefit of her separate estate, such representations were mainly untrue. That in fact the said sum of $1,523.80 was made up as follows: $554.55 was for interest on the first note for $1,000 three times compounded at the rate of 24 per cent. per annum. The sum of $429.25 was to take up a note of Noah H. Badgett to defendant, also bearing 24 per cent. interest per annum given in consideration that said defendant had discharged a certain judgment against him, and the balance of $540 was advanced in good faith and paid out on taxes against the trust estate for the year 1873, but that $300 of this amount was returned to the defendant by the said Noah H. in a few days, leaving the balance of $240 as the real amount advanced for the benefit of the *cestui que trust.* The note for $1,523.80 was due on the first day of October, 1874, with interest at the rate of 2 per cent. per month from date until paid.

The last assignment has the following clause: "This

assignment has no relation to one of date of 12th of July, 1872, which is still unpaid and in full force in all things. This being for a further advance." That the defendant has collected the rents under his power down until the first day of April, 1876. An account in statement of nett receipts is filed with the bill and made an exhibit in the case.

The defendant, Wassell, answers and says: That William B. Badgett never undertook or in any manner exercised any authority whatever under the said deed of trust, but on the contrary left the whole management and direction of said trust property to the care of the said Noah H. and Lucetta S., his father and mother; they renting out and controlling the same without the intervention of any trustee or other person in any manner or for any purpose whatever. That for a period of over eight years the said Noah H. and Lucetta S. exercised and controlled the occupation and disposition of the rents of said property, made all contracts for repairs, paid all taxes due thereon, rented the property and received the rents therefor.

The defendant denies that he made any representations to the said Lucetta to induce her to execute the note and assignment of July 12, 1872, but says the loan for which the note was executed was made at her express request. That she owed Wassell & Mooré a note of $200 for professional services in a suit concerning other property of her own, and agreed that said note with interest should be included in the note for the loan. The balance was handed to the said Noah H. He denies the charge of compounding and re-compounding interest That said assignments of rents gave the defendant the right to commence collecting the rent on the first day of January, 1873, but upon the

earnest solicitation of the said Noah H. and Lucetta S. the defendant allowed them to continue to collect the rents until July 31, 1874, when defendant commenced collecting only upon a small portion of the rents assigned. That on or about the first day of April, 1874, the said Noah H. and Lucetta S. again made application to defendant for a further loan of money to enable them to live and to prevent their personal property from being sold under execution, saying to defendant that it had taken all their ready money to pay taxes and subsist upon, and that they had to assign the rents already assigned to him, to Fletcher & Walker, and asking defendant to indulge them further in carrying out their plans and permit said Fletcher & Walker to receive the rents to the amount of $1,500.

That to help them in their troubles, defendant agreed to make further advances to pay off a certain judgment referred to by them; that he did pay off said judgment and protected their property from execution and sale, and permitted Fletcher & Walker to take the rents for the payment of money advanced by them to pay the taxes for 1872.

That upon said agreement and request a *second* note and assignment of rents to secure the same was made on the fifteenth day of April, 1874, and payable on the first day of October, 1874. That the statement in the bill that the defendant represented to the said Lucetta S. that the same was for advances then made for her separate estate is absolutely untrue in every particular, but says she conferred freely with him about her business and requested the loan as a favor she could obtain from no one else. He denies that any part of the interest account on the first note was included in the second, but says there was included a certain other joint indebtedness due the defendant upon an entirely

different matter which Badgett and wife desired to discharge.

Admits the payment to him of $300 by Noah H. Badgett, but says it was applied to his personal and private account; that no credit therefor was entered on either note, nor was it requested. That the said Noah H. had a running account with defendant entirely different from their joint dealings. That this defendant has collected, after great trouble and expense, on his assignment of rents, about two-thirds of the amount due him, leaving a large amount still due, which the trustee refuses to pay. That in renting and controlling the buildings and stores the defendant by agreement never had any control, that having been alone by the said Noah H. and Lucetta S. That while the defendant was collecting rents the said Noah H. and Lucetta S. were making large bills with the respective tenants, which was taken out of the rents due on assignment. At their earnest request this was permitted in their straitened circumstances to help them along in their trouble about their money matters.

That in January, 1876, a statement of the accounts connected with the assignment of rents was made out by Mrs. Badgett's son, a competent accountant, which was satisfactory to him and to her.

And defendant denies that the account of rents, marked exhibit "D," to the bill of complaint is true, in any of its parts or statements.

There is a demurrer to the bill, on account of multifariousness in the joinder of separate and distinct causes of action.

Prayer for an account of what may be due defendant on the notes, and money received by him for rent, and that the balance be paid him out of rents to be received by the trustee, and be made a lien on the property.

By way of cross bill, the defendant adopts and reiterates the allegations and statements contained in his answer; and says that the money for which the note for $1,000, dated the 12th July, 1872, and the note for $1,523.80, dated the 15th April, 1874, was advanced and paid by defendant to the said Lucetta S., was for her benefit, and at her instance and request, and in relation to matters concerning her separate estate, and that the said notes and assignment of rents as a security therefor, were given by the said Lucetta S., with a full knowledge of the facts connected with the same. That there is a large balance justly due the said Wassell. That the said Lucetta S. has only a life estate in the property described in the deed of trust. That the husband, Noah H. Badgett, is insolvent, and that in case of the death of said Lucetta S., defendant could have no hope of realizing any part of the amount which he claims is justly due him on said notes. That the trustee is proceeding to collect the rents, and refuses to pay the same to defendant; and that Collins also is insolvent, who he prays may be enjoined from paying over any of the said rents to his *cestui que trust*, or otherwise disposing of them, until his debts be fully satisfied.

On the ninth of April, 1877, this cause was submitted to the court, and on the 18th of June following the chancellor decided "that the two notes, and the assignment of rents in this cause involved, are so far valid as to amount to directions for the appropriation of the rents and profits of the trust property received by defendant Wassell, and that said notes are entitled to credits for the several sums of rent so received at the respective dates, without any diminution for commissions, less amount of insurance paid on trust property by defendant, Wassell, and in addi-

tion, the first note for $1,000 is entitled to a credit for the interest of the first year; and the second note, for $1,523.80, is entitled to credit for $300, of the date of the payment by N. H. Badgett, of $500 in State scrip."

Whereupon a reference of this cause was made to the clerk of the court as master, to state an account of the said notes and credits in accordance with the principles announced by the chancellor, giving credits in conformity with the laws regulating partial payments, until the first note be extinguished, then passing any balance to the credit of the second note, until the whole be paid or the rents become exhausted, less the amount of insurance on the trust property paid by said Wassell, allowing the notes to continue to bear interest at the rate expressed on their face; and if there be an excess of rents over the balance of the notes, such excess to bear six per cent. interest from the date of their receipt.

Subsequently the special master made a report accompanied by a detailed account and statement, which was made a part thereof, from which it appears that the first note executed by Badgett and wife, for $1,000, dated July 12, 1872, and bearing interest at 24 per cent. per annum, had been fully paid, as follows:

First—By allowing of one year's interest, or by computing interest thereon from July 12, 1873, instead of from July 12, 1872, and rents collected by Wassell on the trust property after allowing the insurance paid by him out of the first rents collected.

Second—The second note for $1,523.80, dated April 15, 1874, and bearing 24 per cent. interest per annum, had been fully paid off, as follows: By credit of $300, for State scrip, and collections of rents from the trust estate

by Wassell, leaving due to Badgett, over and above the two notes referred to, $384.53, as shown by the account and statement accompanying the report.

Exceptions were filed to the master's report by the plaintiffs and the defendant, all of which were overruled by the court.

And it was further ordered that the directions of the court to the master be so modified as to compute the interest upon the excess down to the date of the decree in cause No. 735; and as so modified the report of the master was in all things confirmed.

In the further progress of this cause (No. 733), on motion of complainants, it was consolidated with cause No. 735, a suit brought by the said John Wassell against the said Lucetta S. Badgett and Noah H. Badgett to enforce a vendor's lien on certain real estate in the complaint mentioned.

The material allegations of the complaint in suit No. 735 are, that on the twenty-eighth day of January, 1871, E. Darwin Ayres, who was the owner of lots No. 1, 2, 3, 4, 5 and 6, in block No. 43, west of the Quapaw line in the city of Little Rock, sold the aforesaid lots to the said Lucetta S. Badgett, for the sum of $9,288 in cash, and the further sum of $2,212, evidenced by five promissory notes of the said Noah H. Badgett, husband of the said Lucetta S.—two of which notes are for $500 each, dated January 28, 1871, and bearing interest at the rate of 25 per cent. per annum from date, and payable ten months after date.

Two of which notes were for the further sum of $500 each, bearing date January 28, 1871, with interest at the rate of 18 per cent. per annum from date, and payable

twelve months from date; and one note for $212, bearing date January 28, 1871, with interest at the rate of 8 per cent. per annum from date, and payable twelve months after date. Copies of the notes are exhibited with and made part of the bill of complaint.

That the said Ayres, at the date aforesaid, by deed conveyed to the said Lucetta S. Badgett the said real estate, reciting therein the terms of sale, the payment in cash, and the five (5) promissory notes mentioned, for the unpaid balance of the purchase money, and retaining a *lien* on the land for the unpaid balance of the purchase money. A copy of the deed of conveyance is exhibited with and made part of the bill of complaint.

That the said notes, and all right, title and interest of the said Ayres, have been assigned to the said Wassell for a valuable consideration, and are now held and owned by him. The deed of assignment is also filed with, and made part of, the complaint.

That one of said $500 notes was paid and surrendered to said Badgett before the remaining four notes were assigned to Wassell. That the defendant entered into and remained in possession of said lands.

That no part of said notes so assigned have been paid, except the sum of $865, which appears by indorsements on the said notes. Plaintiff prays judgment against the defendants for the amount due on said notes, with interest and costs of suit; that plaintiff's lien as vendor may be enforced in respect of said lands, and that, if the judgment be not paid by a short day, that the equity of redemption to said real estate may be forever barred and foreclosed, and the same sold by a commissioner, etc., and that the proceeds of such sale, after paying the costs of suit, be

applied to the payment of the amount found to be due on said notes, etc.

The said Lucetta S. Badgett, answered, admitting the purchase of the lots, as alleged in the complaint, and the execution of the promissory notes of the said Noah H. Badgett, for a part of the purchase money, and of the assignment of the notes to the plaintiff, as alleged in the complaint.

Denies that but $865 of said notes in the hands of the plaintiff have been paid, and alleges that they have long since been paid off and discharged, and should be surrendered up for cancellation, etc.

The residue of the answer is in the nature of a cross-bill:

And sets up, by way of defense to bill No. 735, the substance of her allegations contained in bill No. 733, which, according to the view we take of the case, it will not be necessary to repeat here.

Noah H. Badgett answered, admitting the purchase of the lots by the said Lucetta S. from the said Ayres, as described in said complaint, and that the assignments were as alleged therein.

The plaintiff, Wassell, answered the cross-bill of the said Lucetta S., but it is in substance a repetition of the facts and statements contained in his answer to the original bill, No. 733.

On the thirtieth day of June, 1877, the consolidated causes, No. 733 and No. 735, were heard upon the bill and answer and the proofs and exhibits in cause No. 733, and upon the bill and answer and cross-bill, and answer thereto and exhibits to the papers in cause No. 735, and upon the report of the master in cause No. 733.

Whereupon the court found that the notes and assign-

ments of Lucetta S. Badgett, of July 12, 1872, and of April 15, 1874, were fully paid and satisfied on the first day of February, 1876, and that there was in the hands of said Wassell, on that day, $1,628, which, with additional rents received by him from said trust property, amounted, on the first day of April, 1876, to $356.28, which the court directed to be applied as credits on the notes of Noah H. Badgett, sued on in cause No. 735, at the dates when received by the said Wassell, in such manner that the same shall first go to extinguish the first note, which is a lien on lots Nos. 1, 2, 3, 4, 5 and 6, in block No. 43, W. Q. L., in the city of Little Rock, which first note bears interest at the rate of 25 per cent. per annum, and that the remainder, if any, upon the remaining notes of said N. H. Badgett, which are a lien upon said lots of said L. S. Badgett, which bear 18 per cent. interest per annum.

And the court found that, after applying the credits provided for, there was still due upon the last of these notes of N. H. Badgett (the first one bearing 25 per cent. interest per annum, having been discharged), the sum of $2,232, allowing all the credits provided for.

And thereupon the court decreed that the notes and assignments of the said Lucetta S. Badgett, of the twelfth July, 1872, and of April the 15th, 1874, are fully paid off and satisfied, and that the same be delivered up to the clerk for cancellation, and that the plaintiff recover from the defendant, in cause No. 735, his costs down to the order for consolidation, etc.; and that the plaintiff, Wassell, in cause No. 735, recover judgment against the defendant, Noah H. Badgett, in said cause, the sum of $2,232, with costs, and that said sum bear interest from the date of the decree, at the rate of 10 per cent. per annum, and that

sum be declared a lien upon said lots Nos. 1, 2, 3, 4, 5 and 6, in block No. 43, W. Q. L., in the city of Little Rock.

And it was further decreed that, unless the said sum of $2,232 be paid within ninety days from the entering of the decree, with interest and costs of suit, that the equity of redemption of the said defendants, and all persons claiming under them, to said lots of land, be forever barred and foreclosed, with order to sell, etc.

The plaintiffs in the original suit, No. 733, excepted, and took an appeal to this court.

The evidence in this cause is voluminous, and, to some extent, contradictory, but sufficiently clear and consistent, we think, to lead us to correct conclusions.

There is no question made about the execution of the deed of trust, nor the purposes for which it was made, nor as to the rights of the parties under it.

And there is no question about the execution by the said Noah H. and Lucetta S. Badgett, of the note for $1,000, nor of the note for $1,523.80, nor of the instruments of writing purporting to be assignments of the rents and profits of the trust property to secure the payment of the notes.

But the record presents the question distinctly, as to the powers of a married woman to charge or dispose of her separate property, to secure the payment of her husband's debts, and the further question as to the validity of the assignment.

The deed of trust provides that the trustee, out of the rents and profits, shall keep the premises in good order and repair and properly insured, and pay all taxes and assessments legally imposed upon the same, and the residue of said rents and profits were to be paid over to the said

Lucetta S., upon her sole receipt, to the intent and purpose that she might enjoy, possess and have the same free from the control, interference and liability of her present or any future husband.

The deed of trust is in the nature of a settlement, and invests the *cestui que trust* with a separate estate in the rents and profits of the property described in the deed of trust, and this without express restrictions on her power to dispose of the same.

According to the English doctrine, the right of a married woman to dispose of her separate property, in the absence of specific restraining provisions in the settlement, is well settled. *Peachy*, who is quoted extensively by *Bishop*, says: "Even where trustees have been interposed, unless their assent is rendered necessary by the instrument which gives the wife the property, she may bind it without the trustees; for their assent not being required, their dissent cannot have any effect."

"Indeed, from the moment in which a wife takes personal property to her sole and separate use, from the same moment she has sole and separate right to dispose of it; for upon being once permitted to take personal property to her separate use as a *femme sole*, she takes it with all its privileges and incidents, including the *jus disponendi*."

See *1 Bish., sec. 849, 850. Peachy, Mar. Set., 260, 264, and authorities there referred to.*

The doctrine of the American courts is not uniform on this subject. The decisions of some of the state courts conforming to, and of others departing more or less widely from, the English decisions; yet we think the tendency of the judicial mind, in most of the states at this time, is to favor restrictions and limitations on the right of a married woman to dispose of her separate property.

Cases affecting the power of a married woman over her separate estate have been, on several occasions, before this court.

In the case of *Stillwell and wife v. Adams and others, executors,* MR. JUSTICE WALKER, in delivering the opinion of the court, after quoting the English rule, said: "While this rule has been sanctioned and adopted in the states of Connecticut, Maryland, North Carolina, Missouri, Florida and Georgia, the states of New York, Vermont, Wisconsin and New Jersey limit the power of contracting, to contracts in relation to her separate estate, or for the benefit of such estate. By this rule the wife's general engagements, which have no reference at the time to her separate estate, cannot be enforced against said estate." *2 Perry on Trusts, sec. 660.*

The court continues quoting from Perry: "In a majority of the United States a more limited rule was applied, and the contracts of married women were not enforced against their separate estates unless their contracts were made in relation to their estates, or for their personal benefit." *2 Perry, sec. 680.*

The court further said: "It will be perceived that the point of difference between the decisions of the courts of the several states is, that part of them have adopted the rule as held by the English courts, which gave validity to the wife's contracts, which had no reference to her separate estate; whilst others have limited the right of the wife to contract alone with regard to her separate estate, made for the benefit of her estate, or for her personal benefit. To the correctness of this more restricted right to contract, we yield our assent." *29 Ark., 346.*

The rule then adopted by this court, in the case of *Stillwell and wife v. Adams et al., executors,* is that which

"*limits the right of the wife to contract alone with regard to her separate estate, to contracts made for the benefit of her separate estate, or for her personal benefit.*"

And this rule is recognized and approved by this court in the case of *Henry v. Blackburn, 32 Ark., 445*, and in the case of *Collins and Barton, administrators, etc., v. Underwood*, decided at the present term of this court.

Does this rule affect the right of a married woman to dispose of her separate property to secure the payment of her husband's debts? We think not.

This court has never expressly decided that a married woman can mortgage or otherwise dispose of her separate estate to secure the payment of a husband's debts, because the question has never legitimately arisen for our decision. Although in the case of *Stillwell and wife v. Adams et al., executors*, it seems to be assumed that such power exists.

But it has often been decided in other American states that a married woman can mortgage or charge her separate property to secure the payment of her husband's debts, and that equity will enforce against her separate estate, her mortgage, or other express contract, evidenced by an instrument in writing, whether made for the benefit of herself, or the sole benefit of another.

JONES, in his Treatise on Mortgages, says: "The mortgage of a married woman upon her property, given to secure the debt of her husband, but taken by the mortgagee in good faith and without fraud on his part, will seldom, if ever, be set aside, even on proof that her husband procured her execution of it by fraudulent representations.

See *1 Jones on Mort., sec. 113; 15 Gray (Mass.), 328; 3 Johns (N. Y.) Chan., 144; 4 Barber (N. Y.), 407; 1 Hals.*

(*N. J.*) *Chan.*, *465; 41 Iowa*, *44; 33 Mich.*, *410; 52 Ala.*, *456; 44 Md.*, *108; 44 Md.*, *632; 51 Miss.*, *329; 65 Ill.*, *170.* See also *1 Wash. on Real Property*, *314.*

If, then, a married woman can mortgage or otherwise charge her separate estate to secure the payment of her husband's debts, can not she sell or dispose of it absolutely for the same purpose?

For most purposes, the wife is to be regarded in equity as a femme sole, as to her separate estate, when the deed of settlement does not in terms, or by implication equivalent to an express provision, impose restraints upon her.

The deed of trust in this case imposes no restrictions upon the wife, but leaves her free to dispose of the rents and profits as she may think proper; and this, we think, she could well do, provided it is evidenced by an instrument in writing, showing clearly a purpose on her part to dispose of such rents and profits.

The said Lucetta S. Badgett had no interest in the real estate described in the deed of trust, except the rents and profits, to the extent and for the purposes indicated in the settlement.

The execution of the written assignments by the *cestui que trust* is not questioned. These assignments clearly transfer to Wassell so much of the accruing rents and profits of the real estate described in the deed of trust, as may be sufficient to pay the debts intended to be secured by said assignments, with authority to Wassell to collect the same, and apply such rents and profits to the payment of said debts.

The transfer of the rents and profits to Wassell, is coupled with a power, whereby he is constituted the agent of the *cestui que trust*, to collect and appropriate such rents and

profits; and the assignments may be assimilated to an order in favor of Wassell, simply authorizing him to collect and apply the accruing rents and profits to the payment of the debts.

The rents and profits of said real estate thus transferred to the said Wassell, do not carry to him the entire interest of the *cestui que trust* in such rents and profits, but only so much thereof as may be necessary to pay the debts intended to be secured by said assignments; and such transfer of the accruing rents and profits might well be made without conforming to the requirements and formalities necessary to be observed in the alienation of real estate.

We are, therefore, of opinion, that said assignments are valid and binding in equity, and transfer to the said Wassell so much of the accruing rents and profits of said real estate as may be necessary for the payment of said debts, unless it is shown that the execution of said assignments was obtained by such false and fraudulent representations of the said Wassell as would taint the transaction with fraud, in which case equity would hold the assignments absolutely null and void.

The plaintiffs allege that the said Lucetta S. was induced to join her husband in the execution of the note for $1,000 and the assignment of the rents and profits, as security for the payment thereof, in consequence of the defendant's representations to her that the same was for the benefit of her separate estate, and that she was induced to join her husband in the execution of the note, for $1,523.80, and the second assignment of the rents and profits, to secure the payment thereof, in consequence of the defendant's representation to her that the same was for an advance then made to the said Lucetta S., for the benefit of her separate estate.

The defendant, in his answer, denies these allegations in every particular.

A great deal of evidence was taken to show that the *cestui que trust* was imposed upon, and induced by the fraudulent representations of the defendant, or others, to execute said notes and assignments; that she was in feeble health and mentally incapable of transacting business.

While some of the evidence tends to show that the said Lucetta S. labored under a misconception as to the objects and purposes of the notes and assignments, caused principally by the misrepresentations of the said Noah H. to the said Lucetta S., there is no satisfactory evidence going to show that the defendant participated in, or was cognizant of, such misrepresentations. And although the *cestui que trust* appears to have been a delicate woman, and in feeble health, yet it also appears that she was intelligent and sensible, and as capable as most ladies of attending to her own business affairs; and although her husband may not at all times have dealt fairly and truthfully with her in regard to the purposes for which the notes and assignments were executed, we must suppose, from the evidence, that she was fully informed as to the nature and extent of her husband's indebtedness to the defendant, and intended, by executing the assignments, to secure the payment of the indebtedness out of the rents and profits assigned. We must, therefore, dismiss the theory of fraud, because, as we think, not sustained by the weight of evidence; and recognize the assignments of the said Lucetta S. Badgett as binding in equity upon her separate property, and a valid transfer to the said Wassell of said rents and profits to the extent, and for the purposes, indicated in the assignments.

The only remaining questions relate to the matters of

account between the parties, about which there was some conflicting evidence. But upon a careful review of the evidence, and rulings of the court touching the matters of account between the parties, we are of the opinion that there is no error in the rulings, orders, judgments and decree of the chancellor in this cause, and we do, therefore, affirm the same in all things.

Hon. J. R. EAKIN, J., did not sit in this case.

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RIE VS. RIE.

1. DIVORCE: *Not granted on pleadings, etc.*

A divorce will not be granted on a demurrer to a bill, or upon a failure to answer, or upon admissions in an answer, or alone upon declarations or admissions of the defendant, proven by depositions or otherwise.

2. SAME: *Non-cohabitation sufficient for.*

Actual abandonment of matrimonial cohabitation, without reasonable cause, for the period of one year, intentional on the part of the wife, is cause for divorce, notwithstanding she make occasional visits to the house of her husband to look after her children, and while there engage in domestic duties.

3. SAME: *Not granted on evidence of parties. Conflict between.*

The uncorroborated evidence of the parties, though admissible for what it is worth, is not sufficient to authorize a divorce, notwithstanding they agree in their statements. Where there is a conflict in their testimony that of the defendant is deemed of greater weight.

4. SAME: *Pleading. Allegations must be specific.*

Where the causes alleged for divorce are not sufficiently specific, the court should, on motion of the defendant, compel the plaintiff to make them so.

APPEAL from *Mississippi* Circuit Court in Chancery.
Hon. L. L. MACK, Circuit Judge.
Lyle, for appellant.

ENGLISH, C. J. This was a bill for divorce commenced in the circuit court of Mississippi county, on the twenty-second of September, 1877, by W. C. Rie against Polly Ann Rie.

Upon the bill, answer and depositions, the court below refused a divorce and dismissed the bill.

The causes of divorce, and the primary facts constituting them, are not separately and distinctly stated in the bill, as they should have been to make an orderly pleading, convenient to be answered.

Taking all of the allegations of the bill together, however, we presume appellant intended to rely upon three of the statutory causes of divorce:

1. That appellee willfully deserted and absented herself from appellant for the space of one year, without reasonable cause.

2. That she was guilty of such cruel and barbarous treatment of him as to endanger his life.

3. That she offered such indignities to his person as to render his condition intolerable.

The onus of proving these charges, or some one of them, was upon appellant, who alleged them as causes for divorce, which he sought.

A divorce will not be granted on a demurrer to a bill, or upon a failure to answer, or upon admission in an answer, or alone upon declarations or admissions of the defendant, proven by depositions or otherwise, because the public, and not the parties only, are interested in such suits. *Jacob v. Bob, 18 Ark., 410; Gantt's Dig., secs. 2200, 2201; Jordan v. Jordan, 17 Ala., 466.*

I. The bill alleges that, about the first of March, 1876, appellee willfully deserted appellant, without any reasonable cause, and persistently refused to return to him.

Appellee, in her answer, admits that she did leave his house about the first of March, 1876, but denies that she then, or at any other time, willfully deserted him without any reasonable cause; but, on the contrary, alleges the truth to be that she left him at the time above mentioned, under the influence of well grounded fear that he would inflict upon her some enormous bodily harm, he having, a short time prior thereto, raised a chair over her head, saying he would "dash her infernal old brains out;" and that, at another time, he advanced upon her with a drawn butcher-knife, threatening her life; and that she had, often, during the past year, been at his house and engaged in her usual avocation, as his wife, and the mother of her children, and had not then, nor has she now [the time of answering], any thought or intention of desertion.

The depositions conduce to prove that appellee left the house of appellant about the time stated in the bill, and did not, after that, live with him as a wife. Most of the time she was absent, and stayed with a married daughter and at other houses in the neighborhood. She occasionally returned to the house of appellant and remained for some days, aiding her daughter in domestic matters. When there, but little was said between her and her husband, and they occupied different rooms at night.

There was doubtless, an actual cessation of the matrimonial cohabitation between the parties for the period alleged in the bill, which appears to have been intentional on the part of the wife, and this was cause of divorce, notwithstanding she made occasional visits to the house of her husband, to look after her children, and while there engaged in domestic duties, unless she had reasonable

cause for such abandonment of the matrimonial cohabitation. *Bishop on Marriage and Divorce, secs. 506-7, etc.*

Before the final separation, though they had occasional quarrels, the general treatment of the husband appears to have been good, and, when she was not in a tantrum, her conduct, it seems, was lady-like and affectionate. But when her temper was aroused, she gave the "old man [to use the language of one of the witnesses] *Hail Columbia.*"

The witnesses are not all in harmony as to whether the husband or the wife usually commenced such quarrels, or occasioned them; a majority of them, however, were disposed to lay the blame on the wife. But it is not material to decide which was more at fault in these family jars. The real question is, was it proven that the desertion of the wife was willful and without reasonable cause.

The practice now in this state is to admit the depositions of the parties in suits for divorce for what they are worth, but not to grant a divorce upon the uncorroborated testimony of the parties. *1 Wharton Evidence, 433.*

In this case the depostions of the parties were taken, and read without objections, as to competency.

The wife testified as follows: "In 1876, when I was very ill, he (appellant) never came about me to ask after and provide for my wants—would not even send after a doctor for me. On one occasion, he drew a chair on me and threatened to dash out my infernal old brains; on another, he threatened to pitch me out the door and break my neck; on another, he threatened to come in and beat me to death; on another, he came towards me with a butcher knife in his hand, threatening me some bodily harm—I do not remember what, for I was so badly frightened at the time."

These are the causes stated by her for the desertion, or for refusing to live with him as a wife.

It has been held, subject to some qualifications, that *reasonable cause*, which, within the divorce statutes, will justify one of the married parties in abandoning the other, must be such conduct as could be made the foundation of a judicial proceeding for divorce. *Bishop on Mar. and Div., sec. 526*, and cases cited.

If the chancellor believed the above statement of the wife, her desertion was justifiable, and the husband was rightly refused a divorce.

Appellant, in his deposition, states, in general terms, that he always treated appellee well, and gave her no just cause for desertion. He admits raising a chair over her head, with intention to strike her, but denies advancing upon her in a threatening manner, with a drawn butcher-knife, as stated by her, and is silent as to the other specific charges made, as above, by her against him.

In conflicts between the two depositions, hers must be deemed of greater weight, because he seeks to obtain a divorce by his own testimony, and she attempts to defeat it by hers. He must establish alleged causes of divorce by corroborating evidence. In getting at the truth in relation to private scenes, quarrels and injuries between husband and wife, unwitnessed by others, it may be well to admit the testimony of the parties in divorce cases; but because of the rule, founded on public policy, that a divorce will not be granted upon the unsupported testimony of the party seeking it, it necessarily follows that the greater weight must be given to the party opposing it, where their depositions are in conflict. Nor in order to prevent collusion will a divorce be granted where parties agree in their statement,

unless the cause or causes alleged for divorce are proven *aliunde:* in other words, unless the testimony of the complaining party is supported by other evidence satisfactory to the court, because of the public interest in marriage and divorce.

II. The second cause of divorce is not well alleged in the bill. It is not alleged in the language of the statute, nor in words of like purport, nor are the primary facts alleged to make out the statutory cause for divorce, that defendant was guilty of such cruel and barbarous treatment of complainant as to endanger his life.

The only portions of the bill that may be supposed to have been intended to make a second charge and specifications, are as follows:

"That she often threatened his life, and at one time extracted from his medicine chest a bottle of strychnine, she knowing the same to be a deadly poison, for the purpose of taking his life; that she treated him with great harshness and almost uniform unkindness."

There was a motion by appellee to require the appellant to make the charges and specifications of the bill more specific, which was overruled, but should have been sustained by the court.

Appellee denies that she was ever at any time harsh or unkind in her treatment of appellant, or that she ever threatened his life, or attempted to poison him with strychnine or any other poison, and avers all such charges to be false.

As to the strychnine appellant testifies as follows:

"Some time since the war I had bought a lot of strychnine; the defendant got mad with me; she took a bottle from my chest, and hid it in a lot of cotton seed. She

afterwards denied taking it, until I afterwards found it. She afterwards acknowledged it, but said she did not intend to poison me, but did it for devilment."

As to the same matter appellee testified as follows:

"I never attempted, intended, or thought of poisoning anybody in my life. Mr. Dickson sent by Mr. Sanders' daughter for some strychnine, on one occasion, and Mr. Rie (appellant) accused me of wanting to get it to poison him."

For want of corroborating evidence appellant must be regarded as having failed to prove the charge that appellee attempted or intended to poison him with strychnine.

Nor did he prove any such cruel or barbarous treatment of him by her as to endanger his life.

III. The third charge, that appellee offered such indignities to the person of plaintiff as to render his condition intolerable, was like the other charges, in the opinion of the chancellor, not sustained, and we find in the transcript nothing upon which we would overrule his judgment, and reverse the decree. As to indignities, see *Rose v. Rose, 9 Ark., 575.*

Counsel for appellant have particularly called the attention of the court to a statement made by witness W. M. Holt, in his deposition. He was a witness for appellant, and on cross-examination stated that he had heard him say that he had on one occasion raised a chair to strike his wife, but he did not strike her, because she implored and begged him with uplifted hands not to do so.

On re-direct examination witness stated that the reason appellant assigned for drawing a chair on his wife was that she had accused him in the presence of their children with *bestiality*, which was false.

It was not alleged in the bill that she had ever made any such accusation against him, nor did appellant or any witness swear that she had. Holt did not swear it, but merely repeated a declaration made to him by appellant.

The bill charges as an indignity to the person of appellant that appellee often, upon her bended knees, would pray to the God of the universe to send a thunderbolt from heaven upon the devoted head of appellant to crush him to atoms.

This, appellee, in her answer, denies, but admits that she has often prayed to the God of the helpless to avert from her devoted head and person the wrath of the plaintiff, when threatening to descend, in the shape of uplifted chairs, butcher-knives, and other fearful and deadly missiles, to crush her to atoms.

Here, again, the pleadings and depositions of the parties are in conflict, and appellant is at disadvantage for want of supporting evidence.

Upon the whole record, we must affirm the decree, and leave the parties to reconcile their unhappy quarrels, as they should, or continue to lodge apart, if they will.

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THOMPSON et al. vs. ROBINSON, Sheriff, et al.

1. SURETY: *When discharged by creditor's forbearance. Not, by failing to issue execution.*

An agreement upon a valid consideration by a creditor, without consent of the surety, not to sue the principal debtor for a stated time, discharges the surety. But the payment of part of a debt by the principal, at or after the time it becomes due, is not a sufficient consideration to support an agreement for forbearance; and such an agreement founded

upon such a consideration, though carried out by the creditor, will not discharge the surety. Nor will mere delay of the creditor to issue execution on a judgment against the principal, discharge the surety.

2. SAME: *Not discharged unless time of forbearance is fixed.*

An agreement for forbearance with the principal will not discharge the surety, unless the time of forbearance is fixed.

3. SAME: *Notice to creditor to sue, how given; when he should attach.*

If, after the debt becomes due, the surety, either verbally or in writing, requests the creditor to sue the principal who is then solvent, and the creditor fail to do so, and the principal afterward become insolvent, the surety is thereby discharged.

But before a surety can claim a discharge for the omission or failure of the creditor to *attach the property* of the principal, he must show in his bill for discharge that there were legal grounds for attaching.

4. ATTACHMENT OF BOATS: *Affidavit for.*

For the attachment of boats in the *state* courts, the same affidavit is required as in attachment of other property.

APPEAL from *Phillips* Circuit Court.
HON. J. N. CYPERT, Circuit Judge.
Thweat and Trieber, for appellants.

ENGLISH, C. J. The bill in this case was filed twelfth February, 1877, in the circuit court of Phillips county, by Andrew J. Thompson and Thomas H. Quarles, against H. B. Robinson, sheriff of said county.

The bill alleged, in substance, that on the —— day of ————, 1874, complainants, at the request of William H. Ross, became his sureties in a note to Jacks & Co., of Helena, for $——, payable ——— day of ———, 187—.

That after the maturity of the note, Jacks & Co. brought suit upon it against complainants and Ross to the fall term 1875 of the Phillips circuit court. That process was duly served on complainants, and soon thereafter complainant Thompson, went to Thomas M. Jacks, of the firm of Jacks

& Co., and informed him that Ross, the principal in the note, was then somewhere on St. Francis river with his steamboat Rhoda, and would soon be down; and that complainants wished him, immediately on the arrival of Ross with his boat, to attach it, and by that means secure his debt and save the sureties harmless. That after this, Ross came to Helena with his boat, when complainant Thompson again went to Jacks, and informed him of the arrival of Ross with his steamboat, and repeated the request that he take immediate steps to secure his debt out of the property of Ross, stating at the same time that he, being a steamboat man, was liable at any time to remove his property beyond reach of process of the courts of this state, or that his property, being a steamboat, was liable to the losses incident to water crafts of like character; and that he and his co-security wished to be released from liability on account of said note, and that if he (Jacks) failed to secure himself out of the property of Ross while it was within reach of the law, complainants would not be further responsible on account of said note. That Jacks & Co. at once applied to Ross for the payment of said note, and threatened him with attachment in case of further delay, when Ross agreed to pay Jacks & Co. $150 on account of said note, if they would extend the time of payment on the balance. That said payment and extension were agreed to by Jacks & Co. upon condition that Ross, who had not been served with process in the suit instituted by them against him and complainants above mentioned, should enter his appearance to said suit, and consent that judgment should go in their favor against him and complainants. That in accordance with said agreement, and in consummation thereof, Ross paid Jacks

& Co. said $150 on the nineteenth of November, 1875, and directed his attorneys to enter his appearance to said suit, then pending against him in said circuit court, and allow judgment to go against him for the balance due on said note; all of which was done and judgment entered in conformity with said agreement, on the twentieth of November, 1875.

That complainants had no knowledge or information whatever of said agreement so made between Jacks & Co. and Ross, and the extension of time for the payment of said note, and gave no consent whatever that further time be given thereon.

That after the request and notification to Jacks, who was a member of the firm of Jacks & Co., complainants relied upon them to make their money out of the property of Ross, and relieve complainants as sureties on said note, and did not even know of the judgment against them until long subsequently; and did not know until within the last few days that Ross had appeared, by counsel or otherwise, and consented to waive service and enter his appearance, and suffer judgment to go against him or them.

That complainant Thompson met Ross shortly after his arrival at Helena, with his steamboat, as aforesaid, and mentioned the fact to him that complainants were sued on account of his note to Jacks & Co., and requested him to arrange the payment of the note with Jacks & Co., and save them from loss, which he agreed to do; and shortly afterward told complainant Thompson, that he had adjusted the matter so that they would not be troubled further about it. That, relying upon the statement of Ross, they gave no further thought about the matter, sup-

posing that Jacks & Co. had, according to their request, secured themselves out of the property of Ross, or received payment of the amount due.

That on the ——— day of ————, 1877, Jacks & Co. caused execution to be issued upon said judgment against complainants and Ross, and placed in the hands of defendant Robinson, as sheriff, etc., who had levied on the property of complainants, and would sell the same on the ——— day of February, 1877, to satisfy the judgment, unless restrained.

That from the time the judgment was rendered, twentieth November, 1875, to about the first of February, 1876, Ross continued to run his steamboat in the St. Francis river, and to the city of Helena, where Jacks & Co. resided and did business, and which was the home port of said steamboat, and while the boat, which was still held and owned by Ross, was lying at Helena, a violent storm arose, and broke the boat loose from her moorings, and drove her across the river to the Mississippi shore, where she sank and became a total loss to Ross, her owner; and yet, during all the time, from the date of said judgment until the destruction of said boat, Jacks & Co. made no effort to satisfy the judgment, by subjecting said boat to sale on execution, or otherwise, although liable under the laws of the state.

That, by the loss and destruction of said boat, Ross became utterly insolvent, and, shortly after, became a non-resident of the state, leaving no property out of which said judgment could be satisfied; and, if complainants were compelled to pay the judgment, it would be a total loss to them, and contrary to equity, etc.

Prayer, that Robinson be temporarily enjoined from

selling the goods of complainants, etc, and that, upon final hearing, the execution of the judgment be perpetually enjoined as to them.

On the filing of the bill, an interlocutory injunction was granted.

Although complainants sought to enjoin a judgment in favor of Jacks & Co. they were not made defendants, nor was it alleged who composed the firm. other than Jacks.

By leave of the court, however, Jacks was made a defendant, and answered the bill.

He states that on the third of July, 1874, Ross and complainants executed to Jacks & Co., their joint note for $342, payable at four months, with interest after due at 3½ per cent. per month, for money advanced to Ross, and, though complainants were sureties for Ross, all of the makers of the notes were principals as between Jacks & Co. and them.

Admits that Jacks & Co. brought suit on the note to the fall term, 1875, of the circuit court of Phillips county, against Ross and complainants. and process was served on the latter. That, after the institution of the suit, complainant, Thompson, informed him that Ross had his boat in the St. Francis river, and desired him to attach said boat, upon her arrival at Helena, which he declined to do, because he was unwilling to make the affidavit, and give the bond, and incur the liability for costs of taking care of a steamboat under an attachment.

Admits that, after the institution of said suit, Ross came to Helena with his boat, and Thompson may have again spoken to him, but states that, in all their conversations, Thompson desired him to sue Ross, and not complainants, and he repeatedly told him that, if he desired the collection of the debt pressed, he would so instruct his attorneys.

That Thompson did not wish a judgment against himself, and never notified respondent or any member of the firm of Jacks & Co., in writing or otherwise, to institute suit on said notes, or press the collection of the judgment, which was recovered thereon. Denies that Jacks & Co. applied to Ross for payment of said debt, as alleged. Admits that Ross did pay to Jacks & Co. $150, and did enter his appearance in said cause; but denies that said sum of money was paid, or said appearance entered, upon any agreement to extend time of payment on any part of the balance of said debt. Avers that he always supposed said payment was made, and said appearance entered, at the instance of complainants, or one of them. Did not know what directions Ross gave to his attorneys. Respondent repeatedly told Thompson that when he desired said note to be pressed to a collection, he would do so. But Thompson would not say that he wished it to be done, because respondent told him he would release no one, and Thompson did not wish suit pressed for fear he would have to pay the debt, and would not say to press it. Admits the destruction of the boat of Ross, but did not remember at what time. Denies that complainants ever notified him to make his money out of Ross, or ever made any request of him to that effect, except that Thompson wanted the steamboat attached, as before stated. Avers that he always informed Thompson that he was ready to proceed by suit when he said so, and would do it; and all the indulgence was given on account of Thompson. Denies that he ever agreed with Ross for any consideration, or without consideration, to extend time of payment.

Admits the issuance of the execution, as alleged; that Ross was a non-resident, but did not know whether he was

solvent or insolvent, though he knew of no property in the state belonging to him subject to execution.

The answer also contained a general demurrer to the bill.

It appears that the suit at law upon the note was brought in the name of Thomas M. Jacks and L. A. Fitzpatrick, partners, under the firm name of Jacks & Co., and that judgment was rendered against Ross and complainants, twentieth November, 1875, for $235.35, to bear interest at 6 per cent.

The cause was heard upon the pleadings and depositions, and the temporary injunction was dissolved, and the complaint dismissed for want of equity, and complainants appealed to this court.

We gather from the allegations of the bill that appellants relied upon these grounds for equitable relief:

1. The extension of time of payment by Jacks & Co., the creditors, to Ross, the principal debtor.

2. The refusal of Jacks & Co. to attach the steamboat of Ross.

3. The neglect of Jacks & Co. to take out execution upon the judgment, and cause the boat to be levied upon and sold before it was destroyed.

Material facts proven by the depositions may be stated in considering the several grounds of relief relied on:

I. The bill alleges, in substance, that after the note was due, and suit brought upon it, Jacks & Co., the creditors, agreed with Ross, the principal debtor, to extend time of payment, upon the payment of $150 on the debt. No definite period of forbearance is alleged as having be e agreed on.

Appellants failed to prove this agreement as alleged, and the depositions read on the hearing by appellees, conduce

to prove that, at the time Ross paid Jacks the $150 on the note, the latter refused to extend the time of payment without the consent of the sureties.

But if the agreement, as alleged, had been proven, it would not have discharged appellants.

An agreement upon a valid consideration by a creditor without the consent of the surety, not to sue the principal debtor for a stated time, discharges the surety. Such an agreement ties up the hands of the creditor, because, if he breaks it, he may be sued for damages.

Caldwell, ex'r, v. McVicar, 9 Ark., 418; Arrington v. Washington, 14 Ark., 218.

But the payment of part of a debt by the principal, at the time or after it becomes due, is not a sufficient consideration to support an agreement for forbearance; and an agreement for forbearance founded upon such consideration, even though carried out by the creditor, will not discharge the surety. In such cases, no benefit is received by the creditor but what he was entitled to under the original contract, and the debtor has parted with nothing but what he was already bound to pay.

Brant on Suretyship, etc., sec. 306; King & Houston v. State Bank, 9 Ark., 185; Stone & McDonald v. State Bank, 8 ib., 145; Wright vs. Yell et al, 13 ib., 506.

In order that an agreement between the creditor and principal debtor, extending the time of payment, shall have the effect of discharging the surety, the extension must be for a definite period. It makes no difference for how short a period the time is extended, but that period must be fixed, otherwise the hands of the creditor are not tied, and he may proceed at any time. *Brant on Suretyship, etc., sec. 298.*

II. Jacks admits, in his answer, that after he had

brought an ordinary suit at law upon the note, and after appellants had been served with process, but Ross, the principal debtor, had not, appellant Thompson requested him to attach the steamboat of Ross, which he declined to do, because he was unwilling to make affidavit, give bond, and incur liability for costs of taking care of the boat under attachment. He also admits that the boat was afterwards destroyed, and that Ross became a non-resident, and perhaps insolvent.

This was not a notice in writing to sue, under the statute. *Gantt's Dig., secs. 5696–8.*

If, after the debt was due, the surety, verbally, or in writing, request the creditor to sue the principal, who is then solvent, and the creditor fail to do so, and the principal afterwards becomes insolvent, the surety is thereby discharged. *Hempstead et al. v. Watkins, ad'r., 6 Ark., 352.*

In *Hancock v. Bryant and Hunt, 2 Yerger, 476,* where the surety gave notice to the creditor to sue the principal, it was held to be no excuse for not suing, that the principal lived in an adjoining state, when he had property in Tennessee, where the notice to sue was given, which might have been subjected to the payment of the debt.

But if the creditor may be required to resort to the extraordinary remedy of attaching the property of the principal, the surety ought certainly to be required, in a bill for discharge to show that there were legal grounds for suing out the attachment.

The note was for money loaned by Jacks & Co. to Ross, and was an ordinary personal debt.

It is not shown that Jacks & Co. had any lien upon the boat for the debt, or that it was a maritime contract, that might have been enforced in the federal court by admiralty proceedings. *The Belfast, 7 Wallace, 637.*

In order to attach the boat as the property of Ross, in the state court, under the attachment statute (*The Hine v. Trevor, 4 Wallace, 571*), it would have been necessary for Jacks & Co., or one of them, or some person for them, to make and file an affidavit that Ross was a non-resident of the state, or had been absent therefrom four months, or had departed from the state with intent to defraud his creditors, or had left the county of his residence to avoid service of a summons, or so concealed himself that a summons could not be served upon him, or had removed, or was about to remove, or dispose of his property to defraud his creditors, etc. *Gantt's Dig., sec. 388.*

The bill fails to allege that any ground of attachment existed, or that Jacks & Co. might legally have attached the boat, at the time they were requested to do so.

III. The judgment was rendered against appellants and Ross, on the law side of the court, twentieth November, 1875, and the boat was not destroyed until first of February, 1876, during which time the bill alleges that Jacks & Co. neglected to sue out execution upon the judgment, and cause the boat to be levied on. No notice to do so is alleged or proved.

Mere delay to take out execution, like neglect to sue, without notice to do so, will not discharge the surety. *Brant, sec. 387, etc.*

It was not the fault of Jacks & Co. that appellants did not know that judgment had been rendered against them and Ross. They were served with process in the suit, and it was their duty to see whether judgment was rendered against them or not. Nor was it the fault of Jacks & Co. that Ross put appellants off their guard by assuring them that he had adjusted the matter with Jacks & Co., so that

they would not be troubled further about it. Appellants did not allege, or prove, that Jacks & Co. gave them, or either of them, any such assurance.

Decree affirmed.

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34 55
84 338

WORSHAM and wife vs. FREEMAN.

1. HOMESTEAD: *When asserted to avoid a mortgage, must be proved.*

The allegations in the answer in a suit to foreclose a mortgage, of facts showing that the mortgaged premises were the homestead of the mortgagor at the time the mortgage was executed, are affirmative, and the *onus probandi* is upon the mortgagor.

2. DECREE: *Mortgagee not bound by, if not party to.*

A divorce decree in a suit between the mortgagor and his wife, subsequent to the execution of the mortgage, assigning the mortgaged premises to the wife as alimony, does not affect the rights, or remove the lien, of the mortgagee, who was not a party to the suit.

3. MORTGAGE: *Execution of by wife must be acknowledged, etc.*

If the wife of the mortgagor has such interest in the premises as makes it necessary for her to join him in the execution of the mortgage, her execution must be acknowledged by her, and the acknowledgment authenticated, as prescribed by the statute.

4. ACKNOWLEDGMENT: *Who may not take in another state.*

A justice of the peace, or chairman of a county court of another state, can not take acknowledgments of mortgages of lands in Arkansas.

5. SAME: *How authenticated.*

Such acknowledgments before a county court of another state, must be authenticated by the seal of the court.

6. PRACTICE: *Selling land for cash, error. Plaintiff must not sell.*

It is error in foreclosure suits, to direct land to be sold for cash; and bad practice to appoint the plaintiff commissioner to sell.

APPEAL from *Lee* Circuit Court in Chancery.
Hon. J. N. CYPERT, Circuit Judge.
Thweatt and Hanly, for appellants.

ENGLISH, C. J. This was a bill to foreclose a mortgage, filed in the circuit court of Lee county, on the fifteenth of August, 1874.

It is probable that the suit was brought in the name of C. H. Banks, the mortgagee, for the use of W. D. Freeman, to whom the mortgage had been assigned as a collateral, but in the record entry of the final decree, Freeman seems to have been treated as the real plaintiff.

Wm. D. Worsham and wife, M. C. Worsham (appellants), were made defendants.

The bill alleges, in substance, that on the twenty-first of June, 1871, Worsham and wife executed to Banks a mortgage, by which they conveyed to him one house with one acre of land (house occupied at that time by J. E. Leary), with two store-houses, all in the southeast quarter of section fourteen, township two north, range three east, to secure the sum of $600, for cash and supplies advanced during the year 1871; and which mortgage is exhibited, and made part of the bill. That the amount of indebtedness which the mortgage was given to secure, after all just credits, was $545.65, as would appear by exhibit "B," made part of the complaint, and which had not been paid and was still due.

That on the fifteenth of May, 1874, Banks assigned the mortgage to Freeman, and he still held said claim and mortgage as such assignee, and the same remained due and unpaid.

Prayer for decree to sell the mortgaged property to pay the debt.

By the mortgage, Worsham and wife conveyed to Banks, with covenants of warranty, "the following described real estate: two store-houses and one residence, in the town of Mariana, in the county of Phillips and state of Arkansas;

the residence now occupied by Esquire Leary, including one acre of land upon which said houses and residence are situated, in the southeast quarter of section fourteen, in township two north, range three east."

After the conveyance of the property follows: "But this conveyance is made for the following uses and purposes, and none other, that is to say—the said W. B. Worsham is indebted to said C. H. Banks in the sum of $600, evidenced as follows, to-wit: Cash on account payable the first day of November, 1871, and being desirous to secure the same, this conveyance is made for that purpose; and if said W. B. Worsham shall, well and truly, pay off and discharge said indebtedness as the same may become due, then this conveyance shall be null and void, otherwise it shall remain in full force and effect."

The mortgage bears date the twenty-first of June, 1871. Its execution was acknowledged by W. B. Worsham on the next day, at Memphis, Tennessee, before a commissioner of deeds for Arkansas.

Attached to it is also the following certificate of acknowledgment:

"STATE OF TENNESSEE, }
Wilson county. }

"M. C. Worsham, wife of W. B. Worsham, having personally appeared before me, and having been examined privily and apart from her said husband, and she having acknowledged the due execution of the within mortgage by her, freely, voluntarily and understandingly, without compulsion or constraint by her said husband, and for the purposes therein expressed, the same is therefore certified. Witness my hand and seal, this seventh day of July, 1871. E. F. Ross,

"*J. P. and Chairman W. C. Court.*"

The acknowledgment of the wife is not otherwise authenticated.

Upon the mortgage is the following indorsement:

"I assign the within to W. D. Freeman as collateral, this May the fifteenth, 1874. C. H. BANKS."

Exhibit "B," filed with and made part of the bill, follows:

MR. W. B. WORSHAM in account with C. H. BANKS.

January 1, 1871.	To balance due	$376 81
January 1, 1871.	To interest on above to date	79 13
June 27, 1871.	To draft on Estes, Frizer & Pinson	200 00
June 27, 1871.	To advance commissions and interest on same	40 00
April 29, 1871.	To cash per wife, $10.00; 30th, tobacco, 40 cents	10 40
Novem. 9, 1871.	To shoestrings, 5 cents; 2 yds. calico, 30 cents; pipes, 10 cts.	45
January 1, 1872.	To 4 shirts—2, $3.25; 2, $1.25	9 00
January 4, 1872.	To 1 plug tobacco	40
April 15, 1872.	To 2 bottles ink	20
	To interest to date on $20.45	1 80
		$718 22
	Credits by rents	173 57
	Balance due	$544 65

Defendant, W. B. Worsham, answered the bill, in substance, as follows:

Admits the execution of the mortgage filed with complaint, but denies that the consideration is correctly set out in the complaint or exhibit "B." Charges that upon a just settlement of accounts between plaintiff and him, he would not owe more than the sum of ——— dollars.

Knew nothing of the assignment of the mortgage except from the indorsement thereon, and allegations of the bill.

Avers that at the time he executed the mortgage, said premises were and constituted his homestead and that of

his family, and had been set apart to him as such by his assignee in bankruptcy, as would appear by a transcript of the exemptions allowed him by said assignee, on the —— day of ———, 186— (the original being lost), therewith filed, marked exhibit "H." [There is no such exhibit in the transcript.]

That said homestead did not exceed 160 acres; was not "any lot in any city, town or village, with the dwelling and appurtenance thereon exceeding the value of $5,000." That he was a resident of this state, and owned and occupied said homestead; that said obligation was not contracted for the purchase money of said premises, for the erection of improvements thereon, or labor performed for the owner thereof.

That said homestead has been set apart to his co-defendant, his former wife, as alimony, by the circuit court of Phillips county, and he now has no right, title nor interest in and to the same.

Demurs to the complaint, because it was not brought in the name of the real party in interest.

Mrs. Worsham also answered the bill in substance, as follows:

Denies that she executed the mortgage at the time alleged in the bill. Avers that she signed her name to it without a full understanding of her rights in the premises.

Did not know for what amount of indebtedness the mortgage was given, nor had she sufficient information upon which to form an opinion or belief, nor whether the same had ever been paid or was still due, and what amount, if any, was due,

Knew nothing of the assignment of the mortgage, except from the allegations of the bill, etc.

Denies that the mortgage was, or could have been, legally executed by her co-defendant and herself, jointly or severally, or that the same was a lien or incumbrance upon the premises, because she avers that at the time of the adoption of the constitution of 1868, and long previous thereto, up to and until the twenty-first day of June, 1871 (the date of the mortgage), defendant, with their minor child, continued to live upon, occupy and enjoy the dwelling house upon said tract of land as a homestead, and never abandoned the same as a homestead, and only left the same temporarily on a visit or business; that they had and claimed no other homestead; that the sum demanded in plaintiff's complaint was not for purchase money of said premises, etc., negativing the constitutional exceptions. That she and her minor child continued to reside upon and occupy the premises as a homestead from the twenty-first of June, 1871, to the time of the filing of the bill, etc.

That the circuit court of Phillips county, at the — term, 187—, in which county the premises were then situated, decreed the same to her as alimony and a home for her and her child, in a cause therein pending, in which she was plaintiff, and said W. B. Worsham was defendant. A certified copy of the decree is made an exhibit.

Demurs to the bill because the mortgage, which is made part of it, was not properly acknowledged by her, and said pretended acknowledgment was not properly authenticated, and was therefore void, etc.

The decree made an exhibit to Mrs. Worsham's answer, shows that she was divorced from her husband, and the premises covered by the mortgage decreed to her as alimony for life, remainder to her infant child, the decree describing the property as the homestead of the parties to that suit. The date of the decree is not shown.

The parties to this cause submitted it for hearing, the record states, on the bill, answers and exhibits. The decree recites that the bill was to foreclose a mortgage upon certain property, describing it, said mortgage being to secure the payment of $544.65, and then the entry proceeds thus: "It is therefore ordered, adjudged and decreed that, unless said sum of money be paid on or before the first day of July, 1875, the property mentioned in said mortgage shall be, by the said W. D. Freeman, sold to the highest and best bidder, for cash, after giving thirty days' notice of time and place of sale, and apply the proceeds to the satisfaction of the said sum of $544.65, and all the costs incurred herein."

The defendants obtained the allowance of an appeal by the clerk of this court.

I. The mortgage, upon its face, was *prima facie* evidence that W. D. Worsham was indebted to Banks, at the time it was executed, in the sum of $600, for cash, on account, payable on the first of November following, as recited in the mortgage. All of the items in exhibit "B," except the first, and the interest on it, bear date after the execution of the mortgage, some of which are for money and others for merchandise. If, in fact, the $600 was intended to cover existing indebtedness, the bill should have so alleged, and the items of the account should have been proven, if directly denied by the answer of Worsham.

II. The allegations in the answers that the premises covered by the mortgage were the homestead of W. D. Worsham, at the time the mortgage was executed, were affirmative, and the *onus probandi* was on appellant. They introduced no evidence at the hearing to prove the alleged facts constituting the homestead right; hence, this defense failed.

III. If W. D. Worsham was the owner of the premises at the time the mortgage was executed, as alleged in his answer, and the homestead character was not in fact impressed upon it, and existing at that time, the mortgage was valid as to him, its execution by him being regular, and the subsequent divorce decree, assigning the property to his wife as alimony, did not affect the right, or remove the lien, of the mortgagee, who was not a party to the divorce suit.

IV. If Mrs. Worsham was owner, or part owner, of the land, or had such interest in it as made it necessary to join her husband in the execution of the mortgage, to secure her husband's debt, its execution should have been acknowledged by her, and the acknowledgment authenticated, in the mode prescribed by the statute. *Little, trustee, vs. Dodge, guardian, etc., 32 Ark., 453*, and cases cited.

The acknowledgment of Mrs. Worsham purports to have been by E. F. Ross, a justice of the peace, and chairman of the county court of Wilson county, Tennessee, and is not otherwise authenticated than by his signature.

When a conveyance is acknowledged out of this state, and within the United States, or their territories, it may be done *before any court* in the United States, or of any state or territory *having a seal*, or the clerk of any such court, or before the mayor of any city or town, or the chief officer of any city or town having a seal of office, or before any commissioner appointed by the governor of this state (*Gantt's Dig., sec. 841*), or before a notary public. *Acts of 1874, p. 58.*

Ross had no power, as a justice of the peace, or as chairman of a county court of Tennessee, under the above statute, to take the acknowledgment. If done before the county court, it should have been authenticated by the

seal of the court. *Little, trustee, v. Dodge, guardian, 32 Ark., p. 461*; *Blagg v. Hunter, 15 Ark., 246.*

V. The court erred in directing the land to be sold for cash. *Welch v. Hicks, 27 Ark., 292*; *Gantt's Dig., secs. 4705-8.*

VI. It was bad practice to appoint the plaintiff in the suit a commissioner to make the sale. A competent disinterested person should have been appointed. The master is usually appointed. *Gantt's Dig., secs. 998-9.*

The decree must be reversed, and the cause remanded for further proceedings.

Mock et al. vs. Pleasants.

1. Practice in Supreme Court: *When no appeal against a party.* 34 63 / 55 224
Where no appeal is taken from a decree in favor of one of several parties the case made against him is not before the court. 34 63 / 60 477

2. Administration of Estates: *Jurisdiction of courts in.* 34 63 / 61 580
The probate court has exclusive original jurisdiction in matters of estates of deceased persons, and chancery can not take cognizance of such, except upon some one or more of the ordinary grounds of equity jurisdiction. 34 63 / 63 282

3. Same: *Settlements in probate courts are judgments. How avoided.* 34 63 / 77 355
A settlemont of an administrator in the probate court has the force and effect of a judgment, and can be set aside only by a court of chancery for fraud.

4. Fraud: *What it is, and how alleged.*
Fraud is a term the law applies to certain facts as a conclusion from them, and is not itself a fact, and can not be charged in general terms. The facts and circumstances constituting it must be stated.

5. WIDOW-ADMINISTRATRIX: *Takes rents as widow until dower assigned.*

A widow-administratrix is under no obligation to account for rents and profits of her intestate's plantation, until the assignment of her dower. They belong to her as widow, and not as administratrix. If creditors want them they should have her dower assigned to her.

6. ADMINISTRATION: *Illegal allowances not fraudulently obtained, not impeachable in equity.*

Mere illegal allowances to an administrator, not obtained by misrepresentation or deception upon the court, are no grounds for impeaching or setting aside a settlement, in equity. The proper remedy is by appeal to the circuit court.

7. ADMINISTRATOR: *Purchase by, a fraud.*

It is a fraud for an administrator to be interested in a purchase at his own sale, and equity will set aside the sale.

APPEAL from *Arkansas* Circuit Court in Chancery.
Hon. J. A. WILLIAMS, Judge.
Gibson and *Pinnell*, for appellants.
Johnson, Carlton and *Basham*, for appellees.

HARRISON, J. The complaint in this case was filed by Moses Mock and other creditors of the estate of Joseph C. Pleasants, deceased, against Minerva A. Pleasants, administratrix of said decedent, Helen M. McDaniel, Annie W. Stewart, and George W. Stewart, her husband, Kate J. Pleasants, Andrew J. Miears and Green W. Boatright, and in substance alleged:

That said Joseph C. Pleasants died intestate, on or about the eighteenth day of December, 1862, seized of the following lands in the county of Arkansas: The southwest fractional quarter of section thirty, 145.45 acres; the northeast quarter of the northeast quarter of same section, 40 acres, in township six south, of range five west; the north half of section twenty-five, 320 acres, and the southeast fractional quarter of said section twenty-five, 74.59

acres, in township six south, of range six west, in all 580.40 acres, constituting and being the plantation known as the Pleasants Place, and on which he resided at the time of his death, and also possessed of considerable personal property, leaving a widow, the said Minerva A., and the said Helen M., Annie W. and Kate J., his children and heirs at law.

That letters of administration upon his estate were granted by the probate court of said county to the said Minerva A., on the fifteenth day of June, 1866, before which time there had been no administration; and at the July term, 1869, of said court, she filed her first account current, in which she charged herself with the amount of the sales bill of the personal property, $704.50, as the whole amount of the estate, and credited herself with divers sums, to the amount of $145.37, as expended by her in the course of administration, which account was, at the January term, 1869, approved and confirmed; and that the court allowed her $70.45, ten per cent. on the amount of the sale's bill for her risk and trouble.

That, at the April term, 1869, the court, upon the application of said administratrix, and a showing by her that the personal property was not sufficient to pay the debts of the estate, made an order for the sale of the lands, directing the same to be sold on the third Saturday in May thereafter, and for one-third of the purchase money cash, and the remainder on a credit of twelve months, the purchaser to give his note for the deferred payment, and a lien therefor on the lands. But that, in her petition, the said north half, and said southeast fractional quarter, of section twenty-five, were said to be in range five, instead of range six; and in the appraisement afterwards made,

in view of the sale, the southeast fractional quarter of section twenty-five was omitted.

That the other lands were appraised at ten dollars an acre, and, in pursuance of the order, those appraised were offered for sale on the day appointed, but that, not bringing two-thirds of the appraised value, were not sold, and the fact was reported to the court at the next, or July term, 1869; that no order, however, was made by the court that they should be again offered for sale at the end of twelve months thereafter, and to the highest bidder, and nothing further was done upon the application, or in respect to the sale, until, at the April term, 1872, when the administratrix presented a petition reciting the former order and proceedings under it, and praying an order to sell them, subject to her dower, to the highest bidder, or for what they might bring; which order the court made, directing that they be offered on the eighth day of July thereafter, for one-half cash and the remainder on a credit of twelve months, the purchaser, as required in the former order, giving a note and a lien on the lands for the deferred payment; but that the north half and the southeast fractional quarter of said section twenty-five were described in the last mentioned order as the *north half of the southeast fractional quarter* thereof.

That the administratrix accordingly, on the eighth day of July, 1872, again offered the lands, except the southeast fractional quarter of section twenty-five, at public auction, and they were bid off and purchased by the said Helen M. McDaniel, Ann W. Stewart and Kate J. Pleasants, at the grossly inadequate and nominal price of twenty-five cents an acre, and, on the same day, she executed a deed of conveyance of them to the purchasers; and that at the July

term, 1872, she made a report of the sale to the court, and the same was approved and confirmed.

That the sale was a mere sham, and a fraud upon the creditors of the estate, the result of a combination and collusion between the administratrix and the purchasers—that the lands might, as was the case, be bought in by the latter, who were her daughters, at such inadequate and nominal price—they were for her and their common use and benefit; that no part of the purchase money was paid or intended to be, and no note or lien was given, and that for that reason the administratrix did not file with her report of the sale an affidavit, that she was not the purchaser, and that they were not purchased for her use, and she was not in any manner interested in the purchase, as the statute requires.

That at the June term, 1873, of the circuit court of said county, then having jurisdiction in matters of administration, she filed a second account, in which she charged herself with the sum of $488.68—the balance in her hands according to the previous settlement, and claimed credit for divers sums as expended in the settlement of the estate—amounting to $548.10—the expenditures exceeding the assets $59.42; and this second account was, at the January term, 1875, of the probate court, approved and confirmed.

That said Anna W. Stewart, and her husband, George W. Stewart, on the eighteenth day of April, 1873, sold and conveyed her undivided interest in all the lands, or the whole of the plantation, to the defendants, Andrew J. Miears and Green W. Boatright; that afterwards a partition was made between the said Miears and Boatright and the said Helen M. McDaniel and Kate J. Pleasants, and the following parcels were allotted and set apart to Miears and Boatright, viz.: One hundred and ten acres of said section

twenty-five, bounded as follows: Beginning at the southwest corner of the northwest quarter of the section, and running east one hundred and five and two-thirds rods; thence north to the section line; thence west with the section line one hundred and five and two-thirds rods; thence south to the place of beginning; the southwest fractional quarter of section thirty; and thirteen and one-third acres of the northeast quarter of the northeast quarter of section thirty, bounded as follows: Beginning at the northeast corner of the section, and running west twenty-six and two-thirds rods; thence south eighty rods; thence east twenty-six and two-thirds rods; and thence north eighty rods to the place of beginning; that Miears, on the eighteenth day of September, 1873, sold and conveyed his interest to Boatright, and that Boatright was in possession of said parcels.

That the plaintiffs were severally creditors of the estate, and whose claims had been duly exhibited against it, and allowed by the administratrix, the aggregate of which was, exclusive of interest, $9,116.18, no part of which had been paid, and that they were the only creditors of the estate.

That the property of the estate was sufficient, if it had been honestly and faithfully administered, to have paid all the debts, the rents and profits of the plantation having, since the commencement of the administration up to the time of the partition, clear of all expenses on account of necessary and proper repairs, amounted to at least $3,500, and since then had been $1,200 per annum; that the administratrix had resided with her family on the plantation from the death of her husband until within a few months of the commencement of this suit, and had, except of the parcels sold to Miears and Boatright, since their purchase, appropriated the whole of the rents and profits to her own use.

That she had fraudulently omitted to charge herself, in her first account, with property of the estate which had come to her hands, nor had she charged herself with the same in her second, but of what it consisted was not stated, and had fraudulently claimed and received credit for the following sums, to which she was not entitled: Twenty-five dollars paid R. A. Whitmore, esq , "*attorney's fees*," no authority having been given her by the court to employ an attorney; $16 *fees in replevin case*, and $12 *clerk's fees*, no receipt or voucher having been filed for either of the last two items; and illegally and fraudulently claimed $70.45 as commissions, which sum was allowed by the court, when she had, as shown by the account, only paid out for the estate, or administered the sum of $145.37.

That in her second account she fraudulently omitted to charge herself with the price for which the lands sold, and fraudulently claimed and received the following credits, to which she was not entitled: One hundred and seventy-five dollars paid W. P. McDaniel, the late husband of the said Helen M. McDaniel, and a member of her family, for *services rendered* and *money advanced for the estate;* $250 paid him for *work on gin-stand and gin-house*, and *other repairs on the place;* $25 paid him *expenses in going to Pine Bluff on business of the estate;* $65 paid said George W. Stewart for *work on cotton press;* and $10 her own *expenses, attending court in replevin case*, which last item she had before received credit for in her previous settlement; and that in neither of the accounts did she charge herself with any part of the rents or profits of the plantation.

That the sureties in her bond were R. M. Anderson and W. D. Dunn; that Anderson was dead and his estate was insolvent, and that Dunn had been adjudged a bankrupt, and discharged from his debts; that she was herself insol-

vent, and that the court had, at the April term, 1871, required her to file a new bond, which had not been done.

That Miears and Boatright, when they purchased, resided in the county and near the residence of the administratrix, and were familiar with the matters of, and her management of, the estate, and had actual knowledge of the fraud in the sale of the lands.

The prayer of the complaint was, that the settlement of the administratrix, and also the sale of the lands, be set aside; that she be removed; that a commissioner be appointed by the court to take charge, and administer the estate under its direction; that she be required to account to him for the rents and profits of the plantation received by her, and for the other property she had not accounted for; that Miears and Boatright account for the rents and profits received by them, and that if the assets should not be sufficient to pay all the debts, that the same be paid *pro rata*, irrespective of the classification of the claims.

Boatright, at the September term, 1876, filed an answer, and also a demurrer to the complaint. The demurrer, being presented for consideration, was sustained, and the complaint, as to him, dismissed.

The other defendants, except Miears, also filed a demurrer to the complaint, upon the grounds that the court had no jurisdiction of the subject of the action, and the complaint did not state facts sufficient to constitute a cause of action; and the cause was, as to them, continued. Miears made no defense, but no decree was taken against him. At the next term, the demurrer of the other defendants was heard, and it was sustained by the court, and a decree thereupon rendered in their favor, dismissing the complaint.

From this last decree the plaintiffs appealed.

No appeal having been taken from the decree in favor of

Boatright, the allegations as to him, or his claim to part of the lands, are not before us for consideration.

The probate court has exclusive original jurisdiction in matters relative to the estates of deceased persons, and chancery can not take cognizance of such, except upon some one or more of the ordinary grounds of equity jurisdiction. *Const., Art. VII, sec. 34. West and wife et al. v. Waddill et al. MS. Opinion.* A settlement made by an administratrix has the force and effect of a judgment, and can be set aside only by a court of chancery on the ground of fraud. *Gantt's Dig., sec. 128.*

The allegation that the administratrix fraudulently omitted to charge herself, in her first account, with all the property of the estate, without stating what particular property was omitted, was not a sufficient averment of fraud. Fraud can not be charged in general terms, and without stating the facts and circumstances constituting it. Fraud is a term the law applies to certain facts, as a conclusion from them, and it is not in itself a fact. *Sto. Eq. Plead., 251; Bliss on Plead., 211; Conway v. Ellison, 14 Ark., 360; Ringgold v. Stone et al., 20 Ark., 526.*

A widow has the right to remain in and "possess the mansion or chief dwelling house of her late husband, together with the farm thereto attached, free of all rent, until her dower shall be laid off and assigned to her." *Gantt's Digest, sec. 2227.*

It does not appear that the dower of Mrs. Pleasants was ever assigned to her; it seems indeed that it had not been. She was under no obligations, therefore, to account for the rents or profits of the plantation. They belonged to her as widow, and not as administratrix. If the plaintiffs desired to have any part of them applied toward the

payment of the debts, they should have adopted the proper means to have had her dower assigned to her.

The complaint contains no averment that the allowances made to the administratrix upon her settlement were obtained by any misrepresentation or deception practiced upon the court. The facts, so far as anything to the contrary appears, were all before the court, and understood by it, and its decisions fairly made.

Mere illegal allowances to an administrator are no grounds for impeaching or setting aside a settlement. The proper remedy for such is by an appeal to the circuit court. Nor can it be said that the omission to charge herself in the second account with the sum the lands sold for was fraudulent. The court judicially knew that the lands had been sold, and the price they brought, and there is no room to presume a fraudulent purpose in omitting to charge herself with the price. As there was at the last settlement a balance shown in her hands larger than the cash payment, we may reasonably suppose it was her intention to charge it in her next account, and after the remainder of the money should be collected.

The charge of fraud in the sale of the lands was specifically made. The administratrix and her daughter, it was alleged, conspired together to have the lands sold and bought in by the latter at a nominal price, for her and their common benefit, and that the sale was the result of their conspiracy. Against such a fraud equity will always relieve. The fact that the administratrix was interested in the purchase was of itself alone such a fraud, as for which the sale should be set aside. *Wright Ex. v. Walker et al., 30 Ark., 44; West and wife et al. v. Waddill et al., MS. Opinion.*

The demurrer of the appellees should have been over-

ruled, and they should have been required to answer the complaint.

The decree is reversed, and the cause remanded for further proceedings.

CHRISMAN VS. JONES et al.

1. SURETIES: *Exoneration and contribution between parties.*

Rogers sued Glasscock before a justice of the peace, and attached his property. Chrisman and others became sureties for Glasscock on a bond to release the property. Rogers recovered judgment in the suit, and Glasscock appealed to the circuit court, giving an appeal bond with the appellees as his sureties. Judgment was finally rendered against him in the circuit court, and his sureties in the appeal bond, for the debt, damages and cost. Without issuing execution on the judgment, Rogers then sued Chrisman on the release bond, and recovered judgment against him in the circuit court. He appealed to the supreme court, and the judgment was affirmed, with damages and cost. He paid this judgment, and then filed his bill against the appellees for contribution, not alleging insolvency of the principal, Glasscock. *Held:* 1. That Rogers had the right to sue the sureties on the release bond without issuing executi n on the judgment against Glasscock and his sureties on the appeal bond.

2. The attachment release bond was for the benefit o the sureties (if any) on the original debt as well as for the creditor, and if such sureties had been compelled to pay the debt, the sureties on the release bond would be compelled in equity to exonerate them; and likewise the sureties in the appeal bond, as between them and appellant, were primarily liable; and he was entitled to complete *exoneration* from *them*, and to *contribution* from his *co-sureties* in the *release* bond, to the extent of the judgment rendered in the circuit court, in the suit originally begun by attachment.

Where successive securities for a debt have been given in judicial proceedings, at the request of the debtor alone, to enable him to prolong the litigation, whilst all will be liable to the creditor, they will, as between themselves, be liable to exoneration in the inverse order of their undertakings. Those who contract last become sureties not only for the

benefit of the creditor, but in exoneration of those who precede, and all will be liable to exonerate the original sureties for the debt, if there be any.

3. It was not necessary, as against the sureties in the appeal bond, to make Glasscock a party or to allege his insolvency. But as against the co-securities in the release bond he was a necessary party.

2. PARTIES, WANT OF: *Demurrer.*

A general demurrer does not reach the defect of want of proper parties.

APPEAL from *White* Circuit Court.
Hon. J. N. CYPERT, Judge.
Coody for appellant.
Turner, contra.

EAKIN, J. This case grew out of the matters involved in the case of *Rogers, ad., v. Glasscock, 25 Ark., 24,* and *Chrisman et al., v. Rogers, adm'r, 30 Ark., 351.*

The bill is by Francis M. Chrisman against Lucius M. Jones, Cader Sowell and Robert L. Glasscock, stating: That one Thomas J. Rogers, adm'r, etc., in 1865, had sued one Thomas J. Glasscock, by attachment, before a justice of the peace, for $118.48, with interest at 10 per cent. from the ninth of November, 1861. Complainant, with William Hicks and Robert L. Glasscock, became sureties on the bond of the defendant, in that suit, to release the property attached, and dissolve the attachment.

That judgment was rendered against said defendant, November 20, 1865, for said debt, $47.27, damages and costs. On the twenty-fourth, said defendant appealed to the circuit court, and the defendants in this case, Cader Sowell and L. M. Jones, became his sureties in the appeal bond. After litigation, during which there had been an appeal to this court, and a remand of the cause for error, judgment was rendered by the circuit court, on the third of May, 1870, against said defendant and his said sureties

on the appeal bond, Sowell and Jones, for said debt, and $99.25 damages, and costs.

That Rogers, the plaintiff in said suit, issued no execution or process upon said judgment, against said Sowell and Jones; but, on the sixteenth of June, 1870, sued complainant before a justice of the peace, upon the old bond given to discharge the attachment. The justice sustained a demurrer to the suit, upon which said Rogers appealed to the circuit court, where he recovered judgment against this complainant, in February, 1873, for $330 and costs. This was affirmed on appeal to this court. Whereupon, complainant was compelled to, and did, pay to said Rogers the whole amount recovered, and all costs, amounting in all to the sum of $451.25.

The bill prays contribution from said Sowell and Jones, the sureties on the appeal bond, as well as from Robert L. Glasscock, the co-surety of complainant on the bond dissolving the attachment, with a prayer for general relief.

The court sustained a general demurrer to the bill, which was thereupon dismissed, complainant declining to amend. An appeal was taken.

It is the law of this case (see *Chrisman et al. v. Rogers, supra*) that the complainant was not discharged from his liability on the attachment release bond, by the execution of the appeal bond. The creditor had the option to pursue his rights upon either security. This bill raises the question as to the status of the different sets of sureties amongst themselves. Whether they stand in equal plight, or are, any of them, upon being made to sustain the burden, entitled, as against the others, to exoneration or contribution.

The bond to release the attachment was executed in 1865, by which the complainant and his co-securities became

bound for the defendant, in that suit, that he would "answer plaintiff's demand, and pay and satisfy such judgment" as might be rendered against him *in that suit.*

The sureties became bound in the expectation that, upon the rendition of the judgment, execution might issue, at once, against their principal; or, if that were not done, the sureties would have the right to pay the judgment, be subrogated, and proceed at once to enforce it for their indemnification. They may be considered, of course, to have contemplated that the defendant might appeal, but such an appeal would not have interfered with their right to have the execution enforced for their protection, unless an appeal bond should be executed.

Such an appeal bond operates, in derogation of this right of a surety, to a speedy settlement of the matter. They are held, helpless, to await the result of proceedings over which they have no control, and which, as in this case, may be prolonged for years. Meanwhile, the defendant may become insolvent, and, if the original sureties should then be held *primarily* liable, and be themselves solvent, it would result that the second set of sureties would have been thus enabled to trifle with their rights in a wanton manner, without any danger to themselves. Besides, the costs of the suit would be materially increased, and interest accumulated against the original sureties, by proceedings which they could by no interference have controlled, and which could not have been taken, to their detriment, without the aid and intervention of the sureties on the appeal bond. As these proceedings are equally *in invitum* as to the plaintiff, it is not just that he should be deprived of any of his securities, and, in this matter, it has been held already that he may elect to sue the first set. But it is not equitable, as between the first and second set of

sureties, that the former should be held primarily liable. Whilst the creditor is left free, equity will adjust the rights, declare the liabilities and apportion the burdens of the sureties amongst themselves.

The sureties on the dissolving bond, by their obligation, placed themselves in the position of original sureties for the debt, to be ascertained by the judgment to be rendered in that suit. Their position was analogous to that of special bail put in by a defendant at common law. If there had been any original sureties on the face of the paper, the bond would have been for the benefit of the original sureties, as well as that of the creditor, and in the equitable adjustment, those sureties on the bond would have been liable to exonerate the original sureties, if the latter had been forced to pay the debt; and as to subsequent sureties given to prolong the legal proceedings, it is but fair, and an extension of the same equity, that the sureties in attachment would have the same rights, as the original sureties would have had against them.

The principle in equity seems to be well established, that when successive securities for debt have been given in judicial proceedings upon the request of the debtor alone, to enable him to prolong the litigation, whilst all will be liable directly to the creditor, they will be, as amongst themselves, liable to exoneration in the inverse order of their undertakings. That is to say, those who contract last become sureties, not only for the benefit of the creditor, but in exoneration of those who precede, and all will be liable to exonerate the original sureties for the debt, if any there be. See the cases collected in the American Notes to *Dering v. Earl of Winchelsea, 1 Leading Cases in Equity.* And in the case of *Brandinburg v. Flynn, 12 B. Mon.* (*Ky.*), *397*, the court said, "they knew of no principle

on which a subsequent surety, who came to the aid of a debtor solely at his instance, and without the request or concurrence of the other sureties, could make them liable for immunity:" and that the cases had, on the contrary, established "that the prior sureties were under these circumstances entitled to be substituted to the remedies of the creditor against the subsequent surety." The cases upon this point are numerous, and may be found collected and arranged in *Mr. Brandt's work on Suretyship and Guaranty, p. 320, vol. 1, sec. 227; also ib., sec. 394.*

The result is that the facts of the bill show a right on the part of the complainant to complete exoneration against the sureties on the appeal bond, and to contribution against his co-surety on the dissolving bond, to the extent of the judgment for the debt and costs, rendered in the circuit court, in the suit originally begun by attachment.

The bill does not allege the insolvency of the principal, Thomas J. Glasscock, nor make him a party. As against the sureties in the appeal bond, that was not necessary. They were not co-sureties with complainant. As to him, being previously liable, they stood in the attitude of principals, and their liability to him in equity became direct. The complainant, on payment of the judgment, had the right to be subrogated to it against the defendant and his sureties on the appeal bond, notwithstanding the right of the creditor to proceed against either. The complainant seeks *contribution* only, but the greater equity includes the lesser.

As to Robert Glasscock, the co-surety of complainant in the dissolving bond, no proper proceedings could be had against him in equity without making the principal a party or showing cause why such a thing would be fruit-

less. In the leading case on *contribution* (*Dering v. Earl of Winchelsea, 1 Cox, 318*), which was that of a bill by surety against his co-sureties, the objection was made that the principal had not been made a party. Lord Eyre, C. B., said, "as a question of form it ought to have been brought on by demurrer; but in substance, the insolvency of Mr. Dering may be collected from the whole proceedings, which strongly imply it." I think no reasonable man could take this bill as true, and explain the conduct of the parties as the natural result of any other state of facts than the inability of the principal to pay; otherwise there would be no trouble. Nevertheless the court does not mean to encourage the practice of suing co-sureties for contribution without the principal or without explanation. They are necessary parties, without whom the rights of the co-sureties amongst themselves can not be fully adjusted. It is a rule of practice in chancery, founded on justice and convenience, to avoid multiplicity of suits. The co-securities contribute to each other, and the principal is liable to all. If he is in the same suit, the rights can be all adjusted. But the equity of contribution is not contingent upon the insolvency of the principal. It rises upon payment, and the principal is only a necessary party to its enforcement (unless he be insolvent), because he should be present to answer primarily, and take the ultimate burden without the necessity of other suits.

There are cases in Kentucky, and a few in other states, which seem to favor the idea that the liability to contribution is *contingent* on failure to collect of the principal, or upon his insolvency. We have examined the grounds upon which these decisions are based, as cited by counsel, and can not yield assent to the broad conclusions drawn.

Those in Kentucky, which positively assert this contingent liability, seem to rest upon statutes, and to be peculiar to that state. The cases from other states are meager and inconclusive.

The demurrer should have been for want of parties. A general demurrer does not reach this defect (*Gantt's Dig., sec. 4565*). The bill does show equities against defendant before the court, and want of proper parties. Even if the sureties on the appeal bond were the only defendants, the principal would still be a proper party, if solvent, although perhaps not strictly necessary. The chancellor should have overruled the demurrer, and taken notice of the want of parties. He might have ordered the complainant to make the principal a party, or show by amendment to his bill that it would be useless.

For error in sustaining the demurrer of defendants, let the decree be reversed, and the cause remanded for further proceedings consistent with this opinion.

HUBBARD, as Adm'r, etc., vs. PACE et al.

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1. SURETY: *Discharged by creditor's willful loss of collaterals.*

Lavender, as administrator, let to Pace a farm for 1870, and took his note for the rent, with Taylor as surety, stipulating in the note that he would "retain a lien upon the crop for the payment of the rent." He and Pace were then, and many years afterward, partners in a mercant le firm, and they received of the crop more than sufficient to pay the note, and sold it on the firm account. At the date of the note, Taylor was indebted to Pace in a large amount, which, several years afterward, he paid, without notice that the rent note was unpaid. In August, 1875, Lavender sued Taylor on the note. Taylor pleaded the foregoing facts

as an equitable discharge, and the cause was transferred to the equity docket: *Held:*

1. That the retention of the lien in the note was not additional to the statutory landlord's lien, but a mere assurance to Taylor that the legal lien should be enforced for his protection, or at least was not waived, nor would be abandoned.

2. The mere passive conduct of Lavender, in allowing the cotton to be shipped, when by ordinary diligence he could have prevented it, was, in the face of the written obligation, "to *retain* a lien on the crop for the rent," a fraud upon the surety.

Ordinarily, a creditor's mere neglect or forbearance to sue, or his failure to enforce collaterals, will not discharge the surety; but he must not release them, or do any act by which the surety's right of subrogation, upon payment of the debt, may be fruitless to him.

3. The shipment and sale of the cotton by the *firm* was Lavender's *act* and more than passive acquiescence or neglect.

4. That Lavender's acting as administrator did not affect the equities of his surety.

APPEAL from *Lincoln* Circuit Court in Chancery.
Hon. J. A. WILLIAMS, Judge.
Carroll & Jones, and *J. M. Moore*, for appellants.
Carlton & McCain, *contra*.

EAKIN, J. Lavender, as administrator, let to defendant, Pace, a plantation for the year 1870. Taylor became surety for the rent, and this instrument was executed:

"$3,500—On the first day of January next, we, or either of us, promise to pay W. D. Lavender, administrator of the estate of Alfred B. C. DuBose, three thousand five hundred dollars, for rent of fifteenth section of said estate. We agree to put a lawful fence around the place. W. D. L., administrator, agrees to repair gin-house and put the mill

in running order, and retain a lien on the crop, to secure the payment of the above sum.

"JAMES S. PACE.
"C. M. TAYLOR.
"W. D. LAVENDER,
"*Administrator Estate.*

"SOUTH BEND, January 4, 1870."

Upon this contract, Lavender brought this action at law in August, 1875. Taylor set up his suretyship as an equitable defense, together with charges of such conduct on the part of Lavender as should release the surety. The cause was transferred to the equity docket, and, upon hearing, the chancellor decreed that Taylor was released, and should have costs. From this decree, Lavender, as administrator, appealed.

It appears from the pleadings and proof, that Lavender was a partner with Pace, the tenant, in a mercantile house upon or near the place, principally for the purpose of furnishing supplies to the plantation and the hands engaged upon it. Whether he was a partner with Pace in the planting operations, or not, is a question upon which the evidence is conflicting; but it appears, to this court, to preponderate in favor of such a supposition. It is shown, however, beyond question, that all, or the greater part of the crop made upon the place in 1870, much more than was necessary to satisfy the rent contract, went into the hands of said mercantile firm, and was by it shipped and sold in its name. At the time Taylor signed the contract, he was indebted to Pace in a large amount, and remained so for several years, when he paid. If, during the time of his said indebtedness, he had been called upon to pay the rent note, he might have indemnified himself out of his debt to Pace. Lavender continued to rent the place to

Pace for several consecutive years afterwards, and Taylor had no notice that the rent contract of 1870, upon which he was surety, remained unpaid, until shortly before suit. The chancellor found, as a fact, that Lavender and Pace were not partners in the planting operations of 1870, but based his decree upon other equitable considerations.

Under the ruling of this court, in *Roberts v. Jacks, 31 Ark., 597*, appellant contends that the written instrument gave Lavender no specific lien upon the crops to be raised. This may be conceded, as it does not appear from the instrument itself that the parties intended to create any new lien upon the crop, different from that given the landlord by law, or more specific. The clause concerning the lien could have been inserted for no other rational purpose than to give Taylor, who was merely a surety, an assurance that the legal lien would be made effective for his protection, or, at least, that it was not then waived, nor would it be abandoned. This Taylor contracted for, and had the right to rely upon, independent of the general principles regulating the conduct of creditors towards sureties. The merely *passive* conduct of Lavender, in allowing the crops to be shipped, when he might have prevented it by reasonable care and diligence, to say nothing of his direct assent, would, in the face of his written obligation "to *retain* a lien on the crop to secure the payment of the above sum," be a fraud upon the surety.

Ordinarily, mere neglect or forbearance to sue on the part of the creditor, or failure to resort to collateral securities, will not discharge the surety. The creditor has his option. But he must not trifle with the collaterals, or release them, or do any act by which the surety's right of subrogation may be fruitless to him, when he is compelled,

or voluntarily pays the debt. Collaterals are held not for the protection of the creditor alone. The instinct of property, and a sense of justice, should prevent him from destroying them, if he does not choose, or does not find it necessary, to use them. Others have rights, which the creditor will not be allowed to make the subject of his generosity, or wanton misconduct to their injury.

The cotton and other crops came within the power of Lavender. They were put in the hands of the mercantile firm of which he was a partner. The partners were all agents of each other. It was his duty to require the partnership to satisfy the rent note with the proceeds, or to take it up before shipping, and if his co-partners had objected, he had power to prevent the removal. The shipment and sale was his *act*, and more than passive acquiescence or neglect.

None of the questions made are affected by the consideration that Lavender was administrator. If he failed in his duties, or transcended his powers, or violated his trust as such, it is a matter for the heirs, distributees or creditors of the estate of DuBose. In his dealings with third parties, and as between him and them, in cases where those interested in the estate are not parties, he must be bound by the same rules of equity, which would apply to him as an individual; and can not make the distinction between his acts as administrator, and those done in his own right, the means of perpetrating an injustice against his surety.

Indeed, the distinction between the mere negligence, and positive acts of the creditor, whereby collateral securities are lost, has, by the modern decisions, been almost, if not wholly, obliterated. It differs from mere failure to sue the principal. In the case of collaterals, there are distinct things to be preserved, having a property value, which are

in the hands of the creditor in trust, as well for himself as for the sureties, and it is fair that he should be held to take reasonable care of them. See the subject discussed, and the cases collected in *Brandt on Suretyship and Guaranty, secs. 385, et seq.*

In every view of the case, the decree of the chancellor, below, seems just, and based on sound principle.

Let it be affirmed.

WILLIAMS et al. vs. McILROY.

1. DEED: *Mistake in, how corrected. Intervening purchaser.*

A mistake in a deed in the description of land may be corrected and the title perfected by a subsequent deed; and a purchaser of the land at a sale made after the last deed, under an execution against the grantor levied on it *between* the deeds, gets no title if he have notice at the time, of the mistake and correction.

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34 85
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81 283

2. INNOCENT PURCHASER: *One under his own execution is not.*

A purchaser under his own execution is not an innocent purchaser for value, without notice.

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

ENGLISH, C. J. William McIlroy brought ejectment, in the circuit court of Washington county, against John S. Williams, David Williams and James Williams, for possession of the following lands:

The southwest quarter of the southeast quarter of section twenty-eight; *the south half of the southwest quarter of section twenty-seven;* part of the southeast quarter of the southwest

quarter of section twenty-eight, described by metes and bounds; and—

Part of the northeast quarter of the northeast quarter of section thirty-three, described by metes and bounds; all in township sixteen north, range twenty-nine west.

The plaintiff alleged, in his complaint, that he was the owner of the lands, and entitled to possession of them, and that defendant held possession thereof without right. As evidence of title, he alleged that, on the twenty-third of November, 1870, Balis Shumate and America J. Burris, being the owners in fee of said lands, by deed, duly acknowledged and recorded, conveyed them to *Robert R. Williams*, exhibiting a certified copy of the deed.

He then sets out, and exhibits, a sheriff's deed to himself, by which it appears that on the nineteenth of September, 1872, he recovered a judgment in the circuit court of Washington county against *Robert R. Williams* and wife, Rachael, for $1,370.37, etc.; that, on the eighth of May, 1873, he sued out an execution upon the judgment, which, on the same day, was levied by the sheriff on the lands described in the complaint, and other lands, and returned, without sale, unsatisfied, on the nineteenth of June, 1873; that, on the same day, he sued out a *vend. ex.*, by virtue of which the lands were sold on the twelfth of July, 1873, and purchased by the plaintiff in the judgment, who is plaintiff in this suit, for $200, and, after the expiration of the time for redemption, the sheriff executed to him a deed for the lands.

The defendants answered, in substance, as follows:

1. They deny that plaintiff is the owner, and entitled to possession of the lands described in the complaint.

2. Deny that they hold possession of the lands without right.

3. Aver that defendants John S. Williams and James Williams are the owners of the lands, and entitled to possession thereof, by virtue of two deeds of conveyance executed to them by *Robert R. Williams*, on the second of May, 1871, and the twenty-first of May, 1873, recorder's copies of which, with the certificates of acknowledgment and registration, are made exhibits.

4. That defendants, John S. Williams and James Williams, before and at the time of the commencement of the suit, and at the time of the alleged purchase by plaintiff, at the sheriff's sale, were in the peaceable possession of the lands, and entitled to the possession thereof, possession having been delivered to them before then by their father, Robert R. Williams, who, before he executed to them the conveyance of second of May, 1871, was the owner of said lands in fee simple.

That said Robert R. Williams, for a good and valuable consideration, executed and delivered to them said deed of second of May, 1871, by which he gave, granted and conveyed to them said lands, which, on the day of its execution, was duly acknowledged by him, and afterwards, on the ninth of September, 1872, filed in the office of the recorder of Washington county, for registration, and duly recorded.

That, in said deed, said Robert R. Williams, in describing said *south half of the southwest quarter of section twenty-seven, in township sixteen north, of range twenty-nine west*, unintentionally omitted the word *south* before the word *west*, whereby in said deed the said tract was described as "*the south half of the west quarter of section twenty-seven, etc.,*" said parties to the deed intending to insert the words, *south half of the southwest quarter, etc.*

That, on the twenty-first day of May, 1873, said parties

to said deed having discovered the omission aforesaid, said Robert R. Williams, for the consideration alone upon which said deed of second of May, 1871, was executed, made and delivered to defendants, John S. and James Williams, a quit-claim deed to said south half of the southwest quarter, etc., reciting the omission aforesaid, by which he remised, released and forever quit-claimed to them said tract of land, which deed was duly acknowledged by him on the day it was executed, and on the same day filed in the recorder's office, etc., and recorded, etc.; of all which facts plaintiff had notice before and at the time of his alleged purchase of the lands, at the sheriff's sale, on the twelfth of July, 1873.

The plaintiff demurred to the answer, and the court sustained the demurrer to so much of the answer as set up title in defendants (John S. and James Williams) to the south half of the southwest quarter of section twenty-seven, township sixteen north, range twenty-nine west, and overruled the demurrer as to the remainder of the answer.

The cause was submitted to the court, sitting as a jury, and the court found in favor of plaintiff for said south half of the southwest quarter, etc., and also that the permanent improvements made thereon by defendants, after plaintiff purchased the land, were worth more than the rents and profits thereof; and the court further found that the residue of the lands described in the complaint belonged to the defendants, and that they were entitled to possession thereof.

Defendants moved for a new trial, which the court refused and they took a bill of exceptions.

Judgment was rendered in accordance with the finding of the court, and defendants appealed to this court.

It appears from the bill of exceptions that, on the trial, plaintiff read, in evidence, the judgment recovered by him against Robert R. Williams and wife, Rachael, in the circuit court of Washington county, on the nineteenth of September, 1872, and the sheriff's deed for the lands made an exhibit to the complaint, and it was shown that defendants were in possession of the premises at and before the commencement of the suit.

Defendants read, in evidence, the deed executed by Robert R. Williams to John S. and James Williams, on the second of May, 1871, and also the deed executed by him to them on the twenty-first of May, 1873, which were set out in the answer and made exhibits.

They also proved, by C. W. Walker, Esq., that, as their agent, he attended the sheriff's sale at which plaintiff bid off the land in controversy, and gave public notice that they were the property of defendants, and not of Robert R. Williams, and, as their agent, forbade the sale.

They also proved that, at the time of the commencement of the suit, they were in possession of the lands, by virtue of the deed executed to them by their father, Robert R. Williams, second of May, 1871, having received and held full possession under that deed.

Thereupon, they introduced Robert R. Williams as a witness, and offered to prove by him, *first*, that he, for a good and valuable consideration, executed the deed of second May, 1871, and that the south half of the southwest quarter of section twenty-seven, etc., was intended to be inserted in and conveyed, by said deed, by him to defendants, John S. and James Williams. *Second*, That, in attempting to describe in said deed said tract, it was, by mistake, described as the south half of the west quarter of said section, instead of the south half of the southwest

quarter, etc. That the word *south* was intended by him to have been inserted before the word *west*, etc. *Third*, That he, at and before the time of executing said deed, owned and claimed no land whatever in said section twenty-seven, etc., other than the south half of the southwest quarter of said section.

All of which evidence the court excluded, on the ground that parol evidence was not competent or admissible to explain the ambiguity in the deed, if one existed, and that it could not be shown by such evidence that the word *south* was intended by the grantor to be inserted in the deed.

The deed of second of May, 1871, was executed by Robert R. Williams to appellants, John S. and James Williams, and recorded, before appellee obtained his judgment against the grantor, and there was no attempt to show that the conveyance was made to hinder, delay or defraud creditors of the grantor. Indeed the court below held it valid as to all of the lands embraced in it, except the tract in controversy in this appeal, which was misdescribed, it seems, by a mere clerical omission of the word south before the word *west*, in drafting the deed.

No one could read the deed without noticing the mistake, there being no such subdivision of a section of land as "*the south half of the west quarter.*"

The grantees in the deed went into possession of the land under the defective conveyance, and were in possession of it at the time appellee purchased it at the sheriff's sale, and he was notified that the land belonged to them, and not to the defendant in the execution.

Had the deed of the twenty-first of May, 1873, correcting the mistake, not been made, appellants might have had the mistake corrected in a court of equity, after or before

appellee purchased the land, and obtained the sheriff's deed, as was decided by this court in *Allen v. McGaughey et al., 31 Ark., 253*, which case was similar, in some of its leading features, to this.

The deed of the twenty-first of May, 1873, correcting the mistake in the previous deed, was executed and recorded after the lands were levied on under the original execution, but before they were sold under the *venditioni exponas*, and purchased by appellee.

This deed is, in substance, as follows:

"This indenture, made the twenty-first day of May, 1873, by and between Robert R. Williams, of the county of Washington, etc., of the first part, and John S. Williams and James Williams, of the same county, etc., of the second part, witnesseth, that, whereas, the party of the first part, by his deed, bearing date the second day of May, 1871, conveyed certain real estate to the parties of the second part, and intended to convey, and to fully describe in said deed, the south half of the southwest quarter of section twenty-seven, in township sixteen north, range twenty-nine west, in the county of Washington, etc.; and, whereas, in describing said tract, the word *south* before the word west, although intended to be inserted, was, by mistake, unintentionally omitted, now for the purpose of correcting such mistake, and for the consideration in said deed mentioned, and for the further consideration of $1, the receipt of which is hereby acknowledged, the said party of the first part hath remised, released, granted, conveyed and quit claimed, and doth, by these presents, grant, remise, release and forever quit claim unto the said parties of the second part, their heirs and assigns, the said south half of the southwest quarter of section twenty-seven, in township sixteen north,

range twenty-nine west, etc., etc., to have and to hold the same, to the said parties of the second part, their heirs and assigns, forever; and the party of the first part covenants with the parties of the second part, that he will warrant and defend the title to said land hereby conveyed to them, against the claims of all persons claiming by, through and under him, but against none other. Witness the hand and seal of the party of the first part, May 21, 1873." Signed by the grantor.

By this deed Robert R. Williams did just what a court of equity, upon the facts disclosed in the transcript before us, would have compelled him to do. The mistake in the original deed was thereby corrected, and the legal title to the land perfected in the grantees.

The grantees in the first and second deeds were not only in possession of the land, when appellee purchased at the sheriff's sale, but both deeds were upon the public records, whereby appellee had notice, when he purchased the land, of the mistake in the first deed, and its correction by the second. *Byers et al. v. Engles, 16 Ark., 543.* Appellee purchased under his own execution, parted with nothing on his bid, and was not an innocent purchaser for value without notice, etc. *Allen v. McGaughey et al., sup.*

It follows that the court below erred in sustaining the demurrer to so much of appellant's answer as set up and exhibited title to the tract of land in controversy on this appeal. Their title having been thus ruled invalid, the testimony offered by them on the trial, in support of it, and excluded by the court, would have been unavailing if admitted.

The judgment must be reversed, and the cause remanded with instruction to the court below to overrule the demur-

rer to so much of appellant's answer as set up title to the tract of land in controversy on this appeal, and to grant them a new trial.

WASHINGTON et al. vs. LOVE.

34 93
70 106

1. REPLEVIN. MORTGAGE: *For part of undivided crop.*

Washington rented land from Jones, agreeing to give one-fourth of the cotton produced on it, for rent. He afterward mortgaged to Love three bales of the cotton to be produced on the farm, to secure a debt payable the first of November following, with power to take possession and sell, upon default of payment. After this mortgage was executed and recorded, he made another mortgage, to Deutsch, upon the whole crop, to secure indebtedness to him; and Jones, being indebted to Deutsch, gave him power of attroney to collect the rent, and apply it to his indebtedness. Washington raised and gathered eleven bales. Deutsch got about eight bales, leaving in a pen on the premises about three bales. Love demanded this under his mortgage. Soon afterward Deutsch, with Washington's assent, moved this cotton to a gin to be ginned. Love then brought replevin against Washington for "three bales of cotton, valued at $90," and the officer seized it at the gin. Deutsch interpleaded for the cotton, alleging that "he was the owner, and entitled to the immediate possession;" and was also, on his motion, made defendant. Washington made no defense *Held:*

1. The contest for the cotton was between Love and Deutsch, and Love was entitled to the verdict on the interplea.

2. The eight bales, being more than sufficient to pay the rent, which was the first lien, Deutsch had no right of possession against Love, his *mortgage* being subsequent to Love's.

3. While the cotton was undivided on the premises, and the three liens upon it, Love could not maintain replevin for three bales, or as much as would make three bales, for he had no title to any particular part of the undivided crop. He should have sued in equity, making the three others parties. But after all but three bales had been taken away, he could, under the circumstances, maintain replevin for the remainder.

2. REPLEVIN: *Not avoided by transfer of possession.*

A party in possession of goods can not avoid replevin by wrongfully transferring the possession to another.

3. PRACTICE IN SUPREME COURT: *No reversal where justice is done.*

Where substantial justice has been done in the circuit court, the supreme court will not reverse for matters of form.

APPEAL from *Jefferson* Circuit Court.
Hon. J. A. WILLIAMS, Circuit Judge.
N. T. White, for appellant.
T. B. Martin, *contra*.

ENGLISH, C. J. On the fifteenth of January, 1877, T. C. Love brought replevin before a justice of the peace of Jefferson county against Samuel Washington, "for three bales of cotton, valued at $90," and a *skew-bald* mare.

On the execution of bond by plaintiff, the constable took into his possession, as he returns upon the writ, "seed cotton sufficient to make three bales of cotton, and the mare described within."

The property was seized on the day the writ issued (the fifteenth of January), and was bonded by Washington, Charles Deutsch and J. B. Core becoming his sureties in the bond.

On the twenty-fifth of January, the return day of the writ, Deutsch, by permission of the justice, filed a sworn interplea, alleging that he was the owner of the cotton, and entitled to the immediate possession thereof; and that neither plaintiff Love nor defendant Washington had any legal title thereto, or ownership thereof. He was also, upon his own application, made a defendant in the suit.

On the trial before the justice, the right of plaintiff to the mare was conceded, and the contest was as to the cot-

ton, for which plaintiff recovered judgment, and Deutsch appealed to the circuit court, where the appeal appears to have been treated as if taken for both defendants.

The cause was submitted to a jury on the twelfth of December, 1877, and the jury returned a verdict that the plaintiff was entitled to the possession of the three bales of cotton, and fixed the value thereof at $135, and assessed plaintiff's damages at $15.

Judgment was rendered against defendants for the three bales of cotton; or, if not delivered, the value fixed by the jury, and for the damages assessed, etc.

A motion for a new trial was filed, on several grounds, and among them, that the verdict exceeded the amount claimed in the affidavit, and the court ordered a credit of $45 to be entered on the judgment, and overruled the motion for a new trial; and defendant took a bill of exception, and appealed to this court.

On the trial, plaintiff Love testified that, in the fall of 1875, he sold defendant Washington a horse for $112, and on the eighteenth of March, 1876, took a mortgage to secure the debt, and the mortgage was read in evidence.

By it, Washington conveyed to Love "one sorrel skewbald mare, fifteen hands high, and eight years old; also, three bales of cotton, to weigh about five hundred pounds each, to be raised by me (Washington) the present year (1876), upon the farm known as the Parson Jones place, in Jefferson county, Arkansas," to secure the payment of a note for $102.50, executed by him to Love, about the first of December, 1875, payable the first of November, 1876, with power to Love to take possession of the property on default of payment, and sell it on public notice. The mortgage was recorded the twenty-ninth of March, 1876.

Love further testified that, about ten days before the

issuance of the writ of replevin, he called on Washington, and demanded payment of the debt; that the cotton in controversy was then in his pen on the Jones place, where it was raised; that he agreed to give him the cotton in payment, or part payment, of the debt.

He returned to the Jones place six or eight days afterwards, and the cotton was gone. Washington told him that a clerk of Deutsch had come there with Deutsch's wagon and hauled it off. He went to Pine Bluff, brought this suit, and accompanied the officer, who executed the writ. They found the cotton in the gin of J. B. Core, about five miles from the Jones place. He estimated the value of the cotton taken by the officer at $90, and his damages at $15.

After he replevied the skew-bald mare, he sold her, under the power in the mortgage, for $38, and credited the note with $17, the balance remaining, after deducting expenses and costs.

J. H. Jones testified, in substance, that he and his brother, B. M. K. Jones, owners of the Parson Jones place, rented the land to Washington for the year 1876, and he was to pay them in money for corn land, and one-fourth of the cotton as rent for all the land cultivated by him in cotton.

That Washington raised, in all, eleven bales of cotton, and the cotton in controversy in the suit was in his pen when plaintiff, Love, was up to see him, and was the last of his crop, and that defendant, Deutsch, had gotten all the rest of his cotton.

That the cotton in controversy was taken from the place for Deutsch by his agent, by virtue of witness and his brother being landlords. They had not received one-fourth of this cotton. They had become indebted to Deutsch for supplies, and witness afterwards found their account cred-

ited with $32, as their share of the cotton in controversy. Deutsch was authorized by them to collect the rent of Washington.

James Y. Saunders testified that he took the cotton from the Jones place for Deutsch, by his orders, and hauled it to the Core gin, where it was found by the officer when replevied.

CHARLES DEUTSCH testified, in substance, that Washington became indebted to him for supplies to make his crop, and gave him a mortgage, which was read in evidence.

The mortgage bears date the twenty-ninth of April, 1876, and by it Washington conveys to Deutsch some stock and his entire crop of corn and cotton, then raising and to be raised on the Jones place, to secure an indebtedness of $200, more or less, for goods, wares, merchandise and supplies furnished and to be furnished him by Deutsch, payable on or before the first of November, 1876, with power to Deutsch to take possession of the property, on default of payment, and sell it to pay the debt, etc. The mortgage was recorded the twenty-ninth of May, 1876.

Deutsch further testified that the Jones brothers, landlords of Washington, had also become indebted to him for supplies, and to secure payment for them, as well as for other supplies afterwards furnished them by him, they executed to him, on the twenty-third of December, 1876, a power of attorney to collect their rent of Washington, which was read in evidence.

By this instrument, Jones brothers appointed Deutsch their agent, and authorized him to collect for them and in their names, all rent due, or to become due, from Washington to them, for land occupied by him during the year 1876, and, when collected, to apply the proceeds thereof to any and all debts owed by them to Deutsch, and Wash-

ington was thereby authorized to pay to him the part of the crop coming to them for rent, and the receipt of Deutsch therefor was to be as valid and binding as if executed by them.

Deutsch further testified that, after the cotton was picked, Washington turned it over to him to pay the part of the crop agreed to be received as rent, and the remainder toward paying his account. That he sent Saunders with the wagon to get the cotton, and he got it and took it to Core's gin to be ginned, where it was when the officer replevied it. That Washington was still due him for supplies secured by the mortgage.

Washington testified, in substance, that he rented land of the Jones brothers, and was to pay them money rent for land worked in corn, and for all land cultivated by him in cotton, they were to receive one-fourth of the cotton for rent. That the cotton in controversy in this suit was raised by him under this contract. That he executed both mortgages read in evidence, one to Love and the other to Deutsch. That he raised, during the year 1876, eleven bales of cotton, including the bales replevied. That defendant, Deutsch, received all the cotton raised by him during the year, for the purpose of paying the one-fourth for rent, and the balance to be applied in payment of his supply account. Witness knew that he had authority to collect the rent, etc. At the time he turned over to Deutsch the cotton afterwards replevied in this suit, neither Jones brothers or Deutsch had taken out their fourth for rent, but the cotton was still undivided. Witness never agreed with Love to deliver this cotton, in payment of the indebtedness he held against him, secured by his mortgage. The cotton replevied was the last of the crop raised by witness during the year 1876, and was

turned over by him to Deutsch, for the purposes aforesaid, about four days before the institution of this suit. Love came to witness and inquired about the cotton, and he informed him that he had turned it over to Deutsch, for the purpose of taking his share due for rent, and the balance to be applied toward paying the indebtedness of witness to him. When the process was served on witness, Deutsch was in possession of the property, and had been for four days.

The plaintiff moved six instructions. The defendants objected to each of them, except the sixth, but the court gave them all. The five objected to are as follows:

"1. This being an action of replevin, the only question for the jury to determine is as to the right to the possession of the property in controversy, and if the jury believe, from the evidence, that plaintiff was entitled to possession of the cotton at the time of the commencement of the suit, they will find for plaintiff.

"2. If the jury believe that the mortgage from Washington to plaintiff provides that if payment of the debt therein mentioned is not made on a certain day, then plaintiff might take charge of the property mentioned therein; and that, if the said debt was not paid at the time mentioned, plaintiff's right to possession is clear, unless there is an older mortgage than plaintiff's remaining unsatisfied, or other superior right of possession.

"3. A landlord has only a lien on the crop raised on the rented land, which lien may be enforced in the manner provided by law, and the landlord has no right to possession of the crop, in the event of the failure of the payment of rent, but must enforce his lien by attachment, if he desires to subject the crop raised on such land.

"4. If the jury believe, from the evidence, that plaintiff

had the first dated and first recorded mortgage on the cotton in controversy in this suit, and that the same was due and not paid, at and before the commencement of this suit, no turning over or delivery of the cotton by the defendant to any other person could defeat the claim of plaintiff thereto.

"5. If the jury believe, from the evidence, that Charles Deutsch received the cotton in controversy herein from defendant, Washington, with the understanding that Deutsch was to sell the same and then pay Jones brothers their rent, and apply the balance to his debt against Washington, and that Jones brothers were parties to such agreement, then Deutsch received the cotton as the trustee and agent of Washington, and in that case it makes no difference whatever as to where the cotton was, as the possession of Deutsch was, in law, the possession of Washington."

The defendant moved six instructions, and the court refused the third, fifth and sixth, and gave the others.

Those refused are as follows:

"3. By the law of this state the writ of replevin issues to enforce the claim of an owner of property for its delivery to him by one who wrongfully detains it, but it confers no authority on the officers to seize property which is not actually or constructively in the possession of the party named in the process, and when the property is taken from the possession of a third party, the process will not justify the taking, although it be the identical property described therein.

"5. If the jury find, from the testimony, that plaintiff held a mortgage on three bales of cotton against defendant, Washington, and that Washington made eleven bales of cotton by his crop, and that the said three bales so mort-

gaged had never been set apart or designated as the cotton embraced in said mortgage, then plaintiff can not maintain this action.

"6. A mortgage on three bales of cotton out of a crop of eleven bales of cotton, although it may create an equitable interest in favor of the mortgagee, will not be sufficient in itself to authorize the bringing and maintaining an action at law, unless the said three bales of cotton have been identified or set apart as the cotton intended to be covered by the mortgage; and if the jury find, from the testimony, that the said cotton had not been set apart and identified, and agreed that it should be embraced in said mortgage, they will find for defendants."

I. Deutsch placed himself in the double attitude of interpleader for the cotton and defendant in the main suit. Although, in bonding the cotton, when seized by the constable, Washington was put in front of the battle, and kept there, he set up no claim to the cotton, and had really no interest in the result of the suit, except to save himself harmless on his bond. The contest for the cotton was between Love and Deutsch, both his creditors, and both claiming under mortgages executed by him.

Deutsch failed to establish the allegations of his interplea: he did not prove that he was the owner of the cotton and entitled to the immediate possession thereof, as against Love.

The mortgage of Love was executed and recorded before Deutsch obtained his, and of course the title of the senior mortgagee is superior to that of the junior.

Upon the facts disclosed upon the trial, Deutsch derived no title to the cotton in controversy, from or through the Jones brothers, that was superior to or displaced the title of Love.

Washington was the tenant of the Jones brothers, and they had the first lien upon his cotton crop for rent, which by contract, was one-fourth of the cotton.

Love had, by his mortgage, the second lien upon the cotton crop to the extent of three 500-pound bales.

Deutsch had, by his mortgage, the third lien to the extent of his debt for supplies.

Washington raised eleven bales of cotton.

On the twenty-third of December, 1876, Jones brothers gave Deutsch a power of attorney to collect of Washington the fourth of his cotton crop due them for rent, and put the proceeds to their credit. By virtue of this power, and under his own mortgage, he induced Washington to turn over to him his entire crop of cotton, amounting to eleven bales.

About four days before this suit was commenced, Washington had still in his pen the cotton in controversy, about three bales, and the last of his crop. This remnant Love demanded, under his mortgage, and testified that Washington agreed to let him have it, which the latter denied. Be this as it may, after Love made the demand, Deutsch sent his wagon for the cotton, and had it taken to Core's gin. By what right did he so take this cotton? Not, certainly, to satisfy the claim of the landlord for rent, for he had before then received of Washington as much as eight bales of his crop, which greatly exceeded a fourth of the cotton; so, he then had in his hands largely more than the share of the landlord, whose agent he claimed to be, and to whom he was obliged to account. Nor could he rightly take the last three bales of the crop under his own mortgage, and leave none for Love, whose claim upon as much as three bales was prior and superior to his.

True, the landlords' fourth might not have been taken

out of the particular cotton in controversy, at the time Deutsch had it hauled from the premises, but their share of the whole crop was one-fourth, and it is manifest, from all the facts in evidence, that Deutsch had received, as their agent, or in trust for them, more than their share—eight bales; beyond dispute, is more than the fourth of eleven bales.

If, therefore, the trial had been on the interplea of Deutsch, and not in the main suit against both Washington and Deutsch, as defendants, the verdict and judgment on the interplea should have been for plaintiff, Love.

II. The court below refused to instruct the jury, in effect, that Love could not maintain replevin on the facts of the case, and that his only remedy was in equity. While Washington's cotton crop was on the premises, where it was produced, and undivided, with the three liens upon it—the landlords' for rent, the mortgage of Love and the mortgage of Deutsch—Love could not have maintained replevin for three bales of the crop, or as much cotton as would make three bales, for he had no title to any particular part of the undivided crop. *Hall v. Robinson, 16 Ark., 90.* His only remedy would have been to file a bill in equity to foreclose his mortgage, making Washington and his landlords defendants, and Deutsch, the junior mortgagee, would have been a proper party. In such a suit, the rights of all the parties could have been ascertained and settled. And it would have been the better practice for him to have filed a bill upon the facts existing when he brought this suit: but could he have maintained replevin at all?

When he called on Washington for payment, a few days before bringing the suit, he found that all of his crop had been disposed of and removed from the premises but three bales, or enough to make three bales. Who

could have objected to his taking peaceable possession of this remnant of cotton—the last of the picking—all of the crop that was left—and selling it to satisfy his mortgage? Not Washington, because the law day of the mortgage had transpired, and Love was empowered by the mortgage to take possession of the property embraced in it, and sell it, on default of payment. Not the landlords, for they had already received, through their agent, Deutsch, one-fourth of the whole crop, which was their share for rent. Not Deutsch, for his mortgage was junior and inferior to Love's. If, therefore, Love, under such circumstances, could legally have taken possession of the remnant of the crop, and sold it, under the power in his mortgage, to satisfy his debt, we can see no good reason why he might not obtain possession of it, by replevin, for the same purpose, on refusal of Washington to surrender it. *Jarratt et al. v. McDaniel et al., 32 Ark., 595.*

III. A few days before this suit was commenced, Deutsch, by consent of Washington, removed the cotton in controversy from Washington's pen, on the Jones place, to Core's gin, where the constable found it and took it into his custody, under the writ of replevin. The court below refused to instruct the jury that the officer had no authority to seize the cotton, because it was not in the actual possession of Washington.

A party in possession of goods can not avoid replevin, by wrongfully transferring the possession to another. *Nichols v. Michael, 23 New York, 266.*

In this case, the ginner was in the actual possession of the cotton when the suit was commenced, and it is of no consequence to determine whether Washington or Deutsch had constructive possession. Both of them were defendants. Washington by the act of Love, and Deutsch by his own voluntary act. *Ib.*

Substantial justice having been done by the court below, upon all of the facts of the case, we are not disposed to reverse the judgment on matters of form and drive the parties to the expense of transferring the suit to the chancery side of the court, amending their pleadings and litigating the matter over again.

The sum in controversy is too small for so much trouble. Deutsch got very near the lion's share of the cotton, leaving in Washington's pen not more than Love was entitled to under his mortgage, and then attempted to deprive him of that.

The value of the cotton alleged in the complaint was matter of form (*Baily v. Ellis, 21 Ark., 488*), but the court, by reducing Love's recovery to $90, left him enough, perhaps, with the proceeds of the sale of the horse, to pay his debt.

Upon the whole record, the judgment must be affirmed.

TRAMMELL VS. TOWN OF RUSSELLVILLE et al.

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66 347

34 105
71 241

1. CITIES AND TOWNS: *Liability for injuries to individuals. Enforcing illegal ordinances.*

For acts done by them in their public capacity, and in discharge of their duties to the public, cities and towns incur no liability to persons who may be injured by them.

Neither for the act of the council in passing an illegal ordinance, nor for that of the mayor in issuing a warrant of arrest for its violation, nor for that of the marshal in arresting the offender under it, is a town liable to him.

2. JUDGE: *Liability for judicial acts.*

One acting judicially in a matter within the scope of his jurisdiction, is not liable in an action for his conduct.

3. JURISDICTION: *What it is.*

The power to hear and determine a cause, is jurisdiction.

4. DAMAGES: *Officer protected by fair process.*

Process *fair on its face*, though not in all respects regular, will protect from liability the officer executing it.

APPEAL from *Pope* Circuit Court.
Hon. W. W. MANSFIELD, Circuit Judge.
Rice & Bishop, for appellant.

HARRISON, J. This was an action by the appellant against the town of Russellville, J. B. Ewin, C. C. Luker and James M. Luker, for false imprisonment.

The complaint alleged: That the defendants, on the fifth day of February, 1877, maliciously, and without probable cause, arrested, and, against his will, imprisoned and restrained the plaintiff of his liberty until the sixth day of said month; and that they again, on the sixth day of February, 1877, arrested, and, against his will, imprisoned and restrained him of his liberty until the tenth day of said month, to his damage $1,500.

The defendant Ewin filed a separate answer, and, in justification of the arrests of the plaintiff, averred that he was mayor of said town of Russellville; that the council of said town had passed an ordinance declaring all dealers in spirituous, vinous or malt liquors, in quantities less than five gallons, in said town, to be retail liquor dealers, and assessing a tax on each of $300 per annum, to be paid before commencing or continuing the business, and for every violation of the ordinance by keeping open the saloon, store or place of business, for the purpose of selling without having paid the tax, it imposed a tax of $15 for every day the saloon, store or place of business, should be kept open; that his co-defendant James M. Luker, who was at the time a deputy marshal of the town, on the fifth day of Febru-

ary, 1877, filed with him, as such mayor, an affidavit charging the plaintiff with a violation of the ordinance, and asked a warrant for his arrest on said charge, which he issued, and the plaintiff was thereon arrested and brought before him for trial by said deputy marshal, which was the arrest and imprisonment first mentioned in the complaint; that the plaintiff not being ready for trial, the case was, at his request, continued until the next day, and he was, upon his promise to appear for trial, discharged from the arrest; and that, on the next day, he appeared and the case was tried, and the violation of the ordinance being proved, he was fined, from which judgment he took an appeal to the circuit court.

That afterwards, on the same day, the sixth day of February, 1877, his co-defendant C. C. Luker, who was at the time marshal of the town, filed an affidavit with him charging the plaintiff with another violation of said ordinance, and asking a warrant thereon for his arrest, which was issued, and the plaintiff was again arrested and brought before him by said marshal, which was the arrest and imprisonment last mentioned in the complaint; and the plaintiff not being ready for trial, the case was, at his request, continued until a future day, and he was, upon his promise to appear for trial, discharged from the arrest; and that the enforcement of the ordinance being enjoined by the order of the judge of the circuit court, the last case had never been tried; and he denied that the arrests were malicious or without probable cause.

The answer of the town and that of the other two defendants were a general denial that they had unlawfully, maliciously and without probable cause, arrested and imprisoned the plaintiff.

The verdict was for the defendants.

There was no material conflict in the evidence, and the facts proven were as stated in the answer of Ewin.

It is, and was upon the trial, conceded that the town council had no authority to pass such an ordinance, and that the same was void, as was held in regard to a similar ordinance, in *Tuck v. Town of Waldron, 31 Ark., 462.*

Municipal corporations are created by the state for political objects, and invested with a portion of governmental power, to be exercised for local purposes connected with the public good. "They possess, according to many courts," says Judge Dillon, "a double character, the one *governmental, legislative* or *public;* the other, in a sense, *proprietary* or *private.* The distinction between them," he continues, "though sometimes difficult to trace, is highly important, and is frequently referred to, particularly in the cases relating to the implied or common law liability of municipal corporations for the negligence of their servants, agents or officers in the execution of corporate duties and powers. On this distinction, indeed, rests the doctrine of such implied liability. In its governmental or public character, the corporation is made by the state one of its instruments, or the local depositary of certain limited and prescribed political powers, to be exercised for the public good on behalf of the state, and not for itself." *Dillon on Municipal Corporations, 39.*

For acts done by them in their public capacity, and in discharge of the duties imposed upon them for the public benefit, cities and towns incur no liability to persons who may be affected or injured by them.

The doctrine is thus stated by the court of appeals of Maryland:

"With regard to the liability of a public municipal corporation for the acts of its officers, the distinction is be-

tween an exercise of those legislative powers which it holds for public purposes, and as part of the government of the country, and those private franchises which belong to it as a creation of the law. Within the sphere of the former, it enjoys the exemption of the government from responsibilities for its own acts and for the acts of those who are independent corporate officers, deriving their rights and duties from the sovereign power." *Commissioners v. Duckett, 20 Md., 476.*

Then, for neither the act of the council in passing the ordinance, the acts of the mayor in issuing the warrants, nor those of the marshal and his deputy in making the arrests, was the town liable to the plaintiff.

It is a universally recognized principle, that one acting judicially in a matter within the scope of his jurisdiction, is not liable in an action for his conduct. Judge Cooley says: "Whenever the state confers judicial powers upon an individual, it confers them with full immunity from private suit. In effect, the state says to the officer, that those duties are confided to his judgment; that he is to exercise his judgment, fully, freely, and without favor, and he may exercise it without fear; that the duties concern individuals, but they concern more especially the welfare of the state, and the peace and happiness of society; that if he shall fail in a faithful discharge of them he shall be called to account as a criminal; but that in order that he may not be annoyed, disturbed, and impeded in the performance of these high functions, a dissatisfied individual shall not be suffered to call in question his official action in a suit for damages. This is what the state, speaking by the mouth of the common law, says to the judicial officer." *Cooley on Torts, 408.*

That in issuing the warrants the mayor acted in a judi-

cial capacity, will not be questioned; and we think it is equally clear, within the scope of his jurisdiction.

The enforcement of the ordinances of the town was a duty imposed upon him by the statute, and the validity of the ordinance was a question he had the unquestionable power to pass upon.

"The power to hear and determine a cause is jurisdiction; it is *coram judice*, whenever a case is presented which brings this power into action." *United States v. Arredondo, 6 Pet., 709.* "A court has jurisdiction of any subject-matter if by the law of its organization it has authority to take cognizance, try and determine cases of that description." *Cooley on Con. Limitations, 398.*

Did the warrants protect the marshal and his deputy in making the arrest? It is established doctrine that process *fair on its face* will protect from liability the officer executing it. It is not meant that it shall in all respects be regular; but that it shall appear to have been lawfully issued, and such as the officer might lawfully serve. "That process may be said to be fair on its face which proceeds from a court or magistrate, or body having authority by law to issue process of that nature, and which is legal in form and on its face contains nothing to notify or fairly apprise the officer that it issued without authority. When such appears to be the process the officer is protected in making service, and he is not concerned with any illegalities that may exist back of it." *Cooley on Torts, 459; 2 Hill, on Torts, 184.*

That the marshal and his deputy were protected from liability by the warrants, we think is clear.

The judgment is affirmed.

DONNELLY VS. WHEELER.

1. EXEMPTION: *Only residents entitled to. How pleaded.*

The right of exemption of property from sale under execution appertains only to residents of the State. The pleading asserting it must show such facts as bring the pleader within the expressions of the exemption law. It is not sufficient to allege that the goods are exempt.

2. REPLEVIN: *Affidavit for, no part of complaint.*

The affidavit for replevin in the circuit court, is not a part of the complaint which the defendant is bound to answer.

APPEAL from *Sebastian* Circuit Court.
Hon. J. H. ROGERS, Judge.
Du Val & Cravens, for appellant.
Clendening, *contra.*

EAKIN, J. This is a suit, in replevin, by Donnelly against Wheeler, for certain articles of household furniture. The property was taken and delivered to Donnelly. Wheeler pleaded that he held them, as constable, by virtue of an order of attachment against Donnelly, in a suit by a third party.

The transcript of the proceedings before the justice, showed that the attachment was issued upon a debt contracted under the constitution of 1868; the grounds of which attachment, stated in the affidavit, were: That the defendant (with another co-defendant) was a non-resident of the state, *and* was about to sell, convey or otherwise dispose of his property, with the fraudulent intent to cheat, hinder or delay his creditors. Defendants appeared, and filed an affidavit contesting the grounds of the attachment. No defense was made to the debt for which the suit was brought. There was judgment by default; and,

in the judgment, it is recited that the attachment was sustained. Upon that, there was an order of sale, and the wife of Donnelly filed a schedule, both as his wife, and his agent, claiming the attached property as exempt. A supersedeas was refused by the justice, and this action brought; judgment for return, or for value. Motion for a new trial overruled, and appeal.

It is unnecessary to consider the points raised upon instructions. The right of exemption appertains only to residents of the state. Plaintiff does not show that he was such, and the finding of the jury for defendant was the only legal verdict it could render.

It is true, that in the affidavit for replevin, plaintiff says the goods were exempt from execution, and the answer does not directly deny that, but denies that plaintiff is entitled to the possession. The affidavit for replevin in the circuit court is not a part of the complaint which the defendant is bound to answer. The complaint itself must show cause of action. It is not enough to say that the goods are exempt. That is a conclusion of law from the facts. This court held, in the case of *Cowan v. Baker et al.*, at the May term, 1875 (unreported), that "a party who seeks the protection of a court, against the sale of property, which he claims to be exempt from execution, must show such *facts* as bring himself within the expressions of the exemption law."

Affirm the judgment.

McConnell, Adm'r, vs. Beattie, Adm'r.

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34 113
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f90 55

1. Vendor by Title Bond: *Rights of assignee of purchase notes. Duty to surety on.*

A vendor of land by title bond stands in the position of a mortgagee for the purchase money, and his rights pass to the assignee of the purchase notes, who may proceed against the purchaser to foreclose the lien, or against him and his sureties on the note personally, or any of them separately, or may prosecute all these remedies at once, *pari passu*, until satisfaction. But he must take care that the lien is not lost to the surety by his act or negligence; but to *stay the enforcement* of the lien is no defense to an action against the surety.

2. Surety: *When subrogated to liens.*

A surety can not have subrogation to liens until he pays the entire debt.

APPEAL from *Crittenden* Circuit Court in Chancery.
Hon. L. L. Mack, Judge.
Adams, for appellant.
Weatherford, contra.

Eakin, J. This suit was commenced in May, 1868, by petition in debt, by Andrew J. Cunningham, the holder of the notes, against J. M. Jones, who appeared, on the face of the notes, to be a surety for the maker, J. W. Dillard. The notes were for $500 each, dated December 1, 1860, and payable, respectively, on the first days of January, 1862 and 1863.

The answer sets up that the notes were given for the purchase of certain lands, by Dillard, upon which there was a lien retained; that they were assigned by the vendor and payee, one to Justice Rives and the other to Edwin Dickinson, and had become, each, entitled to a credit; that said assignees had filed bills in chancery, and had obtained de-

crees of foreclosure against the principal and the land, with orders for sale, and the appoinment of a commissioner for the purpose, who had proceeded to advertise the lands. Rives and Dickinson then sold and assigned the notes to plaintiff, who directed the commissioner not to proceed with the sale, and that the land is worth the sum due. Defendant claims that he is entitled to have the lands sold for his protection; or, on payment by himself, to be subrogated to the lien. He prays that the cause may be transferred to the equity docket; that said decrees may be enforced and the lands sold; or, if judgment be rendered against himself, that he be subrogated to the benefit of the decree (which he speaks of in the singular), and *declared entitled* to enforce the same against the land.

It appears, from the proceedings, that both parties died pending the suit, the later papers being in the name of their respective administrators.

Plaintiff replied in equity, admitting the facts of the answer, and showing that Dillard, the purchaser of the land, had (giving no date) sold the lands to one Beattie, by title bond, and that afterwards (Dillard having died) a title had been made to him by order of the probate court, and that Beattie had taken, and since retained, full possession. Plaintiff submits, on this reply, that the proper parties were not before the court to enable defendant to set up the defense attempted; and also demurs to the answer for want of parties and for want of equity.

Upon hearing, the chancellor found for plaintiff the amounts due on the notes; but, reciting the pending causes in equity, by their titles, and naming the parties, and alluding also to the orders of sale, and their suspension by Cunningham, directed: that the collection of the decree in this case be "*stayed until the sales above mentioned,*" and that the

balance which might be due after appropriating the proceeds to the debt, should be certified to the probate court to be allowed against the estate of the defendant Jones. From this decree the administrator of Jones appealed.

The vendor of the lands, as respects the matters involved in this suit, stood in the position of a mortgagee for the purchase money, and his rights passed to the assignees of the notes. They might elect to proceed against the purchaser to foreclose the lien, or against all the makers of the note personally, or any of them separately; or, they might have proceeded upon all these remedies at once, *pari passu*, until satisfaction.

They were subject to one restriction. At their peril, they dealt with the lien upon the property, and were required to take care that it be not lost to the surety on the note by their act or negligence. The act of stopping the sale did not have that effect. The land remained bound, is worth the debt, and the lien may be enforced in favor of the surety when, by full payment, he entitles himself to subrogation. He can not have subrogation before, for whilst anything remains unpaid, the creditor is entitled, himself, to hold all the securities.

The plaintiff in this cause, by his purchase of the notes from the complainants in the chancery decrees, succeeded to their rights. As to the surety, who was not a party in the chancery suits, the notes were not merged in the decrees. The holders had the right to proceed upon them at law, and nothing set up in the answer constituted a defense. Whatever rights of subrogation the defendant might acquire by payment, or rights to enforce and carry into execution the original decree or decrees, for his indemnity, did not entitle him to delay the plaintiff in his suit at law. Upon an original bill, properly framed, or even on a

cross-complaint in this suit, bringing in the parties to the decrees, and seeking enforcement, the court would have gone on to enforce them for the exoneration or protection of the surety; and where that might be done without serious delay to the plaintiff, a chancellor might mould his decree to settle all rights at once; order the sales, ascertain the balance and render a final decree for that. The answer of defendant can not be taken as a bill for subrogation, or for the enforcement of the decrees. It lacks proper parties and contains nothing definite enough to found a decree upon. The decrees should have been specifically set forth with the parties, so that they might have day in court; the complainant (who is not plaintiff here) to show that he is entitled to retain his interest in the decree, if such be the case; and the defendants, to show cause why the decree should not be executed. The chancellor did well not to attempt any decree for enforcement of the former decrees. The course which defendant should have pursued for that purpose is clearly marked out by *sec. 4559 of Gantt's Digest*, as is also the extent of his immunity meanwhile against the plaintiff's rights. The third clause of said section provides that "the filing and prosecution of the cross-complaint shall not delay the trial and decision of the original action, when a judgment can be rendered therein that will not prejudice the rights of the parties to the cross-complaint." The decree for the money in this case against the surety, recognizes and enforces a legal right, which does not affect any right of subrogation, and the chancellor would doubtless have felt constrained to render it in any case, even if a proper cross-bill had been filed, and retained for other purposes.

If any one has the right to complain, it is the plaintiff, that the demurrer to the answer was not sustained, and

that the collection of his debt against the estate of defendant is stayed, and even its probate delayed, until he can execute, or have executed, the decrees. That depends upon himself, however, and, as he does not appeal, we will not interfere for him. Perhaps he recognizes in the decree a practical, common-sense view of what is right between man and man, which has prompted the chancellor to try and do substantial justice. We think that he has succeeded, although somewhat irregularly, and for that reason the decree must stand. Let it be affirmed.

SHEGOGG VS. PERKINS et al.

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34 117
e71 220
e71 221

34 117
76 394

34 117
84 95

1. ADMINISTRATION: *Jurisdiction of courts in.*

The probate court has the exclusive right to make settlements with administrators, which, when confirmed, can never be reinvestigated except in chancery upon a charge of fraud, supported by affidavit. Chancery will then take jurisdiction, not to supersede the probate court, or to withdraw the case from its jurisdiction, but to correct and prevent fraudulent abuse, and to hold the administrator liable for losses or injuries resulting from his mal-administration. It will determine the amount of the administrator's liability and set aside fraudulent settlements made and confirmed by the probate court; and, when the matters in issue are determined, the administration must be remanded to the probate court to be proceeded with as directed by the decree in chancery.

2. DECREE: *What is final.*

A final decree is the order of the court pronounced upon hearing and understanding all the points in issue, and determining all the rights of the parties to the suit, according to equity and good conscience.

If a decree does not profess on its face to dispose of many of the important matters involved in the cause, and it is manifest that the cause was not in condition to be heard upon those matters, and the decree fails to show affirmative action of the court upon them, the presumption may be indulged that they were not under consideration at the hearing or intended to be embraced in the decree.

3. ADMINISTRATION: *Principal and ancillary. Duty of ancillary administrator.*

When different administrations are granted in different countries, that at

the intestate's domicile is the principal administration. It is the duty of the ancillary administrator to collect the assets in his state, and apply them to the payment of debts due citizens of his state, and remit the balance to the principal administrator. He can not allow and pay claims of non-resident claimants. (Harrison, Justice, dissenting).

APPEAL from *Pulaski* Chancery Court.

Hon. J. R. EAKIN, Chancellor.

Before Hon. WILLIAM M. HARRISON, Justice, and Hon. JESSE TURNER and Hon. B. B. BATTLE, Sp. JJ.—Chief Justice ENGLISH and Justice EAKIN being disqualified.

Brown, for appellant.

Clark & Williams, *Rose*, *Farr*, *contra*.

TURNER, Sp. J. The plaintiffs, who were heirs at law of Constantine Perkins, deceased, state, that on the fourteenth of November, 1864, the said Constantine, who was a resident of Maury county, Tennessee, died at his home, intestate, leaving a widow, Nancy R. Perkins, but no children. He had a large estate in Tennessee, real and personal, and a valuable plantation in Arkansas, with the usual accompaniments of stock and farming implements.

By the laws of Tennessee the widow was entitled to all his personal property, subject only to the payment of his debts.

By the laws of Arkansas she was entitled to one-half of his personal property, irrespective of the claims of creditors, and to half the rents and profits of his real estate until her dower was assigned her.

That, on the sixth day of February, 1865, the said Nancy R. was duly appointed administratrix of his estate by the county clerk of Maury county, Tennessee; and that, on the sixth day of April, 1865, William Q. Pennington, a resident of Pulaski county, Arkansas, was duly appointed administrator of said estate by the probate court of said county.

Both administrations progressed, the one in Tennessee, and the other in Arkansas, until the commencement of this suit.

The bill alleged in substance: that said administrator (Pennington) and the widow had confederated together in the matter of the Arkansas administration; that the said widow had received from the rents and profits of the plantation for 1864, and the succeeding years, as her share, large sums of money, the estimated amount of rents and profits for three years amounting, as they allege, to $27,000, the plaintiffs having, in the meantime, received nothing; that the administrator (Pennington) had improperly allowed an account, in favor of the widow, which she claimed to have paid in August, 1865, to the firm of Brennan & Co., of Nashville, Tennessee, for $2,000, denying that she paid it all, or, if she had, alleging it had been paid with money of the estate.

That the allowance of claims against the estate, a list of which they set forth, amount to something over $5,000, all of which have been paid; but as they had no means of proving payment, prayed discovery; conceded dower to the widow; prayed that an account be taken, and for a full and final settlement of the estate, and that after assignment of dower, partition be made of the balance of the lands. The administrator (Pennington) answered: Denied that the deceased resided in Tennessee; stated that in 1865 the widow cultivated 100 acres of the plantation for her own use, free of rent, in consideration that she would claim none of the rents, and that he received that year from the other lands, $600; that for the current year (1867) he had rented the plantation for $4,750, and the whole amount previously received for rents, he stated to be $4,437.05, clear of allowances, one-half of which was paid to the widow. Explain-

ing the claim of Brennan & Co., he stated that it was due for an engine and fixtures put on the plantation in the lifetime of the intestate; that the widow was sued for it, as administratrix in Tennessee; that she compromised the suit for $2,000, and paid her attorney $100, and sent the claim to him, to be allowed against the estate in Arkansas; denied that she got the money from him. He admitted the list of probated claims set forth in the bill, to be correct, with the addition of a claim allowed himself, which was pending when the suit commenced, and showed a balance of money to his debit of $2,028.48. He concluded with a demurrer to the jurisdiction of the court.

Nancy R. Perkins (the administratrix) answered and made her answer a cross bill, claiming the whole of the rents and profits of the land until assignment of dower; denied all confederation with Pennington; admitted that she received her share of the corn and cotton crops for the year 1864, amounting to the sum of $1,421.95.

She admitted the use of 100 acres of land in 1865, which she claims as her right, but denies using any afterwards; also, that she received from Pennington $1,998.80, one-half of the clear rents of 1866, but claimed that she was entitled to the whole. Explaining the claim of Brennan & Co., she stated that her husband had been sued upon it in his lifetime for a larger amount, and that after the grant of administration to her, she was threatened with a revival of the suit, and that, by the advice of William C. Perkins, she had compromised it by paying $2,000 to the claimant, and $100 as fees to her attorneys; that she presented this claim to the Arkansas administrator for reimbursement, because she thought it most proper to have it allowed against the Arkansas property, as it was contracted for that; denied that she had received any of the personal property of the Ar-

kansas place except a mule valued at $25, but that Pennington had bid off for her at the sale, other personal property of the value of $312, for which he had accounted, and paid her, with that, the sum of $455.65 as her half of the sale of the other personal property.

She also set up a parol contract between her husband and Pennington, for an exchange of eighty acres of land, which she alleged had been carried into effect by her husband's occupancy and cultivation for a number of years, and now constituting part of the land in which she claims dower, and prays a specific performance against Pennington. She also claimed the whole of the rents and profits until the assignment of dower.

On the twentieth of December, 1867, Pennington filed a supplemental answer, admitting the receipt of the corn and cotton of the crop of 1864, as stated by said administratrix, and corrected his former statement of balance in hand, to show the balance to be $3,626.44.

On the twenty-third of June, 1868, the plaintiffs answered the cross bill of said administratrix, in which they insisted that the domicile of deceased was in Tennessee, and protested against her claim for all the rents and profits.

They still insisted that the allowance of the Brennan claim was wholly wrong, and that it should have been paid out of the estate in Tennessee, and allege that another claim allowed by the administrator here in favor of John Rowland was improperly allowed. That they believed it had been allowed for the benefit of Mrs. Perkins; that nothing was due him, and that if anything was due Rowland, as claimed, it had been presented here in Arkansas by her procurement to relieve the personal property in Tennessee.

Issues were made up on the twentieth of July, 1868, by the answer to the cross bill of the guardian, *ad litem*, of the minor heirs of Thomas Perkins, deceased, and by replication of the plaintiffs to the answers of Nancy R. Perkins and Pennington to the original bill.

A number of depositions were taken, filed and published on the eighteenth of February, 1869.

These depositions relate only to the residence of the deceased, and concerned nothing else in issue.

The record shows that upon these pleadings, and the accompanying exhibits, the cause was heard on the fifteenth day of December, 1869. The chancellor found that the said Nancy R. Perkins, widow of the said Constantine Perkins, was entitled to dower in the estate of said Constantine, as follows, to-wit: "To one-half of all the personal property and choses in action of which the said Constantine died possessed, as well as to one-half of all the clear rents and profits of the lands of said estate, absolutely and for her own use forever; and also to a life interest in one-half of all the lands of which the said Constantine died seized and possessed." Dower decreed accordingly, and commissioners appointed to make the assignment thereof in the lands, which were particularly described.

The same commissioners were also appointed to take an account of the rents and profits of the lands after the death of the said Perkins, and it was decreed that plaintiffs were entitled to partition of the balance of said lands, etc.

The plaintiffs afterward filed a supplemental bill, to which the said Nancy R. and Pennington appeared, on the twelfth of September, 1870.

On the seventh of November following, the said Nancy

R. and Pennington moved to strike out this supplemental bill.

On the eighth of March, 1871, leave was given plaintiffs to amend the supplemental bill, and on the fourth of April following, the bill was struck from the files at the cost of the plaintiffs. On the next day, April 5, 1871, the report of the commissioners appointed to assign dower was taken up and confirmed. It simply assigns dower in the lands, taking no account of rents and profits. No exception has ever been taken to this assignment of dower.

On the nineteenth of May, 1871, plaintiffs filed a motion to reform and correct the decree of December, 1869, and to reinstate the supplemental bill, which at that term had been struck from the files, basing their motion upon the affidavit of George C. Watkins, Esq.; the effect of which is that the decree was framed and entered hastily by the attorney for Pennington, and is not according to the understanding, which was that the decree should be interlocutory for the purpose of ascertaining dower and to take an account for future action, and not to be decisive of the rights of the parties; that the case was not actually heard by the chancellor then sitting, who only consented that the decree might be entered up as understood by the attorneys, etc.

The attorney for Pennington, C. B. Moore, Esq., filed a counter affidavit in opposition to the motion, to the effect that the decree was drawn as he understood the agreement, which was that it should be final as to all matters save dower; and contends that he so intended it at the time, and insists that it should so stand. The motion was not then acted upon, nor was any further proceeding had in the cause for many months.

On the twenty-second of February, 1872, while the

motion was pending, the plaintiffs asked leave to withdraw the amended supplemental bill, which they had previously attempted to file, and upon leave they were then allowed to file a supplemental and amended bill with the exhibits thereto.

Pennington appeared to it, and was granted until rule day to answer. His securities, Tucker and Bertrand, also appeared. Edward Shegogg (who had become the husband of Nancy R. Perkins) and his wife refused to appear, and a warning order was made, as to them.

In the meantime, pending this suit, Pennington was proceeding with the administration, filing accounts current, etc. The amended and supplemental bill of the twenty-second of February, 1872, assails these accounts and settlements as fraudulent, and repeats the charge of fraud against the said Nancy R. (now Shegogg), in the allowance of the Brennan claim; and charges the allowance of the Rowland claim to be fraudulent also, and that Pennington had fraudulently obtained an order from the probate court to employ an attorney to defend this suit, which was not against the estate but against himself, on account of his own mal-administration. That the accounts and settlements filed in the probate court were in contempt of authority, and except to them as fraudulent.

A full transcript of the proceedings and settlements in the probate court are filed as exhibits in the cause.

The plaintiffs charge mismanagement of the estate in many ways, and allege a relationship and connection between Nancy R. Shegogg (late Perkins), Pennington and one Chravis, hostile to the interests of the estate, and prayed an injunction against Pennington, to restrain him from further proceedings in the probate court. Ask that an account be taken of all the matters charged with regard

to the assets received, or which ought to have been received by the administrator. That he be charged with the Brennan allowance, which they allege was collusively and fraudulently paid to the said Nancy R. That the securities be held liable for any deficiency, and that the money, when collected, be brought into court and distributed under its order.

The injunction prayed for was ordered on the twenty-ninth of February, 1872.

The record fails to show any answer of Pennington to the last bill, while there is among the papers of the cause an answer of his, which appears to have been intended for the first supplemental and amended bill, and which puts in issue the material matters alleged in the last bill, and although it bears date in 1870, we may reasonably assume that it was intended to be filed as a response to the last bill.

The answer contains a demurrer to, and protest against, the jurisdiction of the court.

On the fifth of December, 1872, the death of Pennington was suggested, and the suit was revived against the administrator.

The death of Mary A. Bradley was also suggested, and the suit revived against her heirs at law.

Shegogg and wife answered on the twenty-fourth of May, 1873. She denied any and all fraud, either in the Brennan or Rowland claim, and asserts that she had the right to pursue the course admitted by her to have been taken.

She says that the personal estate in Tennessee has turned out less than she supposed, although, at the time of the Brennan settlement, she did not doubt its sufficiency. She exhibits, with her answer, the inventory returned and

filed by her in Maury county, Tennessee, which contains a large amount of personal property, consisting of furniture, cattle, carriage, mules, horses and other property about the place, which is not valued. Also, an inventory of notes reported good, amounting to something more than $8,000, besides $5,250 in gold.

A large list of notes reported doubtful were also included. Of those returned as good, the exhibits show a subsequent report to the court of the insolvency of more than $6,000.

Solomon F. Clark appeared as the administrator *de bonis non* of the estate of Constantine Perkins, deceased, and was ordered to rent out the lands.

Thomas Fletcher, as administrator of Pennington, filed an answer. Tucker's assignee in bankruptcy also appeared, and the administrator of Bertrand appeared and filed a demurrer and answer.

On the nineteenth day of March, 1875, the cause came on for final hearing, and was submitted to the court on the pleadings and papers in the cause, and argument of counsel; whereupon, the chancellor decreed that there is fraud in the settlements of William Q. Pennington, deceased, as administrator of the estate of Constantine Perkins, deceased, and that said accounts should be surcharged and falsified, and that an account should be taken of the amounts due from the estate of said Pennington, with which it would properly be chargeable, upon an adjustment of his accounts as administrator; and that the claim of Brennan & Co., allowed by the said Pennington against the estate of the said Perkins, be wholly disallowed and rejected, and that all the settlements of the said Pennington, as administrator as aforesaid, made with the Pulaski county probate court, be annulled for his fraud, as charged

by plaintiffs, and that said account be restated by the special master of the court, and that he make report thereof to the next term of the court thereafter.

From this decree Nancy R. Shegogg, a defendant in the original and supplemental bills, appealed to this court, and there was also a cross-appeal by W. O. K. Perkins et al.

The record presents several questions for our consideration:

1. As to the question of jurisdiction. The original jurisdiction of courts of equity in the administration of assets is founded on the principle that it is the duty of courts to enforce the execution of trusts, and that the executor or administrator, who, as trustee, has the property in his hands, is bound to apply it to the payment of debts and legacies, and the surplus, if any, according to the will of the testator, or, in cases of intestacy, according to the statutes of distribution.

It is true the probate court has the exclusive right to make settlements with administrators, which settlements, when confirmed, can never thereafter be subject to investigation, unless in a court of chancery, upon the allegation of fraud, supported by the affidavit of the party making such allegation.

The court of chancery, then, upon the allegation of fraud, as in this case, will entertain jurisdiction of the bill, not for the purpose of superseding the probate court, or withdrawing the case from its jurisdiction, which it has no power to do, but to correct and prevent fraudulent abuse, and to hold the administrator accountable for losses or injuries to the estate, resulting from his mal-administration. The court can determine the amount of liability with which the administrator ought to be chargeable, and may annul and set aside settlements made and confirmed

by the probate court, if their fraudulent character is made manifest. The court, however, confines itself to questions arising in the course of the administration between parties interested in the estate. and does not attempt to set up an administration independent of the probate court. On the contrary, when the matters in issue are determined by the court, the administration must be remanded to the probate court to be proceeded with there, according to the decree of chancery in determining the rights and liabilities of the parties in interest.

2. As to the effect of the decree of the fifteenth of December, 1869:

It is contended by the learned counsel for Mrs. Shegogg that the decree is final and conclusive, as to all matters put in issue by the pleadings; and this position is plausibly and ably maintained in the argument of counsel, and yet we can not think it was so understood by the plaintiffs' solicitors, or was the design of the chancellor. The court decreed dower to the widow of Perkins and provided for its assignment. It was accompanied by a further decree for partition. The widow's rignt to dower was conceded, and the only question was as to its extent. The right of the heirs of Perkins to partition was not contested. The widow, as such, claimed all the rents and profits of the plantation, accruing before the assignment of dower.

This right she asserted as a resident, in virtue of the alleged residence of her husband in Arkansas, while her rights to more than half was resisted, on the ground of his alleged non-residence in Arkansas.

The hearing of the cause, if hearing it could be called, was singularly imperfect and incomplete.

The residence of Constantine Perkins was important as determining the extent of the widow's right to dower in

the rents and profits of the real estate before dower assigned; hence, up to this time, all the evidence taken in the cause is confined to Perkins' residence, and none of the depositions have any allusion to the alleged waste and mismanagement of the estate. The liabilities of the administrator, his failure to file annual accounts current, his wrongful allowance of the claim of Brennan & Co., and other acts of mal-administration charged, are totally ignored, and seem not to have been in the mind of the court at the rendition of the decree.

Whatever the decree may seem to be in form, we are disposed to regard the action of the chancellor as a preliminary disposition of matters mostly not contested, which, though final and conclusive as far as it goes, was not intended to be, and is not, final and conclusive as to the other material matters in issue between the parties, in reference to which, in point of fact, there seems indeed to have been no hearing at all.

A motion was made by the plaintiffs to correct and reform the decree.

This motion was not formally granted, but the plaintiffs had leave to file their amended and supplemental bill, which involved the same matters embraced in the original bill, and the cause, on the amended pleadings, proceeded to a hearing.

Is then the decree final as to all matters put in issue by the pleadings? We think not. It does not profess on its face to dispose of any of the important matters involved, except the subjects of dower and partition, and it is quite apparent that the cause was not in a condition to be heard upon the other matters involved in the pleadings, and we think if the decree fails to show affirmative action of the court upon these matters, the presumption may be indulged

that they were not under consideration at the hearing, or intended to be embraced in the decree of the chancellor.

"A final decree is the order of the court pronounced upon *hearing and understanding all the points in issue*, and determining all the rights of the parties to the suit according to equity and good conscience." *Lube, 156.*

"A decree is final *when all the facts and circumstances material and necessary to a complete explanation of the matters in litigation are brought before the court*, and so fully and clearly ascertained on both sides, that the court is enabled, upon a full consideration of the case made out and relied upon by each party, *finally* to determine between them according to equity and good conscience." *1 Barb. Ch. Prac., 330; 2 Litt., 261; 7 Paige, 18; 4 How. Miss., 485; 1 Ark., 391; 10 Ark., 333.*

And to this effect we think are most of the authorities referred to by the learned counsel who contends for the absolute finality of the decree of the 15th December, 1869.

This decree does not profess to dispose of all the matters in controversy between the litigants. On the contrary, the circumstances attending its rendition, taken in connection with the face of the decree itself, conclusively shows that material matters in issue between the parties were not heard, considered or acted upon by the chancellor, and not intended to be embraced in the action of the court.

We are, therefore, of the opinion that the decree, except as to matters of dower and partition, was not final and did not, in any wise, affect the other matters in controversy, which remained open for the future action of the court.

3. As to the validity of the claim of Brennan & Co.

Two administrations were granted on the estate of Constantine Perkins. One by the county court of Maury county, Tennessee, the place of his domicile, where he

owned a large estate, and the other by the probate court of Pulaski county, Arkansas, where he also owned a large estate.

By the long since settled law, when different administrations are granted in different countries, that is deemed the *principal* or *primary* administration which is granted in the country of the domicile of the deceased party; for the final distribution of his effects among his heirs, or distributees, is to be decided by the law of his domicile. Hence, any other administration which is granted in another country is treated as in its nature *ancillary* merely, and is generally held subordinate to the original administration.

The Tennessee administration, then, is to be regarded as the *primary*, and that of Arkansas as the *ancillary* administration.

It is alleged in the bill that the claim of Brennan & Co. was allowed in Arkansas through the fraudulent procurement of Mrs. Shegogg (Perkins) in confederation with Pennington, the Arkansas administrator.

The claim originated in Tennessee, where all the parties in interest resided. At the time of the death of Perkins a suit was already pending in one of the Tennessee courts for the recovery of this claim. After the death of Perkins this suit was compromised, and the claim sent to Arkansss for allowance.

Both administrations controlled a large amount of assets, but our conclusion is, that the personal effects of the deceased in Tennessee was more than sufficient to have paid all of his debts, and especially his Tennessee debts ought to have been paid.

The Arkansas administration was purely ancillary, and the only duty devolving upon the administrator was to

collect the assets here, and to appropriate so much of the avails of the same to the payment of debts due to our citizens, as would be authorized by the general solvency or insolvency of the estate of the deceased, and remit the balance to the place of primary administration. See *3 Met. (Mass.), 114; 8 Pick., 475, 11 Mass., 256; 2 Mass., 384; 13 Pick., 23; 3 Penn., 185; Story's Conf. of Laws, sec. 518; 2 Kent, 434.*

Here the question presents itself: Was the ancillary administrator in Arkansas authorized to allow this claim as in case of the claim of a local creditor residing in this state? We think not.

In the case of *Churchill et al. v. Boyden, adm'r, 2 Wash. Vermont Reports, 321,* REDFIELD, J., in delivering the opinion of the court, said: "The only question here, is, whether the creditors of an estate where the principal administration is out of the state, and an administration of the estate has been granted here, are all alike entitled to have their demands allowed by the commissioners appointed here; or whether the commission extends only to resident creditors.

"We think it may be regarded as well settled in this state, that it is only the latter class of creditors who are entitled to have their claims allowed here." The court further said:

"I am aware that upon general principles of moral equity, there may be much said against this rule of allowances. But the law seems to be so settled in most of those countries where the common law of England prevails, and in many others. It has never been questioned that the court of probate, where the ancillary administration is, will take no notice of foreign creditors, and not usually of foreign legatees or distributees." *5 Vt., 333; 6 Vt., 374; 7 Vt., 170; 3 Pick., 128; 3 Penn., 185; 81 Penn. S., 441; 3 Rawle,*

312; 20 N. Y., 103; 9 Wall., 740; 2 Kent, 434, and note *a, Story's Conf. of Laws, 334, 336–7,* and authorities there referred to; *7 Johns' Ch. Rep., 45–47.* And to the same effect is a late decision of the supreme court of Pennsylvania. See *Barry's appeal—Foster's estate.* An abstract of this decision may be found in the *Southern Law Review, Vol. 5, No. 1, for April and May, 1879, p. 142.*

In that case the court decided that: "In ancillary administrations in Pennsylvania, of the effects of a decedent who was domiciled elsewhere, the court will pay only such claims as are proved only residents of Pennsylvania, and order the fund to be turned over to the foreign administrator, and non-resident creditors must resort to that jurisdiction."

This court has never expressly decided the question under consideration, yet our decisions, so far as they go, are in harmony with the authorities here cited. See *Clark v. Holt, 16 Ark., 257; Du Val et al. v. Marshall, 30 Ark., 230; Williamson v. Furbush, 31 Ark., 539.*

In the last case the facts were, in some respects, analogous to the facts of this case.

Mills and the plaintiff were citizens of Tennessee. Mills died in Tennessee, and left a will, which was probated. Caledonia Mills, his widow, was his executrix and sole devisee. The personal property was more than sufficient to pay his debts; the plaintiff had a note against the estate which was never presented for allowance or payment in Tennessee; there was no administration on Mills' estate in Arkansas, and the claim never was allowed here.

A bill was filed in equity to enforce the claim against certain real estate in Arkansas, alleged to be subject to the payment of the debt.

Mr. JUSTICE WALKER, who delivered the opinion of the

court, in discussing the question of the liability of the real estate in Arkansas in such a proceeding, after intimating distinctly that the claimant ought to have presented his demand to the administrator in Tennessee for allowance, goes on to say: "It will be seen, too, that this is a foreign debt; one contracted at the testator's domicile, in which administration had been granted, and it is questionable whether, if ancillary administration was had in Arkansas, a foreign claim could be presented here and the assets of the estate exhausted to pay it, to the prejudice of the rights of creditors in Arkansas."

The court further said: "The plaintiff says that the personal estate in Tennessee is amply sufficient to pay his debts, and if such is the case, there is no apparent reason why he should not enforce his claim there. But suppose such was not the case; that there were many claimants whose debts greatly exceeded the assets in Tennessee, and that in Arkansas there was an estate largely more than necessary to pay the debts here, and, upon settlement, there was a balance on hand; it would certainly not be equitable to allow one creditor to bring his claim to Arkansas and take full satisfaction of his debt, leaving the debts of the other creditors unpaid, or but partially paid."

We have given this question anxious consideration, and devoted a good deal of time to its investigation. We find the decisions on the subject conflicting, and often unsatisfactory. But while it is impossible to reconcile those conflicting decisions, we think, according to the weight of authority, to which we yield our assent, the claim of Brennan & Co. ought to have been allowed, if allowed at all, by the administrator of the domicile, and that its allowance by the ancillary administrator in Arkansas was wholly unauthorized.

Independently of the want of authority in the ancillary administrator to allow the claim, viewed in another aspect, the circumstances attending its presentation and allowance in Arkansas are well calculated to throw suspicion upon the motives of the principal actors in the transaction.

Previous to Perkins' death, he had been sued in one of the Tennessee courts for the recovery of this claim, and soon afterwards the widow (administratrix) compromised the suit for $2,000, to which she added $100 for attorney's fees, making in all $2,100, which she claims to have been paid out of her own money. The Tennessee estate consisted largely of personal property, and by the law of that state the widow was entitled to this absolutely, subject only to the payment of the debts of the deceased.

If, then, the widow, as is alleged, paid the claim out of her own money, she being entitled to the whole of the personal estate, subject only to the payment of debts, it was in effect, repaid to her from the personal assets in her hands, which was thereby relieved from further liability on that account.

It seems quite evident that the claim was sent to Arkansas for payment, in the first instance, to relieve the personal property in Tennessee from a liability which originally attached to it, and impose a corresponding burden upon the real estate in Arkansas, to which the plaintiffs, as heirs at law of Constantine Perkins, were entitled, subject only to the dower interest of the widow.

To compel the heirs to pay this claim out of the real estate in Arkansas, which has already, in effect, been paid out of the personal estate in Tennessee, would be unfair and unjust to them, and equivalent to a second payment of the same debt, to their prejudice and for the special benefit of the widow.

Pennington, who seems throughout the whole business to have acted in counsel with Mrs. Perkins, must have fully comprehended the character of the claim, and the purposes for which it was sent to Arkansas for allowance. As we regard it, looking at the matter in the light of the facts and circumstances attending the allowance of the claim here, its fraudulent character is evident; and we agree with the chancellor in his decree, that said claim be wholly set aside and rejected, because of fraud in its allowance.

4. As to the validity of the John Rowland claim.

The reasons which, in our judgment, warrant the rejection of the Brennan & Co. claim apply, with nearly if not equal force, to the Rowland claim. This, too, was a Tennessee debt Rowland lived with the deceased, and continued to reside with the widow after Perkins' death. The claim is said to have been for services rendered Perkins in his lifetime. If a legitimate claim, it ought to have been allowed and paid in Tennessee. *There* was the bulk of personal assets out of which the debts, especially the home debts, were to be paid. Why, then, was the Tennessee administration ignored and the claim sent out to the Arkansas administration for allowance? We may reasonably suppose that it was sent here, as in the case of the Brennan & Co. claim, to relieve the personal property in Tennessee from a liability primarily resting upon it, and impose such liability as a burden upon the real property in Arkansas, to the prejudice of the plaintiffs. That an understanding was had between the widow, Pennington and Rowland to this effect, hardly admits of a doubt. Indeed all the circumstances lead to this conclusion. The fact that the claim was first presented and allowed in Arkansas, where, as we hold, the ancillary administration

had no authority to allow it, was, in connection with other attending circumstances, strong presumption of the fraudulent character of the claim. It ought to have been rejected.

Upon review of this cause, we are of opinion that there is error in so much of the chancellor's decree as decides that the claim of John Rowland is a valid and binding claim against the estate of Constantine Perkins; and to this extent the decree is reversed, but in all other respects affirmed.

HARRISON, J.—Dissenting. I am unable to concur in the conclusion reached in the opinion of the court, that no other creditors but those residing in this state were entitled to prove their claims in the administration here.

For such a distinction there is in my mind no well-grounded or satisfactory reason.

Though an ancillary administration is, as it is said, subservient to the rights of creditors, legatees and distributees who are residents within the state or county where it is granted, the rights of all are to be regarded; their protection is not the primary object of such administration.

During his lifetime, the law gives no preference to the debtor's creditors residing within the state, and all may alike sue him in the courts. Why may not all also, upon his death, sue his administrators or prove their claims against his estate? All creditors may prove their claims in the domiciliary administration, and it is against every principle of equity and justice that the local creditors, or those within the jurisdiction of the ancillary administration, who have equal right in the assets of the former, should exclude the foreign creditors from any participation with them in those of the latter.

All that the local creditors may in justice demand, as I understand the rule to be, is that the effects of their deceased debtor shall not be withdrawn from the state until they are paid, if the estate is solvent; or, if insolvent, they have received a *pro rata* of their claims, according to the law of their state, in the aggregate assets of both the domiciliary and ancillary administrations.

Chief Justice Parker, in *Goodall v. Marshall, 11 N. H., 94*, said: "As the movable property must be administered according to the *lex loci rei sitæ* until it comes to the disposition of the balance in the hands of the administrator, is there any sound reason why a distinction should be made between creditors, citizens of that place, and those who reside in other governments? or, in other words, shall the government which administers the property within its jurisdiction, and causes that administration to enure for the benefit of its own citizens, exclude the citizens of other states from a participation in it by refusing to entertain their claims?

"The first answer to this question may be drawn from a consideration of the state of the laws relating to the remedies of the creditors preceding the death of their debtor. It would, perhaps, be too much to say, that there is no nation, possessing just claims to be regarded as a civilized government, in which, during a time of peace and friendly relations, the subjects or citizens of a foreign state are excluded from pursuing similar remedies for the collection of debts provided for its own subjects. It is sufficient that no such exclusion is known to the common law, nor to the statutes of England, or those of the several United States. So far as regards the relations of the latter to each other, any attempt at such exclusion is prohibited by the clause of the Constitution of the United States, which provides

that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states. If the creditors of the domicile may pursue the property of the debtor in his lifetime, in another government, equally with the citizens of the government where the property is situated, no sound reason suggests itself why they should be debarred of a remedy, and the property be appropriated exclusively, or in the first place to the satisfaction of the creditors in the latter government on his decease. Even if by permitting them to come in, the property may be insufficient to pay all, and the creditors in the government where the property is situated thereby compelled to resort to the principal administration where the debtor had his domicile, or to lose their debts, or a portion of them; this result is no other than might have been obtained in the lifetime of the debtor, by his withdrawal of the property from their jurisdiction.

"Another answer, and one which seems entitled to weight, is furnished by the considerations to which we have before adverted, showing that the ancillary administration, so far as creditors are concerned, is to be governed by the *lex loci.* If no regard is had to the place of residence of the deceased, in the marshaling of the assets, and the payment of the debts, no good reason occurs to us why any regard should be had to the place of residence of the creditors, in the allowance of the claims."

And all the cases I have been able to find, in which the question has been directly passed upon, or adverted to, except the one hereafter mentioned, are in agreement with the case from which I have quoted. *Dawes v. Head, 3 Pick., 144; Davis v. Estes, 8 Pick., 475; Harvey v. Richards, 1 Mason, 381; Cummings v. Banks, 2 Barb., 607; DeSobry v. DeLaister, 2 Harris & J., 244; Rosenthal v. Renick, 44 Ill., 202.*

I find no direct expression in Kent's Commentaries upon the point in controversy. The passage referred to in the opinion, if not indicating a contrary view, certainly does not admit of a construction favorable to that taken by the majority of the court. The author, after saying, "whether the court here ought to decree distribution, or remit the property abroad, was matter of judicial discretion, and there was no universal or uniform rule on the subject," proceeds as follows:

"The manner and extent of the execution of the rule were well discussed and considered in the supreme court of Massachusetts. A person was domiciled at Calcutta, and died there insolvent, and his will was proved and acted upon there. Administration was taken out in Massachusetts, on the probate of the will in the East Indies; and assets came to the hands of the administrator at Boston, sufficient to pay a claim due citizens of the United States, and a judgment debt due a British subject in England; but all of the assets were wanted to be applied, in the course of administration, by the executor at Calcutta. It was held that the administrator here was only ancillary to the executor in India; and the assets ought to be remitted, unless he was compelled by law to appropriate them here to pay debts. It was not decided whether he was compelled to pay here; but if it were the case, it would only be the American creditors; and the British creditor was not entitled to come here and disturb the legal course of settlement of the estate in his own country. If there were no legal claimants with us in the character of creditors, legatees, or next of kin, the administrator would be bound to remit the assets to the foreign executor, to be by him administered according to the law of the testator's domicile; and if any part of the assets were to be retained, it

would form an exception to the general rule, growing out of the duty of every government to protect its own citizens in recovery of their debts. The intimation has been strong that such an auxiliary administration, in the case of a solvent estate, was bound to apply the assets found here to pay debts due here; and that it would be a useless and unreasonable courtesy to send the assets abroad, and the resident claimant after them. But if the estate was insolvent, the question became more difficult. The assets ought not to be sequestered for the exclusive benefit of our own citizens. In all civilized countries, foreigners, in such a case, are entitled to prove their debts and share in the distribution. The court concluded that the proper course, in such a case, would be to retain the funds; cause them to be distributed *pro rata*, according to our own laws, among our own citizens, *having regard to all assets and the whole aggregate amount of debt here and abroad*, and then to remit the surplus abroad to the principal administrator. Such a course was admitted to be attended with delay and difficulty in the adjustment; but it was thought to be less objectionable than either to send our citizens abroad upon a forlorn hope to seek for payments of an insolvent's estate, or to pay them the whole of their debts, without regard to the claims of foreign creditors." *2 Kent's Com., 433, 434.*

The case alluded to in the above extract is *Dawes v. Head, 3 Pick., 128*, which was a suit upon the administrator's bond, for failing to pay the claims mentioned, and the court, in the course of the opinion, say:

"Whether citizens of other states claiming payment of their debts of the administration here, are to be put upon the same footing with citizens of Massachusetts, by virtue of the privileges and immunities secured to them by the constitution of the United States, is a point which we do

not now decide. But, without doubt, the courts of the United States, having full equity powers, would enforce payment upon the principles above stated, where there is no suggestion of insolvency of the estate. There would be no doubt, we think, that the payment of debts by the administrator here, after sufficient proof that they were due, and an allowance of his account therefor by the probate court, with proper notice, would be faithful administration, according to the condition of his bond, and would be a proper way of accounting to the principal administrator abroad.

"In regard to effects thus collected within our jurisdiction, belonging to an insolvent estate of a deceased person having his domicile abroad, the question may be more difficult. We can not think, however, that in any civilized country, advantage ought to be taken of the accidental circumstances of property being found within its territory, which may be reduced to possession by the aid of its courts and laws, to sequester the whole for the use of its own subjects, or citizens, where it shall be known that all the estate and effects of the deceased are insufficient to pay his just debts. Such a doctrine would be derogatory to the character of any government. Under the English bankrupt system, foreigners, as well as subjects, may prove their debts, and share in the distribution. Without doubt, in other foreign countries, where there is a *cessio bonorum*, or other process relating to bankrupts' estates, the same just principle is adopted. It was so under our bankrupt law while that was in force, and no reason can be suggested why so honest a principle should not be applied in the case of insolvent estates of deceased persons. It is always practiced upon in regard to persons dying within our jurisdiction, having had their domicile here; that is, creditors of all countries have the same right

as our own citizens to file their claims and share in the distribution. There can not be, then, a right in any one or more of our citizens, who may happen to be creditors, to seize the whole of the effects which may be found here, or claim an appropriation of them to the payment of their debts, in exclusion of foreign creditors."

The precise question here is not considered, nor even stated, in *Story's Conflict of Laws*, and there is to be found in it no intimation of opinion as to it, except such as may be presumed from a very copious extract from the case of *Dawes v. Head, in a note to sec. 513.*

I have not been able to see the case of *Barry's appeal;* of the others cited, *Hunt v. Fay, 7 Vermont, 170*, is the only one directly in point, or which, indeed, has any material bearing, and the decision in that case was by a divided court, Justice Mattock dissenting. *Mothland v. Wiseman, 3 Penn., 185,* is an authority the other way. The court in that case say: "But that the effects are to be collected and administered by local authority, is a principle, not only of British, but of American law. In *Topham v. Chapman, 3 Rep. Const. Court, S. C., 283*, it was much debated whether they should not also be distributed by the same authority, though according to the law of the domicile; but that the collection and payment of the debts might be by any other authority, was never supposed. The same question was debated in *Harvey v. Richards, 1 Mason, 485;* and in *Dawes v. Head, 3 Pickering, 128*, it was held that an administrator here, though admitted to be but auxiliary to the administrator at the place where the decedent was domiciled, is bound to remit the assets to be administered there, only in case there are no domestic claimants in the character of creditors, legatees or next of kin; but that when these appear, the assets are to be retained for administration,

according to our own laws, *permitting the foreign creditors to participate in proportion to their debts, respect being had to the aggregate of the estate and of the debts, whether foreign or domestic.*

The authorities, it is thus seen, almost without an exception, sustain the doctrine for which I have contended.

STATE, USE OLIVER, Adm'r, vs. ROTTAKEN, Adm'r, et al.

1. ADMINISTRATOR *de bonis non: His right on bond of predecessor.*

An administrator *de bonis non* has no right to sue the representative or sureties of a former administrator or executor, at law, or in equity, for property of his intestate, lost, wasted, mismanaged or converted by him. Only creditors, legatees, distributees, or others interested in the estate, can maintain such action.

2. ADMINISTRATOR PUBLIC: *Rights of, same as other administrator.*

A public administrator has no more or greater power, authority or rights, than other administrators.

3. ADMINISTRATOR: *Action on bond of deceased for waste, etc.*

No action can be maintained on the bond of a deceased administrator for assets of his intestate on hand and capable of identification at his death, nor for waste and mismanagement thereof after his death.

4. AMENDMENT: *When not made.*

Where a plaintiff shows in his complaint that he has no cause of action, the court can not amend it by making others plaintiffs who have.

APPEAL from *Pulaski* Chancery Court.

Hon. J. R. EAKIN, Chancellor.

Before Mr. Justice HARRISON, and Hon. JESSE TURNER and Hon. B. B. BATTLE, Sp. JJ.,—Mr. Chief Justice ENGLISH and Mr. Justice EAKIN being disqualified.

Brown, for appellant.

Rose, contra.

BATTLE, Sp. J. This is an action in chancery, brought by the state of Arkansas for the use and benefit of William S. Oliver, as public administrator of the estate of David Skelton, deceased, against H. H. Rottaken, as public administrator of the estate of John T. Trigg, deceased, and Charles Ayliff and Claiborne Watkins, as the residuary divisee of the estate of George C. Watkins, deceased.

The appellant, in her complaint, states that John T. Trigg was duly appointed administrator of the estate of David Skelton, deceased, in the year 1855, by the probate court of Pulaski county; that Trigg qualified as such administrator, and executed his bond to the state of Arkansas, in the sum of nine thousand dollars, with George C. Watkins and Charles Ayliff as sureties thereon, and conditioned as required by law; and that said bond was approved as good and sufficient.

That on the twenty-eighth day of October, 1858, Trigg filed his account current, showing a balance of fifteen hundred and seventy-one dollars and twenty-five cents due the estate of Skelton; and that this account current was approved and confirmed by the probate court, at the April term thereof, in the year 1859.

That Trigg died in the year 1863, without making a final settlement or paying the balance aforesaid, or any part thereof; that Thomas Fletcher, public administrator of Pulaski county, administered on the estate of Trigg, and as such public administrator filed a partial settlement of Trigg as administrator of Skelton, showing the same balance due the estate of Skelton as shown by Trigg; that this settlement was confirmed by the probate court, at the April term thereof, in the year 1868, and Fletcher, as such administrator, was, at his request, discharged.

That William S. Oliver was appointed administrator of

Skelton, by the probate court, on the twenty-fourth day of October, 1871.

That George C. Watkins died in the year 1873, leaving a last will and testament whereby he bequeathed and devised the whole of his estate to Claiborne Watkins, charged with the payment of his debts and certain legacies, and appointed Claiborne Watkins executor thereof; that said will was proven, and admitted to probate by the probate court of Pulaski county, in the manner prescribed by law; and that Claiborne Watkins qualified as such executor, and took upon himself the execution of the will, and paid all of said debts exhibited to him, properly authenticated, within two years after the date of his letters testamentary, together with said legacies.

That George C. Watkins left property amply sufficient to pay all his debts and said legacies; and that after the payment of the same, a very large and valuable estate was received, and is now held and enjoyed by Claiborne Watkins under the provisions of the will, especially the property described in said complaint.

That at the April term, 1875, of the Pulaski probate court, H. H. Rottaken was appointed administrator of the estate of Trigg, and as such administrator was ordered by said court to pay to Oliver, as administrator of the estate of Skelton, the said sum of fifteen hundred and seventy-one dollars and twenty-five cents, and interest thereon for fifteen years, amounting in the aggregate to the sum of two thousand, nine hundred and eighty-five dollars and thirty-eight cents; that Oliver afterward demanded payment thereof, when Rottaken refused to pay the same, saying he had no assets with which to pay it; that Oliver, as administrator of Skelton, made out an account of his said demand, verified by his oath, and in

June, 1875, presented it to Claiborne Watkins, as executor of the last will and testament of George C. Watkins, deceased, and he refused to pay the same.

That said claim did not mature and become demandable until after the expiration of two years next after the date of said letters testamentary; that the same is barred, as against said executor; and plaintiff's only remedy is in equity against the devisee of Watkins.

The prayer of the complaint is, that said demand be declared a lien upon the property devised to Claiborne Watkins, which is described in the complaint; and that plaintiff, for the use of Oliver as such administrator, have judgment for the amount of such demand, against defendants, and for other relief.

The defendant, Claiborne Watkins, demurred to the complaint, because there is no equity therein; because the claim was barred by the statute of limitation and non-claim; and because it appears on the face thereof that the court below had not jurisdiction of the subject-matter of the action. The demurrer was sustained as to so much thereof as says there is no equity in the action, and was overruled as to the other causes assigned.

Plaintiff, with leave of the court, filed an amendment to her complaint, and therein stated that Skelton left surviving him, at his death, eight children, heirs and distributees—their names; and when they respectively arrived at the age of twenty-one years; that while they were minors their mother moved with them from the state of Arkansas, and from thence hitherto they have been non-residents of this state; that no assets of the estate of Trigg ever came to the hands or possession of Rottaken; and asked that Skelton's heirs be made and considered parties plaintiffs, joining in the further prose-

cution of this action, and renewed the prayer of the original complaint.

Defendant, Watkins, demurred to the amended complaint, because the facts stated therein are not sufficient to constitute a cause of action. The demurrer was sustained, and the plaintiff declining to amend further, the complaint was dismissed; judgment for costs was rendered in favor of defendants against plaintiff; and plaintiff excepted and appealed.

The complaint and amendment thereto fail to show that any part of the assets received by Trigg remained in specie at the time of his death, or were capable of being ascertained and identified as the specific property and estate of Skelton. But, on the contrary, it is alleged that a balance of fifteen hundred and seventy-one dollars and twenty-five cents was due the estate of Skelton at the filing of Trigg's last settlement, and that no part thereof has ever been paid. How and on what account this balance became due, plaintiff fails to explain. The only reasonable conclusion which can be drawn from the complaint and amendment is, it was due and owing by Trigg on account of assets of the estate of Skelton lost, wasted or converted by him, in his lifetime. If the conclusion be correct, does the amended complaint show that plaintiff has or had a cause of action against the defendants or either of them?

It is said, that by the old law of England the king was entitled to seize upon the goods of all intestates as the *parens patriae*, and general trustee of the kingdom. This prerogative he exercised for some time by his own ministers of justice. Afterwards the crown, in favor of the church, invested the prelates with this branch of the prerogative. The goods of intestates were given to the ordinary by the crown; and he had the right to seize them,

and keep them without wasting, and also might give them, alien, or sell them at his will, and dispose of the money *in pios usus.* For the discharge of this trust the prelates were only accountable to God and their own consciences. This trust they abused most outrageously, and in the name of the church and the poor, the whole residue of the deceased's estate, after the *partes rationabiles* of the wife and child were deducted, took unto themselves, without paying even his lawful debts, or other charges thereon. To check this exorbitant power, entrusted with ordinaries, it was enacted by the Statute of Westminister 2 (*13 Edwr., 1 C., 19*), that the ordinary should pay the debts of the intestate, so far as his goods would extend. But this statute did not afford adequate relief. After the payment of the debts there was very often left a *residuum* to be used as the ordinaries might see fit to apply. This power they used in a most iniquitous manner, and thereby caused parliament, by the *Statute 31, Edwr. III, C., 11,* to further enact, that in case of intestacy, the ordinary should depute the nearest and most lawful friends of the deceased to administer his goods; and thereby gave origin to administrators, who, before this statute, were unknown to the laws of England.

Under the *Statute 31, Edwr. III,* an administrator became the deputy of the ordinary, and clothed with all the authority and power which the ordinary previously had in the administration of estates. The legal title to the personal estate of his intestate vested in him. He had the power to alter, change or convert any portion thereof to his own use, and such portion was thereby fully administered, and became a part of his estate, and descended to his legal representatives. But inasmuch as he held in *autre droit*, and, therefore, had no right to dispose, by will, of the property which remained in specie at his death, it

still remaining the property and estate of his intestate, it resulted back to the ordinary to appoint a receiver. So, too, when an executor died intestate, his administrator did not become the representative of his testator, but, as in case of the deceased administrator, it became the duty of the ordinary to appoint an administrator of the testator with the will annexed. In both cases, the appointment of an administrator was for the purpose of completing an administration already begun. It was not, as in case of the first administrator, a full and immediate administration of the "goods, chattels and credits, which were of the testator or intestate at the time of his death," but an administration *de bonis non administratis.* The commission of the second administrator only vested him with the power and authority, and imposed upon him the duty of collecting and administering "such property and effects of the deceased, not administered by the former representative, as remained in specie, and were capable of being ascertained and identified as the specific property or estate represented by him." To this extent, only, did his power, authority and duty extend. He could not sue the former executor or administrator, or his sureties, on his executorial or administration bond, in law or equity, for property wasted, lost, altered or converted by the first executor or administrator. Such liability of the former executor or administrator, or his sureties, was no part of the estate of the testator or intestate, on which the administrator *de bonis non* had a right to administer, but was "a chose in action belonging to those entitled to the estate as creditors, legatees, or distributees." In such cases the creditors, legatees or distributees only, were authorized to sue. *Finn et al. v. Hempstead et al., 24 Ark., 117; Coleman v. McMurdo, 5 Rand., 51; Potts et al. v. Smith, 3 Rawle, 360; Warfield v. Brand's*

Adm'r, 13 Bush. (Ky.), 77; Beal v. New Mexico, 16 Wallace, 540; 3 Redfield on the Law of Wills, star page 103; 1 Lomax on Executors, marginal pages, 335–339; 1 Williams on Executors, marg. pages, 822–827; 4 Bacon's Abr., 24.

In equity, the executor or administrator holds the property of his testator or intestate, in trust for the benefit of those concerned, first for the benefit of the creditors, and then for the legatees, or, in case of intestacy, for the distributees under the statute of distributions. And the assets are treated and regarded as a trust fund, "to be administered by the executor," or administrator, "for the benefit of all persons who are interested in it, whether they are creditors, legatees or distributees, or otherwise interested, according to their relative priorities, privileges and equities." For the benefit and at the instance of those interested, only, will a court of equity interfere to protect the trust funds, and hold the executor, or administrator, or his legal representative and sureties, accountable for waste and mismanagement of the same, and cause it to be administered or disposed of according to their relative priorities, rights, interests, privileges and equities. (*1 Story's Eq., secs. 532, 579, 580*). As we have already seen, the administrator *de bonis non* can not, and does not, stand in the relation of *cestui que trust* to the trust fund; nor does the executor or administrator hold the same in trust for his use and benefit. His commission gives him a right which is purely of a legal nature, and which extends only to so much of the goods, chattels and credits as remains in specie, and can be identified as the specific property or estate of the deceased. Hence, it follows that he has no right to institute suit, in a court of equity, to hold the representative or sureties of a former executor or administrator accountable for property

lost, wasted, mismanaged or converted by such former executor or administrator.

The power, authority and duties of an administrator *de bonis non* remain and are the same in this state as we have already seen they were under the common law of England and statutes of the British parliament, unless they have been changed by statute. Have they been changed? They have not. It is true that *sec. 44 of Gantt's Digest* says: "If any executor or administrator die or resign, or his letters be revoked, he, or his legal representatives, shall account for, pay, and deliver to his successor, or the surviving or remaining executor, all money and personal property, and all the rights, credits, deeds, evidence of debt, and papers of any kind belonging to the estate of the deceased, at such time and in such manner as the court shall order; and such court, in case of a refusal to comply with such order, shall have power to enforce the same by attachment." But what money, personal property, rights, credits, deeds, evidence of debt and papers are referred to in this section? Manifestly, such as remains in specie. The former executor or administrator, or his legal representative, could not account for, pay and deliver to his successor any other assets. No other assets belong to the estate of the deceased. And it would be absurd to require and force him by attachment to account for, pay over and deliver to his successor something which had ceased to exist, and was beyond his reach and control. He could not be forced by attachment; and it would be impossible for him to account for, pay over, and deliver to his successor any assets other than those in specie, and capable of being identified as the specific property or estate of the deceased. It could not be any money which the deceased administrator was liable to pay on account of assets lost, wasted, or converted by him; for the same stat-

utes expressly provide how demands and claims for money against the estates of deceased persons shall be authenticated, presented, classed, and paid, and that, too, in a way and manner entirely different from that provided for the payment and delivery of assets under sec. 44 cited above.

Instead of giving the administrator *de bonis non* the right to sue on the bond of a former administrator, and recover any amount for which he may be liable on account of any waste or mismanagement of the estate of the deceased, *sec. 191 of Gantt's Digest*, on the contrary, expressly provides: "The bond of *any* executor or administrator may be sued on at the instance of any legatee, distributee, creditor, or other person *interested*, in the name of the state, to the use of such legatee, distributee, creditor, or other person interested, for any mismanagement, waste, or other breach of the condition of such bond; and the party to whose use suit is brought, shall have judgment against the executor or administrator, and his securities, for the *whole value of the estate mismanaged or wasted*, with costs of suit; and the amount so recovered shall be distributed by the court in the same manner as if the same had been accounted for by the executor or administrator." This statute in no wise changes the remedies in the cases therein provided for, but substantially re-enacts the law which was in force in such cases at the time of its enactment, and thereby perpetuates it in every material point. Under it, the administrator *de bonis non* has no authority to sue, because he has not, and from the nature of the case could not have, an interest in the assets wasted or mismanaged, or the liability therefor, as we have already seen.

But has Oliver, as public administrator, greater power and authority and more rights than he would have if he had been regularly appointed administrator *de bonis non* of

the estate of Skelton? What are the powers, authority and duties of a public administrator, as defined by the statute? The statutes make it his duty to take charge of all the estates of every kind, of the deceased persons in his county, in certain enumerated cases, and to "institute all manner of suits that may be necessary to recover the property, debts, papers or other estate of the deceased, *in the same manner as if letters of administration were actually granted to him.*" If property comes into his hands, he is required to enter into the like bond and security as is prescribed in cases of administrators in ordinary cases, and to make true and perfect inventory thereof, "and administer and account for the same as near as circumstances will permit, *according to the law prescribing the duties of administrators*, subject to the control and direction of the court." "He holds the estate until an executor or administrator is regularly appointed, when, under the order of the court, he is required to account for, pay and deliver to such executor or administrator all the money, property and estate of every kind in his possession. He is required to act as a temporary administrator for the preservation of the estates of deceased persons in his county, liable to be wasted, injured or lost; and to bring suits for the recovery of the estate in the same manner he would do if letters of administration were actually granted to him. No statute or law, other than those governing administrators, define his power and authority, and prescribe his duties as to the estates in his charge. The same law which defines the power and authority and prescribes the duties of administrators is made applicable to him. There is no statute giving him greater power and authority than is granted to administrators regularly appointed, or giving him power to administer any more or other goods,

chattels, rights and effects, than an administrator of the same estate, regularly appointed, would have. Hence it follows that Oliver, as public administrator, had no more or greater power, authority and rights than he would have if he had been regularly appointed administrator *de bonis non;* and that he only fills the place of an administrator *de bonis non pro tempore,* and until an administrator *de bonis non* shall be regularly appointed. *Gantt's Digest, sec. 216, 223.*

Plaintiff alleges in her complaint that Oliver was appointed administrator of the estate of Skelton, on the twenty-fourth day of October, 1871. Taking it for granted that the appointment was valid, he thereby became the administrator *de bonis non* of Skelton's estate, and thereafter had no right to sue or recover any assets of the estate of Skelton, in his capacity of public administrator; and in such capacity could not maintain this action. *Gantt's Digest, sec. 220.*

Could or can an action be instituted and maintained on the bond of Trigg for assets of the estate of Skelton, which were received and held by Trigg while he was administrator, and were on hand at his death, and capable of being ascertained and identified as such assets, or for damages suffered by reason of the waste and mismanagement thereof since his death? Certainly not. Section 44, cited above, makes it the duty of the executor or administrator, when his administration terminates in his lifetime, to account for, pay, and deliver the assets remaining in specie, under the order of the probate court, to his successor; and in the event he dies before he is discharged or removed, it makes it the duty of his legal representative to account for, pay and deliver so much of the assets as remain in specie and were capable of being identified

and ascertained, in like manner, to such successor. His legal representative is required to give bond for the faithful discharge of his duties, one of which, nominated in the bond, is, he shall, "well and truly, do and perform all other matters and things touching" his administration, "that are or may be prescribed by law, or enjoined" on him "by the lawful order, sentence or decree of any court having competent jurisdiction." One of the duties appertaining to his administration, prescribed by law, is, to account for, pay, and deliver to such successor the assets belonging to the estate of the deceased, represented by his testator or intestate, in his lifetime, and remaining in specie, when thereunto required by the probate court. If he fails to do so, he is liable to a suit on his executorial or administration bond. On the other hand, if the administration of the first executor or administrator terminates in his lifetime, it is his duty to account for, pay, and deliver to his successor such assets, under order of the court; and if he fails to do so, is liable to an action on his bond. Section 45 says: "The succeeding administrator or the remaining executor may proceed at law against the *delinquent and his securities*, or either of them, or any other person *having in his possession any part of the estate.*" What delinquent is referred to in this section? Manifestly he who failed to deliver assets in obedience to the order of the court, as prescribed by section 44, just preceding. If the first administrator be dead, the delinquent and securities referred to could not be the first administrator and his securities, because no action could be brought against him. As to the assets remaining in specie at his death, he could not be considered a delinquent, because the law assumes no jurisdiction of a dead man, and requires nothing of him. His sureties have no right, and it is not

their duty, to take charge and control of the assets, and they are powerless to prevent waste thereof. It is his legal representative who is required to account for and deliver the assets remaining in specie, under the order of the court; and if he fails to do so, he is the delinquent, and his sureties are the securities authorized to be sued by section 45. If the assets have been lost, wasted or converted by the deceased administrator in his lifetime, the creditors, legatees, distributees or other persons interested, are alone authorized to sue on the bond of the first executor or administrator, and not his successor. Sections 44, 45 and 191, stand as a part of one and the same act of the legislature, and should be construed together. From them, construed as a whole, the conclusion that suit can not be brought on the bond of a deceased administrator by his successor, for assets remaining in specie at the time of his death, or for damages suffered by reason of the waste and mismanagement thereof since his death, is unavoidable.

Plaintiff, in the amendment to her complaint, asked that the heirs and distributees of Skelton be joined and considered as plaintiffs in this action. These heirs and distributees, so far as shown by the transcript of the record here, did not appear and ask to be made parties, and were not made parties. Did plaintiff have the right to amend by making them parties? The Code says: "The court may, at any time, in furtherance of justice, and on such terms as may be proper, amend any pleading or proceeding by adding or striking out the name of any party." This provision of the Code assumes that the plaintiff has a cause of action, and does not authorize the court in any case, where the plaintiff has failed to show any cause of action, to amend by adding the name of a party in whose favor a cause of

action is shown by the complaint to exist, because such a proceeding would be practically instituting a new action, and forcing a party, at the instance of one who has no right to demand it, to commence an action when he does not wish to do so. Broad and liberal as the provisions of the statute of amendments are, we see no authority in them for such a proceeding. *Pomeroy's Remedies and Remedial Rights, sec. 420; 4 Waite's Practice, 655; Van Syckels v. Perry, 3 Rob. (N. Y.), 621; Davis v. The Mayor, etc., of New York, 14 N. Y. (4 Kern.), 506; Van Duzer v. Howe, 21 N. Y. (7 Smith), 531.*

We, therefore, conclude that plaintiff's complaint and amendment thereto, under any construction that may or can be placed thereon, fail to state facts sufficient to constitute a cause of action; that the demurrer thereto was properly sustained; and that there is no error in the proceedings of the court below.

Let the decree of the court below be in all things affirmed.

STATE OF ARKANSAS VS. PARKER.

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58 46

34 158
f90 492

1. LARCENY: *Indictment, description of property in.*

"Twenty-five cords of wood" sufficiently indicate, personal property, and is a sufficient description of the subject of larceny. The common and ordinary acceptation of property is to govern in description; the certainty must be to a common intent, which is, such as will enable the jury to say whether the chattel proven to be stolen is the same as that specified in the indictment, and will judicially show to the court that it could have been the subject-matter of the offense charged.

2. SAME: *Trees severed from soil, subject of.*

Trees previously severed from the soil are personal property and the subject of larceny, and when furtively taken from the land or possession, actual or constructive, of another, it is larceny.

APPEAL from *Lawrence* Circuit Court.
Hon. R. H. POWELL, Circuit Judge.
Mr. Attorney General Henderson, for the State.

ENGLISH, C. J. John Parker was indicted for larceny in the circuit court of Lawrence county, the indictment charging—"That the said John Parker, on the twentieth day of December, A. D. 1876, with force and arms, in the county aforesaid, etc., twenty-five cords of wood, of the value of $75, of the property of the Saint Louis, Iron Mountain and Southern Railway company, then and there being found, feloniously did steal, take and carry away, contrary to the form of the statute in such case made and provided, against the peace and dignity of the state," etc.

The defendant demurred to the indictment, on the grounds that it was defective in not sufficiently describing the subject-matters of the larceny; and that it did not contain facts sufficient to require defendant to answer thereto, etc.

The court sustained the demurrer, discharged defendant, and the state appealed.

I. "*Twenty-five cords of wood*" was a sufficient description of the subject of the larceny. Any person in this county, who has intelligence enough to be responsible for crime, would understand from these words the nature of the charge. *Gantt's Dig., sec. 1796.*

The common and ordinary acceptation of property, is to govern in description, and the certainty must be to a common intent, by which is meant such certainty as will enable the jury to say whether the chattel proved to be stolen is the same as that upon which the indictment is founded, and will judicially show to the court that it could have been the subject-matter of the offense charged. *1 Wharton Cr. L. 6 Ed., sec. 355.*

II. Larceny is the felonious stealing, taking and carrying away of the personal property of another.

The indictment does not charge the subject of the larceny to have been the *goods and chattels* or *personal* property of the corporation alleged to have been injured, but the words used, "*twenty-five cords of wood*," sufficiently indicate that the property was personal, and not real.

When trees have been severed from the soil, whether by the owner or a third person, or even on a previous occasion by the thief himself, they have become personal property, the stealing whereof is larceny. *2 Bishop Cr. L., sec. 781.*

Removing of cut timber from the lands of another may be a trespass, and, by statute, indictable as a misdemeanor (*Gantt's Dig., sec. 1385*), but where cord wood is furtively taken from the land, or possession, actual or constructive, of another, it is larceny.

Reversed and remanded for further proceedings.

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64 235

STATE OF ARKANSAS VS. MCMINN.

1. CRIMINAL PLEADING: *Former acquittal. Variance.*

If, upon a former indictment, the defendant could not have been convicted of the offense described in the latter, then an acquittal upon the former is no bar to the latter.

Upon an indictment for stealing a cow, one can not be convicted of stealing a bull. (*Sec.* 178, *Gantt's Digest*, explained.)

APPEAL from *Yell* Circuit Court—Danville District.
Hon. W. D. JACOWAY, Judge.
Mr. Attorney General Henderson, for the State.

ENGLISH, C. J. At the February term, 1879, of the circuit court of Yell county, Danville district, McMinn and others were indicted for larceny, the indictment charging, in substance, that, "the said Robert McMinn, C. T. Rains and Robert Wilson, on the 28th day of July, 1878, in the Danville district, of the county of Yell, etc., one bull of the value of four dollars, of the property of M. V. Adney, then and there being found, did unlawfully and feloniously steal, take and carry away," etc., etc.

McMinn filed a plea of former acquittal, in substance as follows:

"Defendant, etc., having heard said indictment read (and protesting that he is not guilty of the premises charged in said indictment), says that the said state, etc., ought not further to prosecute said indictment against him, because, he says, that heretofore, to-wit: at the present term of this court, he was held and tried on the 13th day of this present month of February, 1879, upon an indictment wherein it was charged that this defendant, with C. S. Rains and Robert Wilson, did, on the 25th day of July, 1878, in the Danville district, in the county of Yell, etc., one cow of the value of $10, one heifer of the value of $3, and one heifer of the value of $4, of the property of W. R. Carrell, steal, take and carry away; and defendant charges that if any offense was committed it was embraced in the said offense aforesaid, and that on the trial of said cause, by a jury, upon a plea of not guilty, this defendant was acquitted, as by the record thereof in this court appears; and this defendant, in fact, says that said Robert J. McMinn, so indicted and acquitted as last aforesaid, and this defendant are one and the same person, and not other and different persons; and that the felony and larceny of which he, the said Robert J. McMinn, was so indicted and

acquitted as aforesaid, and the felony and larceny of which defendant is now indicted, are not other and different felonies and larcenies, and this he, the said Robert J. McMinn, is ready to verify: Wherefore he prays judgment, and that by the court here he may be dismissed and discharged from the said premises, and in the present indictment specified; and this defendant says, as to the said indictment wherein he is now attempted to be put on trial, it is for the same larceny as charged in the said indictment wherein he was so acquitted as aforesaid, and that he is not guilty of the offense as charged in the present indictment, on which he is now attempted to be tried."

The state demurred to the plea, the court overruled the demurrer, and the state resting, defendant was discharged.

The state appealed.

Cow—The female of the bovine genus of animals.—*Webster.*

Heifer—A young cow.—*Ib.*

Bull—Male of the bovine, etc.—*Ib.*

Appellant was indicted (with others) for stealing a *bull.*

The substance of his plea is, that he (and others) were previously indicted in the same court for stealing a *cow* and two *heifers*, tried and acquitted, and that the offense charged in the indictment was embraced in the former indictment—that the offenses are the same.

On the first indictment he could not have been convicted for stealing a *bull.*

If, upon the first indictment, he could not have been convicted of the offense described in the second, then an acquittal upon the former is no bar to the latter. *3 Greenleaf Ev., sec. 36; 1 Wharton Cr. L., 6 Ed., secs. 551–557.*

"The rule is," says MR. WHARTON, "that if the prisoner *could* have been legally convicted on the first indictment,

upon any evidence that might have been legally adduced, his acquittal on that indictment may be successfully pleaded to a second indictment; and it is immaterial whether the proper evidence were adduced at the trial of the first indictment or not."

But upon the indictment for stealing a *cow* and two *heifers*, appellant could not, upon any evidence that might have been legally adduced, have been convicted for stealing a *bull*, the variance between the indictment and proof, as to the subject of the larceny being material and fatal; hence an acquittal upon the first indictment could be no bar of the second for stealing a *bull*.

This rule of the common law has not been changed by statute.

It has been suggested that if, upon the first trial, the court had dismissed the indictment for variance between the indictment and proof, it would have been a bar to the second indictment, under *section 1844, of Gantt's Digest*, and that an acquittal upon the first indictment would, of course, for a stronger reason, be a bar to the second. But this suggestion is made upon a misunderstanding of the section of the Digest above referred to, which Mr. Gantt did not copy literally from the corresponding section of the Criminal Code.

Section 169 of the *Criminal Code* is as follows: "If the demurrer is sustained because the indictment contains matter which is a legal defense or bar to the indictment, the judgment shall be final, and the defendant discharged from any further prosecution for the offense."

Section 178, is as follows: "The dismissal of the indictment by the court, on demurrer, except as provided in *section 169*, or for an objection to its form or substance taken at the trial, or for variance between the indictment and

the proof, shall not bar another prosecution for the same offense."

The meaning of this section may be clearly expressed thus: The dismissal of the indictment by the court, on demurrer (except as provided in section 169), or *the dismissal of the indictment* for an objection to its form or substance, taken at the trial, or *the dismissal of the indictment* for variance between the indictment and the proof, shall not bar another prosecution for the same offense.

Such is the reading which this court gave the section in *Lee v. State, 26 Ark., 268.*

It follows that the plea of former acquittal was bad, and that the court erred in overruling the demurrer of the state thereto.

Reversed and remanded for further proceedings.

HUTCHINSON VS. HUTCHINSON.

1. STATUTE OF LIMITATIONS. *Demurrer for, at law.*

The statute of limitations can not be availed of at law by demurrer to the complaint, but must be pleaded in bar; unless the complaint shows upon its face not only that sufficient time has elapsed to bar the action, but also the non-existence of any ground of avoidance.

APPEAL from *Arkansas* Circuit Court.
Hon. J. A. WILLIAMS, Circuit Judge.
Pinnell for appellants.

ENGLISH, C. J. Thomas H. Hutchinson sued John H. Hutchinson in the circuit court of Arkansas county, upon an open account for balance, after allowing credits, of $375.66.

The account filed with the complaint is made up of numerous items, running from July 5, 1870, to February 26, 1876, amounting to $554.68; and the credits are entered at various dates during and after the same period.

Defendant filed an answer of two paragraphs, the first denying that he was indebted to plaintiff as alleged, or in any sum; and the second, pleading a set-off or counter-claim upon open account, for $950.14, filing bill of particulars made up of running items covering about the same period embraced in plaintiff's account. Plaintiff filed a replication, disputing the set-off.

There was a trial, and verdict in favor of plaintiff for $300.

The defendant filed a motion for a new trial, which was granted by the court.

Afterwards the defendant demurred to the complaint on the following grounds:

"1. That so much of the said account sued upon, and each and every item thereof mentioned in said complaint, accruing in the years 1870, 1871, 1872 and 1873, did not accrue within three years next before the commencement of this suit, and that the same are barred by the statute of limitations.

"2. This court has no jurisdiction of the cause of action," etc.

Plaintiff moved to strike the demurrer from the files; the court overruled the motion, gave defendant leave to withdraw his answer, etc., and sustained the demurrer to the complaint, and dismissed the cause for want of jurisdiction, and plaintiff appealed.

In *Collins v. Mack, 31 Ark., 686*, this court decided that in an action at law the statute of limitations can not be availed of by demurrer to the complaint, but must be

pleaded in bar, unless the plaintiff should be foolish enough not only to show upon the face of his complaint that a sufficient time had elapsed to bar his cause of action, but also the non-existence of any ground of avoidance, which was not done in that or this case.

The sum claimed in the complaint was within the jurisdiction of the court.

Reversed, and remanded for further proceedings.

LEE COUNTY VS. ABRAHAMS.

1. WRITS, ETC. *Tax on, not unconstitutional.*

The tax of fifty cents imposed by statute upon each original writ and execution issued out of any court, and on each certificate of record of recorded instruments, is strictly a fee to the public, and not a tax within the clause of the constitution requiring all property to be valued *ad valorem*, and may be imposed without express authority of the constitution if not prohibited by it.

APPEAL from *Lee* Circuit Court.

Hon. J. N. CYPERT, Circuit Judge.

Monroe Anderson, and Tappan & Hornor, for appellant.

ENGLISH, C. J. Abrahams was ruled to a settlement in the county court of Lee county, for money received by him as clerk of the circuit court and recorder of the county for tax on writs and instruments recorded. There was a judgment against him in the county court, for the amount found to be due from him to the county, and for penalty thereon for his delinquency; and he appealed to the

circuit court, where a demurrer was sustained for want of jurisdiction in the county court; and the county appealed to this court, and the judgment was reversed and the cause remanded for further proceedings. *See Lee county v. Abrahams, 31 Ark., 571.*

On the remanding of the cause to the circuit court, Abrahams again demurred to the claim of the county against him, on the following grounds:

"1. That each and every item exhibited against him is for tax upon original writs, instruments for record, etc.

"2. That article X., section 2, of the constitution of the state, defines a uniform rate of taxation and forbids the levying of any tax except *ad valorem* at true value in money.

"3. That the act of the general assembly under which said taxes were authorized are in conflict with the constitution, and therefore null and void.

"4. That the county of Lee has no right or cause of action herein, or any right to levy or collect said tax."

The demurrer was sustained and the matter dismissed, and the county appealed to this court.

The statute imposes, and requires to be collected for county purposes, a tax of fifty cents on each original writ and execution issued out of any of the courts of the state, and fifty cents on each certificate of record of each instrument recorded in the recorder's office. *Miller's Dig., sec. 7.*

The statute was passed March 5, 1838, and is part of the *Revised Statutes, sec. 1, chap. 38.*

The tax on writs is collected by the clerk. of the parties suing them out, and is part of the costs of the suits.

The tax for recording instruments is collected by the recorder, of persons procuring them to be recorded.

The county is at the expense of furnishing the clerk's office and supplying the recorder with registration books, etc., and the tax on writs and certificates of recording is intended to reimburse the county for such expenditures.

Mr. COOLEY says taxes on legal processes "are usually imposed with a view to adjusting, on an equitable basis, as between suitors and the public, the expenses of the administration of justice. They may be imposed as stamp fees on process, fees for permission to enter suit," etc. *Cooley on Con. Lim., 23.*

Such fees to the public are provided for in the constitutions of some of the states. [*Ib., in note.*] They were not by the constitution of 1868, which was in force when appellee was clerk and recorder. But they may be imposed without an express provision of the constitution authorizing it, if not prohibited. *Harrison, Pepper & Co. v. Willis et al., 7 Heiskell (Tenn.), 35.*

They are strictly fees to the public, and not taxes within the meaning of the clause of the constitution, requiring all property, etc., to be taxed *ad valorem.*

They have been long imposed in this state, under all of the constitutions, and we are not aware that the constitutionality of the statute imposing them has heretofore been seriously questioned.

The judgment must be reversed, and the cause remanded for further proceedings.

CATLIN VS. HORNE.

1. CONSIDERATION: *Pleading.*

A plea alleging that the note sued on was given without consideration, is good.

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2. FRAUD: *Pleading.*

A plea that the note sued on was obtained by false representations, without stating what the representations were, is bad.

APPEAL from *Prairie* Circuit Court.
Hon. J. N. CYPERT, Circuit Judge.
Hughes, for appellant.

HARRISON, J. The appellee sued the appellant before a justice of the peace upon the following note:

"$200. MARCH 7TH, 1876.

"On or before the 15th day of July next I promise to pay Sim Horne two hundred dollars—it being one-half of my subscription for the purpose of building a county jail in the town of Des Arc.

"Witness my hand and seal.

"S. P. CATLIN."

The defendant filed an answer containing three paragraphs.

The first alleged that the note was given without consideration. The second and third were as follows:

"2. Defendant, for a further answer, says: That the said note was obtained by false representations made to defendant by the plaintiff, which he, this defendant, at the time believed and acted on, and which were the sole and only inducement to the execution thereof. That the facts and

circumstances under which this defendant signed and delivered said note, were the following:

"This defendant, in July, 1874, made three distinct propositions to the commissioners elected on the thirtieth day of June, 1874, to locate the county seat of Prairie county, as an inducement to locate the same at Des Arc, conditioned, that any one of said propositions being accepted the others were to be void.

"The first of said propositions was, to furnish the house to be used as a court-house at Des Arc. The second of said propositions was, to furnish the ground upon which to build a court-house and jail; and the third of said propositions was, the donation of four hundred dollars. All of said propositions are herewith filed, marked, respectively, the first, 'C;' the second, 'D;' and the third, 'E;' and made part of this answer. That all of said propositions were delivered to said commissioners; that they had the same under consideration and advisement, and in their report to the county court, at its July term, 1875, locating said county seat at Des Arc, they reported the two propositions, marked respectively 'C' and 'D;' but did not report or make any mention of the proposition 'E;' leaving with the county court to determine which of the two, 'C' or 'D,' to select.

"That upon said report the county court appointed commissioners to receive plans and specifications for building a county jail—to report at an adjourned term, to be held on the thirteenth day of September thereafter. That at said adjourned term, the court made an order approving the letting of the contract for the building of the jail to the plaintiff for the consideration of the Des Arc subscriptions before subscribed and filed for that purpose.

"That at the January term, 1876, said commissioners, so

appointed, reported to the court that they had let the building of the jail to the plaintiff, and had paid him for the same with the subscription list of the citizens of Des Arc and vicinity; which did not and could not have included the naked proposition of this defendant to donate, as an alternative, four hundred dollars, practically rejected by the commissioners, whose duty it was to receive donations and locate said county seat. And said defendant says: that he is informed and believes, that he is bound by the selection of said commissioners; and submits that having executed said note upon a false representation of facts, the same is without consideration and void.

"3. This defendant for a further answer in this cause says: that at the time he executed the note herein sued on, he was wholly and entirely ignorant of the action of the commissioners to locate the county seat on his said three propositions, and also of the action of the county court, and of the commissioners, to build the jail.

"That supposing fair dealings would be meted out, and having entire confidence in the parties managing the matters in question, he gave himself no trouble about the matter. That a short time after the completion of the jail, the plaintiff came to him and informed him that the jail commissioners had turned over to him the four hundred dollars conditional donation proposition, and, at the same time, representing to the defendant that the same had been accepted by the commissioners to locate the county seat; which said statement and representation was untrue. but that this defendant, at the time, believing that the said proposition had been legally accepted, and that he was released from the other two, he gave the note, conditioned, verbally, that it should in no wise conflict with the previous action of the commissioners to locate the county seat,

or the action of the county court, but in all things was to be made to conform to the action of said commissioners and of said court."

The plaintiff filed a demurrer to the whole answer, which the justice sustained, and rendered judgment in his favor.

The defendant appealed to the circuit court.

In the circuit court the demurrer was again sustained to all the paragraphs of the answer, and judgment was again rendered for the plaintiff.

As a consideration is essential to the validity of every contract, the defense set up in the first paragraph of the answer was unquestionably, a good one, and the demurrer as to it should have been overruled.

It was several times held by this court before the adoption of the Code of Practice, that a plea of no consideration, without stating the circumstances attending the execution of the contract sued on, was good. *Dickinson v. Burks, 6 Ark., 412; Cheney v. Higginbotham, 10 Ark., 273; Dickinson v. Burks, 11 Ark., 308;* and the same ruling has been made in other states under the Code practice. *Butler v. Edgerton, 15 Ind., 15; Frybarger v. Cockefair, 17 Ind., 404; Swope v. Fair, 18 Ind., 303; Evans v. Williams, 60 Barb., 346; Newm. Plead. and Prac., 543.*

The *second* and *third* paragraphs, which we have set out, are singularly loose and vague. The *second* alleges that the note was obtained from the defendant by false representations, but does not show what the misrepresentations were, by which he says he was deceived.

The demurrer to it was rightly sustained.

The defense set up in the third, if we correctly understand it, is, that the commissioners to locate the county seat, by not reporting the defendant's proposition to donate four hundred dollars to the county court, when they made

their report of the location, and also reported his other propositions, elected not to accept it, and it was no longer obligatory upon him; of which action of the commissioners he had no knowledge when he executed the note, and was induced to execute it by false representations of the plaintiff that they had accepted it.

The assumption, that the proposition to donate the money was not accepted, or assented to, and never became binding or obligatory upon the defendant, because the commissioners failed to report it to the county court, when they reported their location of the county seat, with his two other propositions, is not correct.

The removal of the county seat of Prairie county from Devalls Bluff to Des Arc, was made under the provisions of an act of the general assembly, entitled "an act providing for the removal of the county seat of Prairie county," approved May 28, 1874.

The *sixth section* of the act required the commissioners elected for that purpose, when they should have selected the location, to make a report of the location to the board of supervisors (now the county court), and also of the donations that had been made in land or money; and the *eighth section* said, "the board of supervisors shall receive all donations made for the erection of the public buildings, and if land be donated, the deed shall be made to the county of Prairie."

The proposition of the defendant to donate four hundred dollars was made to depend upon the event that neither of his other propositions was accepted, and all were upon the condition that the county seat should be located at Des Arc.

As the commissioners had no authority to provide a court-house, or to say upon which ground the court-house or

jail should be built, the board of supervisors, or the county court, which succeeded it, could only accept one of the first two propositions, neither of which being accepted, and the county seat being located at Des Arc, the proposition to donate money became absolute and binding. It is not alleged that either of the first two was accepted, which fact would have been within the knowledge of the defendant.

The fact that the money proposition was not reported by the commissioners when they made their report of the location of the county seat, did not have the effect to reject it. They had no power to reject any proposition or donation made, under the provisions of the act, and their omission to report the money proposition of the defendant when they reported the location, could not affect him in any way, or absolve him from his obligation.

The alleged representation, therefore, was true, and the defendant was not deceived by the plaintiff, or induced by any misrepresentation to execute the note, and the demurrer to this paragraph, also, was properly sustained.

But, for the error of the circuit court in sustaining the demurrer to the first paragraph, which should have been overruled, its judgment is reversed, and the cause remanded for further proceedings

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VANDERPOOL VS. STATE.

1. COMMISSIONER OF UNITED STATES CIRCUIT COURT: *Can not fine. False imprisonment.*

A commissioner of the circuit court of the United States has no power to fine a party as upon final trial, and if he does so and imprisons him until the fine be paid, he is guilty of false imprisonment.

APPEAL from *Marion* Circuit Court.
Hon. A. DAVIS, Special Judge.
Attorney General, for the State.

HARRISON, J. The appellant was indicted in the Marion circuit court for the false imprisonment of John Clark, and was convicted, and fined $100. A motion for a new trial was made, and overruled.

The only evidence in the cause was the testimony of John Clark, the person the indictment charged to have been imprisoned, a witness for the State, who testified: That he was, within twelve months of the finding of the indictment by the grand jury, arrested under a warrant issued by the defendant, who was at the time a commissioner of the United States circuit court, upon a charge of obstructing the passage of the mail; that he gave bond for his appearance before the defendant, as such commissioner, at Yellville, in Marion county, on a day named; that he appeared before him, at Yellville, on the day appointed, and that the defendant examined the charge, and declared him guilty, and fined him $10, and ordered him into custody of the marshal, who was present, until the fine and cost of the prosecution were paid; that some conversation then took place between the witness and marshal about the payment of the fine and costs, and the marshal agreed that if the witness would give a bond for the payment of the fine and costs, it would be satisfactory. Witness and the marshal walked down stairs together, and witness found sureties, whom the marshal was willing to accept, and the bond was given for the payment of the fine and costs at a future day, and witness returned home; that the marshal did not confine witness in any room, or lay his hands upon him; and that the bond had not been paid.

There can be no question as to the authority of the defendant, as a commissioner of the United States circuit court, to issue the warrant for the arrest of said Clark, and cause him to be brought before him for examination upon the charge against him, and to hold him to bail, or, in default thereof, to commit him to prison to answer the charge before the court of which he was the commissioner.

But the law did not empower him to fine him as upon final trial, and to imprison him until the fine and costs of prosecution were paid.

The imposition of the fine, and the order that he be held in custody until it and the costs were paid, were, therefore, outside and beyond his jurisdiction; and if Clark was in consequence thereof imprisoned, the defendant was guilty of a violation of the law against false imprisonment, and can claim no immunity on account of his being a judicial officer.

The law is thus stated by Judge Cooley: "Every judicial officer, whether the grade be high or low, must take care, before acting, to inform himself whether the circumstances justify his exercise of the judicial function.

A judge is not such at all times and for all purposes. When he acts he must be clothed with jurisdiction; and acting without this, he is but the individual, falsely assuming an authority he does not possess. The officer is judge in the cases in which the law has empowered him to act, and in respect to persons lawfully brought before him; but he is not judge when he assumes to decide cases of a class which the law withholds from his cognizance, as cases between persons who are not, either actually or constructively, before him for the purpose. Neither is he exercising the judicial function when, being empowered to enter one judgment, or make one order, he enters or makes one wholly

different in nature. "When he does this, he steps over the boundary of his judicial authority, and is as much out of the protection of the law, in respect to the particular act, as if he held no office at all." *Cooley on Torts, 416; Trammell v. Town of Russellville et al., ante, 105; Piper v. Pearson, 2 Gray, 120; Clark v. May, 410; Craig v. Burnett, 3 Ala., 728.*

But the evidence fails to show any imprisonment of Clark after he appeared before the defendant upon the examination of the charge against him. Though ordered into custody of the marshal, it does not appear that he was taken into custody by him, or that he was in anywise restrained of his liberty.

The verdict was, therefore, without evidence, and the motion for a new trial should have been sustained.

The judgment is reversed, and the cause remanded, with instructions to grant the defendant a new trial.

HINKLE VS. BALL et al.

1. COURTS: *Power over process. Injunction against supreme court judgments.*

Courts of law have the control and direction of their own process, free from interference of other courts of law of co-ordinate authority; and an inferior court of law can not interfere with the execution of the process of the supreme court.

But whenever from fraud, accident, or mistake, etc., it becomes inequitable to proceed with the execution of the process of the supreme court, and it can not interfere without the exercise of original jurisdiction, it allows courts of chancery to interfere by injunction.

2. SUPREME COURT: *Mandamus.*

The supreme court can issue writs of mandamus in aid of its appellate and supervisory jurisdiction, and on proper application, may direct the sheriff as to the funds he should receive in satisfaction of its execution.

APPEAL from *Izard* Circuit Court.
Hon. S. PEETE, Special Judge.
Moore, for appellant.

EAKIN, J. Hinkle, sheriff of Izard county, had in his hands an execution from this court against Ball and seven other defendants, in favor of Fulton county. The defendants petitioned for and, after due notice, obtained from the circuit court of Izard county, a mandamus against the sheriff, commanding him to accept, in payment, certain warrants, or scrip, of said county of Fulton. From this order, Hinkle appealed to this court.

Courts of law have the control and direction of their own process, free from all interference from other courts of law of co-ordinate authority. *A fortiori*, an inferior court of law should not, by mandamus or otherwise, interfere with the execution of process from this court, or control the officer in his duty, either to enforce or prohibit. He must make his return here, and is responsible alone to this court. Whatever orders may be necessary for his direction, should emanate from the tribunal under which he is acting, or from some superior court. Under the constitution, this court has power to issue writs of mandamus in aid of its appellate and supervisory jurisdiction, and has exercised the power in a case like this. *Woodruff v. Trapnall, Atty., 12 Ark., 640.*

Whenever from fraud, accident, or mistake; or from causes supervening, or discovered too late to be brought properly to the notice of this court in the decision of a case, it becomes inequitable to proceed with the execution of its process; and when the examination of the facts involves the necessity of the exercise of original jurisdiction, this court, disclaiming such original powers, and recognizing

the necessity of a remedy somewhere, has formerly conceded to courts of chancery the power to interfere by injunction. No such case is presented by the record. This court may, on proper application, and being satisfied as to the merits, give all necessary directions to the sheriff as to the funds which he should receive in satisfaction of the execution. Such action would be ancillary only. The circuit court should not, by proceedings at law, have assumed jurisdiction to do so.

Reverse the judgment of the circuit court at the cost of appellees, and remand the cause, with instructions to the circuit court to dismiss the petition for want of jurisdiction.

BURGIE VS. DAVIS.

1. LANDLORD AND TENANT: *Laborer not a tenant. Sub-laborer: Lien on crop.*

One who raises a crop upon land of another under a contract to raise the crop for a particular part of it, is a mere cropper, and not a tenant; and has a lien upon the crop for whatever is due him: And, as against him, a laborer under him has a lien upon the crop only to the extent of the cropper's claim against the land owner, and may enforce it against the land owner who gets the crop.

APPEAL from *Chicot* Circuit Court.
Hon. T. F. SORRELLS, Circuit Judge.
Reynolds, for appellant.
Rice & Bishop, contra.

EAKIN, J. By an instrument bearing date the first of January, 1875, Paralee Davis contracted, in writing, with

Philip Armistead to work for him during the year, "to help him make a crop of corn and cotton on the plantation of Samuel Burgie." He, on his part, agreed to pay her, as wages, three bales of cotton of 400 pounds each, which he was to ship, when ready for market, collect the proceeds and pay over to her.

In February, 1876, she sued Armistead and appellant before a justice, in a written complaint; wherein she set up the contract, and that she had performed her part; and that the results of the labor, in which she had assisted, had been eight bales of cotton, weighing, in the aggregate, 3,286 pounds; that a half of it had been turned over to appellant Burgie for rent; that there were still three bales left belonging to said Armistead, which Burgie had taken under a pretended purchase, and was about to remove. She claimed a laborer's lien upon those bales, and obtained an attachment, by which the cotton was seized.

Armistead made no defense, being, as appears from the evidence, in sympathy with the plaintiff. Burgie answered, stating that Armistead had agreed with him to work a part of his land for 1875, for a half of the corn and cotton raised, less the amount of supplies which might be furnished to him, by Burgie, during the year; and that *the balance* of said half, after paying the supplies, was to be turned over to Armistead at the gin-house. The other half was to be retained by Burgie for the use of his land, teams and farming implements; that he was advised by Armistead and Paralee that she was working with him on the same terms as an assistant, and that he had, himself, no contract nor understanding with Paralee. She and Armistead lived together in the same cabin, and together consumed the supplies which appellant furnished, which supplies, after deducting all credits, amounted in value to

$202.92. Further, that the half of the crop (1,643 pounds) had been applied in part payment of these supplies, and the remainder, which had been attached, belonged to him for the use of his lands, etc.

He denies that any of the cotton had been turned over to him for rent, or that any one had authority thus to turn it over, but claims the right to all of it until he may be paid for supplies. He says that the whole crop made, will not pay for the use of the land, teams and supplies furnished, and that Armistead never had any interest in it, except for the balance, as aforesaid. He denies, further, that the plaintiff has any lien as against him.

Judgment was rendered, before the justice, in favor of defendant Burgie, and Paralee appealed to the circuit court, where the cause was tried *de novo*, on the same pleadings. There was a verdict, in favor of plaintiff, for $96, motion for a new trial overruled, judgment, and appeal to this court by defendant Burgie, with bill of exceptions.

Armistead, testifying for the plaintiff, said, that he had contracted to "work some ground" on Burgie's plantation, in 1875, on halves, Burgie furnishing land, teams and utensils. That Burgie was to furnish him, and nothing was said about who should pay for supplies; others, working on the same place for a half, paid for their supplies out of their half of the crop. Witness employed Paralee to work for him under his contract. Burgie took the whole crop, one-half for himself, and the other half to pay for supplies furnished witness. The contract between Paralee and Armistead was then introduced, and proof made that she had rendered the services, and had not been paid, and that cotton was worth from 8 to 10 cents per pound.

Burgie testified, for himself, the same matter set up in his answer, with regard to the nature of his contract with

Armistead, especially that he was to be paid for supplies furnished Armistead, out of his half of the cotton, and pay him over the balance only. He proved the indebtedness of Armistead, and that his half of the crop was insufficient to pay it.

It was further proved, on the part of defendant, that the contract between Paralee and Armistead was not really made until some time in March or April, and ante-dated.

It is apparent, from the pleadings and evidence, that the relation of landlord and tenant did not exist between Burgie and Armistead. The latter was merely what is called a cropper, to be paid for his labor out of the proceeds of the crop. This is equally true, whether he was to be paid half the proceeds in gross, or only the balance after deducting from his half advances for supplies. He was in no sense a tenant. His contract for labor was a personal one, to be paid for by either the gross half, or the balance of the half, as aforesaid, as the jury might determine the contract to have been. (*Christian v. Crocke et al., 25 Ark., 327; Ponder v. Rhea, 32 ib., 435.*) Under the laborer's lien act he had a lien upon the crop raised, for whatever his claim might be, and as against him Paralee had a lien for the proceeds of 1,200 pounds, but only to the extent of his claim against Burgie. If he had nothing coming from his employer, there was nothing upon which any lien in favor of Paralee could attach, inasmuch as she was not a laborer for Burgie, nor connected with him by any privity of contract. She had no right to take his property to satisfy a contract made with Armistead for the latter's benefit.

The instructions of the court to the jury were based upon the supposition that the relation of landlord and tenant existed between Burgie and Armistead, and that

the lien of the former extended only to the half of the crop due for rent, and that as to the other half the lien of Paralee was superior. The evidence would not have authorized the jury in finding a tenancy, and the law governing landlord's liens has no application to the case. The instructions should have been in accordance with the principles above indicated, and it should have been left to the jury to determine the amount, if any, due Armistead under the contract; deducting from the half of the crop the amounts of supplies furnished, if they should find such to have been the contract—or allowing the whole half, to the extent of plaintiff's claim, if they should find no contract for making such deduction to have been made, or impliedly understood by the parties. The plaintiff, by virtue of her lien against Armistead for labor, may enforce against Burgie, who got the cotton, just such lien as Armistead had for his labor, and no more. She stands in Armistead's shoes, claiming under and through him. If, indeed, Armistead contracted to make a crop for one-half, less supplies furnished, it would be grossly inequitable to allow him to take up the half in supplies, and, by employing another to do the work he contracted to do, give that other a lien as against the landlord upon the very crop for which the landlord had paid. No such construction can be put upon the statutes.

For error in instructions, the nature of which has been sufficiently pointed out, let the judgment be reversed, and the cause remanded for a new trial.

KELLY VS. ALTEMUS.

1. FERRYMAN: *Ferriage.*

A ferryman can not charge, as a common carrier, for the contents of a wagon separately from the wagon itself. The fixing of the rates of ferriage by the county court is for the protection of the public against an abuse of the franchise.

2. REPLEVIN: *Measure of damages in.*

The ordinary measure of damages for the plaintiff in replevin, as to property which has no usable value except for consumption, in the absence of proof of special damage, is legal interest on the value of the property, in addition to the property itself or its value. But as to property having a usable value by way of bailment for hire, like horses or tools, the measure is the value of the use during the detention.

The loss of a job by the taking and detention of one's tools is too remote as an element of damages.

APPEAL from *Pulaski* Circuit Court.
Hon. J. W. MARTIN, Circuit Judge.
Ratcliffe, for appellant.

EAKIN, J. Replevin before a justice of the peace, by Altemus against Kelly, to recover a chest of tools. It was taken under the writ, detained by the officer three days, and then delivered to plaintiff. Verdict and judgment for the plaintiff, with $25 damages and cost, from which Kelly appealed to the circuit court.

Upon a trial *de novo*, there, the plaintiff again had a verdict and judgment against defendant and his sureties on the appeal bond, for $28 damages and cost. There was a motion for a new trial, which was overruled upon a remittitur by plaintiff of half the damages—bill of exceptions and appeal.

It appears from the pleadings and evidence that plain-

tiff is a carpenter, who had obtained employment at some point beyond the river from the city of Little Rock, and had engaged a person to carry his tool-chest to the place and deliver it there. This person placed the chest in the charge of one of the drivers of the carts of a coal company, who placed it in his cart and drove it on a ferry-boat under the control and management of Kelly. By an understanding between the owners of the ferry and the coal company, the carts of the latter were passed over upon tickets, which were good to pass them whether loaded or unloaded. It had been the practice, however, for the drivers of the carts to pay extra for any freights they might carry over in them other than coal. There were no rates of ferriage for boxes or packages of goods established, nor was any notice of them posted. Kelly inquired of the driver, whilst the boat was crossing, concerning the ownership of the box or chest, and being informed that it belonged to plaintiff, remarked that Altemus already owed him two dollars for freights; and the driver not having the money to pay the freight, Kelly removed the chest from the wagon, and kept it until the same was replevied. He did not demand any particular amount for the freight, but had been in the habit of receiving fifty cents for such packages. The plaintiff lost the job by the detention of his tools. He was employed at the rate of $2.80 per day, and did not get another job for ten days. There was no established rates of ferriage for freights out of wagons. The rates for wagons were posted on the boat, but the evidence failed to show what they were.

Upon this state of the evidence, the defendant failed to show that, as the agent of the ferry company, he was entitled to demand or receive any freight, separately, for

a box in a wagon. It was his duty to pass wagons loaded or unloaded, at the posted rates of ferriage, whatever that might be. If he had charged or demanded more, he would have committed an offense against the law, and would have been liable to a forfeiture of ten dollars. If, under the contract with the coal company, the ferriage ticket was not good for a loaded wagon, he should have refused it and demanded the posted rate for the wagon itself. He had no right to inquire into the ownership of the contents, and charge separate freights for that—or to take it out of the wagon and retain it for separate charges. He accepted the ferriage ticket, which compelled him to pass the wagon and its load, and he had no right to take the chest out and retain it. The verdict was properly for the plaintiff, so far as regarded the property.

It is not meant to hold that a ferryman, outside of the articles included in the posted rates, may not also be a common carrier of freights across a stream. But with regard to such things as are fixed by the county court, and included in the posted schedule of rates, as wagons were, his duties and obligations are statutory, and he is confined to those rates as a ferryman. He can not charge as a common carrier for the contents of a wagon separately from he wagon itself. So far as the county court goes to establish rates, they are for the protection of the public against an abuse of the franchise.

The court, upon this point, properly instructed the jury, and so far the verdict was right.

Upon the point of damages, the court also properly instructed the jury that they could only look to the immediate injury resulting from the taking and detention of the property, and not to any remote injury growing out of such taking and detention. The jury found for the plain-

tiff what he might have received for wages by ten days' labor with the use of the tools in the chest if they had not been detained. They were in fact only detained three days, but the plaintiff claimed and testified that it was ten days before he got another job. It is not apparent how the detention of the tools for three days prevented his use of them for the other seven, nor is it clear that during the three days he might not have made some remunerative use of his time and labor. He was not entitled to sit idle and claim speculative damages. Nor was it a proper case for vindictive or punitory damages. If, in fact, business was so dull, that being capable of rendering services worth $2.80 a day, he could not find employment, that was his misfortune, and not the immediate result of the action of defendant. He might not have got a job for six months, yet it can not be thought the defendant should pay him full wages all that time. It is not even shown how long the particular job he had in hand would have lasted, or what he would have made by it; although that would have been itself mere speculative damage, as he might have fallen sick, or the job may have been discontinued. He says, generally, that he was promised *employment* for several weeks.

The jury evidently made their verdict, as to damages, upon a misapprehension or disregard of instructions. The error was only mitigated, but not cured, by the remittitur. There was nothing upon which to base a verdict for even half the amount. The defendant was entitled to have his case considered upon a fair understanding of the principles upon which the jury should act, and it is not easy to conceive on the evidence how, so acting, the jury could have found a verdict for more than the interest on the

value of the tools whilst detained. That would have been the full measure of compensation.

The ordinary measure of damages for the plaintiff in replevin, in the absence of proof of special damage, is legal interest on the value of the property, in addition to the property itself or its value. [See *Blakie v. Cooney, and cases cited, 8 Neb., 41*]. This with regard to property which has no usable value, except for consumption. With regard to property having a usable value by way of bailment for hire, like horses or tools, the true measure is the value of the use during the detention. [*Allen v. Fox, 51 N. Y., 562. S. C. Sedgwick's Leading Cases on Measure of Damages, p. 650.*] There may, of course, be special damages from deterioration of the property. But there is no warrant in law or reason in holding the measure of damages to be what the plaintiff might have made by the use of the property in his own labor or business. In this case, the jury acted on this last idea.

For error in overruling the motion for a new trial, let the judgment be reversed and the cause remanded for a new trial.

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STATE OF ARKANSAS VS. DEVERS.

1. JURISDICTION OF CIRCUIT COURTS: *How ascertained.*

The correct method of ascertaining the civil and criminal jurisdiction of the circuit courts, is to see what cases, or class of cases, are confided by the constitution exclusively to the jurisdiction of other tribunals; and the great residuum belongs exclusively, or concurrently, to the circuit courts.

2. JURISDICTION: *Concurrent.*

In cases of concurrent jurisdiction in different courts, the first exercising jurisdiction rightfully acquires control, to the exclusion of the other.

3. CIRCUIT COURTS: *Can not be deprived of jurisdiction.*

It is not in the power of the legislature, under the provisions of the constitution, to deprive the circuit courts of all original jurisdiction of misdemeanors; and the act of the fifteenth of March, 1879, attempting it, is unconstitutional and void.

APPEAL from *Faulkner* Circuit Court.
Hon. J. W. MARTIN, Circuit Judge.
Mr. Attorney General Henderson, for the State.

ENGLISH, C. J. At the December term, 1878, of the circuit court of Faulkner county, George Devers was indicted for misdemeanors. There were two counts in the indictment, the first charging him with wearing a concealed weapon—a pistol; and the second charging him with carrying a pistol as a weapon.

At the March term, 1879, the defendant moved to dismiss the indictment, on the ground that the court had no jurisdiction to try the offense charged against him in the indictment, the jurisdiction being in justices of the peace of the county, etc.

On the hearing of the motion, the prosecuting attorney asked the court to make the following declarations of law:

1. "That the act of the fifteenth of March, 1879, giving justices of the peace exclusive jurisdiction of misdemeanors, is unconstitutional and void.

2. "That the constitutionality of said act does not affect, or take from this court its jurisdiction over indictments for misdemeanors found and duly returned into the court by the grand jury before the passage of the act."

The court refused to make these declarations of law, but declared the law to be, that "the exclusive jurisdiction to try misdemeanors is now vested in the justices of the peace,

and there is no original jurisdiction in this court to try this cause, or to proceed further herein."

The court, accordingly, sustained the motion of defendant, and ordered the case dismissed and stricken from the docket; and the state appealed.

The first section of the act of the fifteenth of March, 1879 (*Acts of 1879, p. 84*), is: "That justices of the peace of this state shall have exclusive jurisdiction of all cases of misdemeanors, to try, and finally to determine the same; *provided*, however, that the circuit courts shall have concurrent jurisdiction in cases of false imprisonment and malfeasance in office."

The second section gives any person convicted before a justice of the peace, the right of appeal to the circuit court, on executing bond, etc.

The third section repeals conflicting laws.

No provision is made for the disposition of indictments pending in the circuit courts at the passage of the act.

The legislature attempted to deprive the circuit court of original jurisdiction of all misdemeanors except false imprisonment and malfeasance in office, and vest such jurisdiction exclusively in justices of the peace.

If this law be constitutional, justices of the peace now have exclusive original jurisdiction of all misdemeanors except false imprisonment and malfeasance in office, as to which only, the circuit courts retain concurrent jurisdiction.

By *sec. 15, Art. 6, of the Constitution of 1836*, it was provided that justices of the peace should have no jurisdiction to try and determine any criminal case or penal offense against the state, but might sit as examining courts, etc.

By an amendment of the constitution, passed by the two houses, ratified November 17, 1846, the general assembly

was empowered to confer such jurisdiction as it might deem proper on justices of the peace in prosecutions for assault and battery, and other penal offenses less than felony, which might be punished by fine only. *English's Digest, p. 71.*

By act of sixteenth of December, 1846 (*Acts of 1846, p. 59*), the legislature attempted to confer upon justices of the peace, jurisdiction to try and punish by fine, assaults, assaults and batteries, affrays, etc., without presentment or indictment by a grand jury.

In *Eason v. The State, 11 Ark., 481*, this act was held to be null and void, because in conflict with the fourteenth section of the Bill of Rights, which declared: "That no man shall be put to answer any criminal charge, but by presentment, indictment or impeachment;" and which the court held was not repealed, or modified, by the amendment to the constitution, ratified seventeenth of November, 1846.

The fourteenth section of the Declaration of Rights of the Constitution of 1864, was in these words: "That no man shall be put to answer any criminal charge, but by presentment, indictment or impeachment, *except as hereinafter provided.*"

And by a clause of section eighteen, article seven, such jurisdiction was given to justices of the peace as might be provided by law "in prosecutions for assault and battery, and other penal offenses less than felony, punishable by fine only."

By a clause of section twenty-two, article seven, of the constitution of 1868, it was provided that: "In criminal causes the jurisdiction of justices of the peace shall extend to all matters less than felony for final determination and judgment."

And section nine of the Bill of Rights, declared that: "No man shall be held to answer a criminal offense unless on presentment or indictment of a grand jury, except in cases of impeachment, or in cases of petit larceny, assault and battery, affray, vagrancy, and such other minor cases as the general assembly shall make cognizable by justices of the peace," etc.

The fifth clause of *section 1642, of Gantt's Digest* (enacted while the constitution of 1868 was in force) provides that: "In criminal causes, the jurisdiction of justices of the peace shall extend to all matters less than felony, for final determination and judgment; *provided*, that circuit courts shall have jurisdiction concurrent with justices' courts in all such cases."

Thus it appears that at the time of the adoption of the present constitution, the circuit courts and justices of the peace had concurrent original jurisdiction of all criminal offenses less than felony—in other words, of all misdemeanors. *James Bradley v. State, 32 Ark., 725.*

Section eight, of the Declaration of Rights of the present constitution (1874) provides that: "No person shall be held to answer a criminal charge unless on the presentment or indictment of a grand jury, except in cases of impeachment or cases such as the general assembly shall make cognizable by justices of the peace, and courts of similar jurisdiction," etc.

And by the *third* clause of section forty, article seven, it is provided that justices of the peace shall have *such jurisdiction of misdemeanors as is now, or may be, prescribed by law.*

By this clause, the criminal jurisdiction of justices of the peace is limited (except for examination, commitment, or bail) to misdemeanors; and it gave them such jurisdiction

of misdemeanors as was then, or might thereafter be, prescribed by law.

We have above shown that by the law in force when the constitution was adopted, justices of the peace had jurisdiction of all misdemeanors, and they will continue to have such jurisdiction until otherwise prescribed by law.

But by the law in force when the constitution was adopted, though they had jurisdiction of all misdemeanors, their jurisdiction of that class of crimes was not exclusive, but the circuit courts had concurrent jurisdiction with them of misdemeanors.

The act of fifteenth of March, 1879, attempts to deprive the circuit courts of all concurrent jurisdiction of misdemeanors, except false imprisonment and malfeasance in office, and, of course, the legislature may also deprive them of jurisdiction of the cases excepted, if it had power to divest them of jurisdiction of all other misdemeanors.

Is it, then, in the power of the legislature, under the provisions of the constitution, to deprive the circuit courts of all original jurisdiction of misdemeanors?

The constitution vests the judicial power of the state in a supreme court, circuit courts, county and probate courts, and in justices of the peace; but provides for the creation, by the general assembly, of municipal corporation courts, courts of common pleas, and separate courts of chancery, and prescribes what judicial power may be distributed to them when established.

The constitution prescribes, limits and defines, with more or less accuracy, the jurisdiction to be exercised by all of the courts except the circuit courts, and instead of attempting to define their jurisdiction (other than appellate), leaves to them the great residuum of civil and

criminal jurisdiction not distributed exclusively to other courts.

Sections 4 and 5, of Art. 7, define the jurisdiction of the supreme court, which is appellate, supervisory and ancillary, with original jurisdiction only in the cases specified in section 5.

Section 14 prescribes the superintending and appellate, but not the original, jurisdiction of the circuit courts.

Section 15 gives them jurisdiction in matters of equity until courts of chancery are established.

Sections 28 and 34 define the jurisdiction of county and probate courts, and section 40, of justices of the peace; and sections 43 and 32 prescribe and limit the jurisdiction that may be vested in corporation courts, and courts of common pleas.

The original civil and criminal jurisdiction of the circuit courts is not otherwise defined than as follows:

"Section 11. The circuit courts 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."

To maintain the constitutionality of the act of fifteenth of March, 1879, this section would have to be interpreted to read as follows:

"The circuit courts shall have jurisdiction in all civil and criminal cases, the exclusive jurisdiction of which *may not be vested* (*by the general assembly*) in some other court provided for by this constitution."

But the interpolation of the words, *by the general assembly*, would not only not be in harmony with the grammatical construction of the section, the verb "*may* (not) *be vested*" being in the present tense, and implying nothing to be done in the future, but it would leave the civil and

criminal jurisdiction of the circuit courts very much at the will of the legislature, which would be at variance with the judicial plan of the constitution.

For example, section 32 provides that: "The general assembly may authorize the judge of the county court, etc., etc., to hold a quarterly court of common pleas, etc.; which shall be a court of record, with such jurisdiction in matters of contract, and other civil matters, not involving title to real estate, as may be vested in such court."

Here the verb *may be vested*, is again used, but from its context it necessarily implies future legislative action.

Now suppose the meaning of *section 11* to be that "the circuit courts shall have jurisdiction in all civil and criminal cases, the exclusive jurisdiction of which may not be vested (by the general assembly) in some other court provided for by this constitution," and it would follow that the legislature might vest in a court of common pleas, established for any county, exclusive "*jurisdiction in matter of contract and other civil matters, not involving title to real estate*," and utterly strip the circuit court of all original jurisdiction of such matters.

The true reading of *section 11*, viewed in the light of the judicial plan of the constitution, is manifestly this:

"The circuit court shall have jurisdiction in all civil and criminal cases, the exclusive jurisdiction of which may not be vested (*by this constitution*) in some other court provided for by this constitution."

The section, when so read, is not free from tautology, nor as euphonious as it was written by BROTHER EAKIN, who was a member of the convention and drafted it, but, so read, it more clearly expresses the intention of the framers of the constitution, and harmonizes with all of its

provisions distributing the judicial power among the courts.

By *section 14* the circuits are given a superintending control and appellate jurisdiction over all the courts inferior to them.

By *section 15*, they are to have jurisdiction in matters of equity until the legislature shall deem it expedient to establish courts of chancery.

Their original jurisdiction in *civil* and *criminal* cases is readily ascertained by comparing other sections of the article on the JUDICIAL DEPARTMENT with *section 11*, as above mentioned.

By *section 5*, the supreme court, in the exercise of original jurisdiction, may issue writs of quo warranto to the circuit judges and chancellors, when created.

This jurisdiction is perhaps exclusive in this court, as the circuit judges are of co-ordinate rank, as will be the chancellors when created.

By the same section the supreme court may issue writs of quo warranto to officers of political corporations when the question involved is the legal existence of such corporations.

In such cases, the circuit courts may, no doubt, exercise concurrent jurisdiction, as the jurisdiction of this court is not made exclusive.

By *section 28*, the county courts are given exclusive original jurisdiction in all matters relating to county taxes, roads, bridges, ferries, paupers, bastardy, vagrants, apprenticeship of minors, etc., etc., and, as to all such matters, the circuit courts are excluded from the exercise of original jurisdiction.

So, by *section 34*, the exclusive original jurisdiction of probate courts is provided for.

Section 40, which prescribes the jurisdiction of justices of the peace in civil and criminal matters, gives them no exclusive jurisdiction in civil cases, except in matters of contract where the amount in controversy does not exceed the sum of one hundred dollars, excluding interest. In all other civil cases, their jurisdiction, to the limited extent to which it is conferred, is concurrent with the circuit courts.

The framers of the constitution refused to give them exclusive jurisdiction in suits for the recovery of personal property, no matter how small the value, and in suits for damage to personal property, however trifling the injury—and gave them no civil jurisdiction whatever in cases of injuries to persons, or trespasses upon real estate.

By what consistent logic, therefore, may it be maintained, in the absence of any express provision of the constitution to that effect, that its framers intended to empower the legislature to confer upon them exclusive jurisdiction of all misdemeanors, many of which are grave offenses, involving the peace and good order of society, and some of them punishable by heavy fines and deprivation of liberty.

Down to the time of the adoption of the constitution of 1868, there was no attempt to confer jurisdiction upon justices of the peace of any misdemeanors except such as were punishable by fine only. That constitution opened the way to give them jurisdiction of all misdemeanors concurrently with the circuit courts.

The framers of the constitution of 1874 simply said, in effect, by the *third* clause of *section 40*, above copied, that they might continue to exercise such jurisdiction until otherwise prescribed by law, but there is nothing in this clause, or in the section of which it is a part, or in any section of the article on the judicial department, from which it may be fairly implied that the framers of the con-

stitution intended to leave the legislature at liberty to deprive the circuit courts of all jurisdiction of misdemeanors.

The correct method of ascertaining what jurisdiction the circuit courts have in civil and criminal cases, is to see what cases, or class of cases, are confided by the constitution exclusively to the jurisdiction of other tribunals, and the great residuum belongs concurrently or exclusively to the circuit courts.

There is no direct provision of the constitution giving the circuit courts jurisdiction of felonies. If we have not, as above, given the proper construction of *section 11;* and if the jurisdiction of all criminal cases is within the control of the legislature, there is no section or clause of the constitution that would expressly forbid the legislature from conferring upon justices of the peace exclusive jurisdiction of felonies, as well as misdemeanors. There is nothing in the literal reading of the Bill of Rights to prevent this, for *section 8* merely declares that: "No person shall be held to answer a criminal charge unless on the presentment or indictment of a grand jury, except in cases of impeachment or cases such as the general assembly shall make cognizable by justices of the peace, and courts of similar jurisdiction," etc.

And yet if the legislature were to attempt to strip the circuit courts of jurisdiction of felonies, and place the lives and liberties of men in the hands of justices of the peace, however intelligent that useful body of magistrates may be, it would strike bench, bar and people as an act at war with the spirit of the constitution, and an innovation upon the long established judicial policy of the state.

There need be no conflict or confusion in the exercise of concurrent jurisdiction of misdemeanors by the circuit courts and justices of the peace. In cases of concurrent

jurisdiction in different tribunals, the first exercising jurisdiction rightfully acquires the control, to the exclusion of the other. *James Bradley v. State, 32 Ark., 725.*

The justices of the peace holding their courts in every township, without terms, and always open, may well try and punish summarily, most of the misdemeanors. The grand juries, assembling but twice a year, may look over their fields, and present to the circuit courts such cases as may have been neglected by the justices of the peace, and cases of a graver character, affecting the peace, morals and good order of communities.

If the orderly and law-abiding people of the state prefer to have all misdemeanors tried and punished summarily before justices of the peace, they may accomplish their preference of jurisdictions, regardless of the act of fifteenth March, 1879, by causing offenders to be brought before the justices. But if they are wanting in such zeal for the public good, the grand juries, prosecuting attorneys and circuit courts must make up for their shortcomings.

If we merely doubted the constitutionality of the act in question, we would, according to the judicial custom, with all due respect for the judgment of the legislative department, resolve such doubt in favor of the validity of the act. But being of the opinion that the act is an unwarranted attempt to deprive the circuit courts of part of their constitutional jurisdiction, we can not, in the conscientious discharge of judicial duty, do otherwise than pronounce it invalid.

The judgment must be reversed, and the cause remanded with instructions to the circuit court to reinstate the cause and dispose of it according to law, and not inconsistent with this opinion.

HODGKIN VS. HOLLAND, Collector.

1. COLLECTOR OF REVENUE: *His bond, measure of.*

The bond of a collector of taxes must be for double the aggregate amount of taxes on the tax books, exclusive of the probable liquor and other licenses that may be issued by the county clerk.

2. SAME: *Affidavit of sureties, requisites.*

The affidavit of the sureties on a collector's bond need not give a description of their property, but only its amount and value. That the affidavits of some of the sureties are not made until after the bond is approved by the county judge and filed in the clerk's office, is no reason that the circuit court should not approve it.

APPEAL from *Chicot* Circuit Court.
Hon. T. F. SORRELLS, Circuit Judge.
Valentine, for appellant.
Rose, contra.

HARRISON, J. E. G. Hodgkin, a citizen and taxpayer of Chicot county, at the January term of the circuit court of said county, filed objections to the sufficiency of the bond of Samuel H. Holland, as collector of taxes, offered for approval.

The bond, which had been approved by the county judge, was in the sum of $85,000; and the aggregate value of the property, real and personal, of the sureties, as sworn to by them, was $115,000.

The objections were:

First—That the penalty of the bond was too small.

Second—That the affidavits of E. P. Osterhout, and six other named sureties, did not sufficiently describe their property.

Third—That the affidavit of James F. Robinson, another

surety, was made by him after approval by the county judge; and the affidavits of three others, H. W. Graves, James Brown and W. E. Graves, after the bond had been filed.

Fourth—That L. H. Springer, Benjamin H. Smith and James Kelly were sureties in said Holland's bond, as sheriff.

And there were also other objections, but which, as they only related to and called in question the amount and value of the property of certain sureties, need not be stated.

The objections were not sworn to.

The court, after hearing evidence, approved the bond.

Hodgkin took a bill of exceptions, and appealed.

The statute requires the bond of the collector to be in double the aggregate amount of all the taxes to be collected.

The proof showed the amount of all taxes on the tax book to be $40,273.

In this amount was not included peddlers', retail liquor dealers', ferry and other licenses, with which when issued, the collector would be charged.

It is insisted by the appellant that these should have been added.

It is made the duty of the county clerk, from time to time, to issue blank licenses and deliver them to the collector, aud to charge him with them; and the collector is required to make settlement with the county court, at every term, concerning them, and is to be credited with all returned by him.

It is apparent that, at the time he gives the bond, the amount with which he shall be charged during the year can not be ascertained. It was proven that the amount

received for licenses the preceding year was $7,140, and this, it is contended, should have been taken as an estimate for the current year. But the statute says nothing about an estimate—it speaks of a certain and definite amount readily ascertainable; and it is clear to our mind it is the aggregate amount of taxes on the tax book that is meant. *Idem est non esse et non apparere.* The penalty of the bond was therefore large enough.

The act of March 1, 1875, which devolves upon the circuit court the duty of approving the bonds of county and township officers, does not require a schedule of the property of the surety, or any more particular description of it in his affidavit, than a statement of the amount of his real estate and its value, and the amount of his personal property and its value.

The affidavits, to which exceptions were taken, were substantially alike. That of E. J. Osterhout was as follows:

"STATE OF ARKANSAS, }
County of Chicot. }

"E. J. Osterhout says he is a resident of Chicot county, Arkansas; that he is worth $3,000 in personal property, situate in said county, subject to execution, over and above all his debts, liabilities and exemptions under existing laws, and that said personal property consists of a stock of merchandise worth $3,000.

"E. J. OSTERHOUT.

"Sworn to before me, this twenty-ninth day of November, 1878.

"CHARLES CARTER, J. P."

The affidavits were sufficient.

Nor does it matter that some of them were made after the approval of the bond by the county judge, or some after it was filed, which latter fact, however, was not proven.

The approval by the county judge was provisional only, and the proceeding in the circuit court was without respect to it; and we can not conceive what probable, or possible, prejudice could be caused by the affidavits being made after the county judge's approval, or the filing in the clerk's office.

We said in *Hyner v. Dickinson, 32 Ark., 776*, that it was no ground for rejecting the bond, if otherwise shown to be sufficient, that the affidavits were not in accordance with the statute, but such as met its requirement should be directed to be filed; and, to avoid misapprehension, we remark, they should be made before the approval of the bond; and that unless affidavits as the law requires are made, the court acquires no jurisdiction of the matter. *Sec. 6, Act of March 1, 1875.*

The fact that some of the sureties were also sureties in Holland's bond as sheriff, did not affect their competency, though tending to lessen the security, which was no doubt considered by the court.

There appears to have been no want of evidence to sustain the action of the court in approving the bond. Evidence *aliunde* the affidavits as to the sufficiency of the bond, as well as in support of the objections, was heard.

Affirmed.

HODGKIN VS. HOLLAND, Sheriff.

1. SHERIFF'S BOND: *Names of sureties in.*

It is not necessary that the names of the sureties appear in the body of a sheriff's bond. It is sufficient in any contract, if the intent of the party to be bound clearly appears.

APPEAL from *Chicot* Circuit Court.
Hon. T. F. SORRELLS, Circuit Judge.
Valentine, for appellant.
Rose, contra.

HARRISON, J. This appeal is from an order of the court below approving the bond of Samuel J. Holland as sheriff, against objections filed by appellant.

The only objection in this case, not made in the case of *Hodgkin v. Holland, collector, etc., ante*, was, that the names of the sureties were not inserted in the body of the bond.

It was not necessary to the validity of the bond that the names of the sureties should be mentioned in the body of it. *2 Par. on Con., 512; Dobson v. Keys, Cro. Jac., 261; Bruce v. Colgan, 2 Litt., 287; Blakey v. Blakey, 2 Dana, 464; Martin v. Dortch, 1 Stew., 479; Bartley v. Yates, 2 Hen. & M., 398; Beale v. Wilson, 4 Munf., 380.*

It is sufficient in any contract, if the intent of the party to be bound clearly appears.

Affirmed.

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56 161
34 204
61 412
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YARBOROUGH VS. WARD.

1. ADMINISTRATOR: *When personally liable on contract. Power of probate court to order contracts by.*

When an intestate has hired land by a contract, complete and binding at the time of his death, it is the duty of his administrator to take possession of the term as assets of his estate; and he will not be personally liable on the contract, whether the probate court orders him or not, to proceed with the cultivation of the land, and fulfillment of the contract. But if the contract be incomplete, and not binding at the intestate's death, and be completed by his administrator, either of his own will or

by order of the probate court, the claim will be against the administrator personally, and not against the estate.

An administrator has no power to rent land for the benefit of an estate, nor the probate court the power to order it.

2. SAME: *In what character to sue and be sued. His power to contract.*

When claims and liabilities of an estate are fixed at the time of an intestate's death, suits in regard to them must be brought by and against the personal representative, in his character as such. But as to contracts made by the personal representative in the course of administration, they are personal, though for the benefit of the estate, and he *may* sue and *must be* sued in his individual capacity, whether he has contracted as administrator or otherwise. If the fruit of the suit will be assets in the plaintiff's hands, he may sue in his individual or representative character at his option.

If the representative binds himself by a contract concerning the estate, or for its benefit, he may be held personally liable, and must look to the probate court for indemnity in the way of allowances for expenses of administration. He can not, by contracting as administrator, etc., create new claims against *the estate*, not arising from some act, or founded on some liability of the deceased at the time of his death.

3. ADMINISTRATOR. PROBATE COURT: *Their duty to pay for personal services for estate.*

Claims for necessary or useful personal services rendered to an estate at the instance of an administrator, and not with'n his personal duties, may be presented to the probate court, not for allowance and classification, but for an order on the administrator to pay them as expenses of administration. It is the duty of the administrator to pay such claims, and if he does so, he will be allowed a credit on settlement. Should he refuse, the probate court has power to compel him. (The case of *Turner v. Tapscott*, 30 *Ark.*, 312, explained.)

APPEAL from *Woodruff* Circuit Court.
Hon. J. N. CYPERT, Circuit Judge.
Coody, for appellant.
B. D. Turner, *contra*.

EAKIN, J. This case was begun before a justice of the

peace, without formal pleadings, by Yarborough against Ward upon an account for the rent of land; in which he recovered $217 and costs. Ward appealed to the circuit court, where, upon a trial *de novo*, there was a verdict and judgment for Ward. Yarborough appealed to this court.

The evidence, brought up by the bill of exceptions, discloses: that Yarborough held some lands as administrator of his brother, which he had agreed to rent, for the year 1875, to one Deberry. He says that the contract was not completed, but that the terms of it had been understood between them, to-wit: that Deberry was to pay $217, and make some clearing, not less than ten nor more than fifteen acres, and to fence the same, for which he was to be allowed ten dollars an acre. Deberry was then on the place, and his children had already done part of the clearing. He shortly afterwards died, and, as plaintiff says, Ward, as his administrator, made the contract on the same terms, and went on to carry it out for the benefit of the estate. The crops made on the lands were sold for the benefit of the estate, and Ward cleared fifteen acres which were fenced, although not in exact accordance with the agreement. Ward, in his testimony, disclaimed any contract on his part, personally, to rent, but contends that he took possession of the ground and adopted the lease as part of the assets of the estate, and worked it, as administrator only, by order of the probate court; Yarborough, on his part, contending that the contract of renting was a new one by Ward, and that he was personally liable in this action.

If the contract of letting had been complete and binding on Deberry in his lifetime, it would properly be a claim against his estate; and his administrator would be charged with the duty of taking possession of the term as a part of the assets. He would not be personally liable on the

intestate's agreement, whether he had been ordered by the probate court, or not, to proceed with the cultivation of the land and the fulfillment of the contract. He would be personally liable for all new contracts for labor, or otherwise incurred in his management of the property. The effect of the order would be only to entitle him to credits therefor in settlement, as expenses of administration.

Upon the other hand, if the contract with the intestate had been only in contemplation, and never completed; and would have no binding efficacy as it existed at the time of his death; and if it had been completed by the administrator, whether of his own will, and on his own judgment, or by order of the probate court, it would not have been a claim against the estate, but against the administrator, personally. The administrator had no power to rent land for the benefit of the estate, nor had the probate court the power to order it. The question turned upon a matter of fact, as to the time of the contract, and the parties between whom it was made, which matter it was the province of the jury to determine.

The court refused to instruct the jury as follows:

"If the jury find that plaintiff made a contract with defendant to rent land to him, and put defendant in possession, and that he enjoyed the use of the same, then they must find for the plaintiff, the amount stipulated to be given, and it is immaterial * * * the contract was made with plaintiff as administrator."

For the defendant, the court instructed, on this point, as follows: "Before the jury can find for the plaintiff they must find, from a preponderance of the evidence, that Ward personally rented the land, on his own individual liability, and not as an administrator."

Also, as to the character in which plaintiff should sue, as

follows: "If the jury find that Yarborough rented the land, as administrator of his brother's estate, then he can not recover in this action in his own name, personally, and they will find for the defendant."

The plaintiff saved exceptions to this refusal and instructions.

The true rule governing these points is obvious. The claims and liabilities of an estate are fixed at the time of the death. With regard to these, suits must be brought by and against the personal representatives in their character as such. It is only as they represent the deceased and the interest of his estate that they, in such cases, have any connection with the suits. With regard to contracts made by the personal representatives themselves, in the course of administration, they are personal, although for the benefit of the estate. The representative becomes the contracting party. He *may* sue, and *must* be sued in his individual capacity, whether he has contracted as administrator, or otherwise. If the fruit of the suit, will be assets in the plaintiff's hands, he may sue as administrator or executor, or, at his option, in his individual capacity. If the representative has bound himself by a contract, concerning the estate, or for its benefit, he may be held personally liable, and must look to the probate court for indemnity, in the way of allowances for expenses of administration. He can not, by contracting as administrator, etc., create new claims against *the estate*, not arising from some act, or founded on some liability of the deceased at the time of his death.

Although the jury may have found that the plaintiff held the land as administrator of his brother, and, as such, let it to Ward, he could nevertheless recover rents in his own name; and if they had in fact found that the effective

contract of renting was made with Ward, and not with the intestate whilst alive, Ward would be liable in this action.

These principles result from our line of decisions upon the statutes regulating administrations. (*Underwood v. Milligan, administrator, 10 Ark., 254; Bomford v. Grimes, administrator, 17 Ark., 567; Tiner, administrator, v. Christian, administrator, 27 Ark., 306*).

The case of *Bomford v. Grimes* (*supra*) was an application by a physician for allowance against an estate, for medical services rendered the family and slaves of deceased after his death. Chief Justice English remarked, in delivering the opinion, that: "It is manifest that our statute of administration provides for the *allowance and classification* of no claims or demands against the estate of a deceased person (other than funeral expenses) but such as arise upon contract or liabilities, made or incurred by him, in some way during his lifetime." He further said that whilst it would be the duty of the probate court to *allow* the administrator, in his settlements, for payments for such services as were dictated by humanity and a due regard to the preservation of the property; yet as between administrator and physician it would be a personal contract. An administrator has no right to make a contract for a *dead man.*

This doctrine received some apparent modification, but real extension and further development, in the case of *Turner v. Tapscott, 30 Ark., 312*, which was an action by an administrator *de bonis non* against an attorney, for money collected by him on notes belonging to the estate. It was held that he should be allowed, as a set-off, proper attorney's fees for services rendered the estate. This might seem to put the claims for services upon the footing of

claims *against the estate*, but that position was not necessary to sustain the decision, and the court, in that case, cited the former cases (*supra*) as harmonizing with the view then taken. Evidently the contract for attorney's services had been made with the administrator, and the contract for compensation being supposed simultaneous, the right of set-off was more in the nature of a counter claim arising out of the same transactions, and might well be allowed whether the contract for collection had been made with the administrator or the intestate. It was not necessary to put the claim for services on the footing of claims against the estate, or to hold that the attorney might have sued *the estate*, through the legal representative, in the same manner as if the contract had been made with the intestate in his lifetime.

The court in that case, nevertheless, prescribed a wholesome rule, and recognized an equitable practice for the government of administrators and executors, and the protection of those who deal with them. Mr. Justice Walker, delivering the opinion, distinguished between services which should be charged against an estate *as costs of administration* and such as render an administrator liable. The former are such as are necessary or useful to the estate, but which do not come within the ordinary scope of the administrator's personal duties—the latter, such as the administrator should do in person, or which are unauthorized and unnecessary. With regard to the former, the court sanctions by implication, the practice of presenting the claim to the probate court, not for allowance and classification, but for the purpose of obtaining an order on the administrator to pay the same as expenses of administration, leaving only the surplus of assets to go to the claims properly allowed against the

estate. It is certainly the duty of the administrator to pay such claims, and if he does so he will be allowed a credit on settlement. Should he refuse, it is certainly within the scope of the general powers of the probate court, in its control over the conduct of the administrator, to order him to do so upon proper application in the case, and to enforce its order. But it does not follow, nor in the face of the former authorities, which he approves, can we suppose the learned justice meant to say that the administrator could not be sued at law, on his legal obligation resulting from his power to contract. The remedy of the party may, in this case as in many others, be cumulative; and when, regarding the latter class of cases, he speaks of them as such as render the administrator liable, he must be understood to mean simply without recourse upon the assets for indemnity, and not that the administrator may not be sued upon a personal contract made by express or implied authority from the probate court.

Harmonizing this opinion with the former expressions of this court, we have developed, a plain, intelligible and rational system. Except for funeral expenses, no debts can be created against an estate after death. They must be then existing, or arise out of obligations incurred by the deceased whilst alive. Only such can be presented for allowance, classification, and payment, in statutory order, out of the assets found in the hands of the representative after settlement.

Save with regard to funeral expenses, no provision is made for the classification and settlement of demands arising in the course of administration. Those who render services, or furnish material useful to the estate, stand upon the common law regulating contracts, and may sue the person with whom the contract is made; and must sue him, *if*

at all, in his individual capacity. There could be no execution *de bonis testatoris*, nor could the judgment be classified in the probate court, as in case of judgments in suits pending against the intestate at his death, or brought against the administrator for causes of action accruing, or originating, in his lifetime. Whether the administrator may pay voluntarily or be coerced by suit, the probate court may allow him the payment out of the assets, or not, as the contracts have been authorized or necessary, or otherwise. There is no hardship in this. The administrator knows what the assets are, and owes it to himself, as well as strangers to the estate, not to incur liabilities beyond its means. If, upon the other hand, there be assets, and the administrator be insolvent, or the collection of the debt out of him be difficult, this court has recognized the power, and sanctioned the practice, of the probate court, in ordering the administrator to pay out of the assets, such expenses of administration as it may, on proper application, approve.

The instructions were upon a wrong theory. The plaintiff is entitled to have his case tried by a jury upon right principles, and we can not anticipate the verdict.

Reverse and remand for a new trial.

MILLER VS. GIBBONS, ADM'R.

1. SWAMP LANDS: *Pre-emption claimant without right, can not question defendant's entry.*

Unless the plaintiff for pre-emption shows a superior right in himself to make the pre-emption, it does not concern him whether the patent to the defendant was rightfully issued or not.

2. SAME: *Pre-emption claimants. Contests between. Decisions of land agents when conclusive.*

The decisions of the state land agents in contests for rights of entry, are conclusive upon the courts, save in cases of fraud or mistake.

3. SUPREME COURT: *Finding of chancellor not conclusive in.*

In all equity cases which are heard upon written documents, and which come as fully before the supreme court as before the chancellor, the supreme court will inquire into the correctness of his finding of the facts.

4. SWAMP LANDS: *Widow's right on husband's improvements on.*

A widow in possession of improvements of her husband on swamp lands, subject to pre-emption, may perfect his inchoate title, but, subject to her dower, she will be held in equity as trustee of the fee for the benefit of his estate.

APPEAL from *Garland* Circuit Court in Chancery.
Hon. J. M. SMITH, Circuit Judge.
Harrell, and *Henderson & Caruth*, for appellant.
McCallum, *contra*.

FAKIN, J. This suit involves a contest between claimants to pre-empt certain swamp and overflowed lands of the state.

About the year 1845, John Blakely owned a tract of land in Montgomery county (now Garland), just south of, and adjoining, the tract in question, which was vacant land of the United States. His residence was very near the north line of his tract, and for his convenience he extended his improvements over the line, taking in three or four acres of the vacant land, upon which he built a stable, crib, etc., and used the land for cultivation. He had no intention to pre-empt, having already as much land as he cared to pay taxes upon. He died in 1854. His estate seems to have been solvent. Letters of administration were granted on

the eleventh of April of that year. On the seventh day of January, 1860, the final settlement and account current of the administrator was approved by the probate court, and he was ordered to turn over the assets in his hands to the guardian of the minor heirs of Blakely. This he did; filed his receipt, and was discharged.

Upon the death of John Blakely, dower was allotted, or assigned, to his widow, Clarinda. No order of court, or instrument of writing, is shown to indicate the extent of her dower, but it appears from the pleadings, and from depositions, that it consisted of about forty acres, including the residence and a portion of the lands, if not all that was arable.

The inference, from the vague and unsatisfactory testimony of witnesses on this point, is, that she took whatever interest her husband had in those vacant lands as a part of her dower. This was the natural result, indeed, of assigning to her the residence, from which all things necessary to its enjoyment would be implied. The stables, crib and opening were household conveniences. The administrator and heirs of Blakely never set up any claim to the improvements on the vacant land. As to them, it was abandoned.

From the death of her husband, in 1854, until her own death, in 1861, there is no evidence that she increased the improvements, or did any work to keep them up or add to their value. It seems that on several occasions she endeavored, through friends, to enter the vacant land under the pre-emption laws of the state, relying on the old extension of her husband's improvements over the line, and her possession of the lands contiguous under her dower. She was unable to do so, because the lands were unconfirmed. In 1861 she died also.

Defendant Gibbons, was appointed her administrator,

and assumed control of the lands which she had occupied sdower. He did nothing whatever upon the vacant land. It was apparently abandoned, and up to the year 1865 had been allowed to go to wreck. The buildings rotted away, and the clearing grew up in weeds and bushes. At this time one Golden went upon the vacant tract, consisting of three forty-acre subdivisions, and commenced an improvement. Complainant Miller, during the same year, bought from him the improvements which he had begun, took possession, and continued enlarging them from year to year, with the declared intention of making a pre-emption under the swamp land acts of the state, as soon as he might be able to do so. He continued in possession until the commencement of this suit. His improvements had reached the extent of a very pretty farm, variously estimated at from thirty-five to seventy-five acres. During all this time, until his attempted purchase from the state, Gibbons stood aloof, and made no attempt to stop him; or to warn him against interference. Whilst Miller was in possession of, and cultivating his improvement, he rented the Blakely farm, also, from Gibbons, for the year 1867, and perhaps continued to hold it longer, as lessee. The evidence on this point is not clear.

The lands were duly confirmed to the state in 1872.

Within sixty days afterwards, on the twenty-eighth day of July, 1872, Miller filed in the office of commissioner of state lands, his declaratory statement, under oath, to the effect that he had, on or about the first day of March, 1866, commenced an improvement on the lands in question, describing them as the northwest of southeast quarter, and the north half of southwest quarter, and the southeast quarter of southeast quarter of section thirty-four, in town-one south, of range twelve west—that he had filed his

application to pre-empt the same, in said office, on the thirteenth day of August, 1869—that the improvements on said land consisted of a barn and corn-crib, and between fifty and seventy-five acres under fence and in cultivation, and that he made this application for the purpose of availing himself of the benefit of the pre-emption laws of the state, and to procure a deed to the land; and that he had not theretofore availed himself of the benefit of said pre-emption laws. This application was supported by the affidavits of P. Thornton and John D. Thornton, "citizens of said county, to me well known to be men of credibility," as recited in the affidavit, who swore that they knew the facts, as set forth in the foregoing affidavit of Miller, of their own personal knowledge to be true. The certificates of these affidavits were signed only by the words "Deputy Commissioner of State Lands," with a blank above for the name; but it is well proved that the oaths were actually taken before the deputy commissioner, and that, by mistake and inadvertence, he neglected to write his name in the blank left for that purpose. The lands were paid for by bonds $120, and fees $5.50. Having filed these papers, Miller left town, expecting to return in October, and find his patent ready.

On the second day of August, 1872, defendant Robert W. Gibbons, describing himself as "administrator of C. Blakely's estate," made an affidavit before the clerk of the circuit court of Montgomery county, to the effect: that about the first day of January, 1850, he commenced an improvement on the north half of southwest quarter and northwest quarter of southeast quarter of section thirty-four, in township one south, range twenty-one west, and that, on the eleventh day of January, 1870, he had filed in the commissioner's office his application for pre emption;

that the improvements on said land consisted of about thirty acres under fence and in cultivation, and a good corn-crib and stables—worth $300; that he made the affidavit for the purpose of availing himself of the benefit of the pre emption laws of the state, and to procure a deed; and that he had not availed himself, theretofore, of the benefit of the pre-emption laws. This affidavit was supported by what purports to be the affidavits of H. S. Lamb and Shelton Fulton, credible citizens, to the effect that they knew the facts set forth in the foregoing affidavit to be true of their own personal knowledge. With regard to this affidavit, Shelton Fulton swears positively, in his deposition, that he never made it, before the clerk of the Montgomery circuit court, or any one else; that he was not in Montgomery county, or a citizen of it, in 1850, and did not, at that time, know R. W. Gibbons, the defendant, nor the land in controversy.

These papers were presented to the commissioner of state lands, who arrested the issuance of the patent to complainant, and declared a contest for pre-emption, which was set for hearing on the eighteenth day of November, following. Of this Miller had verbal but no formal notice. He did not attend on the eighteenth, being, as he says, sick; and on that day, it seems from some imperfect notes of proceedings, the commissioner decided in favor of Gibbons, who obtained the patent.

Miller then filed this bill, seeking to have the title vested in himself, and that Gibbons be declared a trustee, and for other relief which it is not necessary to notice. The matters in behalf of Gibbons were set up in response, and the case made by the pleadings and evidence was, *substantially*, as above recited.

Upon the hearing, the chancellor was of the opinion

that the proof in the case was not sufficient to warrant him in reversing the decision of the commissioner, and holding Gibbons as trustee of the land for Miller. And it appearing from the proceedings in the case, that, pending the suit, Miller had begun an action of forcible entry and detainer against some tenants of Gibbons', who had obtained possession, and that Gibbons had filed a cross bill to enjoin the action and recover possession, the chancellor decreed that the complaint of Miller should be dismissed for want of equity; that the title of Gibbons be quieted; that he recover possession from complainant, and by a certain day have a writ for the purpose, if necessary; that the prosecution of the action at law be enjoined, and that Gibbons recover not only all his costs in this suit, but in the suit at law also. Miller appealed.

The first inquiry which arises, is: Does the complainant show any superior right in himself to make this pre-emption? For otherwise it can not concern him whether the patent was rightly issued to defendant or not.

The swamp-land act of January 12, 1853, after granting a right of pre emption to any settler on the confirmed lands, provided in section 11, that, to obtain it, the settlers should, within thirty days after the settlement, "file their declaration in writing, setting forth the fact that they claim said tract of land," to be described in the declaration "as a pre-emption right," with the land agent of the district. And by section 37, it was provided, that "after the pre-emptor has filed his declaration, he shall make proof before the swamp-land agent of the proper district, or before some justice of the peace, by two disinterested witnesses, that he or she is an actual and *bona fide* settler," etc.

Afterwards, by act of January 16, 1855, this right of

pre-emption was given to any free white citizen of the state "who *has an improvement* on any of the swamp and overflowed lands, who shall within sixty days after such lands are advertised by the land agent of the proper district * * * file his or her declaration in writing, setting forth the fact that he or she claims said tract of land, to be described in such declaration, as a pre-emption right under the provisions of this act, with the land agent of the district." No separate provision was made for proof of the facts, but under the land system of the state, with regard to the swamp-land grant, the same proof was required as in the cases of claims for pre-emption.

In the year 1868, all the duties and powers of the land agents were transferred to the state land commissioner.

The improvement of complainant was not only a *bona fide* one, sufficient to maintain a claim for pre-emption, but it was a very valuable one. It was made with a view to pre-emption, and was of such a nature and extent as to preclude the idea that it was meant to be merely colorable. It was such as accorded with the policy of the pre-emption laws, which was directed to encourage industrious men to open and cultivate these vacant lands as soon as possible, that the resources of the state might be early developed. There is nothing to indicate that he made the improvements for defendant, or any one else save himself. He was on the land before he became the tenant of the adjoining Blakely farm under Gibbons, and the renting of that farm did not make him a tenant nor lay him under any obligations of trust with regard to the vacant swamp land which he had before occupied and was improving. If, indeed, Gibbons had considered him an intruder upon any rights of his, as administrator or otherwise, when he

began his improvements in 1865, he ought to have given him warning—and, especially when he rented the Blakely farm for 1867, there should have been some understanding that the labor and improvements done on the vacant land should inure to Gibbons' benefit. It is very evident that there was no such understanding. We can not think Miller would have taken the lease on any such terms. The improvements made by him were his own, and as he filed his declaration and proof in apt time, he was entitled to a pre-emption, unless the defendant had a better right.

The chancellor seems to have taken the proper view of the *principles* which should govern the court in dealing with the patent to Gibbons.

It has been held in numerous cases, under the laws of the United States, that the decisions of the register and receiver, with regard to contested claims for rights of entry, are conclusive upon the courts, save in cases of fraud or mistake; and the same doctrine has been adopted and applied under our state system, to the decisions of the state land agents in like contests. In the case of *Patty v. Harrell, 24 Ark., 40,* Justice Fairchild said: "This court has often held in this class of cases, generally upon the official acts of swamp-land agents and officers, that it can exercise no jurisdiction in their review. But if a person makes use of an official act to perpetrate a fraud upon another person, he shall be deprived of any benefit that has accrued thereby to himself, to another's prejudice." The patent obtained by the defendant, upon the decision of the state commissioner, must be respected by the courts, unless the circumstances of the case show that it was obtained by fraud, imposition or mistake. The question is one of fact. Did the

chancellor err in his estimate of the force of the proof? This we may inquire into in all equity cases which are heard upon written documents, and which come as fully before this court as they were before the chancellor. Such cases stand upon grounds different from verdicts, or the findings of a court sitting as a jury.

In considering the facts, and their bearing upon the question of fraud, or imposition, it will be useful to trace the rights resulting from the old improvements made by John Blakely. As for himself, he never claimed any. With the freedom of the pioneer in a new country, where land and timber are abundant, he simply used the land of the government in the vicinity of his home, and thought no harm of it. When the land passed to the state by the swamp-land grant of 1850, it became subject to state legislation. In 1853 the state gave a right of pre-emption to any one whose improvements may extend from his own lands to a portion of the swamp and overflowed lands. This right was his when he died, or rather an inchoate right, to be exercised or abandoned, as he might choose, when the adjoining land should be confirmed.

When dower was assigned to his widow, this right, by understanding of all parties interested, was passed to her, to be exercised by virtue of her possession of the dower lands. If she had exercised the right, and acquired title, it would have vested in her as dowager in the same manner, and to the same extent, as she held the houses and lands to which it was, in a manner, appurtenant. There is nothing to indicate an intention on the part of the administrator of John Blakely to assign to her a separate, absolute, interest in the old improvements, distinct from her dower in the realty. That he had no right to do, and if he had designed any such thing it would have been to the prejudice of the

heirs, and void. She had possession of the lands as dower, and might, on such possession, have turned the inchoate into a perfect legal title, if the lands had been confirmed in her lifetime. But in doing so, she would have been held as a trustee for John Blakely's estate, subject to her life-interest in the lands as a part of her dower. A court of equity would not have allowed her to make use of her possession as doweress to acquire a fee simple in her own right. But the right was not perfected by her, nor could it be. When she died, she left nothing, either in the improvements, or the lands, which could pass to her administrator. He had no vestige of right to the control of the dower lands. The widow's interest in them was gone with her death. She never made the improvements, nor did Gibbons, after her. They were confessedly abandoned, actually, from the time of her death until Golden entered upon them for improvement, in 1865, a period of four years. The heirs set up no claim. Neither did the administrator of Blakely. Golden intruded upon no one, and plaintiff took his position. The defendant, Gibbons, had absolutely no interest whatever in the vacant lands. Nothing came to him as administrator, for Clarinda Blakely's rights did not reach beyond her death. As for himself, individually, he neither made nor claims to have made any improvements whatever. Manifestly, the right of Miller to pre-empt, if not the only one in existence, was certainly superior to that of defendant.

Reverting to the declarations made in Gibbons' application, it will be seen at once by the light of the pleadings and evidence, that they were untrue, in fact, and calculated to mislead and impose upon the commissioner. In what sense could it be true that he, as administrator of Clarinda Blakely, commenced an improvement on the lands in ques-

tion in 1850? Her husband was then living, and she herself survived him from 1854 to 1861. How could he say ingenuously, in support of his own claim, that the improvements on said land consisted of about thirty acres under fence and in cultivation, when neither he nor his intestate had ever made improvements to the value of a dollar, and all that had ever been made, save the old abandoned improvement of John Blakely, were made by Miller, whose claim he was seeking to annul? He might have intended in his mind, and perhaps did, that as he claimed under the widow, and she under her husband, that their acts were his acts by a kind of relation; but even in this view, the statement involved a falsity, and was designed to, and doubtless did, mislead the commissioner. There does not seem to have been any other proof of his claim than his own oath, and the supporting affidavit of two witnesses; and over this affidavit the gravest suspicions are cast, by the direct and positive disavowal of Shelton Fulton.

There are in the evidence other indications of the disingenuous nature of defendant's claim, which, taken all together, have led this court to a conclusion, on the facts, different from that taken by the chancellor below. We think the decision of the commissioner, and the patent upon it, were obtained by misrepresentation and imposition, and that the defendant should be held a trustee of the legal title for the complainant, in the lands claimed, to-wit: The north half of the southwest quarter, and the northwest quarter of the southeast quarter of section thirty-four, in township one south, range twenty-one west. There is no contest concerning the southeast quarter of the southeast quarter of the same section, also included in complainant's application for a pre-emption.

DIRECTIONS FOR A DECREE.

Reverse the decree of the court below, and let a decree be entered here, divesting out of the appellee, Robert W. Gibbons, all right and title which, in his own right, or as administrator of the estate of Clarinda Blakely, deceased, he has in, and to, said lands in controversy, by virtue of his said patent from the state, and vesting the same in appellant, Phillip R. Miller, in fee simple. Let the costs of this case, in this court and the court below, be paid by the appellee, Gibbons, and let the appellant be free to prosecute his action at law against James Custer et al., begun by forcible entry and detainer in the Garland county circuit court, being the same ordered by the chancellor below, to be dismissed; to the end that the costs of said action at law may be properly adjudged in said action between the parties thereto.

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BITTLE VS. STUART, Judge.

1. JUDICIAL NOTICE: *United States surveys. County boundaries, etc.*

Courts take judicial notice of the United States system of land surveys; with the base lines, meridians, townships and ranges thereby established, and the relative positions of the sections in the townships; also of the division of the state into counties, and the boundaries of the counties as described in public acts; and also of the principal geographical features of the state, including the navigable rivers.

2. COUNTIES: *Area.*

An act of the legislature reducing the area of a county below 600 square miles, is unconstitutional.

3. STATUTE: *Indivisible, void in part, void in whole:* CLARK COUNTY. *Act abolishing, void.*

The act of the legislature of April 3, 1879, distributing portions of the

territory of Clark county to other counties, is an indivisible act, and can not take effect in part and not in whole. It is also void because it can not be ascertained from its terms, with any reasonable certainty, what territory is assigned to Dallas county.

4. SAME:

An act of the legislature conflicting with the constitutional provision that until a designated time a certain county shall be a representative district with two representatives, and, with certain other counties, shall compose a senatorial district, is void.

PETITION FOR MANDAMUS.

Rice & Whipple, for petitioner.

EAKIN, J. The petitioner, W. A. Bittle, is a suitor in a cause pending in the Clark county circuit court, before the Hon. H. B Stuart, judge. He shows that on the third day of June, 1879, the cause was ready for trial and judgment, and that the court being in session, he moved to proceed with the same. The court refused to do so, on the ground that it no longer had jurisdiction of the case pending, because of the act of the general assembly, which went into force on that day, entitled "An act to attach the territory of Clark county to the counties of Dallas and Nevada, and for other purposes."

Prayer for an alternative writ of mandamus, and that on the hearing he may be commanded to hear and decide said cause and render judgment. A transcript of the record of the proceedings in said cause, filed with the petition, sustains its allegations.

The response of the judge sets up the act, and disclaims jurisdiction; to which the relator demurs. The validity of the act is the sole question presented.

This act is found printed in the pamphlet *Acts of 1879, p. 132*, entitled as above. It did not receive the approval of

the governor, but, if valid, went into operation by his failure to file the same, with his objections, in the office of the secretary of state; and to give notice thereof, by public proclamation, within twenty days after the adjournment of the legislature. (*Const. of 1874, sec. 15, of Art. 6.*)

Section 1 of the act provides: "That all that portion of the county of Clark, included in the following boundaries, shall be, and the same is hereby, declared attached to the county of Dallas, viz: Beginning at the mouth of the Missouri river, thence up said river to the mouth of Terre Noir creek; thence up said creek to the place where the township line between townships seven and eight crosses said creek; thence west with said township line to Antoine river; thence up said river to the county line between Pike and Clark counties; thence easterly with said county line to Hot Spring county; thence southerly with said line to the place of beginning."

Section 2 enacts, "that all that part of Clark county lying west of the Terre Noir creek, and south of township line between townships seven and eight south, be, and the same is hereby, attached to the county of Nevada."

Section 3 transfers all the records of Clark county to the custody of the clerk of Dallas county, and makes them records of the latter county.

Section 4 provides that all civil and criminal actions pending in the Clark circuit court shall be proceeded with in the circuit court of Dallas county, with leave to parties all resident in the portion assigned to Nevada, to have the cases transferred there from Dallas.

The *5th section* provides for the removal of the criminal cases to Nevada, if the defendant *resides* in the territory assigned to that county.

By *section 6*, pending administrations and guardianships

are made transferable to Nevada county, when the *administrator* or *guardian* may *reside* in that portion.

Other sections are directed to the regulation of details, with regard to change of officers, collection of taxes, the burdens of the old debt, etc., as if the effect of the act, in contemplation of the legislature, was to merge the county of Clark into the county of Dallas, save a portion to be transferred to Nevada.

Nowhere is it expressly said that the county of Clark is abolished—nor that the transfers of territory exhausted *all* the old territory of Clark county.

The courts take judicial notice of the United States system of land surveys; with the base lines, meridians, townships and ranges thereby established, and the relative positions of the sections in the townships; also of the division of the state into counties, and the boundaries of those counties as described in public acts; and also of the principal geographical features of the state, including the navigable rivers.

The Little Missouri river constitutes the whole southern boundary of the county of Clark, extending from its confluence with the Ouachita up the channel, westwardly to the mouth of the Antoine, which comes in from the north. Thence the western line of Clark county proceeds up the channel of the Antoine, between Pike and Clark counties, to and beyond its intersection with the township line between seven and eight. Whatever may be the position of the Terre Noir within the county, it is apparent that the portion of Clark assigned to Nevada is definite, or may be made so by a surveyor tracing Terre Noir creek from its mouth to said township line. This is a clean cut of territory, and if the object of the act had been merely to change the boundary between Clark and Nevada counties, it

might suffice. But this portion of the act is so inseparably interwoven with the others, by special provisions, and evident common purpose, that it can not stand alone, as a mere transfer of territory.

Turning to the portion assigned to Dallas, we arrive at the same point, the intersection of the Antoine with said township line between seven and eight. We are already at "the county line between Pike and Clark counties," and need not, as the act directs, go up the river to reach it. Ascending, however, the Antoine continues to form the county line between Pike and Clark counties until it crosses the range line between ranges twenty-three and twenty-four west, in township six south; thence, leaving the Antoine, said county line runs due north with said range line to the northwest quarter of township six south, twenty-three west; thence east on the township line two sections; thence north to the northwest quarter of section four, in township five south, range twenty-three west, where it abuts upon the county line of Montgomery county, without touching Hot Spring county at all; and having extended about nine miles, almost due north from the point where it left the Antoine (*Acts of 1873, p. 186*); thence the county line of Clark, no longer the line between Pike and Clark, runs east, along the southern boundary of Montgomery, to a corner of Hot Spring; thence east and south in a zigzag course, across the Ouachita to the northwest corner of Dallas county; thence south about twelve miles; thence west again to the Ouachita; thence southwardly with said last named river to the mouth of the Missouri, the point of beginning.

This will appear more plainly by the annexed diagram. (See diagram "A.")

It is evident at a glance, that the description of the terri-

tory assigned by the act to Dallas county will not plat without violence to the language. A line can not possibly run eastwardly from any point of *the county line between Pike and Clark counties* on the Antoine river, with said line, since that line, on leaving the river, runs directly *north*. There is nothing in the language of the act by which to correct the error or reconcile the discrepancy. The act itself does not profess, in terms, to dispose of *all* of the county of Clark, nor to abolish it, although it does assume to destroy its organization. A line run eastwardly from the point where "said" county line leaves the Antoine to Hot Spring county, would leave still in the old county of Clark a considerable territory, but far short of six hundred square miles. In this view, the act would be unconstitutional. (*Sec. 1, Art. XIII.*)

There is nothing to warrant a construction of the act which would discard the words, "eastwardly with said county line to Hot Spring county," and to read, instead, "thence with the present line of Clark county to Hot Spring county, and on southerly with said line to the beginning." Such a description would be too vague and general, and not in such terms as the legislature would be apt to use. It would wholly omit the notice of the contiguous counties of Montgomery and Dallas, which form as important parts of the boundary as does Hot Spring. We can not make language for the law-making power, when the means of construing the language used, in any other than its literal and grammatical sense, is not furnished by the act itself, or unmistakably indicated by the circumstances. If we discard the reading "eastwardly," the act becomes too vague and uncertain to be effective, and is void on that account. As already indicated, the sections are so interwoven, in object and purpose, that all must stand or fall together.

If, however, we might adopt the construction of the act, which would dispose of the whole territory north and east of the Terre Noir to Dallas, it would be a complete annihilation of the county of Clark; and very grave considerations would arise thereupon.

Counties are political agencies essential to the existence of all American free governments. No state can dispense with the system of government by counties, nor deprive any portion of its territory of all county organization. Where no constitutional inhibitions exist, the counties are under the control of the sovereign power, which may, at pleasure, alter their boundaries, change their names, burden them with obligations, or even, it is said, abolish any particular one or more; furnishing, however, another county organization for all parts of the territory. We have no disposition to question these general principles, and will, therefore, look only to the inhibitions of the constitution of 1874.

Clark is an old county, and was in existence at the time of the adoption of the constitution. It is recognized in that instrument by name. It is not necessary now to construe *Art. XIII, sec. 1*, which provides that no county *now established* shall be reduced to an area of less than six hundred square miles, nor to less than five thousand inhabitants. Nor that clause of *sec. 1, Art. VIII*, which provides that each county now organized shall always be entitled to one representative in the house of representatives. Whether these clauses prohibit the legislature for all time from destroying the identity of an original county, or only go to secure to them area, inhabitants and representation whilst they exist, is a grand question to be decided when it arises. There are positive restrictions, more direct in their language, and limited in time.

Our whole political machinery rests upon representation through counties. The constitution provides for apportionments of representation, to be made at stated times in the future; but, meanwhile, makes a provisional arrangement, for the present, to continue unchanged until after the federal enumeration, to be made in 1880. Until that time it is imperative that "the county of Clark shall elect two representatives" This takes the matter temporarily out of the sphere of legislation, and if this act stands, it would sweep two representatives out of the hall of the house of representatives. If that might be done for one county, it might be for many, and the provisional apportionment wholly disarranged.

Again, the same provisional arrangement is made for the same period in regard to the senate. It is provided that "the counties of Clark, Pike and Montgomery shall compose the Thirtieth district, and elect one senator." (*Art. VIII, sec. 192.*) Nevada, with Hempstead, forms the Twentieth district; Dallas, with Lincoln and Dorsey, the Sixteenth. Certainly the legislature has no power to say that Clark county shall be transferred to, and form part of, either the Twentieth or Sixteenth districts. How, then, can it be possible that the whole territory of Clark shall be partitioned out to other districts, leaving the Thirtieth to consist of Pike and Montgomery alone?

The constitution of 1868 made a similar provisional apportionment of representation amongst the counties. Whilst it was in force, the question arose of the power of the legislature to change the boundary lines between the counties of Prairie and Monroe. (*Howard et al. v. McDiarmid, 26 Ark., 100.*) The court held that whilst the integrity of the counties should be preserved, with their legitimate area and

population, it was no violation of the constitution to change the county boundaries within the constitutional restrictions. The constitution itself recognizes the right to change boundaries, and whilst the same counties are left organized to fulfill the conditions of the senatorial and representative apportionments, as counties, the boundaries might still be subject to alteration; and thus all the parts of the constitution might find room for harmonious operation. The principles of this decision do not support, but plainly militate against, the idea that the legislature may strike a county out of a district altogether.

The conclusion of the court is, that the said supposed act of April 3, 1879, is an indivisible act, and can not take effect in part and not in whole; that it is void, because it can not be ascertained from its terms, with any reasonable certainty, what territory is assigned to Dallas county; that one possible construction of it would render it unconstitutional, as reducing the area of Clark county below the proper limits; and that another possible construction would conflict with the constitutional provisions, which provide that until after the federal enumeration of 1880, Clark county shall be a representative district, with two representatives; and, with the counties of Pike and Montgomery, shall compose the Thirtieth senatorial district.

Let the peremptory mandamus issue, as prayed.

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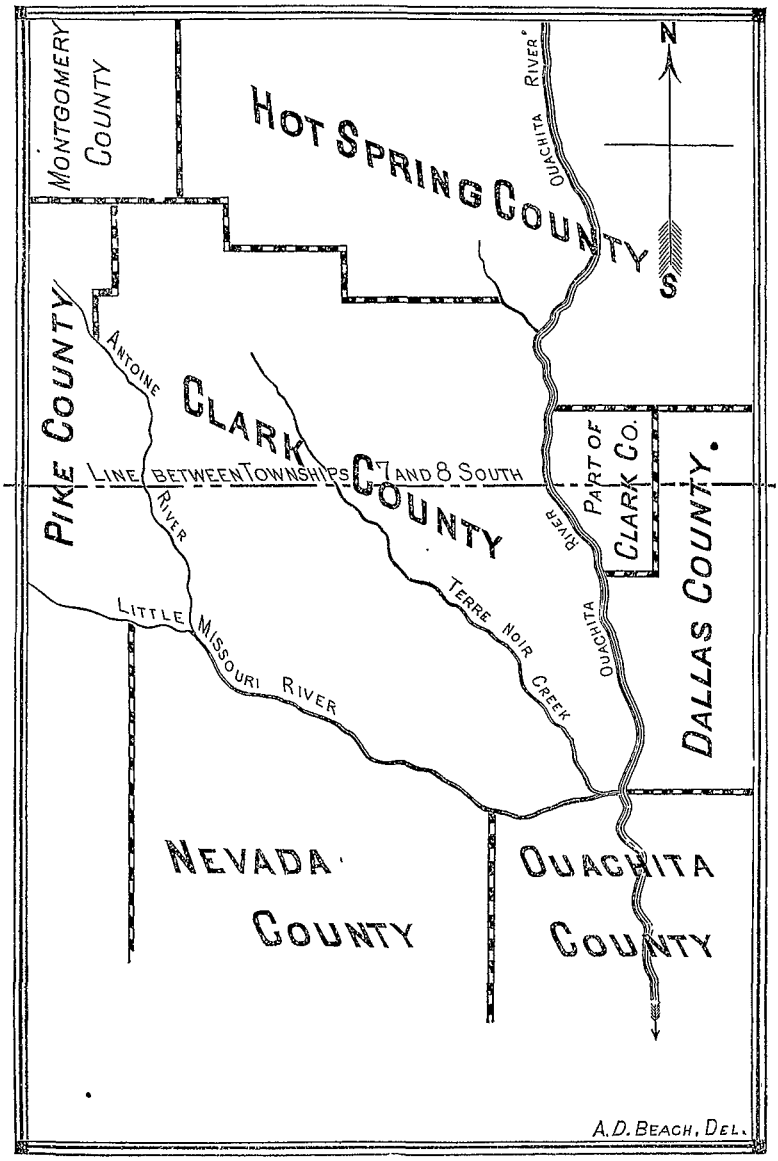
Brown vs. State.

1. Criminal Law: *Practice in supreme court, punishment reduced.*

Where, in a prosecution for manslaughter, the court instructs the jury that if they find that the defendant killed the deceased, as charged in


MONTGOMERY COUNTY
HOT SPRING COUNTY
OUACHITA RIVER
N
S
PIKE COUNTY
ANTOINE RIVER
CLARK COUNTY
LINE BETWEEN TOWNSHIPS 7 AND 8 SOUTH
PART OF CLARK CO.
DALLAS COUNTY.
RIVER
OUACHITA
TERRE NOIR CREEK
LITTLE MISSOURI RIVER
NEVADA COUNTY
OUACHITA COUNTY
A. D. BEACH, DEL.

(DIAGRAM A.)

the indictment, they will fix his punishment at imprisonment in the penitentiary for a term not less than two, nor more than seven, years; and the jury return a verdict for manslaughter, without saying whether *voluntary* or *involuntary*, and fix the punishment at two years' imprisonment; and it does not appear from the bill of exceptions that the jury were informed what punishment the statute prescribes for *in*voluntary manslaughter, and there is a doubt whether the jury were informed or knew that they might find the defendant guilty of manslaughter and fix his imprisonment at *one* year or less; and it also appears that the evidence would warrant a verdict for *in*voluntary manslaughter, the supreme court will not reverse the judgment where there was no objection to the instruction, nor motion for a new trial on account of it, but will give the defendant the benefit of the doubt, and reduce his imprisonment to one year.

APPEAL from *Desha* Circuit Court.
Hon. J. M. PINNELL, Special Judge.
Attorney General Henderson for appellee.

ENGLISH, C. J. Isaac Brown was indicted in the circuit court of Desha county for murder; the indictment charging him with killing Joseph Brooks, Jr., by shooting him with a double-barreled shot-gun.

He was tried on the plea of not guilty, and the jury returned a verdict of guilty of manslaughter, and fixed his punishment at imprisonment in the penitentiary for four years, and on his motion the court granted him a new trial.

He was again put on trial for manslaughter, and the jury found him guilty of manslaughter, failing to state whether voluntary or involuntary, but fixed his punishment at imprisonment for two years in the penitentiary.

The court refused him a new trial, sentenced him in accordance with the verdict; he took a bill of exceptions, and was allowed an appeal by one of the judges of this court.

On the trial, Daniel Deboid, a witness for the state, testified in substance that he was at the house of Daniel Debose, on Capt. Pat Henry's plantation, in Desha county, in July, 1875, where and when Joseph Brooks, Jr., was shot. He and Brooks, after eating dinner in the house of Debose, came out on the gallery. The house had two rooms, separated by a partition wall without a door. There was a gallery in front of both rooms, with a picket division about the middle, separating one room from the other. There was a small yard fenced in front of the house, and a picket fence running from about the middle of the house to the front of the yard, dividing the lot into two parts, with a gate in front of each room. When witness and Brooks came out from dinner, on the gallery, Isaac Brown was standing on his gallery, and threw a cup of water across the division in the gallery on Brooks, and Brooks threw a cup of water back at him. Brown then went into his room; Brooks went out at the front gate of the yard of Debose, entered Brown's yard, went up to the house, and as he stepped into the door of Brown's house, witness heard some one say, "*Take care, take care; I will shoot you.*" And immediately a gun fired, and Brooks said, "Uncle Isaac, you have shot me, and I would not have done a dog that way." In a few minutes witness went into Brown's room, and found Brooks shot near the groin with small shot. There was no one in the room at the time of the shooting, except Brown and Brooks. Witness assisted Brooks to his brother's house.

Sandford Brooks, second witness for the state, testified that he also dined with Debose, came out on to the gallery with Deboid and Brooks, saw Brown throw a cup of water on Brooks, and Brooks throw a cup of water back at him, walked a short distance behind Brooks when he

went into Brown's yard, and as Brooks stepped up into Brown's door, witness heard some one in the house say, "Give me my gun;" and immediately heard the report of the gun; went into the house and saw Brown with a shot-gun in his hand, with smoke coming out of the muzzle, and Brown set the gun down in a corner. As soon as the gun fired, witness heard his brother say, "Uncle Isaac, you have shot me, and I would not have done a dog that way." There was no one in the house at the time of the shooting, except Brown and Brooks. Brooks was removed to the house of his brother, Peyton Brooks, where he remained the following night; next day he was taken on a bed, in a wagon, to the house of his father, about seven miles off, and died on the following morning about day-light.

JOSEPH BROOKS, the father of the deceased, testified that he asked his son how all this happened, and he stated that Brown took the gun and shot him, when he ought not to have done it. This he repeated several times, and the last time he told him this, the contents of his bowels were running out behind, and he died in five minutes.

J. G. WARFIELD, for defense, testified that he acted as attorney for the prisoner before the examining court. That Peyton Brooks, who had since died, was sworn and examined by the magistrate, and testified that Joseph Brooks, Jr., had made dying declarations to him, and stated that Brown shot him, but they were playing, and Brown was not to blame.

ALEX. PITTMAN, was at Brown's room a few moments after Brooks was shot, and heard him say that Brown had shot him, but did not intend to do it, and was not to blame. Brown seemed sorry about the affair, and sent for the doc-

tor, and helped, or was along, when Brooks was removed to his brother's house.

DANIEL DEBOSE, on hearing the gun fire, went into Brown's room, where he found Brown, Brooks and others. Brooks had been shot; was standing up; when asked how he was shot, he said that Brown had shot him, but that they were playing, and that Brown did not mean to do it, and was not to blame. Brown sent for the doctor, and seemed to be very sorry about the shooting, etc.

On behalf of the state, the court gave to the jury seven instructions, the defendant objecting only to the second, third, fourth and fifth.

On motion of the defendant, the court gave the jury five instructions.

Taking the four instructions given for the state, to which the defendant objected, and the five given for him, together, and they, in effect, announced to the jury the statutory definitions of voluntary and involuntary manslaughter, and excusable homicide. *Gantt's Digest, secs. 1264–5–6, 1292.*

The defendant having been, in legal effect, acquitted of murder in the first and second degrees by the first verdict, was on trial for manslaughter only, and this the court gave the jury to understand by the first instruction given for the state, as well as the first given for defendant.

But in the first instruction given for the state, and to which the defendant did not object, the court said to the jury, in effect, that if they believed from the evidence that defendant shot and killed Brooks, as charged in the indictment, they would find him guilty of manslaughter, and assess his punishment in the penitentiary for a period of not less than two nor more than seven years.

This is the punishment prescribed by the statute for *voluntary* manslaughter. *Gantt's Digest, sec. 1277.*

The punishment for *involuntary* manslaughter is imprisonment in the penitentiary for a period not exceeding twelve months. *Ib., sec. 1278.*

The jury returned a verdict for manslaughter, but did not indicate whether *voluntary* or *involuntary*, otherwise than by fixing the imprisonment for a longer period than is allowed by the statute for *involuntary* manslaughter.

It does not appear from the bill of exceptions that the court informed the jury, or was asked by the state or the defendant, to instruct them what punishment the statute prescribed for involuntary manslaughter. We can hardly believe that the court omitted to do so, in a case like this, when the verdict might have been for the one or the other offense upon the evidence, and when the court in the instructions which appear, by the bill of exceptions, to have been given, thought proper to define the two species of manslaughter.

In *McPherson v. State, 29 Ark., 225, 238*, the verdict of the jury was for manslaughter, without indicating whether voluntary or involuntary, but it fixed the imprisonment of the accused at three years in the penitentiary, and the court held that the amount of punishment inflicted fixed the degree of the offense, under *section 1962, Gantt's Digest.* In that case, however, it was manifest from the evidence that the accused was guilty of murder or voluntary manslaughter; and it was sufficiently indicated by the period of imprisonment fixed by the verdict, that the jury intended to find him guilty of voluntary manslaughter. A verdict of involuntary manslaughter would have been inappropriate to and unwarranted by the evidence.

In *Winkler v. State, 32 Ark., 552*, the court instructed the

jury that if they found the defendant guilty of manslaughter, they should assess his punishment by imprisonment in the penitentiary for any period not less than two nor more than seven years, the court failing to discriminate between the two grades of manslaughter.

There was a verdict for manslaughter, and the punishment of defendant fixed at imprisonment in the penitentiary for two years.

The defendant objected to the giving of the above instruction, and made the overruling of the objection ground of his motion for a new trial.

MR. JUSTICE TURNER, who delivered the opinion of the court, said: "The jury, we have no doubt, intended to find the defendant guilty of voluntary manslaughter, without so declaring in words, for the penalty clearly indicated this purpose, and we should have no hesitation in treating the verdict as for voluntary manslaughter, were we clearly of the opinion that the evidence authorized such a finding, but as we are not satisfied on that point, and as the finding might have been different, had the court declared and explained to the jury the distinction and difference of penalty, in the two grades of manslaughter, the judgment must be reversed," etc.

In the case now before us, the prisoner did not object to the first instruction moved for the state, nor make the giving of it ground of the motion for a new trial, and, in this respect, this case differs from Winkler's case.

Possibly, however, the jury may not have known, or been informed, that they might find the prisoner guilty of manslaughter, and fix his punishment at imprisonment in the penitentiary for one year or less, and whilst we are not willing to reverse the judgment and remand the case for a new trial, we will give him the benefit of a doubt, and

modify the judgment of the court below so as to reduce his imprisonment to one year from the date of his conviction, under *section 1103, of Gantt's Digest.*

The appellant was sentenced to the penitentiary for two years from the tenth of March, 1879. A judgment will be entered here, and certified by the clerk of this court to the keeper of the state prison, modifying the judgment of the court below so as to reduce the period of his imprisonment to one year from the tenth of March, 1879.

READ, IN RE, APPROVAL OF TREASURER'S BOND.

1. The filing of a treasurer's bond for $65,000 is a sufficient compliance with an order for one of $60,000.

APPEAL from *Chicot* Circuit Court.
Hon. T. F. SORRELLS, Circuit Judge.
Reynolds, for appellant.
Rose, *contra*.

HARRISON, J. The appeal in this case is from an order of the Chicot circuit court, approving the bond of Samuel F. Whithorne, as county treasurer, against objections filed thereto by appellant.

The only point in this case, not decided in the case of Hodgkin vs. Holland, collector, etc., *ante*, is this: the bond first offered having been rejected, and the treasurer required to give a good and sufficient one in the penal sum of $60,000, the bond in question, presented under the order, was in the sum of $65,000.

We are unable to see how the validity of the bond could be affected by the penalty being larger than that required. If not a literal, it was a substantial and strict, compliance with the order.

Affirmed.

PHILLIPS COUNTY VS. LEE COUNTY

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1. LEE COUNTY: *Indebtedness to Phillips county. Appeal from county, to circuit court.*

Under the act of April 11, 1873, creating the county of Lee, the county of Phillips ascertained and reported to the county court of Lee county the amount of the latter's portion of the debt of Phillips county to be paid by Lee county, as provided by the act. Said county court, upon its own examination, allowed by order on its record a much smaller amount, and Phillips county appealed to the circuit court. There Lee county demurred to the "action or complaint" as insufficient in law, etc., etc., and the circuit court sustained the demurrer and dismissed the appeal. *Held:* That the proceedings were not in the nature of a suit to enforce an obligation resting on contract, but were in pursuance of legislative directions to adjust the fiscal arrangements between the old and new counties; that the action of Lee county court was subject to appeal, and by it the whole cause was transferred to the circuit court to be tried *de novo*, and final judgment rendered, just as if brought there in the first instance.

APPEAL from *Lee* Circuit Court.
Hon. J. N. CYPERT, Circuit Judge.
Sanders-Brown, for appellant.

EAKIN, J. By act of April 11, 1873, the general assembly created the county of Lee, out of territory taken from the county of Phillips and other counties.

By section 6, of the act, it was made the duty of the board of supervisors of the several counties out of which the county of Lee was taken, "to ascertain the exact amount of the indebtedness of each county at the date of the passage of this act, and to ascertain what portion of said debt would fall to the inhabitants of each county, now included in the county of Lee, making said estimates from the assessment lists filed by the assessors of and for the year 1872; which amount and apportionment of indebtedness, with a copy of all records and proceedings therein, shall be transmitted by the clerk of said board to the clerk of the board of supervisors of Lee county, who shall lay the same before the board of supervisors of said county at its next session thereafter, and, *if found correct by said board*, the same shall be entered of record in the record and proceedings of the board of supervisors of said county; and the same shall thenceforward *become and be the debt* of Lee county, to be paid by the inhabitants thereof and owners of property therein, *in such manner and at such times* as the said board of supervisors may determine."

On the fifteenth of September, 1873, the board of Phillips county, acting upon the report of its clerk, who had been appointed to ascertain the facts, declared the indebtedness of the county, on the seventeenth of April, 1873, to be as follows:

On railroad bonds issued to the Arkansas Central Railway Co.	$100,000
Iron Mountain and Helena Railway Co.	100,000
Unpaid interest to that date	6,000
Total railroad debt	$206,000
Floating or scrip debt	33,758
Old bonded scrip, due and unpaid	15,000
In all	$254,758

It ascertained further, that the valuation of real and personal property, taken off by the formation of Lee, was 23⅔ per cent. of the whole valuation of the county, which per centage of the indebtedness above found would make:

Of railroad debt	$48,753 32
Floating or scrip debt	11,559 38
Total	$60,312 70

All of which estimates were made on the assessment lists filed by the assessor of and for the year 1872; and it was further ordered that the clerk should make a certified copy of the order, and transmit it to the clerk of the board of Lee county. This was done.

Upon receiving it, the board of Lee county suspended action for investigation, and appointed its own agent to that end. On the thirteenth of October, 1873, he reported, as the result of his examination, that the per centage assigned to Lee county was, by a very trifling amount, too large; but that the county of Lee had gained in other respects, in matters which had been left out of the estimate, more, by a very considerable amount, than would compensate her for the overcharge by way of per centage. As to the railroad debt, he says he did not examine it, but sets forth the claim of Phillips county with regard thereto, as stated above.

Upon this report the board of Lee county, in June, 1874, ordered and adjudged "that the actual amount of said indebtedness is the sum of $12,959.39, arising from the old scrip debt, *and interest on railroad bonds*, which said amount of debt is ordered to be made a part of the records of this board."

It is apparent that the board adopted the per centage of 23⅔ per cent. as its share of the scrip and floating debt of

Phillips, augmented by the interest accrued on the railroad bonds, but meant to decline assuming any responsibility or burden with regard to the principal of said bonds.

The county of Phillips appealed to the circuit court.

There, Lee county appeared and demurred, because the case, as presented, showed no right of action, or claim, on the part of Phillips county, nor liability on the part of Lee, either separately, or jointly, with Phillips county, which it has not discharged, and because, generally, the "action, or complaint," was wholly insufficient in law.

The circuit judge sustained the demurrer, and dismissed the appeal—from which judgment, the county of Phillips appealed to this court. All the proceedings until the submission of the cause on the demurrer, were had under the constitution of 1868. The final judgment was not entered, however, until after the adoption of the constitution of 1874.

The proceedings are not of the nature of a suit or action by Phillips against Lee county to enforce an obligation resting on contract. They were had in pursuance of legislative directions, for the purpose of so adjusting the fiscal arrangements of the new, and several old counties, as to save the rights of citizens and creditors, and make the change in the political organization of the territory concerned, harmonize with them, as far as might be possible. The legislature had full power to make this adjustment of the burdens, and to impose on the new county of Lee all it attempted, with or without its consent. This power of the legislature over its subordinate political corporations, and governmental agencies, has been heretofore discussed and fully recognized by this court.

The action of the Lee county board was subject to appeal, and the appeal was properly taken by the county of

Phillips (*Gantt's Digest, 705–6, 1191*). The whole cause was thereby transferred to the circuit court, to be heard *de novo*, and it became the duty of the latter court to retain it for final judgment, just as if brought there in the first instance. *Ib., sec. 1195.* There was nothing wrong in the appeal itself, and the court erred in dismissing it. If no cause of action had been sustained upon the papers brought up, nor made out by the evidence before the circuit court, it should simply have declared that there was no indebtedness on the part of Phillips county, which should become the debt of Lee, to be paid by the inhabitants, and property owners, and should have adjudged the costs against Phillips, but not dismiss the appeal.

The demurrer should have been overruled. The appeal brought up the whole case, as well what had been allowed by the board of supervisors, as what had been denied. The statement of the Phillips county debt was prepared and presented to the Lee county board, properly and in accordance with the directions of the statute. The floating debt was not denied, nor the accrued interest on railroad bonds. There was certainly something which justified, and sustained the application—something which Lee county should enter of record as its own debt. The contest was simply one of amount, and the *whole* case was brought up. Even if it were conceded that Phillips county had got all that she ought to have by the action of the Lee county board, and was entitled to no more, and should take nothing by the appeal, there would be no ground of demurrer. The court should still have retained the cause and rendered the proper judgment—fixing the amount of the indebtedness, to be certified to the board of Lee county, to be entered of record, and this course must still be pursued.

The question really in controversy will arise again on

remanding the cause. It results from what we have said above, that the amount of the burden to be assumed by Lee, and its nature, depends entirely upon the act creating the county, without any regard to contract, or of privity between the new county and the old creditors. The act, in terms, includes *all* the indebtedness of the old counties. Outstanding bonds not yet matured are debts, and the courts can make no exceptions. It is imperative on Lee county to admit so much of the bonded debt of Phillips, and in such proportion, as it may find to be correct; to enter it of record in its proceedings, to be and become the debt of Lee. It does not follow that it must be immediately paid or provided for. That may not be necessary, nor prudent. It is sufficient at present that it be ascertained and entered of record, to be paid "at such times" as the county court (which has succeeded the board) may determine.

The legislature doubtless intended this, and thought it equitable. The railroad debt was contracted with a view to enhance the property, and subserve the convenience of all the citizens of the county, and in the just expectation that such enhanced property would supply the means of paying the debt. The advantages, whatever they may be, remain attached to the same property and inhabitants after it has been transferred to Lee, and it is just that the new county, which enjoys the advantages, and has *pro tanto* deprived the county of Phillips of its resources, should bear its proportion of the burden. What becomes of the stock for which the subscriptions were made, it is not our province to inquire. If it is all retained by Phillips county, and has any marketable value, it would seem unjust to compel Lee county to pay her proportion of the debt without acquiring a portion of the stock. If any injustice results from

this, it comes from legitimate legislative action, and is only remediable by the same authority.

For error in sustaining the demurrer, and dismissing the appeal, let the judgment be reversed, and the cause remanded to the circuit court of Lee county for further proceedings, consistent with this opinion.

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HALBUT et al. vs. FORREST CITY.

1. MUNICIPAL CORPORATIONS: *Contracts of; how made and proved.*

Contracts of municipal corporations may be proved by their ordinances and records, or made by authorized agents without seal, and proved by parol; and the authority of agents may, in many cases, be implied from circumstances.

No officer, or member of a corporation, can, without its authority, make contracts for it, or bind it by his declarations or admissions.

2. LANDLORD AND TENANT: *Contract to return in good order, etc.*

Whenever there is an agreement of the tenant to re-deliver the premises in any prescribed condition of good order, it is a question of the real intention and meaning of the parties, whether he meant to become bound to rebuild, in case of their casual destruction by fire during the term. In arriving at this meaning, the circumstances and probable intention of the parties will be considered.

3. STATUTE OF FRAUDS: *Contracts to repair or rebuild.*

Agreements to repair or rebuild are agreements for work, labor and material, and are not required to be in writing.

4. AGENT: *Authority to rent, no authority to repair, etc.*

Authority to an agent to rent a house does not authorize him to covenant to repair or rebuild.

5. MUNICIPAL CORPORATION: *Contracts not for corporate purposes, void.*

A contract by a town for rent of a house solely for the use of the county as a court-house, is void; but when a town is authorized to rent a building for its own use, it will not vitiate the contract to allow it to be used for other purposes of a public nature.

APPEAL from *St. Francis* Circuit Court.
Hon. J. N. CYPERT, Circuit Judge.
Howes, for appellant.
Brown, contra.

EAKIN, J. Appellants were the owners of a lot and building in Forrest City, which they had rented to the city for the year 1874, at the rate of $50 per month, by verbal contract. On the sixteenth of December of that year the building was destroyed by fire.

In September, 1876, they filed in the circuit court of St. Francis county their complaint against the town, in three paragraphs.

The first charges that in the contract for 1874 the town agreed, at the expiration of the lease, to surrender the building in the same condition, in all respects, as it was received, and to keep it meanwhile in repair; that on the fourteenth day of December the lease was renewed for the year 1875, with, substantially, the same agreement; which renewal was ratified by the town council. The building is alleged to have been worth $2,000, and damages are sought for failure to rebuild.

The second paragraph charges the town with gross negligence in the use of said building, and want of due care, in this, that it cut a hole through the ceiling, and so negligently and carelessly passed a stove-pipe through the same as to endanger the building; and although warned of the danger, allowed the pipe to be used in that condition, whereby the building was burned. For this they claim damages.

The third paragraph claims rents accrued since the destruction of the building, not only for the remainder of the month of December, 1874, and for the year 1875, but

afterwards until the beginning of the suit, upon the ground that the town has continued to be tenant by sufferance.

The town of Forrest City admits that it rented the lot and buildings from plaintiffs for the year 1874, but denies that it agreed to keep the building in repair, or to deliver the same in all respects in the same condition as when received, or that the contract of renting was renewed, as alleged, for the year 1875, or that said contract was ratified by the council. It says that plaintiffs themselves determined the lease for 1874, by notice in writing, demanding possession on the first day of January, 1875, which notice is exhibited by copy. It denies that the building was in its possession or under its control when destroyed by fire, on the sixteenth of December.

In response to the second paragraph, defendant denies carelessness and negligence in the matter of the stove-pipe, from which the fire originated. But says that William H. Wills, one of the plaintiffs and part owner of the building, was a member of the town council; and that, upon the dangerous condition of the stove-pipe being suggested to the council, he was appointed a committee of one to examine the place, and have it made safe at the expense of the town; and that if there was any negligence in the matter, it was his own.

With regard to the third paragraph, defendant denies indebtedness for the rents of 1875, and demurs to the claim for rent for 1876.

The plaintiff had charged that the premises were rented to the corporation "for the purposes of a town hall and council room, and for other purposes." The original answer admitted this; but afterwards defendant filed a supplemental answer, not expressly denying the fact, but alleging that the building was rented for the use of St.

Francis county, for court rooms, jury rooms, clerk's office, etc, and that the council in this had transcended its authority, and could not bind the town.

Upon trial, the jury found for the plaintiff, and rendered a verdict for the balance of the rent for 1874 only, and costs. Plaintiff moved for a new trial. The motion was overruled, judgment rendered in pursuance of the verdict, and an appeal.

The evidence and proceedings upon the trial have been brought up by bill of exceptions.

Such grounds of the motion for a new trial as require notice may be best considered separately.

The court refused to allow plaintiffs, in support of the contract of renting for 1875, to introduce a conversation on the subject between one of the plaintiffs and the mayor. There was no error in this. It is true that the rigor of the old rule, which required the contracts of corporations to be under seal, has relaxed; and with regard to municipal corporations especially, it is now conceded that their contracts may be proved by their ordinances and records, or made by properly authorized agents without seal and proved by parol; and that the authority of agents to make them may in many cases be implied from circumstances. For instance, in this case, if the contract to rent for the year 1874, had not been admitted, it would be sufficiently proved by the acceptance and use of the premises for that year. It remains true, however, that a corporation can not bind itself except by seal, or by matter apparent upon the record of its proceedings, or by the act of some agent thereunto authorized. No officer nor member of a corporation, however much he may be interested in its proceedings, can, without such authority, make contracts for it, or bind it by his declarations or admis-

sions. The conversation with the mayor, unaccompanied with proof of his authority to contract, would have been mere hearsay. There does not appear to have been any offer to make such connection.

It appears in evidence that on the second of November, 1874, plaintiffs had given the defendant written notice that the contract of renting would terminate on the first of January, 1875, and demanding possession at that time. Upon the trial, they offered to prove by parol that this notice had been withdrawn before the building was burned. This the court refused, upon what grounds is not shown. It was admissible, in connection with proof of a subsequent contract for the year 1875. It certainly did not estop the parties from making a subsequent parol contract, and the withdrawal of the notice would be implied by such contract, and enter into it. Without proof, however, of such subsequent renting for 1875, the exclusion of the evidence would not injure the plaintiffs, as such withdrawal would not of itself create a tenancy from year to year, under circumstances which would not have created such a tenancy in the absence of any notice whatever.

It is alleged, as error, that the court excluded from the consideration of the jury, the proceedings of the common council of the seventh and fourteenth of December, 1874. They would have shown that on the seventh the council appointed a committee, of which the mayor was a member, "to make arrangements for securing rooms for court-house purposes, and report" at the next meeting. The committee, at the next meeting on the fourteenth, reported that "after examination we have concluded that the Wills & Halbut building be retained by the city for said purpose, and would recommend the council to rent the same at the terms proposed—fifty dollars in currency per

month." This report was *adopted*, and the mayor appointed three aldermen, not including himself, "to contract for said building." This is the last action on the part of the council which the proceedings would have shown. Evidently they contemplate further action on the part of the committee before the contract should be considered as closed. They were admissible in connection with proof of further action on the part of the last committee, to show its authority. Without such supplemental proof, their exclusion did not injure the plaintiffs.

We come next to the exceptions concerning instructions. A portion of these relate to the liability of the corporation for rents after the year 1874. They are based upon the contingency that the jury should find a contract for continuation of the lease. It is useless to discuss these, as we may say, once for all, that there was no proof sufficient to sustain a finding of the jury, for a continuation of the contract of renting, after the year 1874, nor would have been if all the excluded evidence had been admitted. Henry Halbut, one of the plaintiffs, who attempted to introduce the conversation with the mayor, does not swear, directly, that there was a contract for 1875, independently of the excluded evidence. If there had been he would have been best informed on the subject, and could have set it forth in detail, with the parties who entered into it on the part of the council, and their authority.

William H. Wills, the other plaintiff, deposes in a very confused manner, concerning dates, but evidently means to say that in the fall of 1874, the contract of renting was renewed, and that the last contract was a written one. No written instrument was introduced, nor is it shown through what agent the contract was made, nor how the authority of the agent was revived, as there was never any action

on the renting for 1875, by possession or use, to aid in the implication of a contract. A verdict for rents of 1875, would not have been sustained on the evidence—or, at least, if found, should have been set aside, on motion, by the court below, where the doctrine of *scintillas* does not apply to the same extent as on appeal.

With regard to the liability of the city for damages for carelessness, or on its contract to redeliver the premises in the same condition as received, these questions arise under the tenancy for 1874, during which the buildings were burned. This tenancy is admitted, but the terms are denied, and the *onus* of proving the contract is on the plaintiff. It does not arise from the tenancy.

On this point, the proof is about as follows: The plaintiff Wills, says, that in the spring or winter of 1873 (meaning 1874), he rented the premises to the town of Forrest City, through Mr. A. L. Grady, then a member of the town council, for $50 per month. This contract was verbal. He says, "defendants were to make such repair as the building needed to fit it for their purpose," and also "to leave said building, upon the expiration of the said lease, in good condition and repair."

This was all the positive evidence upon this point. Upon the other hand, Mr. Grady testifies that he was one of the committee of the common council to contract for the building for 1874—that there was a verbal agreement for the renting, and that there was nothing said in said agreement as to the returning the building in the same condition as when rented, after the expiration of the lease; or to repair the building at all; but that the changes in the building, necessary to adapt it to the purposes required, were to be made by the city.

The court refused to charge the jury, on motion of the

plaintiff, that if they found, by the terms of the lease, that the corporation was to return the possession of the buildings to plaintiffs, at the expiration of its lease, in the same condition as when received by it, and the buildings were destroyed by fire, they should find for the plaintiffs the value of the buildings as proven.

Instead thereof, the court, of its own motion, instructed that the defendant, as to this point, was not liable, unless it had expressly covenanted to repair or rebuild, and a mere verbal covenant, or agreement, to return the premises in the same condition as taken, is not sufficient.

This is not correct as an abstract proposition of law. The general rule, as laid down in *Parsons on Contracts, vol. 1, p. 504 (5 ed.), in book 3, chapter 3, section 3*, is, that "if there be an express and unconditional agreement to repair, or redeliver in good order, or to keep in good repair, the tenant is bound to do this, even though the premises are destroyed by fire, so that he is, in fact, compelled to rebuild them; but not if destroyed by the act of God, or the public enemies." The rule, however, is not imperative and unbending, whenever, by the terms, there is an agreement to redeliver the premises in any prescribed condition of good order. It is a question of the real intention and meaning of the parties, whether or not the tenant meant to assume the position of an insurer against fire.

In arriving at this meaning, the circumstances and probable intention of the parties will be considered, and the tendency of the more recent decisions is averse to extending the responsibility of the tenant when the covenant is not special and express, and so clear as to leave little doubt that he really meant to take the risk of an insurer. (See the question discussed in *Levy v. Dyers, 51 Miss., 501*, where various cases are commented upon.) In that case

the defendant had rented a saw-mill, and covenanted to return the same in good running order, except the usual wear and tear. The court concluded that a covenant to redeliver or restore to the lessor in the same plight and condition, usual wear and tear excepted (or words of like import), does not bind the covenantor to rebuild, in case of a casual destruction by fire. Nevertheless, it can not be taken as a proposition of law that a mere verbal covenant or agreement to return the premises in the same condition as taken, is not sufficient to fix the liability. This assumes that such a contract must, in all cases, be in writing. A parol contract for a lease for a year may be made, and where the lessee occupies and pays rent under it, it will be governed by the terms of the original letting. *1 Wash. on R. Prop., p. 531.* See, also, the case of *Richardson v. Grifford, 1 Ad. & Ellis, p. 52*, a case very much like this, where a lease was made without proper writings, and was taken as inoperative for more than three years, in accordance with the Statute of Frauds. The lessee was, nevertheless, held liable on his covenants to repair. The rule is, with regard to these leases which are only good for a limited time for want of writing, under the Statute of Frauds, that *during the time* all the terms of the lease prevail, which do not go to extend the time, or which, in themselves, are not such as require to be in writing. *1 Whar. on Ev., sec. 855.* Agreements to repair or rebuild, are agreements for work, labor and materials, and are not required to be in writing.

Whilst not true in the abstract, the instruction was harmless in its application to the case made by the evidence. The mere verbal contract of Grady certainly did not bind the corporation, in the absence of evidence of his authority. There was no other evidence of that than may be implied from the acceptance and use of the premises by the town.

This, of itself, would only be a ratification of the contract to take, and pay rent; but unless special covenants had been authorized by the council, or reported to it and ratified, or acted upon, the town would not, as to them, be bound by occupation. There was no evidence before the jury which would have justified them in holding the mere verbal agreement of Grady binding on the town, even if, in the direct conflict of evidence, they had found that Grady had made such an agreement.

The law, with regard to negligence, seems to have been correctly given. It was a matter properly left to the jury, and, upon this point, they found for defendant. The evidence was sufficient to support this verdict. It was shown, on the one hand, that the stove-pipe was put up and used whilst the tenancy for 1874 existed, and the arrangement and control of the building was in the hands of defendant; that the hole through the ceiling and upper floor was too small, and brought the pipe in too near contact with the wood; that it was obviously and well known to be dangerous; that the council had been warned of the fact, but permitted it to be used by an occupant of the building, and that the loss of the building ensued from that cause. On the other hand, it was shown that the hole had been made under the directions of one of the plaintiffs, who objected to its enlargement, on account of its effect upon the building; that he was himself a member of the town council, and when the dangerous condition of the pipe was reported to the council, was himself appointed to remedy the defect at the expense of the council; that he accepted the appointment, or at least did not decline, and had taken no steps to secure the building, although there had been ample time to do so. It is not shown that he even objected to the use of a fire in it until altered, or that he interfered in any way.

The court, on motion of plaintiffs, instructed the jury, that if they believed that defendant was using and occupying the building, and that through its carelessness and neglect it was destroyed by fire, it would be liable for the value; and, of its own motion, added, that if the plaintiffs, or either of them, contributed to the negligence, the defendant was not bound. This, in general, is the law. The court was not asked to be more definite in explaining the effect and operation of the contributory negligence.

Upon a view of the whole case, we are of the opinion that, under any proper instructions, the jury ought not, upon the evidence, to have rendered a different verdict upon so much of the complaint as rests upon the contracts for rent, and to repair and redeliver in the same condition as when taken. As to so much of it as rest upon injury from negligence, the evidence was properly presented, upon fair instructions, and the verdict will not be disturbed.

No question is made, in this record, of the propriety of joining the two causes of action, and it is too late now to give this question any importance.

It may be proper to add that it appears, from the evidence, that the building was rented for the use of the county as a court-house. This was not a legitimate town purpose, and if it had appeared that this was the *sole* object of the renting, the contract would be invalid. See case of *Jacksonport v. Watson, MS. Op., this term.* This does not appear, however, either from the pleadings or evidence, and the proper presumption is, that it was used for town purposes also. Where the town may be authorized to rent a building for its own use, it will not vitiate the contract to allow it to be used for other purposes of a public nature. The defense, upon this ground, could not be maintained, but, for the reasons above stated, let the judgment be affirmed.

ANDERSON VS. THE STATE.

1. CRIMINAL PRACTICE: *Oath of jury. Entry of.*

It is not necessary to enter upon the record the *form* of oath administered to the jury. It is sufficient for the entry to show that they were duly sworn. The supreme court will presume, in the absence of a contrary showing, that they were sworn according to law. But if the form of oath administered is entered of record, and appears not to be in substance and legal effect the oath prescribed by law, it will be error.

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2. WITNESS: *Not impeached by proving indictment against.*

A witness can not be impeached, nor his testimony impaired, by proving that he had been indicted for larceny.

3. PRACTICE IN CIRCUIT COURT: INSTRUCTIONS: *Judge must charge in writing.*

It is the duty of the circuit judge, at the request of a party, to reduce his charge to writing.

APPEAL from *Drew* Circuit Court.
Hon. T. F. SORRELLS, Circuit Judge.
R. L. Elliott, for appellant.
Mr. Attorney General Henderson, for appellee.

ENGLISH, C. J. James Anderson was indicted, tried, found guilty, and sentenced for rape, in the circuit court of Drew county; a new trial was refused him; he took a bill of exceptions, and prayed an appeal, which was allowed by one of the judges of this court.

I. There was a demurrer to the indictment, which the court overruled.

After the usual caption, the indictment is as follows:

"The grand jury of Drew county, etc., etc., accuse James Anderson of the crime of rape, committed as follows, to-wit: The said James Anderson, in the county aforesaid, on or about the twenty-third day of September, A. D. 1878,

did feloniously make an assault in and upon one Eliza Burks, a female; and that he, the said James Anderson, did then and there feloniously ravish and carnally know her, the said Eliza Burks, forcibly, and against her will, contrary to the statute in such cases made and provided, and against the peace and dignity of the state of Arkansas."

The beginning of the indictment is in Code form. *Gantt's Dig., sec. 1797.*

The offense is charged substantially in the language of the common law precedents for indictments for rape. *2 Arch. Cr. Pract. and Plead. (6th B.), p. 304; 2 Bishop on Cr. Proc., sec. 907.*

The statute defines rape to be the carnal knowledge of a female, forcibly and against her will. *Gantt's Digest, sec. 1300.*

The objection taken to the indictment, in the demurrer, that it does not aver that the female alleged to have been injured, was a human being, is simply frivolous. No such an averment is to be found in any of the precedents for indictments for the crime of *rape.* The court properly overruled the demurrer.

II. The following is the record entry, as copied in the transcript, of the swearing of the jury:

"The parties announcing themselves ready for trial, it is ordered that a jury come to try the issue in this cause; whereupon came T. C. Erwin, etc. (naming eleven others), who are duly selected, impannelled and sworn, to well and truly try the issue herein, and, after hearing the evidence adduced, argument of counsel, and charge of the court, retire to consider of their verdict," etc.

It is submitted, for appellant, that the entry sets out the

form of oath administered to the jury, and that it is not in the form prescribed by law.

The statute provides that the jury shall be sworn, substantially, as follows:

"You, and each of you, do solemnly swear that you will well and truly try the case of the State of Arkansas against A. B., and a true verdict render, unless discharged by the court, or withdrawn by the parties." *Gantt's Digest, 1921.*

The code makers changed the form of oath formerly administered in this state, which was the substance of the oath as administered in England, and made no improvement upon it. See *Patterson v. State, 7 Ark., 59.*

It is not necessary for the clerk to enter the form of oath administered to the jury. It is sufficient for the entry to show that they were duly sworn, and this court will presume, in the absence of a contrary showing, that the court below caused them to be sworn as prescribed by law. But if the form of oath administered is entered of record, and appears not to be, in substance and legal effect, the oath prescribed by law, it will be error. Such is the effect of the previous decisions of this court. *Greenwood v. State, 17 Ark., 467, and cases cited; Harper v. State, 25 Ark., 83; Palmore v. State, 29 Ark., 253.*

The judgment of the court is, that in making the entry above copied, the clerk did not attempt or intend to set out the whole of the oath administered to the jury. The entry is similar to that in *McDaniel v. Hanauer et al., 25 Ark., 48.*

III. The first, second and third grounds of the motion for a new trial relate to the sufficiency of the evidence to support the verdict. The substance of the testimony will be stated below, in considering the fourth cause assigned

for a new trial, which is that the court admitted improper evidence.

The substance of the testimony of ELIZA BURKS, the female alleged to have been outraged, is, that she occupied a house with one door and one window, in Monticello, Drew county. On a Monday, in the latter part of September, 1878, she washed very hard, and was tired at night. She cooked supper, and a while after dark, her husband being absent driving for Col. Slemmons on his canvass, she locked the door, and she and her two little children went to bed. The window was nailed down. Some time during the night, she supposed about 10 or 11 o'clock, but had no time-piece, somebody woke her up by rubbing his hands over her face and head. She said, who is that? He said nothing. She said again, who is that? Then he said, hush; if you "hollow" I will kill you. Then he caught her throat with his hand, and choked her so she could not "hollow." Then he got on her, with his knees on her stomach, and said, I have got you where I want you, etc. Witness then proceeded to state the means by which he forced and outraged her. When he got through, he jumped off of her bed into a dark corner of the room, and she was afraid to move for fear he would kill her. He then jumped out through the window. She saw him the best she could. It was a star-light night. During the time he was outraging her, she felt his face and short whiskers. He was a full-faced man; he had on no coat; his shirt was neither white nor black; it seemed to be a yellowish-colored, woolen shirt. The window was raised open with a stick of stove-wood, etc. She had never seen the prisoner but once before, when he was pointed out to her. She thought it was he that committed the rape upon her, but was not certain.

Hers was the only direct testimony connecting the prisoner with the rape. Other witnesses testified to some circumstances to which the jury may have attached more or less weight in making up their verdict.

MARTHA PACKARD, a witness for the state, testified in substance and effect, that the prisoner confessed to her that he had committed the rape. She also indicated that she was inimical to the prisoner.

The prisoner then introduced JESSE J. HANKINS, as a witness in his behalf, who testified that he was acquainted with the reputation of *Martha Packard* for truth and veracity in the community where she lived; that it was bad, and that from that reputation he would not believe her on oath.

The state then proved by Jack Collins, Charles Hightower, Green Wilson and Peter Ragland, that they were acquainted with the reputation of *Martha Packard* for truth and veracity in the community where she lived; that it was good, and that they, from that reputation, would believe her on oath.

John H. Hammock, sheriff of Drew county, was then sworn as a witness for the state, and permitted to testify against the objection of the prisoner, that Martha Packard had not, at any time within his knowledge, been indicted for any crime or misdemeanor in that county. That Jesse J. Hankins, the witness for the defense, had been indicted by the grand jury of Drew county, at some former term of the court, for grand larceny, but that he had been unable to find the principal witness. That Hankins had never been tried, or convicted of the offense.

This testimony was inadmissible, and should have been excluded from the jury by the court.

A witness may be disqualified, and excluded from testi-

fying, by proper evidence that he has been convicted of any infamous crime. *Gantt's Dig., sec. 2482.* But it was not competent for the state to impeach Hankins, or discredit him, or impair the weight of his testimony, by proving that he had been indicted for larceny.

"A witness may be impeached, etc., by evidence that his general reputation for truth or immorality renders him unworthy of belief, but not by evidence of particular and wrongful acts, except that it may be shown by the examination of a witness, or record of a judgment, that he has been convicted of felony." *Gantt's Dig., sec. 2524.* The character of an impeaching witness may be so impeached. *1 Wharton on Evidence, sec. 568, and cases cited.*

IV. The fifth ground for a new trial, as stated in the motion, is in substance that Nancy Raymond was permitted to testify that defendant had entered her room, in which she slept at night, and attempted to carnally know her, and that this testimony was not excluded from the jury.

The bill of exceptions, which purports to set out all of the evidence introduced at the trial, fails to show that Nancy Raymond was introduced as a witness, or gave any testimony whatever.

V. The only remaining grounds for a new trial that need be noticed is, that the court charged the jury orally, after the written instructions offered by plaintiff and defendant had been agreed upon, against the defendant's objection.

It appears from the bill of exceptions that the court gave all the instructions moved on behalf of the state, and also all that were asked for defendant, and that "the court, after the conclusion of the argument in the case, against the objection of defendant, charged the jury orally as to their duties generally upon the case."

What the court said to the jury in its general charge does not appear, nor is it shown that the court was requested by the prisoner to reduce the charge to writing.

If the court, in the exercise of its constitutional duty to declare the law to the jury, committed any error in the judgment of the counsel for the prisoner, it would have been the duty of the judge, at his request, to reduce the charge to writing, that it might be reviewed on appeal. But no such request was made, and the charge is not before us. *Sec. 23, art. 7, Const.*

We find in the record but one error, that is the admission of the testimony of Hankins. The life of the prisoner, perhaps, hung on the testimony of Martha Packard, who swore that he confessed the crime to her. He attempted to impeach her by the testimony of Hankins, and the state was permitted to discredit him by proving that he had been accused for larceny. We can not undertake to say that the prisoner was not prejudiced by the admission of this evidence. It may have influenced the minds of the jurors.

For this error, we deem it safer, in a case involving the life of the prisoner, to reverse the judgment and remand the cause for a new trial.

HANEY VS. THE STATE.

1. MURDER: *Indictment must show manner of killing.*

An indictment for murder that fails to show the manner of the killing is fatally defective. 34 263 58 116

2. STATUTE: *Mistake in. When corrected by the court.*

Where it is obvious that the legislature did not intend to use a particular

word written in a statute, and it is further apparent what word they *did* intend, the courts will correct the mistake by substituting the word intended for the one used.

APPEAL from *Clark* Circuit Court.
Hon. H. B. STUART, Circuit Judge.
Henderson, *Attorney General*, for the State.

EAKIN, J. Appellant was indicted at the July term, 1879, of the Clark circuit court, for murder. The indictment charged that on, etc., at, etc., he "did willfully, unlawfully and feloniously, and with malice aforethought, and with premeditation, kill and murder James Bell, with a gun loaded with gunpowder and leaden balls, and held in the hand of him, the said John Haney." He was, on trial, found guilty of manslaughter, and his punishment fixed by the jury at seven years in the penitentiary. He moved for a new trial, for reasons unnecessary now to notice, and afterwards in arrest. Both motions were overruled. Bill of exceptions taken, and appeal.

The grounds of the motion in arrest were:

First—That the indictment does not charge the manner of killing with sufficient certainty.

Second—That the facts stated do not constitute a public offense; and—

Third—That the supposed act of the general assembly of the state of Arkansas, approved March 11, 1879, in pursuance of which the term of the Clark circuit court was then held, was unconstitutional and void.

The first and second causes were sufficient. The judgment should have been arrested, and the prisoner held for further action on the part of the grand jury. The indictment was fatally defective, in failing to indicate the

manner of the killing. This case is the same in principle with *Thompson v. State, 26 Ark., 323.* See also *Edwards v. State, 27 Ark., 493.*

The court is urged, and it seems proper, to settle also the third ground of the motion in arrest, as it affects all the courts of the eighth judicial circuit, and renders the administration of justice therein uncertain. This point the court may notice from the record, without considering whether it was properly raised by motion in arrest of judgment.

By act of December 14, 1875, the courts of this district were to be held as follows: In *Montgomery* county, on the *last* Mondays in January and July. These are taken as the initial points of reckoning for all the other counties.

The courts of *Scott* were prescribed for the first succeeding Mondays; of *Polk*, for the second Mondays; of *Sevier*, for the third Mondays; of *Little River*, for the fifth Mondays; of *Howard*, for the eighth Mondays; of *Pike*, for the ninth Mondays; and of *Clark*, for the tenth Mondays, referring all to one point of calculation for the beginning of the terms; and allowing to some counties one, to some two and to some three or more weeks for the term.

When the twelfth judicial district was created, on the eighth of March, 1877, Scott was transferred to that, and Montgomery county took the place of Scott in the times for holding her courts. The other counties remained as before, all reckoning from the last Mondays of January and July.

This system of taking certain Mondays of the year, and fixing the terms of courts for a succession of counties, by reckoning so many weeks from those Mondays, has always been a favorite one in our state; and was largely adopted in the establishment of the circuits in the constitution of 1874.

Sec. 1 of the act of March 11, 1879, provides: "That, hereafter, the circuit courts in the eighth judicial circuit shall be begun and held as follows, to-wit:

"Commencing in Clark, on the fourth Monday in January and July.

"Montgomery, third Monday after the fourth Monday in January and July.

"Polk county, the fourth Monday after the fourth Monday in January and July.

"Sevier county, the fifth Monday after *the fifth* Monday in January and July.

"Little River county, the seventh Monday after the fourth Monday in January and July.

"Howard county, the ninth Monday after the fourth Monday in January and July.

"Pike county, the eleventh Monday after the fourth Monday in January and July."

And it was provided that the act should take effect from and after the first day of May, 1879.

This act, as literally read, presents the anomaly that, whilst the time for all the other courts of the district are reckoned from the common points of the fourth Mondays of January and July, the courts for Sevier alone are fixed by reckoning from the fifth Mondays of those months. This is not only anomalous, but absurd, inasmuch as those months can only at intervals of years have five Mondays; and the legislature would appear to be singling out this county, to deprive her of the due and regular means for the administration of justice accorded to all the counties of the state. The general assembly had no power to do this, and can not be supposed to have intended it, if any plain, manifest intention consistent with the constitution can be discovered; and if such intention can be plainly seen, the lit-

eral reading of the act must yield to it. This *intention* of the legislative power is the paramount object of judicial search, in aid of which all rules of construction are devised.

If the act is held invalid with regard to Sevier county, and the courts of that county be held under the previous act, it will clash with the times prescribed in the new act for other counties. The act can not be apportioned, and must be sustained or discarded in toto.

It is probable that the courts of the eighth circuit have been held in the counties other than Sevier, under the new act, inasmuch as the same judge is supposed to have presided that refused to arrest the judgment in this case.

To hold the act invalid, will produce great confusion as to the rights of suitors, and others who have acted under orders of the court. Although this consideration would not justify this court in sustaining the act, unless some constitutional intention can be derived from its face, in connection with other acts on the same subject, it, nevertheless, imposes on the court the duty of searching carefully for such valid intention, *ut res magis valeat, quam pereat.*

Renouncing the idea that the general assembly intended to do an absurd and unconstitutional thing, which would be the result of a literal construction, let us inquire if there can be plainly discovered any other fixed and certain intention.

The obvious general intention of the act is to fix upon the fourth Mondays of January and July, for the beginning of the spring and fall circuits in Clark county; and to prescribe the succession of the several courts in the several counties, with such intervals as to allow, at each, proper time for the transaction of business. If we read the clause regarding Sevier county as reckoning from the *fourth* in-

stead of the *fifth* Mondays in January and July, it will harmoniously effect this general intention; and no other reading will. For instance, it will allow three weeks for Clark; then one for Montgomery; one for Polk; two for Sevier; two for Little River; two for Howard; and then the circuit will end with Pike. This system will be hopelessly and irreconcilably disturbed by any other reading of the act. The use of the word *fourth* in the place indicated, is the only key to harmony.

One reading the act will have suggested to his mind at once that the use of the word fifth is a clerical error, and that it resulted by a natural law of the mind (tending as it does to run in formulas), from the tautology of the preceding clause, repeated in the next. A copyist, or a draughtsman, after using "fourth after the fourth," would be apt, carelessly, to use the terms, "fifth after the fifth."

Whilst this clerical error is sufficiently manifest from the general tenor of the act, which evidently meant to fix the times of holding the courts of the district in regular and orderly succession from the fourth Mondays in January and July, the court would, if necessary, find confirmation of this view in the original act, as introduced into the general assembly. The clause in question was written by the draughtsman as printed, but he evidently discovered the mistake, and blurred over the letters "*if*" in the word *fifth*, and wrote over them the letters "our," intending to change the word "fifth" into "fourth." In this shape, the bill passed without amendment. In enrolling, the clerk, by inadvertence, failed to notice the correction; and the enrolled bill, as signed, had the word, in this place, "fifth," as originally written. It was so signed by the presiding officers of the two houses, and the governor.

The courts have it in charge to declare the law, and may,

of their own motion, resort to any aids in determining what the law is; especially in cases where no rights of property have been fixed by action upon the act as enrolled. It is not necessary, in this case, as remarked, to resort to the original bill. The mistake is obvious on the face of the act.

It is very true, as a general rule of construction, that where the language of an act is plain and unambiguous, the courts must give it effect, as it stands, or declare the law unconstitutional. But this rule is subject to much qualification, and does not apply to cases of plain clerical errors, where it is obvious that the legislature *did not intend* to use the word as written, and it is further apparent what word they *did* intend. A mistake of this nature may be corrected by the courts, upon as sound principle as a mistake in a deed. It is not judicial legislation, nor judicial interference with the legislative will. It is in support of the legislative will, and wholly distinct from the reprehensible practice of warping legislation, to suit the views of the courts as to correct policy. The only conditions to be observed in the exercise of this power of literal correction are, that the courts should be thoroughly and honestly satisfied of the legislative intent, irrespective of the policy of the act.

It would be frightful if, in a case like the present, the business of all the courts of a circuit should be delayed by such a mistake, and the rights of litigants thrown into confusion until the next session of the legislature, for the want of this wholesome power, which is constantly applied to the contracts of individuals. Such is not the meaning nor spirit of our constitutional provision that the different departments should be independent of each other. They should respect the constitutional will and intention of each other,

and that being clearly ascertained, should act in consonance therewith. These views are not new. In some form, the spirit of them has been often declared by the courts. See, for instance, the cases of *People v. King, 28 Cal., 265; Moody v. Stephenson, 1 Minn., 401; Nazro v. Mer. Ins. Co., 14 Wis., 295.*

The court did not err in refusing to arrest the judgment on the ground that the court was not held at the proper time. The circuit courts of the eighth district should proceed, as if the clause of the act of the eleventh of March, 1879, regarding Sevier, read as follows: "Sevier county, the fifth Monday after the *fourth* Monday in January and July."

For the insufficiency of the indictment, the judgment should have been arrested.

Let it be reversed, and the case remanded, with directions to hold the prisoner for such further action as the grand jury may take.

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF ARKANSAS,

AT THE

NOVEMBER TERM, A. D. 1879.

CROFTON VS. THE STATE.

1. LANDS OF THE STATE: *Coupons not receivable for.*

Neither the "act to provide for the funding of the public debt of the state," passed April 6, 1869, nor the act of the fifth of March, 1875, fixing the price of state lands, etc., by any of their provisions, authorizes the commissioner of state lands to receive coupons of the funded bonds of the state in payment of lands sold by him.

APPEAL from *Pulaski* Circuit Court.
Hon. J. W. MARTIN, Circuit Judge.
Percy Eakin, for appellant.
Attorney General Henderson, *contra.*

ENGLISH, C. J. On the eighth of October, 1877, H. H. Crofton applied to the circuit court of Pulaski county for a mandamus against J. N. Smithee, commissioner of state lands, etc. On the eighteenth of the same month the peti-

tioner filed an amended petition, to which, on the same day, the commissioner filed an answer.

On the twenty-third of October, the petitioner entered a general demurrer to the answer; upon the submission of which, the court held that the facts stated in the petition were not sufficient in law to entitle the petitioner to the writ, and rendered judgment accordingly—from which Crofton appealed to this court.

We are first to decide whether the facts alleged in the petition were sufficient to entitle the appellant to the mandamus as prayed.

The petition follows:

"Your petitioner would respectfully state that, in pursuance of an advertisement by the commissioner of state lands, Hon. J. N. Smithee, a copy of which advertisement is hereto attached, and made a part hereof, said Smithee, as such commissioner, did proceed to sell said lands at public outcry, to the highest bidder for cash. That petitioner bid the sum of $280—being the appraised value of the northeast quarter of southwest quarter, and southeast quarter of southwest quarter of section thirty-two, township ten south, range twenty-seven west—for said lands; and, being the highest and best bid then offered, the said lands were then and there struck off and sold to petitioner for said sum of $280.

"That on the sixteenth of October, 1877, petitioner tendered to said Smithee, as commissioner, the sum of $280, as follows: Nine over-due coupons of the state six per cent. funded bonds, each for thirty dollars, amounting, in the aggregate, to $270, and $10 in state scrip; and that said Smithee, as commissioner, refused to receive said coupons in payment for said lands, so bid in by your petitioner.

That said coupons are in possession of and deposited with the clerk of the court, subject to its inspection."

Prayer for mandamus to compel the commissioner to receive the coupons in payment for the lands.

The petition does not allege what class of the lands of the state were offered for sale by the commissioner, and bid for by appellant. Nor is the advertisement referred to in the petition, in the transcript before us. Whether the lands were swamp lands, internal improvement lands, forfeited lands, or lands mortgaged to the Real Estate bank, we do not know from the allegations of the petition.

The coupons alleged to have been tendered in part payment of appellant's bid, and deposited with the clerk of the court below, are not copied into the transcript, and are not before us. The petition alleges that they were nine over-due coupons of the state six per cent. funded bonds, each for $30, and makes no other or more particular description of them. It may be supposed, from the language of the petition, that the coupons tendered were taken from some of the bonds issued under the act of sixth of April, 1869, entitled "An act to provide for the funding of the public debt of the state." *Acts of 1869, p. 115.* That act required the governor to fund the debt of the state, consisting of bonds issued by the state to the Real Estate bank, and State banks, by issuing, in lieu thereof, new bonds of the state, payable at thirty years, bearing interest at six per cent. per annum, with coupons attached for installments of interest, payable in the city of New York. It may be stated, as a matter of public history, that, under the provisions of the act, some bonds were issued in lieu of bonds that had been issued to the State bank; others, in lieu of bonds issued to the Real Estate bank, and sold for banking capital; and others in lieu of five hundred bonds for $1,000

each, pledged to the North American Trust and Banking company, commonly known as the Holford bonds—the history of which may be found in *Whitney v. Peay, Receiver, et al., 24 Ark., 22.*

From which class of the new bonds, so issued, the coupons tendered by appellant were taken, does not appear from the allegations of the petition.

There is no provision of the act of April 6, 1869, making the coupons of bonds, issued under the act, receivable in payment for lands sold by the commissioner of state lands.

By act approved February 26, 1879, it is provided: "That the six per cent. funded bonds of the state, shall be received by the treasurer in payment of debts due the Real Estate bank, and in payment of the purchase money of lands whereof the state has title, by reason of the foreclosure of mortgages executed to said bank, whether the said bonds be due or not; provided, that bonds issued in lieu of the bonds known as the Holford bonds shall not be received." *Acts of 1879, p. 10.*

Assuming that appellant's bid was for bank lands, and that the coupons tendered were not from the excluded class of bonds, yet appellant can have no benefit of this act in this suit, because the tender was made, and the judgment of the court below, refusing the mandamus, rendered before the passage of the act.

The act of fifth of March, 1875, (*Acts of 1875, p. 218*), fixing the price of state lands, etc., relied on by counsel for appellant, does not authorize the commissioner, by any of its expressions, to receive coupons of the funded bonds for lands sold by him.

In *Thruston et al. v. Peay, Receiver, 21 Ark., 85,* it was decided that it was competent for the legislature, under its

power to regulate the law of set-off, etc., to make (as it had done by acts referred to in the opinion of the court) the interest due upon the bonds issued by the state for the benefit of the Real Estate bank, and evidenced by the coupons attached, receivable in pay of debts due the bank. But neither the decision, nor the legislation referred to in the opinion, has any bearing on any question presented in this case.

Counsel have discussed, in this case, the validity of the novated Holford bonds, but the facts alleged in the petition present no such question for decision.

The facts alleged in the petition being insufficient in law to entitle appellant to mandamus, and the demurrer to the answer reaching back to the petition, the judgment of the court was rightly rendered against appellant, and must be affirmed.

Lacefield vs. The State.

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34 275
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65 410
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73 150
34 275
82 73
34 275
e86 361
86 362
34 275
f89 393
f90 599

1. Criminal Law: *Assault with intent to murder.*

To sustain an indictment for an assault with intent to murder, the evidence must be such as would warrant a conviction for murder if death had ensued from the assault.

2. Assault with Intent to Kill: *Shooting one with intent to kill another.*

When one, intending to kill A, shoots and wounds B, or if it be doubtful which he shoots at, he can not be convicted of an assault with intent to kill B.

Section 1327, *Gantt's Digest*, has no application to assaults with intent to kill. It has relation to maiming or wounding; and prosecutions under it are for the maiming, or bodily injury done, and not for the assault or attempt.

3. CRIMINAL PLEADING: *Indictments need not follow statutory form.*

The form of indictment given in the statute need not be strictly followed. It is sufficient if it contain the requisites specified in *section* 1796, *Gantt's Digest.*

4. SAME: *Indictment for assault with intent to kill.*

Indictments for assault with intent to kill, need not state the means used by the assailant to effectuate his intent.

5. CRIMINAL PRACTICE: *Trial without plea of defendant, error.*

To proceed to trial without a plea from the defendant, is error, for which judgment should be arrested.

APPEAL from *Conway* Circuit Court.
Hon. W. D. JACOWAY, Circuit Judge.
Allen and *Williams & Clark*, for appellant.
Attorney General, *contra.*

HARRISON, J. The appellant was tried in the Conway circuit court upon the following indictment:

"CONWAY CIRCUIT COURT.

"The State of Arkansas,
vs.
Lee Lacefield.

"The grand jury of Conway county, in the name and by the authority of the state of Arkansas, accuse Lee Lacefield of the crime of *felony*, committed as follows:

"The said Lee Lacefield, on the first day of December, A. D. 1878, in the county and state aforesaid, upon one Thomas Hearstings, with a certain pistol, feloniously, willfully and of his malice aforethought, did make an assault with intent him, the said Thomas Hearstings, then and there feloniously, willfully, and of his malice aforethought to kill and murder, then and there, no considerable provocation appearing; against the peace and dignity of the state of Arkansas. A. S. MCKENNON,

"*Prosecuting Attorney, Fifth Circuit.*"

The jury returned a verdict of guilty as charged in the indictment, and assessed his punishment at three years imprisonment in the penitentiary.

He moved for a new trial, which was refused, and he was sentenced in accordance with the verdict.

Upon the trial the state introduced L. M. McClure as a witness, who testified that the defendant was, on or about the first day of December, 1878, in the town of Plummerville, in Conway county, and that he became involved in a difficulty with one Holloway. The witness induced him to leave Holloway's presence and go with him to witness's saloon. When they got to the saloon, the defendant took a pistol from his pants' pocket, and, after cocking it, put it into another pocket. The witness dissuaded him from any further difficulty. He then left, and in a short time returned with Holloway, and called for whisky. He was intoxicated, and the witness tried to prevail upon him not to drink any more, but finally, after exacting from him a promise that he would behave himself, gave him a drink.

In a short time after taking the drink, he staggered or fell against the sash of a window and broke two panes of glass. The witness demanded twenty-five cents from him for the panes of glass he had broken; when he declared, with an oath, he would pay no such sum, and became very disorderly—using profane and abusive language to the witness. The witness called Thomas Hearstings, a bartender in the saloon, and he and Hearstings put the defendant out of the saloon on a porch, and Heartstings then went back into the saloon; the defendant holding on to the witness; the witness, to get loose from him, seized him by the hair of his head, with both hands, and *churned* his head several times against the wall, and then threw him down on the floor, and, with his hands in his hair as before,

struck his head several times against the floor. The defendant then let go the witness, and the witness dragged him by the hair of his head off the porch to the ground, and left him and went back into the saloon to a desk at the farther end. Very soon afterwards Hearstings told the witness to look out, the defendant was going to shoot into the saloon, and immediately a shot was fired from without, which grazed Hearstings's neck, and he fell on the floor, exclaiming, "I am shot"—the bullet lodging in a picture frame on the wall; and two or three other shots, from the same direction, were fired into the saloon in rapid succession, the bullets lodging in the wall. The witness got a pistol and pursued the defendant, who was moving rapidly away, and arrested him, and, taking his pistol from him, delivered him into the custody of the constable. When arrested, his pistol had four empty chambers.

Thomas Hearstings testified for the state, and his testimony corroborated McClure's, except that he knew nothing of the taking of the pistol from the defendant; and Columbus Taylor, another witness for the state, testified to seeing the defendant fire the shots.

The court charged the jury: That, although the shots were fired at some other person, if Thomas Hearstings had been killed, the killing would have been murder, the same as though they had been fired at him, directly, unless they were fired in necessary self-defense.

The defendant excepted to this charge, and asked the following, which the court refused: That the jury must, before they find the defendant guilty, be satisfied, beyond a reasonable doubt, that he intentionally made an assault upon Thomas Hearstings; and that proof of an assault upon another person, although Thomas Hearstings was hit, was not sufficient to warrant a verdict against him.

The court erred in charging as it did, and in refusing to charge as asked by the defendant.

The proposition is incontrovertible that to sustain an indictment for an assault with intent to murder, the evidence must be such as to warrant a conviction for murder had death ensued from the assault. *McCoy v. The State, 8 Ark., 451; Cole v. The State, 10 Ark., 318; 1 Russ. on Crimes, 719; Whar. Crim. Law, 467; Stark. on Ev., 53.*

If the assault was made in a sudden heat of passion, caused by the beating and maltreatment the defendant received from McClure, and that was a provocation apparently sufficient to make the passion irresistible, and the death of McClure had ensued, the killing would have been manslaughter, and not murder.

If, therefore, the intent was not so criminal as would have made the killing murder if McClure had been killed, the crime could not have been greater if the act, or shooting, had resulted in the unintended death of Hearstings.

Bishop, in his work on criminal law, says: "How intensely evil the intent must be to infuse the bane of criminality into the unintended act, is not easily stated in a word. Evidently there may be cases wherein * * * * * * it is too minute in evil for the law's notice, the same as when the act is the true echo of the intent, and as when carelessness exists. So, also, as, on the one hand, the evil intended is the measure of a man's desert of punishment; and, on the other hand, the injury done to society is the measure of its interest to punish, and punishment can only be inflicted when the two combine. It follows, that where the law has different degrees of the same offense, as in felonious homicide, which is divided into murder and manslaughter, the crime must be assigned to the higher or lower degree, according as the intent was more or less in-

tensely wrong. * * * * * * Thus we have seen that to shoot unlawfully, but not feloniously, at the poultry of another, and thereby accidentally kill a human being, is manslaughter; to do the same with the felonious intent to steal the poultry, is murder." *1 Bish. Crim. Law, sec. 334.* And Wharton says: "Where a blow aimed at one person lighteth upon another and killeth him, this is murder. Thus, A, having malice against B, strikes at and misses him, but kills C. This is murder in A; and if it had been without malice, and under such circumstances that if B had died it would have been but manslaughter, the killing of C, also, would have been but manslaughter." *2 Whar. Crim. Law, sec. 965; 1 Hale, 766 n. (11).*

Whilst it is true that every person is presumed to contemplate the ordinary and natural consequences of his acts, such presumption does not arise where the act fails of effect, or is attended by no consequences; and where such act is charged to have been done with a specific intent, such intent must be proved, and not presumed from the act.

"If the act is alleged to be done," says Greenleaf, "with intent to commit one felony, and the evidence be of an intent to commit another, though it be of the like kind, the variance is fatal. Thus, when a burglary was charged with intent to steal the goods of W, and it appeared that no such person as W had any property there, but that the intent was to steal the goods of D, the alleged owner of the house, and that the name of W had been inserted by mistake, instead of D, it was held that the indictment was not supported." *3 Green. on Ev., sec. 17.*

In the case of *Rex v. Holt (34 Eng. Com. Law Rep., 522)*, the prisoner was indicted for shooting at John Hill, with intent to murder him. It was proven that the prisoner, intending to shoot and kill the Rev. James Lee, shot at

Hill, mistaking him for Lee, but without doing him any injury. The judge left it to the jury to say whether there was an intent to murder Hill. The jury found that the prisoner did not intend to do any harm to Hill, and the judge directed an acquittal. *2 Stark on Ev., 572; State v. Neal, 37 Maine, 468; The State v. Jefferson, 3 Harrington, 571; Ogletree v. The State, 28 Ala., 693.*

Section 1327, Gantt's Digest, which declares that if any person, of his own malice, attempt to *shoot*, or to do some *bodily injury* to some particular individual, and in attempting to do so, shall shoot or injure some third person against whom the offender had no evil design, he shall be held and adjudged to be guilty in the same manner as if the injury had fallen on the person intended—has no bearing upon the question before the court. It has, as appears by both its language and the context, relation to maiming and wounding, and prosecutions under it are for the maiming or bodily injury done, and not for the assault or attempt.

It follows that the fact that Hearstings was struck by one of the bullets, but tended, as any other fact or circumstance in the case, to prove that the defendant shot at him—and if, from all the evidence in the case, the jury were satisfied he did not shoot at him, but at McClure, or were in doubt as to which he shot at, the charge in the indictment was not sustained.

The indictment, it is insisted, did not charge the commission of any particular crime.

Felony is not a crime, but a class of crimes, and the use of the word felony in the indictment, as a designation of the offense, was inaccurate and improper; but the offense of which the defendant was accused, was made

distinct and certain by the statement of the facts and circumstances of its commission.

The form of the indictment given in the statute need not be strictly followed—it is sufficient if it contain:

"*First*—The title of the prosecution, specifying the name of the court in which the indictment is presented, and the name of the parties.

"*Second*—A statement of the acts constituting the offense, in ordinary and concise language, and in such a manner as to enable a person of common understanding to know what is intended." *Gantt's Dig., sec. 1796; Anderson v. The State, 5 Ark., 444.*

It is also contended that it is defective in not setting forth the manner in which the assault with the pistol was made, as whether by shooting or striking," etc.

The rule is well settled that in an indictment for an assault with intent to commit an offense, the same particularity is not necessary, as is required in an indictment for the actual commission of the offense; and an indictment for an assault with intent to murder need not state the means made use of by the assailant to effect his murderous intent. They are matters of evidence to the jury. *Robinson v. The State, 5 Ark., 659; 2 Whar. Crim. Law, 1281; 2 Bish. Crim. Proceed., sec. 77; United States v. Herbert, 5 Cranch, 87; Harrison v. The State, 2 Coldu., 232; State v. Dent, 3 Gill & Johns, 8.*

The record states that the arraignment of the defendant was waived by him, but contains no entry of a plea to the indictment, though the trial was had, as if the plea of not guilty had been entered.

It was certainly very irregular to proceed to trial without a plea—there was no issue and nothing to try. It was an error for which the judgment should have been

arrested. *1 Arch. Crim. Prac. and Plead., 178–31; 3 Whar. Crim. Law, sec. 3043; State v. Fort, 1 Car. Law Reps., 510; Cannon v. The State, 5 Tex. Ct. App., 34; Bush v. The State, ib., 64; The State v. Matthews, 20 Mo., 55.*

The judgment is reversed, and the cause remanded with instructions to require the defendant to plead to the indictment, and to be proceeded in according to law.

SCOTT VS. CLARK COUNTY.

1. STATUTE: *Whether constitutionally passed, raised by demurrer.*

An answer denying that an act of the legislature under which the plaintiff claims was constitutionally passed, is but a demurrer; and the court will, at the suggestion of counsel or of its own motion, seek information to determine the question.

APPEAL from *Clark* Circuit Court.
Hon L. J. JOYNER, Circuit Judge.
Kimball & Coleman for appellant.
Rose, contra.

EAKIN, J. Scott sued the county of Clark in her circuit court, for interest due upon a certain bond of the county; being one of a series issued under the act of April 29, 1873, "authorizing, restricting and regulating the subscription, issue and registration of bonds by counties," etc.

The county answered, admitting all the facts, but denying that there was any such law as that assumed in the complaint. It endeavors to show by plea that the pretended act did not pass both houses of the general

assembly, but that an original bill had passed the house of representatives, and a substitute therefor had been sent to the senate and there acted upon; and had been approved by the governor without having ever passed the house.

The court, sitting as a jury, tried the facts; found that the bill had never passed both houses in a constitutional manner, and had not become a law. Judgment was rendered against plaintiff for costs. He moved for a new trial, and by bill of exceptions brings up certified proceedings of the house and senate, with regard to the passage of the bill, and also copies of the original and substituted bills, which are admitted to have been found on deposit with the secretary of state, but not marked filed.

It was a misconception on the part of the court, and the parties, to consider the issues as made upon facts, and to try them, as by a jury. The answer was nothing, in effect, but a demurrer; it denied that the county could lawfully issue the bonds. That was a question of law, to be determined by the court in its own breast, with such aids to information as it might invoke for its own satisfaction, whether furnished by the parties or not. There was no occasion for a motion for a new trial, nor for a bill of exceptions. This court, without either, under the promptings of counsel, or of its own motion, may seek information to determine whether an assumed law be indeed such.

The act in question is on file in the office of the secretary of state, with the signatures, in due form, of the speaker of the house, the president of the senate, and the governor of the state. This is sufficient *prima facie* to advise the courts of the existence of such a law, and to direct citizens and others in the regulation of their rights and conduct. When an act has actually received the intelligent assent

of both houses of the general assembly, been approved by the governor, and published by authority, there should be shown a clear and palpable disregard of constitutional directions in its passage, to induce the courts to hold it for naught. The public are not expected, in the transactions of ordinary business, to look behind the acts enrolled and signed; and it would lead to great wrong and inconvenience, as well as destroy all confidence in legislation, if the courts should be hypercritical in supervising the forms and proceedings of the law-making bodies, and setting aside their acts for slight causes.

Looking into the transcripts from the journals, brought to the notice of the court by the attorneys, we find some confusion in describing the bill in places—the clerk not being always particular to distinguish between the original and substituted bills. Yet, upon the whole matter, we conclude that the bill, as printed, passed both houses, and is law.

The court erred in rendering judgment for the defendant.

Let the judgment be reversed, and the cause be remanded for further proceedings, consistent with law and this opinion.

Price vs. Dowdy.

34 285
57 275

1. Appropriation of Payments: *Rule for.*

In the absence of any agreement between the parties, or any actual appropriation of payments by either of them at the time, the law makes the appropriation. The rule for this, in case of successive charges, making a running account, and successive payments at different times, is to apply the payments to the charges in the order of their dates, extinguishing the oldest first. But this results from presumed intention of the parties. A different agreement may be shown by evidence.

2. RECEIVER; *When appointed for mortgaged property.*

When a mortgagor, or one who has created a lien upon land, enforceable in equity, is insolvent, and the land is insufficient to satisfy the decree when rendered, a receiver will be appointed to take charge of it, and secure the rents and profits during the litigation to enforce the lien.

APPEAL from *Crittenden* Circuit Court.
Hon. L. L. MACK, Circuit Judge.
Lyles and Peters, for appellant.
Wright and Folkes, contra.

EAKIN, J. The bill in this cause was filed by Dowdy, a commission merchant and cotton factor, of Memphis, Tennessee, against Fleming H. Price, a cotton planter of Crittenden county, Arkansas, to foreclose a lien on a certain plantation in said county, which had been created to secure Dowdy, as accommodation acceptor of two drafts of $1,500 each, drawn by F. H. Price in favor of Wm. R. Price, and accepted and paid by Dowdy. The drafts were drawn on the fifth of August, 1874, payable, one on the first of November, and the other on the first of January, following. There is no question of the lien or its validity.

F. H. Price, in his answer, claimed that the debt upon the drafts, due from him to Dowdy, as accommodation acceptor, had been covered by shipments of cotton, the proceeds of which should have been appropriated to the drafts; and that, in fact, he did not owe Dowdy any thing at all upon a fair settlement of their accounts. He charged that Dowdy had made an apparent indebtedness in his own favor, by false charges of commissions, interest, etc.; and made his answer a cross bill for the settlement of accounts; submitting that, if upon a fair accounting with Dowdy he should be found indebted, Dowdy might have the lien claimed.

Dowdy answered the cross bill, and stated that the accounts had been from time to time duly rendered to Fleming, and assented to, without objection; and that the shipments of cotton made by Fleming Price had been appropriated to the running account of Price for supplies, and other advances.

It appears from his exhibits of the different accounts stated, that he had charged up the acceptances, with commissions for accepting, against Price, at the time the same were made, just as other items of money or supplies; and that the balance on the account, stated for that period, was charged up in the next account stated.

If the proceeds of shipments of cotton are to be applied to the items of the account in the order of their date, the drafts will appear to be paid, and the lien will not remain for the general balance of accounts.

Upon this point Fleming Price deposes, that when he made shipments of cotton, he did so with the understanding that the proceeds were to be applied to the drafts, although it does not appear that he gave any specific directions, to that effect, at the time. Dowdy, on his part, testifies, directly and positively, that he accepted the drafts upon the express agreement and understanding with Fleming Price, that the drafts were to remain a permanent lien upon the land, and that credits were to be applied, as made, to the running account for advances and supplies; and that he would not have continued to advance money and supplies to Price on any other terms.

The different accounts stated were found to have been correctly taken from his books, and furnished to Price at stated times—to which he made no objection. Interest upon all of them was charged at the rate of 10 per cent. per annum. It was claimed by Price that legal interest

in Tennessee was 6 per cent., and that 10 per cent. was excessive. Dowdy proved that it was customary with business men and citizens to charge 10 per cent. interest in such cases, and that the money actually procured for Price, and advanced by Dowdy, had cost him 10 per cent. at the banks.

The last account stated brought the transactions of the parties down to May, 1876, when Price was shown to be indebted in a sum exceeding $3,000, which by subsequent charges undisputed, had been brought up to about $3,224. This account, rendered in May, had been acquiesced in by Price, and he had promised to pay it.

The cause was heard upon the pleadings and evidence, at the November term, 1877, of the Crittenden court. The chancellor held that the payments or shipments were properly applied to the running accounts, outside of the drafts, and that the lien remained for the balance due (which appears to be less than the drafts with interest), and that, the insolvency of the defendant being admitted, a receiver would be proper. He was of the opinion, however, that the interest charged had been excessive, and referred the accounts to the clerk, to state them on a basis of 6 per cent., and to report at once.

The clerk reported in a few days, at the same term showing a balance due of $2,937. Exceptions to the report were overruled, a decree rendered for complainant with order of sale, and a receiver was appointed to collect rents for the current year, and take care of the property. Price appealed.

In the absence of any agreement between the parties, or any actual appropriation of payments by either of them at the time, the law makes the appropriation. The rule for this—in case of successive charges making a running

account, and successive payments at different times—is, to apply the payments to the charges in the order of their dates—extinguishing the oldest first. Upon the face of the accounts stated in this case, it appears that Dowdy had charged his acceptances with commissions, as so much money advanced, along with other advances and supplies, without any mark of distinction as to these drafts, to show that they were held upon a different footing, with a separate lien for their payment independent of payments made on the general account.

If this were all, the rule would apply and the law would appropriate the proceeds of the cotton to these drafts in their due order of time, as these charges appear in the account. But this results only from a presumption of intention, and may be controlled by evidence. It was competent to show a different agreement. The complainant may have kept his account in this manner for convenience, and he is not estopped thereby. There is evidence to show an agreement that the proceeds should be applied, first to the open and unsecured account, reserving the acceptances to be paid last, and retaining the lien meanwhile as to them. Although the evidence is conflicting, the chancellor seems to have given most weight to the evidence of Dowdy on this point.

Considering all the circumstances, we are of opinion that he held correctly in determining that the lien was to be retained until all should be paid. The decree is for a balance of an account, and is, so far, not in apt language. It should have been, as prayed, for a balance on the acceptances, considering them as *pro tanto* unpaid. But this is only matter of form. The decree is for a less amount than the drafts with interest would cover, and the error in form is not prejudicial to defendant.

The defendant can not complain of the directions to the master to reopen the accounts, by charging 6 per cent. interest instead of ten. That was in his favor, and he admits in his pleadings that 6 per cent. was the lawful rate of interest in Tennessee, and was intended to govern the transaction.

There was no error in appointing a receiver. The insolvency of the defendant and the inadequacy of the security was not denied. In such case, it would be inequitable to allow defendant to take advantage of his own wrong, and by refusing payment to enjoy the rents and profits of the land during a protracted litigation without leaving a sufficiency in the *corpus* of the property to satisfy the decree when rendered. There is no distinction in this respect between a mortgage which gives the mortgagee a technical legal title, which he might enforce by a possessory action, and an agreement for a lien enforceable, as this was, only in equity. The principle is the same, and arises from no legal right to possession in the holder of the lien, which the receiver exercises in his stead, but *ex equo et bono*, from the nature of the case. The court impounds the property by virtue of its inherent power to enforce the equities which come within its cognizance.

In restating the account, the master has allowed no interest on either side until the rendition of the different accounts stated, and has calculated the interest at 6 per cent. from the time of each statement, upon the aggregate charges and the aggregate credits, in each statement respectively, until the time of the report. Each account stated stands by itself, bearing its own interest on the aggregate sum of its charges and credits from the date of rendition. No balances are struck nor amounts carried over into subsequent accounts. When all are stated, the

charges with their respective interests, and the credits with their interests, are all balanced at the time of the report. This mode of stating it is particularly favorable to defendant, and can not be recognized as a precedent fixing the correct principle. It deprives the creditor, in whose favor the balance may be, of the advantage of his greater amount of interest in the periods between the advances and the time of rendering the accounts. This is well illustrated in the case of these very acceptances. The bills fell due on the first of November, 1874, and the first of January, 1875. The amount of the principal only is charged in the account, and they are not made to bear interest until the tenth of June, 1875. There is no compounding of interest in this method, as claimed by the exception to the report. If there was a mistake, it was largely in favor of appellant.

We see no mistake in the report prejudicial to appellant, of any character, and think, without objection on the part of appellee, it was properly confirmed and made the basis of a decree.

Let the decree be in all things affirmed.

King et al. vs. Clay et al.

34 291
72 187

1. Courts: *Power of, over process. Injunction against.*

Common law courts have jurisdiction and power over their writs, and over the officers who execute them, and may, on motion, recall and quash process illegally issued. This being a plain and complete remedy at law to a party to an execution illegally issued, he can not apply to chancery for injunction against it. But one who is not a party to an execution illegally levied on his property, has not this remedy, and may apply to chancery to enjoin the sale.

2. FRAUDULENT CONVEYANCE: *None but creditor can assail.*

One who is not a creditor, is not in condition to ask chancery to set aside an alleged fraudulent conveyance of a debtor.

3. JUDGMENT: *Amendment of without notice, error.*

Failure to give notice to the adverse party of an application to amend a judgment, is ground for reversing the order of amendment, on appeal or writ of error; but the order can not be held void in a collateral proceeding.

4. SAME: *Entry procured by fraud, vacated in chancery. Fraud, how charged.*

Chancery will vacate an entry procured by fraud; but the allegations of fraud must be specific of the facts constituting it. General allegations are not sufficient.

5. DECREE: *Binds only parties: Reversed if necessary party not made.*

A decree is not binding upon one not a party to the suit. It is error in a court to render a decree without having before it a party necessary to make it final and effective.

APPEAL from *Lonoke* Circuit Court in Chancery.
Hon. J. W. MARTIN, Circuit Judge.
Clark & Williams, for appellant.
Chapline, *contra*.

ENGLISH, C. J. The material facts of this case, as disclosed by the pleadings and exhibits, are, that, on the sixth of April, 1866, Marion M. Clay, administrator of Thadeus N. Ferrell, deceased, commenced an action of replevin, in the detinet, against William Valliant, in the circuit court of Arkansas county, for a two-horse wagon, the declaration alleging that Valliant received the wagon of Clay, to be redelivered on request. Demand, and refusal, etc.

On the execution of a personal bond by Clay, with sureties, the sheriff seized the wagon, under the writ of replevin, and delivered it to him.

At the return term, Valliant pleaded non-detinet, and the

cause was continued. At the May term, 1867 (sixteenth of May), the case was submitted to the court, sitting as a jury. The court found the issue for Valliant; fixed the value of the wagon at $125, and damages at $25, and, Valliant electing to take the value of the property, etc., the court rendered a personal judgment against Clay, in his favor, for $150, and costs of the suit.

At the May term. 1870 (seventeenth of May), the following entry appears to have been made in the case, Hon. Henry B. Morse, presiding as circuit judge; Hon. William M. Harrison having presided when the above judgment was rendered:

"Come the parties, and it appearing that at the May term, 1866, the said Marion J. Clay, administrator of the estate of Thadeus N. Ferrell, brought his action of *trespass on the case* against William Valliant, and that in said cause, at the May term, 1867, judgment was rendered in said cause against Marion J. Clay, in his individual character; and, it further appearing that said judgment should have been entered against Marion J. Clay as administrator of Thadeus N. Ferrell, and that the entering of the same against said Marion J. Clay, in his individual character, was through an error and misprision of the clerk, it is, on motion of the plaintiff, ordered that said judgment be, and the same is hereby, corrected so as to be against the said Marion J. Clay as administrator of the estate of Thadeus N. Ferrell; and it is, on motion, further ordered that such correction take effect, and have force, from hence of the May term, 1867."

On the twenty-second of December, 1876, a personal execution was issued against Clay, on the original judgment as entered the sixteenth of May, 1867, to the sheriff of Lonoke county, taking no notice of the entry of the seventeenth

of May, 1870, modifying the judgment. Upon the execution was indorsed, by the clerk who issued it, a credit of $75, as of the third of November, 1868; and a further indorsement that William Valliant, in whose favor the judgment upon which the execution issued was obtained, died in June, 1870; and that, on the third of January, 1871, George W. Turner was appointed by the probate court of Arkansas county, administrator of his estate, and, at the October term of said court, ordered to give a new bond as such administrator, and had failed to give such bond.

The execution came to the hands of J. M. King, sheriff of Lonoke county, and was levied on lands situated in that county, as the property of Clay, and the lands were advertised to be sold the tenth of February, 1877.

Before the day of sale, Charlie Clay and Harry Clay, minors, by their next friend, Marion J. Clay, and the latter in his individual capacity, filed the bill in this case, on the chancery side of the circuit court of Lonoke county, against King, as sheriff, praying that the sale of the lands, under the execution, be enjoined.

The bill alleges, in substance, that complainant, Marion J. Clay, was appointed administrator of the estate of Thadeus N. Ferrell, by the probate court of Arkansas county, on the —— day of ——, 1866; gave bond, etc., and acted as such administrator until the —— day of ——, 1868.

That, as such administrator, he brought the suit against Valliant, which resulted in a personal judgment against him, as above shown; and that the judgment was corrected by the entry of May 17, 1870, copied above.

That when the judgment was rendered, and at the time it was amended, the estate of Ferrell was solvent; that there was real property belonging to the estate, situated in Arkansas and Prairie counties, and yet property in said

counties more than enough to pay the judgment, if, in fact, it could be collected by law.

The bill then sets out the personal execution issued against Clay, and the levy upon the lands, etc., as above stated; and alleges that all of the lands levied on are the property of the minor complainants, except the northwest quarter of section twenty-seven, township two south, range eight west, which is averred to be the individual property of Marion J. Clay, and claimed by him as a homestead.

That the execution was against Clay, in his individual capacity, and that the judgment was against him as administrator, etc.

That William Valliant, in whose favor the judgment was rendered, died in June, 1870, and the judgment had not been revived by his administrator, executor, heirs, or any one else entitled by law to revive it.

That King, as sheriff, etc., had advertised the lands, and would sell them unless restrained, etc.

Prayer for injunction, etc.

A temporary injunction was granted, in the absence of the circuit judge, by the judge of the county court of Lonoke county.

On motion of King, P. H. Wheat was made a defendant, as an interested party, and permitted to file an answer and cross bill.

The answer admits that Clay was appointed administrator of Ferrell's estate, as alleged in the bill.

Alleges that in December, 1875, before the replevin suit, Wheat being the owner of a wagon, sold it to one Solomon Boyd, who sold and delivered it to William Valliant; that the wagon never was the property of Ferrell, or Clay.

That Clay, without right, brought the replevin suit for

the wagon, against Valliant, describing himself as administrator of Ferrell.

The answer then proceeds to set out, and exhibit, the proceedings and judgment in the replevin suit, as above shown.

Alleges that after the wagon was taken from Valliant and delivered to Clay, under the writ of replevin, Valliant demanded of Wheat that he should replace the wagon, or pay for it, and employ counsel and defend the suit. That Wheat delivered to Valliant another wagon, which was satisfactory, employed counsel and defended the replevin suit at his own expense, and for his own use and benefit, and that the suit resulted in a personal judgment against Clay for the value of the wagon, etc., which was right and proper, etc., and that the judgment belonged to Wheat.

That the effort of Clay to have the judgment altered by subsequent order of court, without notice to Wheat or Valliant, and without their appearance in court, or consent, was fraudulent, and said order void. That the entry of record that the parties appeared, was falsely made by the fraud, connivance and procurement of Clay. Denies that said judgment was entered by error or misprision of the clerk, but avers that it was deliberately entered by the then presiding judge of the court, after full argument, on the ground that an administrator must bring an action of replevin at his peril, and if he fail, must pay, and save his sureties harmless, and do justice to the defendant; and, after having wrongfully replevied property, he can not turn the defendant over to the pro rata per cent. of an insolvent estate; and upon the ground that plaintiff had received defendant's property from the sheriff, and defendant had a right to have a return of the property, or its value, and defendant having exercised his right of election,

and chosen to take the value, the law made no exception in favor of administrators; and as the administrator had received the property, it was no hardship to make him pay the value; and if there was any loss, and the suit was indeed brought in good faith, the probate court could allow the administrator credit as for expense of administration for the excess.

Admits that the execution was issued as stated in the bill, and levied on the lands described therein.

Wheat makes his answer a cross bill or counter claim against complainants, and the administrator of Valliant, and avers that he is the owner of the judgment, and that it is unsatisfied, except $75, credited on the execution; all of which, but $28, was appropriated to costs, etc.

Avers that the lands levied on were bought and paid for out of the funds of Marion J. Clay; that the minor complainants were children, of tender years, and had no property or means of their own. That Clay bought said lands himself, paid therefor out of his own money, and being at the time indebted to Wheat on said judgment, as well as to other creditors, for the purpose of hindering, delaying and defrauding his creditors, caused the title to said lands to be made to his said minor children, except the tract claimed by him as a homestead, and between the fraudulent conveyances and his homestead right, was attempting to hold his creditors at defiance, etc.

Prayer that said fraudulent conveyance be set aside, and said lands be subjected to said execution, and that so much thereof as might be necessary be sold, and the proceeds appropriated to the payment of the judgment, costs, etc., and for general relief.

King adopted the answer of Wheat.

A summons was ordered for George W. Turner, as ad-

ministrator of Valliant, and a guardian *ad litem* appointed for the minor defendants to the cross bill.

The complainants demurred to the answer and cross bill; the court sustained the demurrer, and rendered a final decree, making the injunction perpetual, and defendants appealed.

I. In considering the demurrer to the answer, etc., we may look back to the bill to see whether it makes a case for relief in equity.

Treating, for the present, as the bill does, the order of the Arkansas circuit court, of seventeenth of May, 1870, as a mere correction of a misprision of the clerk in entering the judgment of the court in the replevin suit, at a former term, no execution could be legally issued upon the judgment as corrected—none against the property of Marion J. Clay, because, after the correction, there was no personal judgment against him, and, under our system of administration, no execution against the estate of Valliant, could legally be issued.

There can be no doubt of the jurisdiction and power of the common law courts over their writs, and over the officers who execute them. And in the due exercise of this power, such courts may, on motion, recall and quash process illegally issued. *State Bank v. Noland et al., 13 Ark., 301.*

Clay, the defendant in the execution, had a simple and adequate remedy at law, by application to the court out of which the writ issued, to recall and quash it; and, if the court was not sitting, the judge, in vacation, could stay the execution of the process, until the court met. *Sec. 14, Art. 7, Const.; Gantt's Dig., sec. 2619.* His remedy being plain and ample at law, he had no ground to apply to chancery for an injunction, and, as to him, there was no equity in the bill. *Lansing v. Eddy, 1 Johnson's Chancery*

Rep., 49; Anthony et al. v. Shannon, 8 Ark., 53; Moore et al. v. Granger, sheriff, et al., 30 Ark., 577.

II. But the minor complainants stood upon a different footing; they were not parties to the execution—their father was the defendant in the execution—they had no legal right to apply to the law court, out of which it issued, to recall and quash it. The court might or might not have acted on their application.

The sheriff levied an execution against their father, upon lands owned by them, and they joined in the bill for an injunction. Insomuch as a sale and conveyance by the sheriff, would put a cloud upon their title, the better opinion seems to be that they could maintain a bill in equity to injoin the sale, and therefore there was, as to them, equity in the bill. *Horman on Execution, 614; Key City Gaslight Co. v. Munsell, 19 Iowa, 305; Kirkpatrick v. Buford et al., 21 Ark., 268; Conklin et al. v. Forster, 57 Ill., 108; 61 ib., 334; Dunn v. Tozer et al., 10 Cal., 167; Vogel v. Montgomery et al., 54 Mo., 577.*

III. But it is alleged in the cross bill, in answer to the claim of the minor complainants, that they are not the owners of the lands levied on; that the lands were purchased by Clay, the defendant in the execution, with his own money, and that he caused them to be conveyed to his two minor sons, to hinder, delay and defraud his creditors; and these allegations were admitted to be true by the demurrer to the cross bill. And the cross bill prays that the fraudulent conveyance be set aside, and the lands, or enough thereof, be sold to satisfy the execution.

In other words, the cross bill seeks the aid of chancery to uncover the lands and subject them to the satisfaction of the execution against Clay. But if the entry of the seventeenth of May, 1870, is not void, and the allegations of the

cross bill do not make a case for vacating it by decree in equity, as procured by fraud, then not only is the execution levied on the lands invalid, but it is founded on no personal judgment against Clay, and though Wheat may own the judgment, he is no creditor of Clay, and is in no condition to ask a court of chancery to set aside the alleged fraudulent conveyances; and the demurrer to the cross bill was properly sustained. *Meux v. Anthony, 11 Ark., 411; King v. Payan, 18 Ark., 589; Clark and Wife v. Anthony and Wife, 31 Ark., 546.*

IV. Is the entry void upon its face?

It was well settled by this court, before the adoption of the Code that a court has power, after the close of a term at which a judgment is rendered (as well as during the term), on proper application and notice to parties legally interested, to amend its record so as to make it speak the truth. *King et al. v. State Bank, 9 Ark., 185; Arrington v. Conrey et al., 17 ib., 100; Green v. State, 19 Ark., 178; Martin et al. v. State Bank, 20 Ark., 336; Freel v. State, 21 ib., 213; Alexander v. Stewart, 23 ib., 18.*

Failure to give notice to the adverse party, of the application to amend a judgment, is ground for reversing the order of amendment, on writ of error or appeal. *Alexander v. Stewart, and Martin et al. v. State Bank, sup.*

By provisions of the Code, the court in which a judgment or final order has been rendered or made, has power after the expiration of the term to vacate or modify such judgment or order for a number of causes specified, and among them: "*third*, for misprisions of the clerk." *Gantt's Dig., sec. 3596.*

The proceedings to correct misprisions of the clerk shall be by motion, upon reasonable notice to the adverse party, or his attorney in the action. *Ib., sec. 3597.*

As to what are misprisions of the clerk, see *Badgett v. Jordan, 32 Ark , 154.*

It does not appear in the transcript before us that any notice was given by Clay, to Valliant or his attorney, of the application to amend the judgment; but the record entry shows that the parties appeared, and on motion of Clay, upon facts shown to the court, the amendment was made.

The record entry does not show an attempt of the court to modify a judgment rendered at a former term, because of an error of the court in rendering it, but because of a misprision of the clerk in entering it. In other words, the judge presiding on the seventeenth of May, 1870, found on the facts shown to him, that the judge who was presiding, and tried the cause on the sixteenth of May, 1867, in fact, rendered a judgment against Clay as administrator, and by misprision of the clerk, a personal judgment was entered against him, and upon such showing an order was made modifying the judgment as shown by the entry.

It may be that the judgment was right, upon the facts as entered by the clerk, and it may be that the court erred in changing it, and that such error might have been corrected on writ of error or appeal; but in this case the order modifying the judgment comes before us collaterally, and the court having jurisdiction of the subject matter, we can not pronounce it void on its face. *Borden v. State, 9 Ark., 253.*

V. That chancery may vacate the entry, if procured by fraud, is well settled.

There is no direct allegation in the cross bill that notice was given to Valliant, or his attorney in the action, of the motion to amend. Nor is there a direct allegation

that Valliant did not appear, or was not present in person or by attorney, when the motion was made; nor are there any specific allegations of fraud on the part of Clay in procuring the entry to be made; nor is there any prayer that the entry be vacated. A party seeking to set aside a judgment or order of court, on the ground that it was procured by fraud, must allege the particular facts constituting the fraud. General allegations are not sufficient.

The court did not err in sustaining the demurrer to the answer and cross bill.

VI. After sustaining the demurrer to the answer and cross bill, the court, upon the bill, rendered a decree, perpetually enjoining the execution of the judgment as amended, without causing the administrator of Valliant to be made a party. The bill was against the sheriff only, who had no interest in the judgment, but was only charged with the official duty of executing the writ issued upon it, and placed in his hands.

Wheat, who claimed to be the owner of the judgment, very properly made Turner, the administrator of Valliant, a defendant to the cross bill, and took an order for a summons against him; but before the summons was issued, the case was disposed of on demurrer to the answer and cross bill, and the final decree entered. This decree is not binding upon the administrator of Valliant, because he was not made a party to the bill on which it was rendered, and, regardless of the decree, he might sue out another execution upon the judgment as amended.

It was an error in the court to render a decree without having before it a party necessary to make the decree final and effective. *Simmons et al. v. Richardson & May, 32 Ark., 297.*

For this error, the decree must be reversed, and the cause

remanded, with leave to appellees to amend the bill so as to make the administrator of Valliant a defendant; and with leave to Wheat to amend his cross bill so as to make the allegations of fraud in procuring the amendment of the judgment direct and specific; and also to amend the prayer thereof, and for such further proceedings as may be in accordance with principles of equity, and not inconsistent with this opinion.

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RAU VS. THE CITY OF LITTLE ROCK.

1 CITY ORDINANCES: *Retrospective in part, void pro tanto.*

A city ordinance retrospective in part, is inoperative and void to that extent only, if otherwise unobjectionable.

2. CITY OFFICER: *Accepting salary under one ordinance, can not claim under another.*

Where a salary, as fixed by an ordinance, and afterwards by a resolution of the city council, is paid monthly to an officer, and he, with full knowledge of the fact, accepts the same, without protest or objection, in full satisfaction and discharge of his demand, he can not afterward object that the ordinance and resolution were void, and demand a larger salary under a previous ordinance.

3. CONTRACTS: *Extent of obligation.*

Parties to contracts are bound, only so far as they intend to be bound.

APPEAL from *Pulaski* Circuit Court.
Hon. J. W. MARTIN, Circuit Judge.
Cohn, for appellant.
Johnson, *contra*.

HARRISON, J. The appellant, Louis Rau, sought, by his action, to recover from the city of Little Rock the sum of $1,560.83, which he claimed as a balance due him on salary as late city clerk.

The complaint alleged that he was appointed city clerk by the city council, on the twelfth day of April, 1875, at a salary of $200 per month, and he held the office and performed its duties from that date until the thirty-first day of December, 1876, and was entitled to receive, for the time he so served, the aggregate sum of $4,120, but had received only $2,559.17.

The city, in its answer, denied that the salary had been $200 per month, but averred that from his appointment until the tenth day of April, 1876, it was only $135 per month, and from that date $100 per month; and that the same had been fully paid him.

The facts, and as to which there was no controversy, were these: The plaintiff was appointed city clerk by the city council, on the twelfth day of April, 1875. The salary, which had been fixed by an ordinance on the first day of November, 1872, was, then, $2,400 a year, and payable monthly. On the twentieth day of May, 1875, the city council, by a general ordinance in relation to the salaries of city officers, fixed the city clerk's at $135 per month, and the salaries established by it, the ordinance declared, should be such from the fifteenth day of April, 1875.

On the tenth day of April, 1876, the salaries of the city officers were again fixed by the city council, by a *resolution*, and that of city clerk at $110 per month; and the plaintiff was the same day after the adoption of the resolution, again appointed, and he continued to hold the office until the thirty-first day of December, 1876, when he resigned.

His salary, as fixed by the ordinance of May 20, 1875, and afterwards by the resolution of April 10, 1876, was paid monthly, and he had received the whole.

The court, trying the case without a jury, found for the plaintiff the sum of $97.50, the difference between the sal-

ary as fixed by the ordinance of May 20, 1875, and as established by the ordinance of 1872, from the twelfth of April, 1875, the date of his appointment, until the first day of June thereafter, the end of the current month at the adoption of the ordinance of May 20, 1875.

It is insisted that the ordinance of May 20, 1875, being retrospective as to the salaries which had already accrued between the fifteenth day of April, 1875, and its passage, was void, not only as to such provision, but entirely so.

If, except, so far as it was retrospective, the ordinance was unobjectionable, it was inoperative and void to that extent only; so far as it was prospective, it was in no way connected with or dependent on such void part.

But it is also objected, that the city council was prohibited by its charter from making any change in the salary, either by diminishing or increasing it, during the term for which appellant was appointed; and it is further objected, that the salaries of officers could not be fixed or changed by the council in any other manner than by an ordinance read on three different days, unless two-thirds of the members of the council dispensed with the rule.

Section 86, of the charter, or act, entitled "An act for the incorporation, organization and government of municipal corporations," approved March 9, 1875, says: "The emoluments of no officer, whose election or appointment is required in this act, shall be increased or diminished during the term for which he shall have been elected or appointed;" and the same section contains the following provision: "All by-laws and ordinances of a general or permanent nature shall be fully and distinctly read on three different days, unless two-thirds of the members composing the council shall dispense with the rule."

But we do not propose to enter into a consideration of

the questions raised by these objections; the salary as fixed by the ordinance, and afterwards by the resolution, was paid the appellant monthly, and he, with full knowledge of the facts, accepted the same, without, it would seem, any protest or objection, as in full satisfaction and discharge of his demand, and such was the operation and effect of the acceptance. *2 Par. on Con., 618; 2 Chit. on Con., 1101, 1127; Birt. on Con., sec. 417; King v. New Orleans, 14 Louis. An., 389; Emrie v. Gilbert & Co., Wright (Ohio), 764; Woodburn's Adm'r v. Stout, 28 Ind., 77; Kirby v. Taylor, 6 Johns. Ch., 242; Milliken v. Brown, 1 Rawle, 391; Riley v. Kershaw, 52 Misso., 224; Palmerton v. Huxford, 4 Denio, 166.*

It does not matter whether the ordinance of May 20, 1875, was inoperative upon the appellant's salary for that year, or not; nor whether the resolution was valid, or not; it evidently was the mutual understanding of the council and the appellant that he was to receive no more than the salary intended to be so established. It is not at all likely that the council would have reappointed him, if it had been suggested or intimated by him that he claimed, or would claim, a higher salary than was so provided. Parties to contracts are bound only so far as they intend to be bound.

The judgment is affirmed.

ALLIS VS. JEFFERSON COUNTY.

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f80 282

1. STATUTE CONSTRUED: *Appropriation of taxes by the county court.*
Section seven, of the act of March 18, 1879, limiting the appropriation of taxes by the county court, to "ninety per cent. of the taxes for that year," means, of the taxes levied upon the assessments of property and to be extended upon the tax-books; and does not prevent the court from also appropriating the revenue accruing to the county from fines, forfeitures and licenses.

APPEAL from *Jefferson* County.
Hon. X. J. PINDALL, Judge.
N. T. White, for appellant.
Attorney General, contra.

EAKIN, J. On the eighteenth of October, 1879, appellant, a citizen and taxpayer of Jefferson county, applied, by petition to the circuit court, and obtained a writ of *certiorari* to the county court to bring up the proceedings had in the levy of the taxes, and making appropriations for the county.

Upon the return of the writ, it appeared that the county court, composed of the judge and a quorum of the justices, convened on the sixth of October, 1879, the time prescribed by law.

A committee of its members, appointed for the purpose, reported to the court the assessed value of the real and personal property of the county, at $3,841,825, and that the county had, for the year ending in July, 1879, derived a revenue of $6,000 from fines, forfeitures and licenses, and the further sum of $858.54 from land redemptions; and that there was reason to expect that these items would be increased for the ensuing year. They further reported

deficits of former allowances, on which no scrip had been issued, for want of appropriations, to the amount of $6,294.97, not estimating a bridge-tax deficit of $600, which had been provided for. The unadjusted claims against the county, including jurors' and witnesses' certificates, were reported at $13,945.17. This report was approved, and the committee discharged.

Afterwards, the court, upon the recommendation of a committee on appropriations, levied a tax of five mills on the dollar, on the assessed value of property in the county, estimated to produce the sum of $19,209.13; ninety per cent. of which, to-wit: the sum of $17,288.22, was, by order of the court, divided into separate sums, and appropriated to various heads of expenditure for the county, exhausting the whole. Concerning these appropriations, no question is made, nor is there any of other levies and appropriations for special purposes made at the same time.

At a subsequent day of the term, a quorum of justices being still in attendance, it was ordered that out of the fund estimated to accrue from fines, forfeitures, licenses and penalties, certain appropriations be made; which appear to be for deficits in the several offices of the circuit and county clerks, the sheriff and assessor; deficits for printing; and the payment of special county judges; also, appropriations for payment of justices of the peace in criminal cases; for bridges; refunding money erroneously paid into the county treasury; payment of the coroner, associate justices, jurors' and witnesses' certificates—in all, $6,400.07.

These last appropriations, the petitioner sought to quash, on the ground that the county court had exhausted its power of making appropriations, with the use of the ninety per cent. on the product of the five mills tax. The circuit court dismissed the petition, and the case is brought

here on appeal. Meanwhile, upon bond being here given and approved, this court, as ancillary to its appellate and supervising power, has granted a temporary supersedeas of the order of the county court, to prevent the issuance of any warrants under the last appropriations, until the matter may be determined.

The constitution of 1874, Art. VII, sec. 28, provides that: "The county courts shall have exclusive original jurisdiction in all matters relating to county taxes, * * * the disbursement of money for county purposes, and in any other case that may be necessary to the internal improvement and local concerns of the respective counties." This is a very broad, general and unrestricted jurisdiction, within the scope and purview of the subject matters indicated. It was not intended to leave it so. To guard against abuse, it was provided by section 30 that: "The justices of the peace of each county shall sit with and assist the county judge in levying the county taxes, making appropriations for the expenses of the county *in the manner to be prescribed by law.*" A majority of the justices of the county were made necessary to a quorum, and the general assembly was required to regulate by law the manner of compelling their attendance. By this section, it is plain that the extraordinary court, organized for the special purpose of levying taxes and making appropriations, was subject to the control of the general assembly, as to the manner of levying taxes and making appropriations whenever the law-making power should see fit to exercise it, and to that extent. Acts authorizing the raising of county revenue, are essential to give any validity to said thirtieth section; but, the revenue being authorized, it would seem to follow that there would be in the court a general power of appropriating it to any county pur-

pose, unless restrained or otherwise specially directed by law. This power must necessarily be implied, otherwise enormous revenues might accumulate from year to year in the county treasuries, while the counties themselves would remain impotent to discharge their proper functions in sustaining the general government of the state.

After several imperfect acts, which it is not important to notice, the legislature, by act of March 18, 1879, endeavored to make a system for the guidance of the county court in levying taxes and making appropriations.

Sec. 7 provides: "The court shall specify the amount of appropriation, for each purpose, in dollars and cents; and the total amount of appropriation for all county or district purposes, for any one year, shall not exceed ninety per cent. of the taxes levied for that year." Further on, in section 10, it is provided that: "The taxes levied for county purposes, hereinbefore named and specified, shall be extended upon the tax-books under the general head of county expenses," etc., thus plainly indicating the intention of the legislature to use the terms "*taxes levied*" in the strict sense of those made upon assessments of property and entered in the tax-books. Forfeitures, fines and penalties are in no true sense taxes levied, and licenses are only so in a general sense, being rather the result of police regulations made ancillary to purposes of revenue.

The policy of the act seems to be to check extravagance in appropriations with reference to contracts, rather than to encourage the accumulation of funds in the county treasuries. The particular limitation of ninety per cent. was, obviously, to provide that the taxes collected might meet the appropriations, by allowing for ten per cent. for loss or delinquency. It was not to retain ten per cent. of each year's levy in the treasury as a sinking fund. Such a

thing might incidentally result, and make other legislation necessary. What is meant here is, that the act does not seem to have been framed with that object.

Nor does it seem that the legislature had in view, in this section, the revenue to arise from fines, forfeitures, penalties or licenses. These have no connection with, nor relation to, the amounts levied on property. They are wholly independent. They belong to the county for county purposes, and it would be absurd in the legislature to prevent the counties from using them, because the whole amount to be used would exceed ninety per cent. of the levied taxes. There is no tie between the subject matters, nor any conceivable policy making one control the other.

The statute, on this point, means simply to say, that, of the taxes levied and to be extended on the tax-books for county purposes, not more than ninety per cent. shall be appropriated for that year. A very wholesome provision, inasmuch as perchance, and very probably, not more than that might be collected. This does not prevent the county from using revenues undoubtedly her own, upon a proper appropriation by a full court.

There was no error in the judgment of the circuit court, dismissing the petition upon *certiorari*. Let the same be affirmed, and the supersedeas from this court be discharged.

34 312
54 345

COLDCLEUGH VS. JOHNSON, Administrator, et al.

1. VENDOR AND VENDEE: *Mutuality of contract; want of, when no defense.* One who receives property from a married woman, under a contract of purchase, whether valid or invalid, and enters upon it and enjoys it for years, will not be heard in a court of equity to plead that the contract is not binding upon her, or to refuse payment upon tender of a sufficient deed. The defense of want of mutuality has no place, except where the defendant has never received the benefit of the contract on his part, and never had the right to enforce it.

2. SAME: *Enforcing lien of married woman's title bond. Parties. Pleading.* Where husband and wife have executed bond for title to the pnrchaser of the wife's land, and transferred the purchase note, the assignee of the note should, in a suit instituted in 1872, to enforce the lien upon the land for the purchase money, have made the husband and wife parties, so that their legal title might be divested, and vested in the purchaser; or should have tendered a sufficient deed, executed by the husband and wife, or by her alone if the husband had died.

3. STATUTE OF LIMITATIONS: *Lien of mortgagee or vendor, when barred.* The bar of a debt due to a mortgagee, or to a vendor of land by title bond, does not necessarily preclude a proceeding *in rem* in a court of equity, to enforce the specific lien upon the land itself. Only adverse possession for the statutory period necessary to bar ejectment, can bar such a proceeding.

4. ADVERSE POSSESSION: *As against mortgagee, or owner by title bond.* The possession of a mortgagor, or vendee by title bond, is not adverse, and the statute will not commence running to protect him, until there is an open and notorious denial on his part, of the mortgagee's or vandor's title.

APPEAL from *Arkansas* Circuit Court in Chancery.
Hon. J. A. WILLIAMS, Circuit Judge.
Bell, *McCain*, *Halliburton*, for appellants.
Dooly, *contra*.

EAKIN, J. Sarah Willis (now Coldcleugh) filed this bill

in the Arkansas circuit court, on the second day of August, 1872, against the administrator and heirs of Lorenzo D. Hewitt, deceased, setting forth, in substance:

That, on the third day of November, 1859, James L. and Paralee Totten sold to said Hewitt a certain tract of land in said county, of which said Paralee was, at the time, seized in fee, as her sole and separate property, with the right to sell and convey the same. Hewitt was then put in possession, and so remained until his death; and his administrator and heirs have had possession since.

The purchase money was all then, and since, paid, save the balance of a note for $1,000, due January 1, 1860, given by Hewitt to the vendors, upon which $500 was paid on the last day of December, 1859. At the time of the sale, the vendors gave Hewitt a bond for title, to be made on full payment.

The note was indorsed by the Tottens to William Willis, who, for valuable consideration, transferred and delivered it to H. B. Tombs, who, on the twenty-sixth day of September, 1866, brought suit to foreclose the lien. This suit was dismissed, on demurrer, at the November term, 1868. Tombs afterwards, for valuable consideration, transferred and delivered the note to complainant, who is now the owner. Meanwhile, said Lorenzo died, in the spring of 1867, and Johnson, in the following September, was appointed administrator of his estate.

On the twentieth of March, 1869, complainant, together with James H. Willis, who has since died, leaving no issue, brought another suit, to obtain a decree upon said note. This suit also was dismissed by the court below upon demurrer. Complainant appealed to this court, where, as the bill states, the decree was modified; and it was directed that the bill be dismissed without prejudice. The mandate,

as the bill goes on to show, was filed in the court below at the March term, 1872, "with leave of said court to file a new or amended complaint in this behalf."

It is further alleged that said Paralee "has duly signed, sealed and acknowledged, in due form of law, a deed with general warranty to said lands, to the heirs and legal representatives of said Lorenzo D. Hewitt, and that said deed has been duly tendered to the said heirs and legal representatives," with demand of payment of the residue of the purchase money; and complainant tenders by her bill, and offers to file in open court, said deed, which she refers to as marked exhibit "B." The deed, however, does not appear in the transcript.

The prayer is for judgment for the amount due on the note, and for general relief.

The administrator demurred, assigning for causes:

I. Want of equity in the bill.

II. Bar of the statute of limitations.

III. The same bar, before the beginning of the suit of the twentieth of March, 1869.

IV. Want of mutuality in the contract of sale, the land being separate property of the wife, against whom he could not have enforced specific performance.

It may be remarked in passing, that the Code does not authorize this style of pleading. All the causes assigned are included in the first, which is the *fifth* cause for which a demurrer may be taken under *section 4564 of Gantt's Digest*, to-wit: "That the complaint does not state facts sufficient to constitute a cause of action." All that follows, simply serves to call the attention of the court to the *reasons* why the demurrer for want of equity should be sustained. They do not vitiate, but tend to render demurrers argumentative.

The fourth cause of demurrer is a speaking one. The bill nowhere alleges that Paralee Totten was a married woman; nor is there any expression in it from which the court would be authorized to presume such fact. She may have been the sister, or cousin, of James L. Totten. Having the same patronymic, does not establish the marital relation between a male and female, although she may have property for her sole and separate use. As the bill stands, no question can arise of the *mutuality* of the contract, or the *validity of the deed* tendered; and the demurrer, on those grounds, could not be sustained.

Nevertheless, it is doubtless true, in fact, although we can not know it as a court, that Paralee Totten *was* the wife of James L. at the time of the sale. The court and attorneys, perhaps, knew the parties, and did not observe the omission of such an allegation. We deem it advisable to meet the points which would be raised upon proper allegations of coverture. There has been, in the United States, a conflict of authority as to the power of a married woman, under such laws as obtained here in 1859, to bind herself by a title-bond. The point has never been directly presented to this court in such manner as to have required an authoritative decision, but expressions have been used to indicate a leaning to the line of authority which holds her incompetent, generally, to enter by any mode, into an executory contract binding her lands.

Conceding this to be established here, to the extent at least of its application to lands of which she was seized, generally, and with regard to which she remained under the common law disabilities, it is unnecessary now to inquire how far it would apply to that peculiar separate estate for her sole and separate use, concerning which she has, for more than a hundred years, been considered competent in

equity to contract, independently of statute. Suffice it to say, that one who receives property from a married woman, under such a contract, whether valid or invalid, and enters upon it, and enjoys it for years, will not be heard in a court of equity to plead that it has not been binding upon her; or to refuse payment, upon her tender of a sufficient deed. It would be in effect a fraud upon the vendor. The claim is really to enforce the collection of a debt, through the security of the land. The objection amounts to want of consideration, which the defendant would not be allowed to plead without giving up the land, and accounting for rents and profits. The demurrer could not be sustained on the ground of want of mutuality. If a good deed had been tendered, the defendant would have then already had all which a right of action could have given him against one undoubtedly bound, and the contract would, on the part of the vendor, have been fully performed. The equitable defense of want of mutuality has no place, except where the defendant has never received the benefit of the contract on his part, and never had the right to enforce it. If he has received them, his measure is full. If he has had the right to enforce them, there has been mutuality of obligation.

But it was essential to complainant's cause of action upon the supposition which we now entertain of the vendor's coverture, that she should either have made the vendors, Totten and wife, parties, so that the legal title might, on payment, be divested from them, and vested in defendants, or have shown that Paralee had become discovert before the execution of the deed tendered, or have tendered a deed executed by herself *and her husband.* If she were not discovert, the deed executed by herself alone would not, under our statute, give defendants the complete legal estate to which they were entitled. If the coverture had been al-

leged, the want of a sufficient deed, together with the want of parties, would have been fatal to the equity of the bill, and the demurrer on this point would be good.

The note was due on the first day of January, 1860. At the time suit was brought by complainant and James H. Willis, on the twentieth of March, 1869, neither the debt, nor the right to subject the land to its payment, in equity, had been barred by statute of limitations. The period of four years, ten months and twenty-seven days, must be excluded from the calculation, that being the period during the war when the statute was suspended.

The bill alleges, in effect, and the demurrer admits, that said suit was dismissed in the court below, brought here on appeal, and remanded, with instructions to dismiss without prejudice,—that the mandate was filed in the court below, "with leave of said court," which we understand to have been granted at the time of filing the mandate, "to file a new or amended bill in this behalf." This court will not, *upon demurrer*, look into its own records in another case. Taking the allegations, in this regard, as admitted by the demurrer, it follows: that the circuit court, having, by the mandate, again acquired jurisdiction, and having given the leave, the order to that effect must stand until reversed. If erroneous, it should have been corrected by another appeal. It can not be collaterally attacked. Decisions of inferior courts, made within the scope of their jurisdiction, must, however erroneous, be respected, not only by litigants and all other persons, but by all other tribunals, as *res judicatæ*, until reversed, otherwise they would fall into contempt, and nothing could be put at rest. Unless the inferior courts transcend their jurisdiction, or unless their decisions be reversed, this court will, itself, set the example and require all other tribunals and persons,

also, to respect their authority. This bill was filed within a few months of said leave being given, and no statute bar can be interposed in disregard of the permission.

But, aside from that permission, it is well, whilst the case is here, although not strictly necessary, to inquire whether this suit would appear to be barred, irrespective of all intervening suits. With respect to *all* the issues upon the statute, the defendants holding under a title bond to their intestate, and ancestor, stand as if he had given a mortgage upon the land to secure the debt, and remained in its possession and enjoyment.

The debt itself would appear to be barred in 1872, and no action could be brought at law. But the bar of the debt, does not necessarily preclude a mortgagee, or vendor, retaining the legal title, from proceeding, *in rem*, in a court of equity to enforce his specific lien upon the land itself. He has an interest in the land to the extent of his lien; a grasp upon it, which nothing but the bar of adverse possession for the statutory period, can relax. He may neglect the debt at law, and rely upon the lien. He need not make probate of it in case of the mortgagor's death. He ceases, in such case, to claim a debt, but claims instead thereof, that he has a right to hold and enforce his legal title, unless a certain sum of money be paid. Unless the defendant can show that the lien has been in some way discharged and extinguished, or lost upon some equitable principles, such as estoppel, he can only interpose the bar of adverse possession of the land, for such time as would bar the action at law for its recovery. When does adverse possession begin? The rule as laid down in Mr. Washbourne's work on *Real Property* (*vol. 2, p. 158*), is, that "between the mortgagor and mortgagee, as long as the latter does not treat the former as a trespasser, the posses-

sion of the mortgagor is not hostile to, or inconsistent with, the mortgagee's right. The possession of the mortgagor is, to this extent, the possession of the mortgagee." The result of the cases *at law*, in England, with regard to adverse possession, in such case, is announced in a note to the case of *Patridge v. Bere, 5 Barnwell & Alderson, 604*, where the cases are collected. It is there said, that where the mortgagor remains the actual occupant, with the consent of the mortgagee, he is strictly *tenant at will.* If the tenancy "be determined by the death of the mortgagor, and *his heirs or devisees enter and hold* without any recognition of the mortgagee's title, by payment of interest, or other act, an *adverse possession* may be considered to take place." In the case before us, adverse possession, under this rule, could not have commenced before the spring of 1867, which was less than seven years before the beginning of this suit. That is the time when the purchaser (or, in effect, the mortgagor) died. An action of ejectment for the legal title would not have been barred.

Mr. Story, in his work on *Equity Jurisprudence* (*section 1028 b.*), after stating that an equity of redemption, in equity, could not be enforced against the mortgagee in possession, after twenty years, says: "If the mortgagee has suffered the mortgagor to remain in possession for twenty years after the breach of the condition, without any payment of interest, or admission of the debt, or other duty, the right to file a bill for foreclosure will, *generally*, be deemed to be barred or extinguished." He remarks, however, that the bar is not positive, but open to be rebutted by circumstances.

The cases cited by the learned commentator do not go to the extent of fixing the time of default as the date from which the statute of limitation would commence running

to protect the mortgagor in possession, but proceed rather upon the ground of staleness of the demand, and upon such peculiar circumstances in each case, as raised a presumption, either that the original debt was invalid, or had been settled. In other words, equity will not, in any doubtful matter, aid a mortgagee who has slept upon his rights for the long period of twenty years, although no point can be fixed at which the possession of the mortgagor may be said to have become adverse.

The result of the English cases at law and equity, taken together, is, that the statute of limitations will not commence running to protect a mortgagor in possession, after default; or rather that his possession is not to be deemed adverse until he makes some claim, or does some open and notorious act adverse to the rights of the mortgagee; or until he dies, and there be an entry and possession by the heirs, without some positive act, like payment of rent, recognizing the mortgagee's debt, and showing the acquiescence of the heirs therein. But if the mortgagee should allow his claim to lie dormant for twenty years, without any recognition of it by the mortgagor in possession, it will be considered a stale demand; and the neglect will raise the presumption (which, however, will not be conclusive), that the debt could not originally have been enforced, or has been paid. See cases of *Trash v. White, 3 Bro. Ch. Rep., 289*, and the remarks of Sir Thomas Plumer, master of rolls in *Christopher v. Sparkes, Jacob & Walker, 223*. To like effect, see, also, the New Jersey case of *Barned v. Barned, 6 C. E. Green, 245*, in which the presumption of payment after twenty years is conceded; but it is further intimated, not to be conclusive (as is case of a statute bar), but liable to be rebutted by circumstances explaining the delay. And so, also, by this court, in the case of *Bernie et*

al. v. Maine, 29 Ark., 591, it was held that the possession of the mortgagor was that of the mortgagee, and there must be open and notorious denial of the latter's title to constitute an adverse holding, and set the statute of limitations to running.

The principle is a wholesome one for both parties, as it enables the mortgagee (or vendor by title bond) to rest securely on his legal title, and indulge the mortgagor, or purchaser; whilst the latter can easily, upon payment, procure the legal title, or have satisfaction of the mortgage entered of record under the statute; and even if he should neglect this, a court of chancery would not entertain a stale demand for foreclosure after many years, without clear proof rebutting the presumption of payment; or, if the mortgagor should die, and the heirs should enter without recognition of the mortgagee's rights, the statute of limitations would commence running as in case of adverse possession.

In no aspect of this case, does it appear from the bill, that the right to enforce the lien is barred by the statute.

The court erred in sustaining the demurrer. Reverse the decree, and remand the cause, with leave to complainant, if so advised, to amend her bill, and for further proceedings consistent with this opinion.

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STATE VS. HUNN.

1. INDICTMENT: *Venue.*

When the name of the county appears in the caption, and is referred to in the body of an indictment in laying the venue, it is sufficient.

APPEAL from *Jefferson* Circuit Court.
Hon. X. J. PINDALL, Judge.
Attorney General, for appellant.

ENGLISH, C. J. At the May term of the circuit court of Jefferson county, 1879, H. H. Hunn was indicted for gaming, as follows:

"STATE OF ARKANSAS, vs. H. H. Hunn. } Indictment.

"JEFFERSON COUNTY CIRCUIT COURT, Spring Term, A. D. 1879.

"The grand jury of *Gaming* county, in the name and by the authority of the state of Arkansas, accuse H. H. Hunn of the crime of gaming, committed as follows, to-wit: The said H. H. Hunn, *in the county and state aforesaid,* on, etc., did, then and there, unlawfully bet ten cents in money on a check, or chip, of the estimated, or representative, value of ten cents in money, on a certain unlawful game at cards then and there being played with cards, as aforesaid, which said game so played, as aforesaid, is commonly called whist, contrary to the statute," etc., etc.

The defendant demurred to the indictment, on the ground that the offense charged was a misdemeanor, and not within the jurisdiction of the court.

The court overruled the demurrer.

Afterwards, on another day of the same term, by leave of the court, the defendant entered a demurrer in short to the indictment, which the court sustained, and discharged the defendant, and the state appealed.

If the court, in sustaining the second demurrer to the indictment, meant to reverse its judgment in overruling the

first demurrer, and to hold that it had no jurisdiction of the offense, it was an error. *State v. Devers, ante.*

The word "*Gaming*," in place of Jefferson, preceding the word "county," in the commencement of the indictment, is so plainly a clerical misprision in drafting the indictment, that we can hardly think his honor, the circuit judge, held the indictment bad on that account.

The name of the county—Jefferson—in the caption, and the reference to it in the body of the indictment, in laying the venue, was sufficient. *Thetstone v. State, 32 Ark., 179.*

Reversed and remanded for further proceedings.

JONES et al. vs. JARMAN.

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71 3
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e85 96
j85 101

1. STOCKHOLDERS IN CORPORATION: *Their liability at common law.*

By the common law, stockholders of a corporation are not personally liable for its debts. They are liable to an action at law by the *corporation* for unpaid stock, but a *creditor* of the corporation can not, by the common law, sue them in a court of *law* for unpaid stock. His remedy is in chancery.

2. SAME: *Liability under constitution of* 1868.

The clause of sec. 48, Art. V, of the constitution of 1868, which provides that "in all cases each stockholder shall be liable, over and above the stock by him or her owned, and any amount unpaid thereon, to a further sum at least equal in amount to such stock," entered into and formed a part of the act of April 12, 1869 (*Secs.* 3333-3334, *Gantt's Dig.*), for the organization of private corporations, and parties becoming stockholders in a corporation under that act, during the operation of that constitution, assumed the liability imposed by the foregoing provision of it, and in the absence of any statutory remedy at law, the corporation creditor may enforce such liability in equity.

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

ENGLISH, C. J. This was an action at law, brought in the circuit court of Phillips county by W. H. Jarman, against John T. Jones and others, stockholders in the Phillips County Agricultural and Mechanical Association, upon a note executed by the corporation to A. G. Jarman, one of the defendant stockholders, and by him assigned to the plaintiff.

The complaint alleges, in substance, that on the first of January, 1870, the defendants, and other persons named but not sued, together with a large number of other parties, some of whom were dead, organized an incorporated company under the laws of this state, under the name of the Phillips County Agricultural and Mechanical Association; the defendants subscribing for stock in said incorporated company for various sums; all of which would more fully appear by a certified transcript of the articles of incorporation from the records of the department of state, filed with and made part of the complatnt.

That after the organization of said company, on the twenty-fifth of August, 1870, said corporation, by John J. Hornor, its treasurer, duly empowered, etc., executed and delivered to defendant, A. G. Jarman, its promissory note for $954, payable at four months, and bearing interest at one and a half per cent. per month from maturity; which note was given for money loaned to the corporation to improve its fair grounds, etc. That the corporation had paid to A. G. Jarman, upon the note, before he assigned it to the plaintiff, at various times, sums amounting in the

aggregate to $1,115.35, leaving due to plaintiff, to whom the note had been assigned, of principal and interest $1,009.30.

The note, with credits indorsed, is made an exhibit.

That the corporation has no property, either real or personal out of which plaintiff's claim can be collected, and was and is dissolved in fact.

That by virtue of the laws of the state under which said corporation was organized, each of said stockholders, defendants herein, is liable over and above the stock by him owned, and any amount unpaid thereon, to a further sum equal in amount to said stock; and that each of the defendants is the owner of the following stock in said corporation, etc.: Here the number of shares of stock owned by each defendant and the amount thereof, is stated, etc. Transcript of stock subscriptions exhibited.

Prayer for judgment against each of the defendants, for a sum equal to the amount of stock so owned by him, as aforesaid, sufficient to pay plaintiff's claim with interest.

A demurrer to the complaint was filed, on grounds stated below, which the court overruled.

Whereupon answer was filed, admitting the formation of the corporation, as alleged in the complaint; that defendants were stockholders, as stated therein; that Hornor, as treasurer, executed the note sued on; and alleging that said corporation is the legal owner of a tract of land containing about forty-six acres, on which its fair grounds are situated, which has been improved, etc., and on which it has paid $1,350; and that there is a lien on said property for balance of purchase money, amounting to about $5,500. That the legal title to the land is still in the corporation, and it is in possession

thereof, etc. Denies the authority of Hornor to execute the note sued on for the corporation, etc.

The case was submitted to the court sitting as a jury, and the court found the following facts:

"That the corporation, by John J. Hornor, its agent, executed the note sued on, for money loaned by A. G. Jarman to the corporation, for the purpose of improving its grounds; that the money was so used by said corporation; that the payments indorsed on the note were made by order of the board of directors; that the land described in the answer was sold to the state in the year 1876, for the taxes of 1873-4-5, and that the taxes thereon for the year 1876 have not been paid, which said taxes amount to $385. That at the present term of the court a decree was entered against said land for the balance of purchase money, amounting to $5,530 and costs. That the land would not yield on execution sale as much as the balance of purchase money due thereon, under said decree. That said corporation has no other property whatever; and that defendants herein named are owners of the amounts of stock set opposite their names, as exhibited in said complaint; and that the note sued on is held by the plaintiff for value, and is his property.

Whereupon the court rendered the following judgment:

"It is considered by the court that plaintiff have and recover of the defendants the sum of $1,096.72 for his debt and damages, and all the costs by him in this suit expended; and it is further considered by the court that the said defendants pay the following sums each, toward the satisfaction of said judgment, as their pro rata shares, to-wit:

John T. Jones	$121 87	J. T. Ramsey	$121 87
J. E. Bennett	121 87	P. F. Anderson	121 87
J. W. Clopton	121 87	Higgatt Clopton	121 87

A. G. Jarman.....	121	87	Leon Berton.....	24	38
C. R. Coolidge.....	48	75	J. P. Clopton.....	48	75
Tappan & Hornor...	48	75	E. D. Pillow.....	24	38
P. O. Thweat.....	24	38	W. E. & C. L. Moore	24	38

And interest thereon at the rate of six per cent. from the rendition of this judgment until paid, and that each of said defendants pay a pro rata share of the costs of this suit, according to the amount of judgment rendered against them respectively, and for which execution may issue."

A motion for a new trial was overruled, and bill of exceptions taken.

The defendants, John T. Jones, Joseph T. Ramsey and Paul F. Anderson were granted an appeal by the clerk of this court.

The propositions taken on the demurrer to the complaint, requiring notice, may be formulated thus:

1. There is no law of this state making stockholders individually liable for the debts of a corporation.

2. The complaint does not show a legal cause of action.

3. The complaint shows no joint liability of defendants.

4. The complaint does not allege that the debt sued on had been adjudged to be due from the corporation, or that any attempt had been made to make the property of the corporation liable for the debt.

5. The complaint does not show what, if any other, debts of the corporation are outstanding or owing.

I. It appears from exhibits made part of the complaint that the capital stock of the corporation was $7,000, divided into shares of $25 each, and that appellants, Jones, Ramsey and Anderson subscribed each for ten shares, $250. How much of their stock they had paid in is not shown by the complaint.

The plaintiff, in his complaint, assumed that each of

the defendants was liable to him in this action in a sum equal to the amount of stock owned by him, and in an additional sum equal to the amount of stock not paid in by him, to pay the debt of the corporation described in the complaint and prayed an apportionment of the debt between the defendants according to their several liabilities.

By the common law the stockholders of a corporation are not personally liable for its debts.

A stockholder is liable to an action at law, by the corporation, for unpaid stock subscribed by him; but a creditor of the corporation can not, by the common law, sue him in a court of law for unpaid stock. Creditors may, however, by bill in equity, compel delinquent stockholders to pay in stock subscriptions due from them, on a proper case made by the bill.

But by the common law, when a stockholder has paid in the amount of stock subscribed by him, he has discharged all personal liability to the corporation, or to its creditors, on his own subscription for stock.

These are familiar elementary principles. *Thompson on Liability of Stockholders; secs. 4, 9, 14, 15, etc.*

At the time the corporation in question was organized, and when the debt described in the complaint was contracted, the constitution of 1868 was in force, and it is insisted for appellee that by one of its sections the liability of stockholders is greater than it was by the common law.

The section is as follows:

"*Section 48* (*Art. 5*). The general assembly shall pass no special act conferring corporate powers. Corporations may be formed under general laws; but all such laws may, from time to time, be altered or repealed. Dues from corporations shall be secured by such individual liability of the

stockholders, and other means, as may be prescribed by law; but, in all cases, each stockholder shall be liable over and above the stock by him or her owned, and any amount unpaid thereon, to a further sum, at least equal in amount to such stock. The property of corporations, now existing, or hereafter created, shall forever be subject to taxation, the same as the property of individuals. No right of way shall be appropriated to the use of any corporation until full compensation therefor shall be first made in money, or first secured by a deposit of money, to the owner, irrespective of any benefit from any improvement proposed by such corporation; which compensation shall be ascertained by a jury of twelve men, in a court of record, as shall be prescribed by law."

Under this section of the constitution, the general assembly passed a number of general acts providing for the organization of private corporations for various purposes, and among them the *Act of April 12, 1869, Gantt's Digest, p. 626, sections 3333 to 3364*, caption, INCORPORATIONS, sub-title, II—INCORPORATIONS, FOR MANUFACTURING AND OTHER LAWFUL BUSINESS, under which the corporation in question was doubtless organized.

There is no provision in this act, or any other, declaring to what extent stockholders of a corporation organized under it shall be liable for dues from such corporation, nor does the act provide any remedy by which creditors may enforce the double liability of stockholders prescribed by a clause of the section of the constitution, above copied.

The clause read in connection with the one which immediately precedes it, declares, in effect, that, "in all cases each stockholder shall be liable" (for dues from the corporation of which he is a stockholder) "over and above the stock by him or her owned, and any amount unpaid

thereon, to a further sum, at least equal in amount to such stock."

If this clause was not self-enforcing, to the extent of the minimum liability prescribed by it, in connection with acts passed, providing for the organization of private corporations, it remained a dead letter during the existence of the constitution of which it formed a part. If it required express legislation to give it life and force, it was utterly neglected in the acts providing for the organization of private corporations, and it might become a grave question whether such acts were not in violation of a mandate of the constitution, and void.

"'A constitutional provision (says Mr. Cooley) may be said to be self-executing if it supplies a sufficient rule, by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced; and it is not self-executing when it merely indicates principles, without laying down rules, by means of which those principles may be given the force of law. Thus, a constitution may very clearly require county and town government; but if it fails to indicate its range, and to provide proper machinery, it is not, in this particular, self-executing, and legislation is essential. Rights, in such a case, may be dormant until statutes shall provide for them, though in so far as any distinct provision is made, which, by itself, is capable of enforcement, it is law, and all supplemental legislation must be in harmony with it." *Cooley's Con. Lim., (4th Ed.), p. 101.*

Some of the clauses of the section of the constitution, above cited, were manifestly self-executing—that is, they went into force immediately upon the adoption of the constitution. Others, as evidently required legislation to execute them.

For examples: The first clause, that "the general assembly shall pass no special act conferring corporate powers," operated as a limitation upon the power of the legislature to pass such special acts (as had been the previous habit), from the moment of the adoption of the constitution.

The next clause contemplated the passage of general laws, under which corporations might be formed, subject to the power of the legislature to alter or repeal them.

The clause that "the property of corporations, now existing, or hereafter created, shall forever be subject to taxation, the same as the property of individuals," was self-enforcing as a law of taxation, with the limitation that it could not affect exemptions made by previously granted charters, in the nature of contracts between the state and the corporations.

In *Cairo and Fulton Railroad Co. v. Trout, 32 Ark., 25*, we held that the last clause of the section relating to the ascertainment of compensation for the right of way, by jury trial, required legislation to enforce it, as indicated by its language. See, also, *Cairo and Fulton Railroad Co. v. Turner, 31 Ark., 494.*

The fourth article of the constitution of California contains the following sections:

"Sec. 32. Dues from corporations shall be secured by such individual liability of the corporators, and other means, as may be prescribed by law.

"Sec. 36. Each stockholder of a corporation, or joint stock association, shall be individually and personally liable for his *proportion* of all its debts and liabilities."

The first of the above sections is like the *third* clause of the section of our constitution of 1868, under consideration. In *French v. Teschemaker et al., 24 Cal., 539*, the

chief justice delivering the opinion of the court, commenting upon the above sections, said: "The first is a positive injunction requiring the legislative department of the government to provide security for corporate dues, by laws imposing, in connection with other means, some degree of individual liability upon members of the corporation, but leaving the extent of that liability to the wisdom and sound discretion of that department. But the latter section, by itself considered, seems to fix, upon first impression, the precise degree of liability, leaving no room for the exercise of legislative judgment."

The court then proceeds to comment at large upon the word "*proportion*," used in the latter section, and to decide that legislation was necessary to give practical effect to the section, and without the aid of legislation it was inoperative.

This section of the California constitution, it will be observed, materially differs in its terms from the *fourth* clause of the section of our constitution, under discussion, which declares that, "in all cases each stockholder shall be liable over and above the stock by him or her owned, and any amount unpaid thereon, to a further sum, at least equal in amount to such stock."

The learned chief justice, in the California case above cited, in the course of the opinion, said: "An act of the legislature authorizing the formation of corporations without attaching to the corporators an individual liability would be as obnoxious to the constitution as would be the creation of a corporation by special act; and the courts would be bound to hold that persons organized under such an act had acquired none of the rights of a corporation."

As to the personal liability of stockholders under the

constitutional and statutory provisions in California, see also *Larrabee v. Baldwin, 35 Cal., 155.*

Section 6, article 8, of the constitution of Missouri, of 1865, was similar in its language to the *third* and *fourth* clauses of the section of our constitution of 1868, which we are considering, and statutes were passed to enforce the double liability of stockholders and providing remedies by which creditors could enforce such liability in the courts of law. See *Schricker et al. v. Ridings, 65 Mo., 208; Gausen v. Buck et al., 68 Mo., 545; McClaren et al. v. Franciscus, 43 Mo., 452; Lewis, pub. ad., v. St. Charles County, 5 Mo., Appeal Rep. 225.*

Hence the supreme court of Missouri has had no case before it in which it was necessary to decide whether the clause of the sixth section of article eight, of the constitution of 1865, relating to the double liability of stockholders, was self-executing or not. We are assured by the chief justice of that court that the court has in no case decided that the clause was not self-enforcing.

Section 27, article 12, of the constitution of Missouri, of 1875, declares that "it shall be a crime, the nature and punishment of which shall be prescribed by law, for any president, director, manager, cashier or other officer of any banking institution, to assent to the reception of deposits or the creation of debts by such banking institution, after he shall have had knowledge of the fact that it is insolvent or in failing circumstances; and any such officer, agent or manager shall be individually responsible for such deposits so received, and all such debts so created with his assent.

Before the passage of any statute to enforce this section, the president, directors, cashier and teller of a bank were sued for the amount of deposits made by plaintiffs while

the bank was in an insolvent condition and failing circumstances, etc. The circuit court gave judgment against plaintiffs, the St. Louis court of appeals reversed the judgment, and the supreme court overruled the court of appeals and affirmed the judgment of the circuit court—holding that the expressions of the section relating to civil liability were so connected with the expressions relating to criminal liability that the whole section required legislation to enforce it. *Fusz v. Spaunhorst, et al., 67 Mo., 256.*

Section 48, article 5, of our constitution of 1868, above copied, is a literal copy of sections 1, 2, 3, 4 and 5, article 13, of the constitution of Ohio, of 1851; section 3 corresponding with what we have designated above as the *third* and *fourth* clauses of our section.

In the *Citizens' Bank of Steubenville v. Wright, auditor, 6 Ohio State R., 330,* the supreme court of Ohio expresses the opinion, after deciding the principal question presented in the case, that the clause of the third section: "but in all cases each stockholder shall be liable over and above the amount by him or her owned, and any amount unpaid thereon, to a further sum at least equal in amount to such stock"—was self-executing to the extent of the minimum liability prescribed by it.

In *State of Ohio, on the relation of the Attorney General, v. Sherman et al., 22 Ohio State R., 430,* Chief Justice WELSH, who delivered the opinion of the court, in the course of the opinion said:

"But the trouble in the defendants' case arises when we attempt to reconcile their claim that they are an Ohio corporation, under the act of 1863, with the third named limitation in the constitution—the limitation in regard to individual liability. Under the present constitution the

legislature is powerless to grant a charter to any such corporation, unless the grant is made in a form that will secure the individual liability of its stockholders for the debts of the corporation, at least to the amount of their stock over and above their subscription. This liability may be secured by an express provision in the act of incorporation. Where it is to exceed the amount of the stock, it must be secured in that form. In the absence of any such provision in the act of incorporation, I presume this provision of the constitution would enter into and form part of the act of incorporation, and to that extent execute itself. In either case, however, the act of incorporation, the grant of the charter, must be in some such form as will secure this liability. It must require of the individuals availing themselves of its provisions some acts as such, under and in pursuance of it as will subject them individually to its provisions, or to this provision of the constitution in regard to *liability*. If it fails to do this, it is simply unconstitutional and void."

After a thoughtful consideration of the question, and a careful examination of such adjudications as we have been able to find bearing on it, we have come to the conclusion that the clause of section 48, article 5, of the constitution of 1868—"but, in all cases, each stockholder shall be liable over and above the stock by him or her owned, and any amount unpaid thereon, to a further sum at least equal in amount to such stock"—entered into and formed part of the act under which the corporation in question was organized; and that appellants, by becoming stockholders of the corporation, assumed the liability imposed by this provision of the constitution; and that though the act fails to prescribe remedies for creditors of corporations formed under it, the liability of stockholders may

be enforced by the proper judicial tribunals in accordance with settled principles of law. A different conclusion would force us to the necessity of declaring the act unconstitutional and void, and that associations organized under it are not corporations.

II. And this brings us to the consideration of the second proposition taken on demurrer to the complaint—that it does not show a legal cause of action—in other words, that the remedy, if any the creditor has, is by bill in equity, and not by an action in a court of law.

By the seventh section of a statute of New York, it was provided, "that for all debts due and owing by the company at the time of its dissolution, the persons then composing it shall be individually responsible to the extent of their respective shares of stock."

In *The Bank of Poughkeepsie v. Abbotson, 24 Wendell, 472*, the plaintiff having obtained judgment against a corporation, and taken out execution, which was returned *nulla bona*, brought an action at law against a single stockholder of the company, to charge him with the debt.

The court held, in effect, that a single stockholder might be sued at law, but if the creditor desired to proceed against more than one stockholder, the remedy was in equity. The court said: "There can be no doubt that the liability of the stockholders is *several*, and not joint. The measure of it may be wholly different in each case, depending upon the shares held. A joint suit would be impracticable, as there could be no joint judgment. * * Each is severally responsible to the amount of his own stock."

In *Spence v. Shapard, 57 Ala., 598*, which was a suit in chancery by a creditor of a corporation against stockholders, under a statute of Alabama, similar to the statute of New York, above copied, the court said: "Under this

statute many rulings were had in the several courts of New York, and the following, among other principles, were laid down, and have ever since been steadily adhered to: That when the corporation is dissolved, the liability of the stockholders to the creditors becomes primary and absolute; that it is not necessary first to sue the corporation, or to aver or prove its insolvency; that when the creditor sues a single stockholder, he can maintain an action of assumpsit or debt, and that when he proceeds against two or more stockholders, he can maintain a bill in equity." (Here the New York cases are cited.) Then the court proceeds to say further: "Section 1478 of the Code of 1852 (of Alabama), relating to the same subject, is a copy, less some unnecessary words, of the provision of the New York statute. Its language is: 'The stockholders of any such corporation are liable for all debts due by it at the time of its dissolution, to the extent of their stock.' We think the present bill can be maintained, without averring the insolvency of the corporation, and without previous suit against it. We have declined to follow the New York rulings, so far as they hold that an action at law may be maintained by creditors against individual stockholders, in *Smith v. Huckabee, 53 Ala., 191.*'"

Under the double liability clause of the constitution of Ohio, a statute was passed declaring that stockholders, etc., should be deemed and held liable to an amount equal to their stock, in addition to said stock, for the purpose of securing the creditors of such company, etc.

The statute adopted the minimum liability allowed by the constitution, and was intended to make the constitutional provision effective.

In *Wright et al. v. McCormack et al., 17 Ohio S. Rep., 94,* which was an equitable action, instituted by the plaintiffs,

not for themselves alone, but for the equal benefit of all the creditors of an insolvent corporation, its object being to effect an equitable distribution of the assets of the corporation, and to subject to the payment of the creditors the statutory liability of all the stockholders, the court said: "The statute under which the liability arises, contains no provision in regard to the manner in which the liability is to be enforced. It is a provision inuring to the benefit of the creditors of the corporation; but in what way, and upon what principles of equity, as between creditors, and as between stockholders, it is to be made available, and under what circumstances resort may be had to it, are matters left for judicial determination," etc.

The court, after quoting the provisions of the constitution and the statute, further said: "The liability thus imposed on stockholders, is not a primary resource or fund for the payment of the debts of the corporation. It is collateral, and conditional to the principal obligation which rests on the corporation, and is to be resorted to by the creditors only in case of the insolvency of the corporation, or where payment can not be enforced against it by the ordinary process. It is a security provided by law for the exclusive benefit of the creditors, over which the corporate authorities can have no control. The liability on the part of the stockholders is several in its nature, but the right arising out of this liability would seem to be intended for the common and equal benefit of all the creditors. But however this may be, we are unanimous in the opinion that, where proceedings are instituted by part of the creditors of an insolvent corporation against the stockholders, to enforce such liability for the benefit of all the creditors, no creditor can acquire priority, or institute a separate suit for the enforcement of such liability in his own behalf."

In *Umsted v. Buskirk et al., 17 Ohio S. Rep., 118,* which case was in the nature of a bill in equity, by a creditor of an insolvent corporation, to obtain satisfaction of his judgment by the enforcement of the statutory liability of the several stockholders, etc., the court said: "The liability on the part of the stockholders is several in its nature, but the right arising out of this liability is intended for the common and equal benefit of all the creditors. The suit of a creditor, under the statute, should, in our opinion, be for the benefit of all the creditors; and the stockholders, whose liability is sought to be enforced, have the right to insist on their co-stockholders being made parties for the purposes of a general account, and to enforce from them contribution in proportion to their shares of stock. The right of contribution grows out of the organic relation existing among the stockholders. As between them and the creditors, each stockholder is severally liable to all the creditors; as between themselves, each stockholder is bound to pay in proportion to his stock. The corporation ought to have been made a party," etc.

In the absence of a statute giving the creditor of a corporation a right of action in a court of law to enforce the liability of stockholders under the constitution of 1868, the remedy, we think, is in a court of equity, where the corporation (if in existence), all the creditors and stockholders may be made parties, the dues from the corporation and its assets ascertained, and the debts in excess of assets, charged upon the solvent stockholders in proportion to their several liabilities as such. Thus a multiplicity of suits by creditors, and by stockholders between themselves for contribution, may be avoided. In addition to the authorities above cited, see *Pollard v. Bailey, 20 Wallace,*

520; 2 Otto, 161; Coleman v. White, 14 Wiscon., 700–705, note.

The remaining propositions, taken on demurrer to the complaint, are sufficiently answered above, at least so far as we are disposed to settle them on this appeal. Further questions of practice in equity may be better settled when they are presented in suits in equity.

The court below erred in overruling the demurrer to the complaint, and, for this error, the judgment, as to the three defendants who have appealed, must be reversed, and the cause remanded to the court below, with leave to appellee to amend his complaint, and transfer the case to the equity side of the court, if he desires further to prosecute it.

THE STATE VS. MARTIN.

1. CRIMINAL PLEADING: *Indictment for Selling Liquor. Alcohol is not liquor.*

An indictment for selling liquor without paying the special tax prescribed by *secs.* 5052 or 5054, *Gantt's Digest*, must charge that the defendant was a liquor dealer, and must state the particular tax, whether state or county, that had not been paid.

2. Alcohol is neither ardent or vinous spirits, or liquor of any kind; and its sale is not in any manner restricted or attempted to be regulated.

APPEAL from *Independence* Circuit Court.
Hon. R. H. POWELL, Circuit Judge.
Henderson, Attorney General, for the State.

HARRISON, J. The appellee was indicted in the Independence circuit court for selling liquor by wholesale,

without having paid the special state and county taxes required of him as a liquor dealer.

The charge in the indictment was as follows: "The said Edward Martin, on the twentieth day of October, A. D. 1878, in the county and state aforesaid, did unlawfully sell to one Gilbert Malone one quart of *alcohol* without paying the *special tax* by law levied."

The defendant demurred to the indictment upon the ground that the facts charged did not constitute a public offense. The court sustained the demurrer, and dismissed the indictment.

It was not charged that the defendant was a liquor dealer, and such special taxes were required only of liquor dealers, by the statute in force when the indictment was found.

Alcohol is not either ardent or vinous spirits, or liquor of any kind, and its sale is not in any manner restricted or attempted to be regulated.

The indictment was defective, also, in not stating the particular special tax, whether the state or county, that had not been paid.

The demurrer was properly sustained.

Judgment affirmed.

WOOD VS. THE STATE.

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1. LARCENY: *Drunkenness, when a defense.*

If one, at the time of taking property, is so under the influence of intoxicating liquor that a felonious intent can not be formed in his mind, he is not guilty of larceny.

2. CRIMINAL PRACTICE: *New trial for improper conduct of jury.*

When evidence is adduced, and shows that a jury, in a criminal case, exposed to improper influences, were not in any way influenced, biased or prejudiced by the exposure, the verdict will not be disturbed; but unless it is proven that it failed of an effect, the verdict will be set aside.

APPEAL from *Johnson* Circuit Court.
Hon. W. D. JACOWAY, Circuit Judge.
Henderson, *Attorney General*, for the State.

HARRISON, J. The appellant was tried and convicted of the crime of grand larceny in stealing a pistol, the property of one Cheek.

The pistol, which was of the value of $8, was taken from the room of the owner, at a hotel, and out of a coat pocket, on the night of the fifth of August, 1879; and was, on the fifteenth of the same month, found in the defendant's possession.

The defendant, a lawyer, had been for three or four years very intemperate, and for several weeks before he was found with the pistol in his possession, almost continuously drunk. On the night of the fifteenth of August, he was very drunk — according to one of the witnesses, crazy drunk — and the constable, learning that he had a pistol, to prevent his doing harm, took it from him, when it was found to be the pistol that had been taken from Cheek's room. When it was taken from the defendant, he said it had been given him by one Hamp. Lane, who had then, as was proven at the trial, left the county. Several witnesses testified that the defendant's conduct during his spree, or drunkenness, was strange and unnatural — quite different from such as is the effect of ordinary drunkenness — and that he appeared demented to some degree. One of them, a physician, who

had known him two or three years, said that there were times during his spree when he thought he did not know what he was about, and he believed his mind, by long and excessive indulgence in ardent spirits, had become impaired; and another physician, who was called to see him on the seventeenth of August, the day after his arrest, said he found him suffering with symptoms of *mania a potu*, and that the functions of the brain were partially paralyzed.

It was proven that the defendant had previously borne a good character for honesty and integrity.

The court was asked to instruct the jury for the defendant that, if they believed, from the evidence, the defendant took the pistol, but that at the time he was so under the influence of intoxicating liquor, a felonious intent could not have been formed in his mind, they should find him not guilty; which instruction the court refused to give.

As a general doctrine, voluntary intoxication furnishes no excuse for crime, even when the intoxication is so extreme as to make the person unconscious of what he is doing. "Perhaps no better illustration of the doctrine," says Mr. Bishop, "can be given than to state its application in ordinary cases of homicide. The common law divides all indictable homicides into murder and manslaughter; but the specific intent to kill is not necessary in either. A man may be guilty of murder without intending to take life. He may be guilty of manslaughter without so intending; or he may intend to take life, yet not commit any crime in taking it. Now the doctrine of the courts is, that the intention to drink may fully supply the place of malice aforethought; so that if one voluntarily becomes so drunk as not to know what he is about, and then with a deadly weapon kills a man, the killing will be murder, the same as if he were sober. In other words, the mere fact of drunkenness will not alone

reduce to manslaughter a homicide which would otherwise be murder, much less extract from it altogether its indictable quality." *1 Bish. Crim. Law, sec. 401.* But he says that, "in cases where the law requires, not general malevolence, but a specific intent to commit the particular act, which intent must concur with the act in point of time, in order to constitute the offense charged against a prisoner, he can not be guilty, if, at the time when the act transpired, he was so drunk as to be incapable of entertaining such intent." *Ib., sec. 408.*

"Intoxication is no excuse for crime," said Judge Baldwin, in *United States v. Roudenbush*, "when the offense consists merely in doing a criminal act, without regarding intention. But when the act done is innocent in itself, and criminal only when done with a corrupt or malicious motive, a jury may, from intoxication, presume that there was a want of criminal intention; that the reasoning faculty, the power of discrimination between right and wrong, was lost in the excitement of the occasion. But if the mind still acts; if its reasoning and discriminating faculty remain, a state of partial intoxication affords no ground of a favorable presumption in favor of an honest or innocent intention, in cases where a dishonest and criminal intention would be fairly inferred from the commission of the same act when sober." *United States v. Roudenbush, 1 Baldw., 517.*

In larceny, there must be a concurrence with the act—an intent to do it—and also a felonious intent; and the same author we have quoted, says: "A bare intentional trespass not being larceny, but the specific intent to steal being necessary, also, if one who is too drunk to entertain this specific intent takes property, relinquishing it before the intent could arise in his mind, there is no larceny."

Sec. 411; Wing v. The State, 1 Tex. Ct. App., 36; Johnson v. The State, ib., 146; Lozar v. The State, ib., 488.

The instruction should have been given.

During the trial, the officer in charge of the jury took them to his drug store and treated them to whisky, and all of them, except two drank. He also at night took them to a billiard saloon, where they remained a half hour, and on Sunday, took them in a hack five or six miles in the country to church. And the prosecuting attorney loaned one of them a shirt. It was proven that when they were taken to the billiard saloon, they sat together, and the officer drew a chalk line between them and the crowd in the saloon, and that there was no intermingling between them and the persons there; and that when at church, they were kept together, and not permitted to disperse.

In *Thompson v. The State, 26 Ark., 398*, the court say: "The conclusion to be derived from the former decisions of this court, and which seems to be well supported by the authorities, as to the consequence of the misconduct of the jury, in cases of mere exposure to improper influences, we understand to be this: Where evidence is adduced, and shows that the jury were not in any way influenced, biased or prejudiced by the exposure, the verdict will not be disturbed; but unless it is proven that it failed of an effect, the presumption will be against the purity of the trial, and the verdict will be set aside."

What improper influences may have had an effect upon the views of the jury, can not be known. That they were exposed to none, can not with certainty be said.

Such conduct can not be too strongly reprehended and condemned. It was trifling with a most serious and important duty, and calculated to throw doubt and suspicion upon the fairness of the trial, and to degrade the adminis-

tration of justice; and for it, as well as for the error before noticed, the verdict should have been set aside.

The judgment is reversed, and the cause remanded, with instructions to grant the defendant a new trial.

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WELLS et al. vs. RICE et al.

1. SALE BY COURT: *When complete.*

Until confirmed by the court, a sale made under its decree is not completed; and a deed from the commissioner to the purchaser confers upon him no right to the property, and may be assailed in a collateral proceeding.

2. MORTGAGOR AND MORTGAGEE: *Ejectment.*

Upon failure to pay the mortgage debt at the time stipulated in the mortgage, the estate of the mortgagor becomes forfeited, and ejectment can not be maintained against the mortgagee in possession, or those holding under him, until payment of the debt. But payment satisfies an unexecuted decree of foreclosure, and revests the estate in the mortgagor, his heirs or assigns, and may be given in evidence to support the action.

APPEAL from *Randolph* Circuit Court.
Hon. L. L. MACK, Circuit Judge.
Henderson for appellants.

HARRISON, J. On the twenty-second day of March, 1875, Fielding Rice and Susan Rice commenced this action against James M. Wells and Adolphus Kibler, to recover possession of the west half of the southwest quarter of section 11, in township 21, north, of range 1, west, to which they claimed title as heirs at law of their

father, William L. Rice, who claimed title by entry and purchase from the government.

The defendants claimed the land in severalty, but did not in their answer, which was joint, designate the part of each, nor was it in any manner shown in the subsequent proceedings. Kibler, they said, purchased from Wells, and Wells the whole tract from Louis Hanauer, who purchased the north half of it, at a sale under a decree of foreclosure of a mortgage thereof from said William L. Rice to said Hanauer; and the south half at a sale made by the administrator of said William L. Rice under an order of the court of probate, for the payment of the debts of his intestate's estate; and they averred that they had had peaceable, adverse and continuous possession for more than seven years before the commencement of the suit, and set up and pleaded the statute of limitations.

The verdict of the jury was in favor of the plaintiffs, for the whole tract, and for six hundred dollars damages; but the plaintiffs entered a disclaimer as to the south half of the tract, and a remittitur of the damages.

The defendants moved for a new trial; their motion was overruled, and they appealed.

It is unnecessary to notice the evidence and proceedings upon the trial in relation to the south half of the tract.

The plaintiffs read to the jury a patent from the United States to William L. Rice, for the northwest quarter of the southwest quarter of said section 11, dated the seventeenth day of August, 1838.

They then read from the chancery record of the Randolph circuit court the following two orders in—so stated in the bill of exceptions—the suit of foreclosure recited in

the deed of the commissioner therein, to Louis Hanauer, exhibited with the answer:

"Louis Hanauer, Daniel Hanauer and Jacob Hanauer, merchants and partners, doing business by the firm name, style and description of L. Hanauer & Co. vs. William L. Rice.	Bill to foreclose.

"Now come the plaintiffs by their solicitors, and file their motion to require James Martin, the commissioner heretofore appointed in this case to sell the lands as commanded."

"Louis Hanauer, Jacob Hanauer and Daniel Hanauer, merchants and partners, doing business by the firm name, style and description of L. Hanauer & Co., Complainants, vs. William L. Rice, Defendant.	Bill to foreclose mortgage.

"On this day come the complainants by their solicitor, and showed to the court here that James Martin, Esq., who was appointed commissioner in this case to sell the mortgaged premises, has failed to make sale thereof according to the direction of the decree in this case, and moved the court to direct said commissioner to proceed to sell said premises; and the premises being seen and fully understood by the court, it is therefore ordered, adjudged and decreed that the order of this court, made at the last term, in this case, be, and is hereby, revived; and the said commissioner is hereby directed to proceed and sell said lands according to the terms and directions of said decree; and that he, as such commissioner, report his proceedings to this court at the next term, to which time this case stands continued."

They then introduced the following witnesses:

Larkin Johnson, who testified: That he, in 1852 or 1853, lived at the Warm Springs—the land in controversy—and

was well acquainted with William L. Rice and his daughter, Susan. Susan was about the age of witness's son, who was, at the time mentioned, eighteen months or two years old, and he was a little older than she; neither of them could talk plainly. His son was twenty-five years old on the fifth of January, 1877; she was then, at the time of testifying, he understood, married.

Edmond Gilliam testified: That he, in 1856 or 1857, went with William L. Rice to Pocahontas to see Louis Hanauer, who was then merchandizing there. The witness then knew that Rice had before sold or delivered to Hanauer a negro woman on a mortgage, for which Hanauer was to allow him $1,000 and all he could get for her over that sum. Hanauer told Rice that he did not get but $400 for the woman, and refused to account to him for any more. They got angry and had some words, and the interview ended by Rice telling Hanauer that he would sue him unless he paid him the overplus on the negro woman, and Hanauer saying he would not pay, and that he (Rice) owed him on a fair settlement.

William H. Waddle testified: That he was a clerk of Louis Hanauer, in Pocahontas, in the years 1856, 1857 and 1858, and knew that William L. Rice, about that time, let Louis Hanauer have a negro woman. Louis, Jacob and Daniel Hanauer did business together, and appeared to be jointly interested. When any land was sold under deed of trust, mortgage or execution, that which was valuable was generally bought in by Louis Hanauer. William L. Rice sometimes had an open account with the house.

Nicholas Bach testified: That shortly after the death of William L. Rice, which was in 1857 or 1858, he went to Batesville to enter a tract of land adjoining the Rice Springs, or Warm Springs, and he met Daniel Hanauer

there. That Daniel Hanauer asked him why he did not buy the springs property. He told him he was not able—that if he should do so, they would want their money on the mortgage, and he could not pay it, and Daniel Hanauer replied, "that that was all settled, and the mortgage satisfied; and that there was not more than fifty dollars between them, and that was against the estate."

And John P. Black testified: That Louis, Jacob and Daniel Hanauer were partners. That he was present at the foreclosure sale of the land—the northwest quarter of the southwest quarter of said section (11), and that it was bid in by Jacob Hanauer.

It was admitted that the plaintiffs had brought a previous action against the defendants for the land, which was commenced on the twenty-second day of May, 1874, and a nonsuit was taken in it at the November term of the same year. The defendants objected to the admission of the orders read from the chancery record, of the testimony of Gilliam, Waddle, Bach and Black.

The defendants read to the jury a deed, from James Martin, as commissioner in chancery, to Louis Hanauer, for the said northwest quarter of the said southwest quarter, in which it was, in substance, recited: That the said William L. Rice, on the twenty-fourth day of April, 1850, executed to the said Louis Hanauer a mortgage on the said tract of land, and other property, not described, to secure the payment of a note of that date to him for $1,000, bearing ten per cent. interest from date until paid—payable on the first day of April, 1852; that the said Louis Hanauer brought suit, after the maturity of the note, in the Randolph circuit court in chancery, for a foreclosure of the mortgage, and sale of the mortgaged property, and a decree of foreclosure and sale was rendered thereon on the

fourth day of December, 1854, and that he, the said Martin, was appointed such commissioner to sell the property and carry the decree into effect.

That the said William L. Rice, having died, and Elizabeth Rice been appointed administratrix of his estate, the decree was, on the twenty-fifth day of May, 1858, revived against said administratrix, and he, the said commissioner, was directed, unless the money should be paid on or before the first day of the next term of the court, the same being the twenty-second day of November, 1858, to sell said property, on that day, to the highest bidder for cash; and that the money not having been paid, and having given the notice of the sale prescribed in the decree, he, on that day, offered the said tract at public auction, in pursuance of the decree, and the same was bid off and purchased by the said Louis Hanauer, at and for the sum of $400. Which deed was dated the twenty-seventh of November, 1858, and acknowledged before the clerk and filed for record the same day.

They then read a power of attorney from Louis Hanauer and Jacob Hanauer to James C. Marvin to sell any or all of the land owned by them in the counties of Randolph, Green, Craighead and Lawrence, in the state of Arkansas; and Ripley, Howell, Oregon and Carter, in the state of Missouri, dated on the thirtieth of May, 1868, and a deed from them, by their said attorney, to the defendant Wells for the entire tract in controversy—dated the sixth day of October, 1869.

Isam Russell, a witness for the defendants, testified that he had lived a near neighbor to William L. Rice, and was well acquainted with him; that he died in 1857 or 1858. He left two children, a son, who died about 1863, and a daughter. The daughter's name was Susan, and she was

about one year younger than a daughter of the witness, who was twenty-nine years old on the thirty-first day of January, 1877. Susan had since married, but had not, by her marriage, changed her name. He also said that the widow of William L. Rice was in possession of the land in 1866. The premises had been, both before and since that time, occupied by visitors at the springs which were on it, but he did not know under whom they occupied. But only a small part was cleared. Wells went into possession in 1869 or 1870.

Edmond Gilliam testified for them that the premises were, in 1867 and 1868, occupied by visitors, but said he did not know by whose permission. He stated, further, that William L. Rice was in possession in 1857, and his widow in 1866. And Joseph T. Fisher, another witness for them, testified that Wells went into possession in January, 1870.

The deed from Martin, as commissioner, to Louis Hanauer, contained no recital of a confirmation of the sale by the court, or of a report of it, having been made by him to it.

It is contended by the appellants that the sale by the commissioner could not be attacked collaterally, or in an action other than that in which it was ordered, or it be shown that the debt was paid before the sale was made.

This position would undoubtedly be correct, had there been a confirmation of the sale, and it had so become completed and absolute.

But, until confirmed by the court, a sale made under its decree is not completed, and a deed to the purchaser confers upon him no right to the property.

"The theory of sales of this character is," as the court say, in *Sessions v. Peay, 23 Ark., 41,* "that the court is itself

the vendor, and the commissioner, or master, its mere agent in executing its will. The whole proceeding, from its incipient stage up to the final ratification of the reported sale, and the passing of the title to the vendee, and the money to the person entitled to it, is under the supervision of the court. The court will confirm or reject the reported sale, or suspend its completion, as the law and justice of the case may require." *Ror. on Jud. Sales, secs. 1, 2; Freem. Void Jud. Sales, sec. 41.*

No evidence whatever was offered that the sale had been confirmed, or that it had ever been reported to the court; consequently no title could be established in the defendants through the deed. Although, therefore, it may not have been necessary for the plaintiffs to have shown that the debt was paid, evidence of such fact was not improper and could not have prejudiced the defendants. If, however, the debt still existed, the plaintiffs could not maintain their action, if the defendants, as they claimed, entered into possession under the mortgagees, because upon the failure to pay the debt at the time stipulated in the mortgage, the estate of the mortgagor was forfeited. It was competent, therefore, for the plaintiffs to show that the debt had been paid, and the decree satisfied, by which the title revested in the mortgagor.

The orders in the case were produced, as it clearly appears, not only for the purpose of showing that the suit for the foreclosure was not such as was recited in the deed, but by showing the interest of Daniel Hanauer in the mortgage, to lay a foundation for the proof of his declaration that the mortgage had been paid by William L. Rice, in his lifetime, and the decree satisfied.

As the obvious object in introducing them was the proof of the fact that Daniel Hanauer was a party plain-

tiff in the foreclosure suit, it was not necessary for the plaintiffs to have read the whole record, but it would, it seems, have been better to have read the decree. However, if there had been a mistake as to the title of the cause, and none can be presumed, the defendants, by reading the decree themselves could have shown it. We can see, therefore, no objection to the admission of the orders, or of any of the evidence objected to, which tended to prove the payment of the money.

The defendant, Wells, was proven to have first taken possession of the land in January, 1870. Hanauer appears never to have been in possession. No question as to the statute of limitations can therefore arise; and the averment in the complaint that the plaintiffs were the children and heirs at law of William L. Rice, was not denied or put in issue by the answer.

The evidence was clearly sufficient to maintain the verdict.

The judgment is affirmed.

SCANLAND, Ad., et al. vs. MIXER.

1. JUSTICE OF THE PEACE: *Their power over their process. Equity can not enjoin.*

A justice of the peace has control of an improper or improvident execution issued by him, and may recall and quash it. Or the circuit court may bring up the proceedings by *certiorari*, and grant relief. But equity can not enjoin it. It has no power to *correct* even the grossest errors of inferior courts.

APPEAL from *Arkansas* Circuit Court in Chancery.
Hon. J. A. WILLIAMS, Circuit Judge.
E. L. Johnson, for appellant.
Gibson, contra.

EAKIN, J. Bullock, on the fifteenth of July, 1874, recovered a judgment against Mixer, before a justice of the peace of Morris township, for the sum of $187.70. The suit had been removed, by change of venue, from another township. An appeal was prayed and granted. The affidavit and bond required by law were duly filed on the thirty-first of the same month. The justice failed to send up the transcript to the next term of the circuit court, and his office expired in November following. On the twenty-seventh day of February, 1875, his successor issued an execution on the judgment, which was levied upon the goods and chattels of Mixer. He obtained from the probate and county judge an interlocutory order restraining the plaintiff, Bullock, and the constable, from proceeding with the execution. The court overruled a demurrer to the complaint, and upon hearing, upon bill, answer and exhibits, made the injunction perpetual. Meanwhile Bullock had died, and his administrator, Scanland, had entered an appearance. The defendants below appealed.

The execution was unlawful. The appeal was granted at the time of the rendition of the judgment, and the affidavit and bond required by section 3819 of Gantt's Digest, was filed within thirty days. This suspended all further proceedings before the justice. He was not required to give a certificate of appeal unless an execution had been already issued. The proceedings were before

him, or should have been turned over to him by his predecessor. He had no authority to proceed further.

Courts of chancery do not sit, however, to correct even the grossest errors of inferior courts. There must be some special element of equity jurisdiction to justify an interference—some impending mischief otherwise irremediable, some want, or peculiar obstruction, of legal redress. The remedies in this case were plain.

A justice of the peace has control of an improper or improvident execution issued by him, and may revoke and quash it. If he should refuse to do so, or, from accident be unable to act, the circuit court, by its general supervisory power may, on proper application, bring up the proceedings by certiorari, and grant relief. Or the better course still would have been, for the appellant from the judgment of the justice to have prosecuted his appeal and obtained a rule for the proceedings and a supersedeas.

No reason is shown why these were not pursued. The demurrer should have been sustained.

Reverse the decree and dismiss the bill here, without prejudice to either party in the appeal, which is still pending from the original judgment before the justice.

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WORTHEN, Clerk, etc., vs. ROOTS et al.

1. COUNTY COURT: *Power to make allowances and issue warrants beyond appropriations.*

Since the passage of the act of March 18, 1879, the county court is not prohibited from allowing claims against the county, in excess of the appropriations. The law makes it the duty of the clerk to issue warrants on allowances when made. (ENGLISH, C. J., dissenting as to so much of the opinion as holds that the clerk may issue warrants upon allowances not covered by appropriations, or against exhausted appropriations.)

APPEAL from *Pulaski* Chancery Court.
Hon. D. W. CARROLL, Chancellor.
Hughes, for appellant.
Rose, *contra*.

EAKIN, J. At the October term, 1879, of the Pulaski county court, in full session with the justices, a tax of five mills on the dollar, for general purposes, was levied upon the assessed value of real and personal property in the county; estimated at $6,573,650, and the proceeds from said tax were appropriated as follows:

For expenses of the circuit court	$7,000 00
For expenses of the county court	6,800 00
For expenses of prisoners in jail	7,000 00
For making tax and assessment books	1,750 00
For paying for public records	300 00
For support of paupers	1,000 00
For building bridges and repairing roads	1,250 00
For expenses of justices' courts	3,000 00
For county expenses allowed by law	1,481 41
Total	$29,581 41

Afterwards, on the fourteenth of October, the judge alone presiding, it was ordered by the court, "that the clerk issue proper warrants on the treasurer of the county for all claims that have been allowed, or that may hereafter be allowed, in the order in which they have been allowed."

On the seventeenth of October, Roots, and others, citizens of the county, and taxpayers, filed this bill in the Pulaski chancery court against defendant Worthen, the clerk; exhibiting the foregoing proceedings of the court, and alleging: that at different times, the court had made large allowances, in favor of many individuals, too numerous to be made parties, amounting in all to about $65,000;

upon which no warrants had, as yet, been drawn, and which remained unpaid. Of these, about $21,354 had been allowed prior to the eighteenth day of March, 1879.

The usual form in which those allowances had been made, prior to said date, is shown by an order exhibited for example, which merely states that "the same is allowed and audited as an established claim against Pulaski county."

The form, after said date, is shown in like manner, which is the same, followed by these words: "and the clerk is ordered to draw his warrant on the county treasurer, payable out of the appropriation to defray the legal expenses of the county."

The amount of allowances already made, at the time of filing the bill, even those made after said date, greatly exceeded the amount of said appropriations.

They complain that the indiscriminate issue of county warrants, authorized by the order of October 14, in disregard of the objects and amounts of said appropriations, would be illegal, and injurious to the public service, and detrimental to the taxpayers. They fear the clerk will proceed to issue them, and, as the circuit court was not then in session (nor would be for some time), they pray that the defendant be restrained from issuing any warrants, on any allowances made since the eighteenth of March, 1879, exceeding in the aggregate the amounts of the said several appropriations; and, also, from issuing any warrant on any of said funds, after said fund shall have been exhausted by prior warrants; prays, also, for general relief.

The defendant appeared, and, without answer, or formal demurrer, the cause was submitted on the seventeenth of October. On the thirty-first, the chancellor, by a final order restrained the defendant from drawing any warrant

on any fund, unless there should be a balance of said fund, duly appropriated by a proper court, consisting of a majority of the justices. Defendant appealed.

It would have been better to have required an issue of law or fact to be made before final hearing. The submission, however, may be taken as an admission by defendant of all the matters contained in the bill and exhibits. The order of the fourteenth of October is not, *upon its face*, illegal. It was in conformity with the usual and long established mode of administering the county revenues. The clerk was directed to issue *proper* warrants on the treasurer for all claims, etc. This was, so far, right, that it requires extrinsic evidence to support the claim of illegality, on the ground of excess of warrants over the appropriations. It is not clear that a writ of certiorari could have brought to the notice of the circuit court the point made by the bill, which is not the power of the county court to direct the clerk to issue warrants in the mode prescribed; but the power of the clerk, under such order, to issue them after the appropriations may be exhausted. The remedy, if the complainants have one, is not at law, plain, adequate and complete, and the chancellor properly exercised jurisdiction in the case.

The question is rather as to the scope and meaning of the order, than as to its validity. In a normal condition of county affairs, where there was no county debt, and where the appropriations met the county expenditures, the order would be a very proper one. But it is alleged that in Pulaski county such a healthful normal condition does not exist; that, in truth, the allowances greatly exceed the appropriations, and that the order, properly construed, does not authorize the clerk, as a ministerial officer, to continue the issue of such warrants as the order directs, *after* the

books of the office show that warrants, properly issued, have exhausted the appropriation. The proper construction of the order, and the powers conferred by it, are to be determined by the policy of our constitution and laws with regard to the county revenues and expenditures. If they contemplate the issue of warrants, and the use of them by citizens, in anticipation of appropriations to be made for the particular funds drawn upon, the threatened action of the clerk would be right. If they do not, the complainants have the right to require that he be restrained to the narrower construction of the order, and follow it only to the extent of the appropriations. In short, did the constitution and laws, on the fourteenth of October, 1879, require or empower the county court to issue warrants upon allowances, judicially made, irrespective of any consideration as to whether the proper appropriations for such warrants had been exhausted by previous warrants?

Let us look to the system as it existed up to the time of the constitution of 1874. The county revenue then consisted of divers *funds*, raised by taxation for special purposes. These were for county purposes generally; for public buildings; for support of the poor; for bridges; for roads; and for interest and principal on the public debt. The board of supervisors, answering to the old, and present county courts, determined *the amount* to be raised for each purpose, which was set forth specially on the record. The clerk was required carefully to ascertain the amounts collected for each purpose, and it was forbidden to use any specific fund for any other purpose than that for which it was levied, until the purposes of the special tax had been accomplished. *Gantt's Digest, sec. 5059.* It is to be observed that the amounts which might be levied for such purpose was limited to a definite maximum per centage, as was also

the school tax for each district. (*Ib.*, *5068.*) These funds were obviously appropriated as raised, as effectually as if they had been raised by a tax *in solido*, and then divided up and appropriated to the several objects.

With regard to allowances and warrants, it was provided that the board should "have and exercise" the power "to audit, settle and *direct the payment* of all just demands against the county" (*Gantt's Digest, sec. 595, sixth clause*); and it was made the duty of the clerk, whenever an order for an allowance might be entered upon the record, to issue in favor of the creditor, and upon his request, a warrant for the allowance, to be drawn upon the treasurer, and to be paid either out of the fund for county expenditures, or, as the case might be, out of any particular fund. (*Ib.*, *sec. 605.*) The clerk was required further to keep a register of all warrants issued, setting forth the numbers, date, name of the payee, the account upon which it was drawn and the amount. (*Ib.*, *sec. 607.*) We observe here provision for keeping the clerk thoroughly advised of the relation between the sums collected for the several funds, and the drafts made upon them; so that he might know when the funds were exhausted. Yet, nevertheless, it was made his imperative duty to continue their issue upon all allowances, whether the funds upon which the warrants were drawn might be exhausted or not.

When warrants, thus issued, were presented to the treasurer, it was his duty to pay them at once, having funds, or forfeit four-fold the amount to the holder. (*Ib.*, *sec. 1037.*) If he had no funds, he indorsed the fact upon the warrant, and it bore interest from that date at 6 per cent. (*Ib.*, *sec. 1039.*) When funds came in it was made the duty of the treasurer to give notice of his readiness to redeem, which stopped the interest, and they were redeemed and paid in

the order of their number and date. (*Ib.*, *secs. 1041–1042.*) In doing this, the treasurer was required to keep a strict register of warrants, similar in all respects to that required by the clerk. (*Ib.*, *sec. 1044.*) It is manifest that the object had in view in requiring these minute and strict accounts of the amounts drawn was *not* that the clerk should be advised when the specific fund was exhausted, in order that he might cease to draw further.

These warrants remaining unpaid, were not however dead, meanwhile, and useless in the hands of the citizen. Irrespective of number or date they were made receivable for "all taxes and debts accruing to the county." (*Ib.*, *sec. 610.*) There could have been but one policy in this—a wise and wholesome one. It gave the warrants a value, independent of any specific fund on hand to pay them, and encouraged the citizen to render services to the county, which were indispensable to the maintenance of the government, and which, in many cases, could not be compelled, or if compelled, would produce hardship. I have never heard that, under that system, any complaints were made of evils arising from the practice of issuing warrants upon all allowances. Great evils arose from the corruption of county officers in some cases, and from the extravagance and improvidence of boards of supervisors, in others. Allowances were made without stint, and for shocking amounts, to cover depreciated scrip. Extravagant contracts were made, and taxes levied, for public buildings, under *sec. 5060.* By these malpractices, a great many of the counties became, and some still remain, hopelessly embarrassed with debt. The warrants were the result, and not the cause, of the evils. The load of debt and the embarrassment would have been quite the same upon the allow-

ances alone, without the warrants. Such was the condition of things when the constitution of 1874 was adopted.

By that constitution the board of supervisors was abolished, and the county affairs entrusted to the county court, consisting, ordinarily, of a single judge, and having "exclusive original jurisdiction in all matters relating to county taxes, roads, bridges, ferries, paupers, etc.; * * * the disbursement of money for county purposes, and in every other case that may be necessary to the internal improvement and local concerns of the respective counties." But, it was provided that the justices of the peace of each county should *sit with and assist* the county judge "in making appropriations for the expenses of the county, in the manner to be prescribed by law," or, in the absence of the county judge, should themselves, or a majority of them, constitute a court for the purpose. (See *Art. VII, sections 28, 30.*) Counties were prohibited from levying taxes exceeding one-half of one per cent. for all purposes, save for the payment of debts existing at the time of the adoption of the constitution, for which an additional half per cent. might be levied (*Art. XVI, section 9*); and it was provided (*sec. 10*) that "the taxes of counties, towns and cities shall only be payable in lawful currency of the United States, or the orders or warrants of said counties, towns and cities respectively." Counties were further prohibited (*Art. XVI, sec. 1*) from issuing any interest-bearing evidence of indebtedness.

By *sec. 1, of the Schedule to the Constitution*, all existing laws not in conflict, or inconsistent with this constitution, were continued in force.

The important change effected by these provisions, was to take the administration of county affairs out of the hands of boards of supervisors, too many of which—it is

now public history—had recklessly ruined their county finances; and commit so much of it as touched the revenue to a more conservative and reliable body, to be composed of the justices of the peace with the county judge. These were simply to levy the taxes, and make appropriations for county expenses. It was, in effect, the same duty which had been imposed upon the old supervisors, who had levied and raised specific funds by taxation—instead of raising a sum *in solido*, and apportioning it to the different funds by appropriation. The effect was the same. It was only a change of tribunal. There was no longer any use in presenting warrants to the treasurer for the purpose of interest, but in other respects the laws, as to the issuance of warrants, remained unimpaired, and it was *expressly provided* that they should always be receivable for county taxes. No payment of the warrant could be made until there might be an appropriation to the fund, but it remained, nevertheless, the duty of the clerk to draw the warrant upon the proper fund, and that warrant was, for wise purposes of policy, protected in its value by the ægis of the constitution—making it receivable for taxes. Certainly there is nothing in this constitution to forbid the clerk to issue the warrants threatened.

The first general assembly under the new constitution, by act of February 5, 1875 (*Pamphlet Acts, first session, p. 143*), prescribes the time in each county for the meeting of the full court of justices, and the mode of procuring their attendance; and directed that, at the time of levying the taxes, they should make an appropriation to defray the county expenditures for one year; the amount to be specified in dollars and cents, and not to exceed three-fourths of the county taxes levied. The same act defined the jurisdiction of the county court, expressing, amongst other things, that

it extended "to audit, settle and direct the payment of all demands against the county." Upon this point, the act was but a declaration of the existing law, under which the court was not confined, in *directing the payment*, to cases where there was sufficient money left in the particular fund to meet the warrant. If it had been the intention or wish of the legislature to restrict the issuance of warrants to the case of unexhausted funds, this would have been the place to declare it. Its failure to do so, is very significant that the legislature did not consider such warrants an evil, and contemplated the continuance of the practice under the former laws, as adopted and brought under the new constitution by the schedule.

The same general assembly, at its second session (*Pamphlet Acts, second session, p. 51.*), regulated and restricted the county court in the manner and extent of *making allowances;* amongst other things, providing by section 3, "That no county court, or agent of any county, shall hereafter *make any contract or allowance* in excess of the appropriation made for the current year, with a proviso that the clerks and sheriffs might proceed to discharge all legal duties necessary in the administration of public justice, etc, and that such expenses should be paid out of the next appropriation. By the same act, the county courts were enabled to appropriate the full amount of the taxes levied for any year. There is no express repeal of any former act, nor is this act inconsistent with the former act directing the clerk to issue warrants on the allowances when made. Evidently the evil sought to be corrected was the old extravagance and improvidence in making contracts, and carelessness in making allowances, which lay at the root of all the troubles. Obviously, too, the act does not affect the *jurisdiction* of the court over the

subject matter, but only makes that erroneous which before was not so.

In this connection it is important to notice an act of the fourteenth of December, 1875, declaring and enforcing the constitutional policy of making warrants receivable for taxes. It declares, amongst other things, that all county warrants and county scrip shall be receivable for any taxes for county purposes, except for interest on the public debt and for the sinking fund; and this without regard to the time or date of issuance of said warrants, except that new warrants or scrip shall not be receivable for old debts existing at the time of the adoption of the constitution. Stringent provisions are made to compel collectors and others to comply with the act. (See *Pamphlet Acts of 1875, second session, p. 151.*) Further, in passing, it is germain to the subject to notice the act of March 8, 1877 (*Pamphlet Acts, p. 42*), making jurors' certificates receivable for taxes, in all respects as county warrants, and directing that they shall all be within the limit of the appropriations, as specified in the above-mentioned act of December 7, 1875.

A review of all this legislation anterior and subsequent to the constitution of 1874, together with that constitution itself, reveals a settled policy, almost in terms enjoined by the constitution itself—and persisted in until December 7, 1875—of supporting the credit of the counties, and encouraging the citizens to render their services with alacrity by making claims against the county a set-off for taxes. This could best be effected by authorizing the court to audit the claims and issue warrants—could indeed be effected conveniently in no other way, inasmuch as the collector could not know what claims against the county were valid until allowed; nor could he know anything of

allowances without examination of the records. It is a very remarkable thing that the right to use county warrants in payment of taxes should be crystalized into a constitutional provision, and indicates a strong sense in the convention of the evil and danger to the very framework of our government (which is built upon counties) of allowing the county debts to become utterly valueless in the hands of the citizens—as well as the hardship to the citizen of compelling services, which would be, to all practical intents, gratuitous.

The third section of the act of December 17, 1875, made the first attempt at a deviation from this policy, in prohibiting any county court or county agent from making thereafter any contract *or allowance* in excess of the appropriation for the current year. So far as contracts are concerned, the law is in harmony with the intent of the constitution in providing that the appropriations should be made by a court of justices. One of the crying evils of the land had been extravagant jobbing contracts made by county courts, or authorized agents, by which insupportable loads of debt had been imposed, and in many cases still remain, pressing upon the people. To prohibit such was wise and proper. But the ordinary expenses of the county government—those essential to its maintenance and absolutely required by law—stand upon a different footing altogether. These things should be done, as imperatively as the others should be strictly left undone; and to place the latter class of expenses on the footing of contracts was, to say the least of it, a matter, under the constitution, of questionable power.

The law, it is true, recognizes the rights of clerks and sheriffs alone to receive compensation for some kinds of services, required by their duties, and directs that they

shall be paid out of the next appropriation. But even as to these favored officers, they were required to wait in patience for an uncertain event, and were meanwhile unable to make that practical use of their just claims which the constitution contemplated. The succeeding legislature made a partial attempt to supply the defects of the act by providing for jurors' certificates, and making them receivable for taxes as warrants would be.

Such being the condition of the law, the act of March 18, 1879, was passed, which we have now to construe. The first section repeals many of the foregoing acts, for the purpose, apparently, of clearing the way for a complete and well defined policy. Amongst the repealed acts is that part of the act of December 7, 1875, which limited the power of the court to make contracts or allowances beyond appropriations. The second section prescribes the time for the meeting of the full county court to levy the taxes and make the appropriations. The succeeding sections, to section 5, concern only the organization of the court.

The sixth section, which consists of many clauses, provides for reports on the affairs of the county, to be furnished, respectively, by the clerk, sheriff, treasurer and county judge, and for the reference of these reports, if desirable, to committees, after which the court is directed to make appropriations for the current year, in the following order:

1. To defray expenses of courts of record and magistrates' courts, designating the sum for each.

2. For expenses of prisoners in jail accused or convicted of crime.

3. For expenses of making assessment and tax books, and collecting taxes.

4. For expenses of public records of the county or district.

5. For expenses of paupers.

6. Expenses of building and repairing public roads and bridges, and taking care of public property; and—

7. For such other expenses of county government as are allowed by the laws of the state.

Then the tax shall be levied; and, by section 7, the court is required to specify in dollars and cents the amount of appropriation for each purpose, restricting the whole aggregate amount of the taxes levied for the year.

Section 8 requires the clerk to open an account with each appropriation, debiting it with the full amount, and crediting it from time to time with *allowances* made upon it by the court, when made. Then follows this provision of—

Sec. 9. "No county court or agent of any county shall hereafter make any *contract* on behalf of the county unless an appropriation has been previously made therefor, and is wholly or in part unexpended."

What is noteworthy in this section is, that it restores the policy of the act of December 7, 1875, as to *contracts*, but designedly omits any restrictions upon *allowances*. The nature and reason of this distinction, and, indeed, the full scope of the operation of the constitution itself, will become apparent from a consideration of the various purposes for which the tax is to be levied. Reverting to them, it will be seen that the first four are of an indispensable nature, essential to the support of the government. They are for services that *must* be performed, or the business of the counties must stop. The last three are not supposed to be imposed by necessity, but are matters of contract. It is well that appropriations be made for all purposes, but of great consequence that in the matter of *contracts* the expenses of the

counties should be limited to the amounts appropriated. This is impossible in cases of positive service required by law, and expenses incident to them; and in accordance with this view the legislature did not reimpose upon the county court any disability as to allowances. Indeed, it is plain that any other view of the case would place the county in the attitude of dealing oppressively and unjustly with those citizens who render her involuntary or indispensable services.

Section 10 provides that the warrants drawn by the clerk shall specify the *fund,* or appropriation, upon which the same are respectively drawn; and that "when so lawfully drawn and issued," said warrants shall be receivable for all taxes lawfully levied by the county court, or for licenses, or debts due the county. There is an express proviso in the next section, with regard to receiving those warrants for taxes; that the provisions and intent of the act of fourteenth December, 1875, shall be observed, which, it will be remembered, made them receivable without regard to date for all county taxes, except for interest or sinking fund.

The twelfth section requires that every allowance made shall set forth the appropriation out of which the same is to be paid. It had always been the practice in the state to issue warrants upon funds exhausted, as if they were in the treasury, although the particular fund was required to be specified. In the administration of the state revenue it is not done; but that results from an express statutory provision. There is nothing in the twelfth section to restrain the court from making allowances upon exhausted funds, in the face of the marked removal of that restraint in another section.

The irresistible conclusion, upon a review of all the legis-

lation, is, that the act of March 18, 1879, is the result of an effort (perhaps imperfectly accomplished) to return to the true policy indicated by the constitution of 1874: To require all appropriations to be made and taxes to be levied by a full court of justices, and that no money should be paid out of the treasury except on appropriation; and to restrain the county court, or its agents, from making any contracts until money may be appropriated to meet them. This gives effect to the policy of requiring the justices, as a conservative body, to act with the judge.

Hand in hand with this, is another policy, quite as plainly indicated in the constitution. It is, that every citizen, having an ascertained debt against the county (or a warrant as it is termed), shall have the privilege of paying it in for taxes. No discriminations are made in favor of any persons who, standing on the same rights, may have been more industrious or fortunate than others, in obtaining these evidences of their claims. It would be, as to these creditors, the same, in effect, to refuse to allow their claims, and deny them warrants, as it would be to refuse to receive their warrants, when issued, and either would be repugnant, not only to the spirit of the constitution, but to that of all our legislation for a series of years.

We search in vain for any prohibition, in the act of 1879, against allowing claims by the county court beyond the appropriations. A large class of the claims *ought* to be allowed, and with regard to those depending on *contracts made* in excess of appropriations, if it be error to allow them, any citizen may appeal and correct the error. There is room for the operation of the whole constitution in all its aspects.

The law makes it the duty of the clerk to issue warrants

on allowances when made, and we think the chancellor in error in making the injunction perpetual.

Let the decree be reversed, the injunction dissolved, and the bill dismissed.

ENGLISH, C. J., *dissenting*. With all due respect for the judgment of my brother judges, I dissent from so much of their opinion in this case as holds that the clerk may issue warrants upon allowances not covered by appropriations, or against exhausted appropriations. I think this is prohibited by the spirit and intention of the act of March 18, 1879, as indicated in several of its provisions, though not directly expressed.

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34 372
75 461

STATE VS. LINDSAY.

1. GAMING TABLE: *Cities can not license.*

A city ordinance licensing the exhibiting of a gaming table or gambling device, within the limits of the city, and a license granted under it, are null and void, and afford no protection against an indictment for the offense.

APPEAL from *Jefferson* Circuit Court.
Hon. J. A. WILLIAMS, Circuit Judge.
Henderson, Attorney General, for the State.

ENGLISH, C. J. The indictment in this case was found at the May term, 1876, of the circuit court of Jefferson county. It charged, in substance, that James Lindsey did, on the sixth day of May, 1876, in said county, set up and

exhibit a certain gaming bank, or gambling device, adapted, devised or designed for the purpose of playing a game of chance, at which money or property might be lost or won, commonly called *keno.*

At the May term, 1879, the defendant filed a special plea, in which he admitted that he did, at the time alleged in the indictment, set up and exhibit, within the corporate limits of the city of Pine Bluff, in said county, a gambling device called keno, as alleged in the indictment, but justifying, under a license issued to him by the council of the city.

It appears from the plea that, on the fifth of May, 1876, the council of the city of Pine Bluff passed an ordinance providing that, if any person should exhibit any gaming table, or gambling device, in said city, without having obtained a license therefor from said city, he should be guilty of a misdemeanor, and for such offense fined not less than $100, nor more than $300.

The second section of the ordinance authorizes the city council to grant a license to any person petitioning therefor, for six months, on payment of $500, to exhibit a gambling device, or gaming table, within the corporate limits of the city; the license, on payment of the money to the city treasurer, to be signed by the mayor and attested by the recorder.

The plea alleges that defendant procured a license, under the provisions of the ordinance, to exhibit his gambling device, called keno, etc., of which he makes profert, etc.

The state entered a general demurrer to the plea. The court overruled the demurrer, and the state resting, final judgment was rendered, discharging defendant, and the state appealed.

The defendant should have pleaded not guilty, and offered

in evidence the ordinance of the city, and the license relied on for defense, and the special plea might have been stricken out on motion, and defendant required to plead not guilty. (See *Dig., secs. 1845–1850.*) But, as the state thought proper to meet the plea by demurrer, which was an admission of the facts pleaded, we will inquire whether the facts constituted a valid defense to the indictment.

By a general statute, nearly as old as the state, it is made a criminal offense, punishable by fine, etc., for any person to set up, keep or exhibit, any gaming table or gambling device, etc., etc. *Gantt's Dig., sec. 1557, etc.*

This statute covered every foot of territory within the limits of the state, over which jurisdiction is not conceded to the United States.

And it has been decided that the gambling device commonly called keno is within the purview of this statute. *Trimble v. State, 27 Ark., 355; Portis v. State, ib., 360.*

By section 12 of the act of March 9, 1875, for the organization and government of municipal corporations (*Acts of 1874–5, p. 8*), it is enacted that such corporations shall have power "to *license*, regulate, tax or suppress" (among numerous other things), "tables or instruments used for gaming," etc.

Under the authority so seemingly conferred, the council of Pine Bluff thought proper to pass an ordinance to license the exhibition of gaming tables, or gambling devices, within the corporate limits of the city, and under such ordinance appellee, for the sum of $500, obtained a license to exhibit his gambling device called keno, for the period of six months, for which he was indicted by the state, regardless of the license.

By section 4, Article XII, of the constitution, it is provided that: "No municipal corporation shall be author-

ized to pass any laws contrary to the general laws of the state," etc.

It follows that the ordinance and the license are null and void, and furnish appellee no protection against the indictment.

If appellee was otherwise disposed to be a law-abiding man, it is a misfortune that he was induced to part with his money for a worthless license, and deluded into the commission of a crime against a general law of the state. Whether he can recover back from the city the money paid for the license, is not a question before us now.

Reversed, and remanded for further proceedings.

PORTIS VS. FALL et al.

1. INJUNCTION: *None against criminal proceedings.* 34 375 / 85 232

A court of equity will not exercise jurisdiction by way of injunction to stay proceedings in any criminal matters, or in any case not strictly of a civil nature. 34 375 / 88 358

APPEAL from *Jefferson* Circuit Court in Chancery.
Hon. J. A. WILLIAMS, Circuit Judge.
N. T. White, for appellant.

ENGLISH, C. J. William N. Portis was arrested on warrants issued by Benjamin F. Fall, a justice of the peace of Jefferson county, and other magistrates, on charges of violating the law of the state by setting up and exhibiting a gambling device called *keno,* within the limits of Pine Bluff.

In October, 1877, he filed a bill on the chancery side of

the circuit court of Jefferson county, praying an injunction against the prosecutions, and a temporary injunction was granted.

Afterwards a demurrer was sustained to the bill; the injunction dissolved; the bill dismissed for want of equity, and Portis appealed.

A court of equity will not exercise jurisdiction by way of injunction to stay proceedings in any criminal matters, or in any case not strictly of a civil nature. *2 Story Equity Jurisprudence (12 Ed.), sec. 893; Bispham's Prin. Equity, sec. 424.*

Affirmed.

STATE OF ARKANSAS VS. ROSS.

1. PRACTICE IN SUPREME COURT: *Verdict in criminal case erroneously set aside, etc.*

When there is a valid trial and verdict against a defendant in a criminal case, and the verdict is set aside for an erroneous reason, and there is no final judgment, the supreme court will not send a mandate to the court below to sentence the prisoner upon the verdict, where there were other causes assigned in the motion for new trial for which the court may have set aside the verdict.

2. CRIMINAL LAW: *Conviction of less offense, acquittal of higher.*

Where a defendant is indicted for murder, and a verdict against him for a lower offense, the verdict is an acquittal of any higher offense, and he can not, in a new trial, be tried for the higher offense.

ERROR to *Pike* Circuit Court.

Hon. A. B. WILLIAMS, Special Judge.

Attorney General Henderson, for plaintiff.

ENGLISH, C. J. At a term of the circuit court of Clark county, commenced on the seventh of April, 1879, being the tenth Monday after the last Monday of January of that year, Robert C. Ross was indicted for murdering Andrew Goodwin. On his application, the venue was changed to the circuit court of Pike county.

He was tried at a term of the latter court, commencing on the thirteenth of October, 1879, and the jury found him guilty of murder in the second degree, and fixed his punishment at imprisonment in the penitentiary for eleven years.

It seems that the defendant filed a motion for a new trial, assigning thirteen grounds therefor, which was heard by the court, and a record entry shows that it was disposed of as follows:

"Said motion for a new trial containing, among other grounds, one that there is no authority under the constitution and laws of the state to hold the present term of the circuit court of Pike county at the present time, and that no judgment could be rendered upon said verdict, whereupon the court, after hearing the argument of counsel, and being advised as to the law, it is the opinion of the court that said motion for a new trial be granted upon said cause as above stated, which is the third ground for a new trial; it is, therefore, considered, ordered and adjudged by the court, that a new trial be granted, and that the verdict of the jury be set aside; to which ruling of the court the state, by her attorney, excepts, and defendant is remanded in custody of the sheriff of Pike county."

Looking at the motion for a new trial (though there is no bill of exceptions making it part of the record), we find the third cause assigned to be as follows:

"That there is no authority under the constitution and

laws of said state, etc., to hold the present term of the circuit court of Pike county at the present time, and that no judgment could be rendered upon said verdict, because the same would be *coram non judice*, and, consequently, null and void."

There were other grounds of the motion for a new trial, relating to the instructions of the court, etc., the sufficiency of the evidence to sustain the verdict, etc.

The attorney general has caused a transcript of the record in the cause to be brought into this court on writ of error, and submits that we should reverse the decision of the court below granting a new trial, and direct the court to sentence the prisoner upon the verdict.

The term of the circuit court of Pike county at which the prisoner was tried, was held under the act of March 11, 1879, and in *Haney v. State*, *ante*, we held the act valid, though on its face there was a clerical misprision as to the times of holding the terms of the circuit court of Sevier county, manifest upon the face of the act.

There was a valid trial and verdict against defendant in error, for murder in the second degree, which verdict the court, in fact, set aside, but for an erroneous reason; and there was no final judgment.

We decline to send a mandate to the court below directing it to sentence the prisoner upon the verdict so set aside, because we can not undertake to say that if the court had not fallen into the error of setting aside the verdict on the ground stated in the record entry, it might not have granted a new trial on some of the other grounds assigned in the motion.

There being no final judgment to which a writ of error would lie, the case here must be dismissed, and the prisoner will stand for trial again, as if charged with murder in the

second degree, having, in effect, been acquitted of murder in the first degree, by the verdict set aside by the court; and the judgment of dismissal, accompanied by this opinion, will be certified to the court below, that it may proceed with the cause.

McCauley & Co. vs. Six et al.

34 379
74 158

1. Practice in Equity: *Parties, where title to land involved.*

Upon the death of a defendant in a suit in equity for land, his heirs must be made parties, before the question of title can be determined. If this is not done, the complaint should be dismissed without prejudice.

APPEAL from *Independence* Circuit Court in Chancery.
Hon. William Byers, Circuit Judge.
Coody, for appellant.

Harrison, J. This was a complaint in equity filed by the appellants against Marcus D. L. Six and Robert Rushing, the substance of which was, that the defendant, Six, on the fifth day of March, 1874, executed to the plaintiffs a mortgage on the southwest quarter of section 25, in township 12, north, of range 6, west, to secure the payment of his note to them of that date, for $600, payable nine months thereafter, and bearing after maturity ten per cent. interest, which, then past due, was unpaid; that Six acquired title to the land by a donation deed from the auditor, the fifth day of November, 1872, and he had complied with the condition upon which the grant was made, by clearing and fencing five acres, and putting the same in readiness for cultivation within eighteen months

from the date of the deed; and he filed a certificate of a justice of the peace of a township adjoining that in which the land was situated, of his having made the improvement, with the auditor, on the twelfth day of March, 1874; that after the execution of the deed to Six, the defendant, Rushing, falsely claiming to have been at the time of the donation the owner of an improvement thereon, made application to the auditor to purchase the land, as again forfeited to the state, by Six failing to pay him double the value of his improvement, which the auditor allowed him to do, and executed to him also, a deed for the land; and that Rushing had since entered upon the land and dispossessed Six, and was then the occupant thereof. Prayer that the deed to Rushing be set aside and cancelled, and for a foreclosure of the mortgage and a sale of the land.

Six made no defense. Rushing answered the complaint. He was, he said, at the time of the donation to Six, the owner of an improvement on the land, and that Six did not, within three months from the date of his deed, pay him double the value thereof; and that by failing to do so, he forfeited to the state all his right to the land; that after such forfeiture, he, said Rushing, filed with the auditor his affidavit, stating the fact that he owned an improvement on the land at the time it was donated to Six, and that Six had not paid or tendered him double the value of the same, and applied to purchase the land; and having paid to the state all the arrearages of taxes charged thereon, the auditor, on the twenty-fourth day of September, 1874, sold the land to him, and executed to him a deed therefor. He admitted, that he had entered into possession and was then the occupant of the land, and denied that Six had any title or valid claim to it.

After having answered, Rushing died; and on application of the plaintiffs the cause was revived against Enoch D. Rushing, his administrator; but his heirs were not made parties.

The cause was heard upon the pleadings, as stated, and depositions in the case. The court dismissed the complaint.

No statement of the evidence is necessary. As the heirs of Rushing were not made parties, there could be no determination of the question of title; but the complaint should not have been dismissed absolutely, but without prejudice.

The decree is reversed, and the cause remanded, with instruction to permit the plaintiffs to make the heirs of Rushing defendants, if they should elect to do so; if they do not, to dismiss the complaint without prejudice.

DeBois vs. The State.

1. Liquor: *Sale of, near Judson University, can not be licensed.*

The sale of liquors within two miles of Judson University, in White county, is regulated entirely by the act of twenty-seventh February, 1875, entitled "An act to prevent the sale of alcoholic spirits or vinous liquors within two miles of Judson University, White county;" and the county court can not license one to sell within that distance of the university.

APPEAL from *White* Circuit Court.
Hon. J. N. Cypert, Circuit Judge.
Coody for appellant..
Henderson, Attorney General, contra.

HARRISON, J. J. D. DeBois was indicted, with C. L. McCauley, in the White circuit court, for selling liquor without license.

The indictment charged that they, on the fifteenth day of April, 1879, sold one quart of whisky to H. W. Shepard, without having procured a license to sell liquors.

DeBois was separately tried, by consent, by the court, upon an agreed statement of facts; and he was convicted and fined two hundred dollars.

He moved for a new trial, on the ground that the verdict was against the evidence; his motion was overruled, and he appealed.

By the agreement, the sale of the whisky by the defendant, and that he had no license, was admitted by him; and it was admitted by the state, that the sale was upon the prescription of a physician, and for a medical purpose only, and that it was within two miles of the site of Judson University, in White county.

The act of February 27, 1875, entitled "An act to prevent the sale of alcoholic spirits, or vinous liquor, within a distance of two miles of the site of Judson University, White county," prohibits the sale of alcoholic spirits and vinous liquors within two miles of the said university, except by a person exclusively engaged in the business of a druggist, and for sacramental or chemical purposes, or for medicinal purposes upon the prescription of a regular practitioner or graduate of medicine; for a violation of which act the offender is subject to a fine of not less than twenty-five, nor more than one hundred dollars.

The act of March 8, 1879, expressly declares, that it shall not repeal any special act regulating the sale of ardent, vinous or fermented liquors in any particular locality.

It is therefore clear, that it was not the intention of the legislature, that the county court might grant a license to sell within two miles of the university, and that the sale of liquors within that distance, is regulated entirely by the act of February 27, 1875; and although upon the evidence, it not being shown he was a druggist, the defendant, if indicted for it, might have been convicted for a violation of that act, he could not be upon the present indictment, which is under the act of March 8, 1879, and for a different offense.

A new trial should have been granted.

The judgment is reversed and the cause remanded.

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34 383
54 128

34 383
69 560

EVANS & SHINN VS. RUDY.

1. PRACTICE IN SUPREME COURT: *Instructions.*

The supreme court will not reverse for the refusal of the circuit court to give a proper instruction, if others, substantially the same, and equally favorable to the party, are given.

2. FERRYMEN: *Liability of.*

When a ferryman receives property for transportation, and has the exclusive custody of it, he is held to the strict liability of a common carrier. But if the owner retains control of the property himself, and does not surrender the charge of it to the ferryman, such strict liability does not attach, and he is only responsible for actual negligence; and if the owner, by his own negligence, has contributed to the loss, which otherwise would not have happened, the ferryman is only liable when the direct cause of the loss is his omission, after becoming aware of the owner's negligence, to use a proper degree of care to avoid the consequences of such negligence.

3. SAME: *Measure of damages against.*

The measure of damages for property lost by the fault of a ferryman in its transportation, is the value of the property, together with compensation for the actual expenses, and loss of time, caused by the detention on account of the accident.

4. PRACTICE IN CIRCUIT COURT: *Admitting testimony irregularly.*

It is within the discretion of the circuit court to allow a plaintiff to introduce further evidence in chief, in support of his action, after the defendant has closed his testimony. And, unless the discretion is abused, it is not error.

5. MOTION FOR CONTINUANCE: *Must be in bill of exceptions.*

A motion for continuance, not contained in the bill of exceptions, is no part of the record in the supreme court.

APPEAL from *Sebastian* Circuit Court.
Hon. JAMES BRIZZOLARI, Special Judge.
Duval & Cravens, for appellants.
Sandells, *contra*.

HARRISON, J. This was an action by the appellee against the appellants, who were proprietors of a ferry on the Arkansas river, at Fort Smith, for damage suffered from the negligence of the defendants in the transportation of the plaintiff's property.

The defendants denied that there was any negligence on their part, and averred, that the damage was occasioned by the negligence of the plaintiff's agent in charge of the property.

The plaintiff had a verdict for fifty dollars, and the defendants moved for a new trial, which was refused.

The plaintiff's wagon, drawn by two mules, and driven by, and, as the evidence tended to show, in charge of the plaintiff's wife, was, about night, taken on board the defendants' steam ferryboat, at Fort Smith, for transportation to the other side of the river.

There were in the wagon, besides the plaintiff's wife, his seven children—and divers goods belonging to him.

A young man on horseback, and two other wagons be-

longing to other persons, were in company, and went on board at the same time, and the young man rendered some assistance in getting the plaintiff's team and wagon on the boat.

The plaintiff's wagon was driven on last, and was stopped in the gangway between the two gates of the boat, somewhat in the rear of the others, in front of the furnace, and the end of it, four to six feet from the gate at which they entered, and one of the hind wheels was chocked, by an employé on the boat, with a stick of whortleberry wood, used for that purpose. The gate was then closed and fastened by raising the apron, which was done by a chain and an iron weight,—one of the defendants' witnesses said of 100, and another of 140 pounds,—at one end, and by tying with a grass rope, three-fourths of an inch in diameter, to the main stanchion, at the other.

According to witnesses for the defendants, the mules were wild and unruly, and did not go on the boat readily, and the captain of the boat, after they were got on, told one of the men along with the wagon, and who seemed to have charge of the plaintiff's property, to unhitch the mules and take the plaintiff's wife and children out of the wagon—that the fire, when the doors of the furnace were opened, would frighten the mules—apprising him of the danger of leaving so wild a team hitched to the wagon while crossing the river; but the man would not unhitch them, saying that he could hold them, and there was no danger—and that the plaintiff's wife said she would stay in the wagon, and she and the children did so.

Witnesses for the plaintiff testified directly contrary. The mules, they said, were gentle and easily managed; that they were driven on the boat without difficulty or

trouble; and that no such direction was given by the captain or any one.

After the boat started, and had got some distance from the shore, the mules became frightened—witnesses for the plaintiff said, by sparks from the chimney or smoke-stack, falling upon and burning them; witnesses for the defendants said by the glare of the fire upon the opening of the furnace doors; and, in their fright, backed the wagon with such force against the gate as to break the chain and rope, and the wagon and mules, and the persons in the wagon, were precipitated into the river, and some of the goods were lost.

The chimney or smoke-stack had no spark-catcher.

Evidence was produced as to the value of the goods lost and the plaintiff's expenses in recovering and taking care of the other property.

Witnesses for the defendants testified that the ferryboat was in good order; was well suited and adapted to the business; had an efficient captain and crew, and was carefully and prudently managed; that no spark-catcher was necessary, and one could not be used, with wood for fuel; and that the fastenings of the gates were as strong and secure as were usually found on ferryboats.

The defendants asked the court to instruct the jury; that, "If you believe from the evidence that the ferryboat was in good order, suitable for the purpose for which she was used; was manned by a prudent and careful captain and crew; that the gates were securely fastened; that the captain warned the person in charge of the wagon of the danger of the mules becoming frightened while crossing the river, and directed him to unhitch them, and requested the plaintiff's wife to get out of the wagon and take her children out; but the person in charge of the wagon

refused to unhitch the mules, and asserting his ability to manage them, retained control of them; and the plaintiff's wife remained in the wagon with her children; that there was no negligence on the part of the captain or crew; and that the accident would not have occurred if the captain's order to unhitch the mules had been obeyed; the defendants were not liable, and you should find for the defendants."

The court refused to give the instruction, and the defendants excepted.

We do not perceive any objection to this instruction, but the error in refusing to give it was corrected by the following—substantially the same, if not more favorable to the defendants, which the court gave with others on its own motion:

"7. If it appeared from the evidence that the plaintiff, by any willful act done, or omitted to be done, directly contributed to the injury complained of, you should find for the defendants."

Of the others given by the court on its own motion, the defendants excepted to the following:

"2. Ferrymen are common carriers, and as such are insurers of all things committed to and received by them for transportation, against all harm or damage, except such as may be occasioned by the act of God, the public enemy, or the willful negligence or default of the party injured.

"6. Whether proper appliances and means were used, or the ferryboat skillfully manned and managed, is a question of fact for the jury; and if you find from the evidence, that such necessary and proper appliances and means were used, and the boat skillfully and properly manned and managed; and that the defendants exercised

extraordinary care in the use of such appliances and means, and in the skillful management of the boat, you will find for the defendant; but if you find that such appliances and means were not used—that the boat was not properly manned, or skillfully managed, or the defendants did not exercise extraordinary care in using such appliances and means, or in the skillful management of the boat—you will find for the plaintiff.

"8. If, for want of a spark-catcher, sparks from the chimney or smoke-stack fell upon and burnt the mules, by which they became frightened, and, by backing, precipitated the wagon into the river, such fact is to be considered by you, as evidence tending to show negligence on the part of the defendants.

"9. If the ferryboat was in good condition and repair, and suitable for the business in which she was employed, and was manned with a sufficient number of hands, and all proper appliances and means were in use at the time, and due care and caution were used in the transportation of the plaintiff's property, and the falling of the mules and wagon into the river was occasioned by the neglect of the person in charge, to obey the order of the captain to unhitch the mules, and without fault on the part of the defendants, their agents or servants—these facts may be taken in consideration in passing upon the question of negligence on the part of the plaintiff.

"10. If the plaintiff's wife, or other person in charge of the wagon and team, retained on the boat exclusive control thereof, and the defendant assumed no control of the same, and the precipitation of the wagon and team into the river occurred without negligence on the part of the person in charge of the boat, the defendants are not chargeable for the loss or damage, as a common carrier or

as an insurer; and are only answerable for actual negligence. And if the loss was occasioned by the willful wrong or negligence of the plaintiff, and would not have occurred but for it, the plaintiff is not entitled to recover, unless the direct cause of the loss was the omission of the defendants, after becoming aware of the plaintiff's negligence, to use proper care to avoid the consequences of such negligence.

"12. If you find for the plaintiff, you will assess his damages at such sum as is equal to the value of the property lost, together with compensation for the actual expenses and loss of time caused by the detention on account of the accident."

That ferrymen, when they receive property for transportation and have the exclusive custody of it, are held to the strict liability of common carriers, is too well settled to be questioned. But it is also well settled, that if the owner retains control of the property himself and does not surrender the charge of it to the ferryman, such strict liability does not attach, and he is only responsible for actual negligence; and if the owner, by his own negligence, has contributed to the loss, which otherwise would not have happened, he is only liable, when the direct cause of the loss is his omission, after becoming aware of the owner's negligence, to use a proper degree of care to avoid the consequences of such negligence. *Harvey v. Rose, 26 Ark., 3, and the authorities there cited; Wyckoff v. Queen's County Ferry Co., 52 N. Y., 32; Whar on Neg., 326, 335, 706–8; Davies v. Mann, 10 M. & W., 445.*

Whether the property in this case was intrusted to the exclusive custody of the defendants; whether the plaintiff, by the negligence of his agent, so contributed to

the loss, that but for it the loss would not have occurred; and whether the direct cause was the omission of the defendants, after having become aware of such negligence, to take proper means to prevent the consequences of it—were questions raised by the evidence; and the instructions in respect to the matter of negligence properly presented them for the consideration of the jury, and were unobjectionable. The last, related to the measure of damages, and was also without objection. The plaintiff was entitled to recover, if at all, for whatever damage was the natural and proximate consequence of the accident. *2 Green. on Ev., 268, a; Sedg. on Dam., 66.*

An exception was raised by the defendants to the plaintiffs being permitted, after the defendants had closed their evidence, to introduce further evidence in support of the action, though not rebutting that for the defense.

To suffer the plaintiffs to do so, was within the discretion of the court, and can not, when there is no abuse of discretion—and none is shown here—be assigned as an error. *Gantt's Digest, section 4668.*

Another ground of the motion for a new trial was the refusal of the court to postpone the trial, upon the application of the defendants, for the want of the testimony of absent witnesses. The bill of exceptions shows that an exception was taken to the ruling of the court upon the defendant's motion for the continuance, but the motion is not contained in the bill of exceptions, and is not part of the record before us.

Finding no error, the judgment is affirmed.

SISK vs. ALMON et al.

1. NOTICE OF TITLE: *Possession.*

Actual possession of land at the time of another's purchase is sufficient to put him on inquiry of the possessor's title.

2. DECREE: *Must be only for parties to suit.*

A court of equity can not render a decree in favor of persons not parties in the cause.

3. PARTIES; *Heirs, Administrator.*

The administrator or executor is entitled to the real estate of the deceased for the payment of his debts; but in suits in which he claims the possession, when the title is in question, the heirs are necessary parties.

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APPEAL from *Mississippi* Circuit Court in Chancery.
Hon. L. L. MACK, Circuit Judge.
Lyles for appellant.

HARRISON, J. The appellant brought an action of ejectment against James Almon, for the north part of the northwest quarter of section eight, in township fifteen, north, of range eleven, east, to which he claimed title under a deed of conveyance, executed on the fifteenth day of December, 1875, from T. J. Richardson and George W. Richardson, who purchased the same as swamp land from the state, and on the twelfth day of April, 1861, received a deed thereto from the governor.

W. L. Fields and W. H. Pittman, administrators of Henry H. Moody, were, on their application, made parties, and filed an answer.

They admitted the conveyance from T. J. Richardson and George W. Richardson to the plaintiff, and that T. J. Richardson and George W. Richardson had received a deed to the land from the governor; but they averred that Tur-

ner J. Richardson, the father of T. J. Richardson and George W. Richardson, held, on the fifth day of July, 1859, a patent certificate for the land in controversy, and the northeast fractional quarter of section five, in the same township; and that he, on that day, sold, and by warranty deed conveyed, that in controversy, to John Bryans, who, immediately upon his purchase, entered into possession and actual occupancy of it, and continued in possession and actual occupancy from his purchase until the thirteenth day of June, 1871, when he sold, and by warranty deed conveyed it, to Henry H. Moody, their intestate, who entered into possession, and was in the actual occupancy thereof until his death; and that Almon, at the commencement of the action, occupied the land as the tenant of Moody.

That Turner J. Richardson, on the ninth day of November, 1860, after his sale and conveyance to Bryans, with the intent and purpose to defraud Bryans, and without any valuable consideration, assigned the patent certificate to said T. J. Richardson and George W. Richardson, his sons, and who were then minors.

That Moody, and Bryans, under whom he claimed, had, from the time of the latter's purchase from Turner J. Richardson, until the commencement of the action, and for more than seven years, held peaceable, uninterrupted and adverse possession of the land; and they pleaded the statute of limitations.

They made their answer a counter-claim, and prayed that the deed from T. J. Richardson and George W. Richardson to the plaintiff should be set aside and canceled, and that the title should be vested in the heirs of Moody, their intestate.

The cause, upon their motion, was transferred to the equity side of the court.

Almon made no defense; and no reply was filed by the plaintiff to the counter-claim.

The decree of the court was, that the deed from T. J. Richardson and George W. Richardson to the plaintiff should be set aside and canceled, and that the title be vested in the heirs of Moody.

Charles Bowen, the only witness in the case, deposed for the defendants: That Turner J. Richardson, having separated from his wife, told him that he was going to leave the country, and that he wished to make some provision for his children, whom he was going to leave with her, but said he did not know what he could do. The witness informed him, that if he would transfer his patent certificate for his land to them, they could get the deed to it. That he concluded to do so, and the witness, at his request, wrote the assignment on the certificate to his sons, T. J. and George W. Richardson, which he signed, and the witness afterwards took the certificate to Little Rock and obtained the patent for them.

It appears, by the pleadings, that the deed from the governor to the Richardsons was filed for record on the fifteenth of January, 1866; that from Turner J. Richardson to Bryans on the thirtieth day of August, 1870; and that from Bryans to Moody on the first day of January, 1873; and it is insisted by the appellant, that, because the deed from the governor to the Richardsons was put upon the record before that from their father to Bryans, he is an innocent purchaser with the legal title. But when the plaintiff purchased, Moody was, by his tenant Almon, in actual, pedal possession of the land, and he, and Bryans, under whom he entered and claimed, had been in succes-

sive and continued possession and actual occupancy from the latter's purchase; so admitted by the plaintiff—the fact being averred in the counter-claim, to which there was no reply.

The actual possession and occupancy of Moody at the time of the plaintiff's purchase, was sufficient to put him upon inquiry as to the title, and there can not, therefore, be any doubt as to the validity of the title of Moody's heirs. But they were not parties, and the court could not render a decree against the plaintiff, in favor of persons not parties in the cause.

Real estate is, by statute, made assets in the hands of the executor or administrator for the payment of the testator's debts, and he is entitled to possession for that purpose; but in suits in which he claims the possession when the title is in question, the heirs are necessary parties.

The decree is reversed, and the cause remanded for further proceedings, with instructions to allow the heirs of Moody to make themselves parties, if they desire to do so, or to be made such by the defendants.

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WHITTINGTON, Ex Parte.

1. STATUTES: *Permissive words in, when imperative.*

Permissive words in statutes, in many cases, impose a duty on tribunals, which will be enforced by mandamus. But it is always in cases where the public interest, or vested private rights, are to be thereby protected or enforced. The power to give the citizen full, adequate and complete relief, or the power to promote the public interest in some prescribed mode, implies the duty to exercise it when the occasion arises. In all other cases, the words *may*, or *it shall be lawful*, imply discretion, and are used in contradistinction to *must* or *shall*.

2. LIQUOR LICENSE: *Discretion of county court in granting.*

Under the act of May 30, 1874, regulating the licensing of dram-shops, the county court had the discretion to grant or refuse the license petitioned for, and its action was final.

3. MANDAMUS; *Discretion not controlled by.*

Where a court has discretion, it can not be controlled by mandamus.

APPEAL from *Scott* Circuit Court.
Hon. J. H. ROGERS, Circuit Judge.
Clendening and Landells, for appellant.

EAKIN, J. At the election held on the first Monday in November, 1878, a majority of the voters in Hickman township, Scott county, voted "for license." On the eighth of January following the election, Whittington applied to the county court for license to keep a dram-shop in said township, tendering a bond and the receipt of the collector for all the county taxes, fees and costs of officers, which had been levied on retail liquor dealers—in short, complying fully, on his part, with the law.

The county court, exercising its discretion, and without passing upon the sufficiency of the papers filed in the cause, refused the license. Thereupon the petitioner applied to the circuit court for a writ of mandamus, setting forth the facts by proper allegations and exhibits, and asking that the county court be commanded to pass upon the sufficiency of the papers; and if they be found conformable to law, to grant the license.

The circuit court held that it was within the sound discretion of the county court to grant, or refuse the license; and denied the prayer for a mandamus. From this ruling, the applicant appeals here; and relies upon the act of May 30, 1874 (*Pamph. Acts of 1874, p. 48*).

Before this act, the law upon the matter of retailing spirits stood upon *secs. 5717–18–19 of Gantt's Digest.* These prohibited keeping retail shops without a license from the county supervisors, which board was *authorized*, but expressly not *required*, to grant such license when the applicant should present a petition therefor, signed by a majority of the resident voters of the township. It was left to the judgment and discretion of the board, "considering the interest and general welfare of the whole county." During the recess of the court, however, the clerk might be *authorized by the board* to issue such license, on a proper petition, until the next meeting.

This was a very well guarded act on a dangerous subject, exhibiting a due regard to the views of those citizens who might consider the retail of liquors by the drink as safe, under wholesome regulations, and at the same time endeavoring so to control it as to avoid the manifold evils to society and good government which would result from an indiscriminate use of the privilege.

The board had no authority at all to grant the license until a majority of the voters had signified their confidence in some particular man as fit to exercise it, and even then were not compelled to regard the recommendation. Whether the clerk could permit it in vacation upon such recommendation, depended altogether on the confidence which the board might have in *him.* The board might empower him to do so, or not, in its discretion.

Evidently the legislature of 1874 did not consider the safeguards sufficient. Perhaps it resulted from the good-natured facility with which voters who might be opposed to the general policy signed the petitions of friends, from personal favor, or from a private desire to show no discrim-

ination amongst acquaintances. Whatever the motive may have been, the legislature did change the system.

The act now relied upon, provided that the question should be submitted to the qualified voters of the township, ward of a city, or incorporated town; and if a majority of the votes should "be cast for license, then it shall be lawful for such board of supervisors (now the county court) to grant licenses in such townships," etc.; and it was further made expressly unlawful to grant them for one year after such action, if the majority were against it.

It was further required that the applicant for the privilege should enter into a bond of $2,000 to pay all damages occasioned by reason of liquors drank at his house; and to pay all money lost at gaming in his saloon or dram-shop; and it was provided that any person aggrieved might sue on the bond, both principal and sureties.

The penalty for keeping such a house, without license, was increased from a maximum fine of $50, to a maximum of $100, and the additional punishment of imprisonment in jail not less than thirty days.

This act bears upon its face the marks of an anxious solicitude to build up further safeguards against a dangerous traffic.

It was a matter wholly within the constitutional control of the legislature as a police regulation.

There was a general repeal of all laws in conflict with it. The appellant contends that upon compliance with the requirements of the law on his part, the policy of the act will be satisfied, and that in this case the terms "it shall be lawful" are equivalent to "shall." In other words, that the jurisdiction and discretion of the court extends to satisfy itself that the bond is good; and that the law has been

complied with, and, thereupon, to issue the license, without discretion.

Permissive words in many cases impose a duty on tribunals which will be enforced by mandamus. But it is always in cases where the public interests, or vested private rights, are to be thereby protected or enforced. The power to give the citizen full, adequate and complete relief, or the power to promote the public interest in some prescribed mode, implies the duty to exercise it when the occasion arises. In all other cases the terms *may*, or *it shall be lawful*, imply discretion, and are used in contradistinction with *must*, or *shall*. None of the cases cited by appellant contravene this rule.

The effect of the act of 1874 is to substitute for the special petition, in favor of an individual, a general vote of the township or ward on the policy of granting licenses at all. The majority of the electors may prohibit it altogether; or, if they permit it, they must be understood to do so with all the safeguards against abuse which the law affords. Otherwise, there would be no use for any petition to the county court at all. The clerk might have been ordered to take the bond and the receipts, as ministerial acts.

The retail traffic is one which confessedly requires to be kept in prudent hands. Under the general laws of the state it is forbidden. It can not be said that it concerns, or any way promotes, the public interests for any one to exercise it. No one has a vested right to do so, which he can ask to be enforced. The former law *expressly* left it to the court to determine both the fitness of the traffic, and of the persons to exercise it, notwithstanding the petition of a majority. There is nothing in the last act to contravene this. There is everything to indicate that the legislature meant to double the guards against abuse. The county court

must be presumed to act with a view to the public interests, and if it does not, the legislature may take away its discretion, or the people may elect more satisfactory judges.

The county court had the discretion in this case to grant or refuse the license, and acted upon it finally.

Where a court has discretion, it can not be controlled by mandamus.

Affirm the judgment.

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FEILD, BROWN et al. vs. DORTCH.

1. ATTACHMENT: *When jurisdiction over attached property begins.*

The intrinsic power of the court over attached property originates with, and relates back to, the levy.

2. JURISDICTION: *Consent can not give, but, etc.*

Consent can not give jurisdiction where none exists; yet, where the court has jurisdiction of the subject matter (as of property attached), and certain conditions are made essential to its exercise, they may be waived. Orders made concerning the property within the general scope of the power of the court, and in furtherance of the design for which it was attached, may be made by consent; and consent may well be presumed where parties ought to object, and fail to do so.

3. SALE OF LAND UNDER EXECUTION: *Sheriff not bound to sell in forty-acre tracts.*

Sec. 2681, *Gantt's Dig.*, which provides that lands be sold under execution in forty-acre tracts, is directory, and at the option of the owner. In the absence of instructions, the sheriff will exercise his sound judgment in making the sale.

APPEAL from *Phillips* Circuit Court.

Hon. J. N. CYPERT, Circuit Judge.

Davis and *Hanly*, for appellants.

Tappan & Hornor, *contra*.

EAKIN, J. Appellees, Dortch and wife, with others, on the nineteenth of March, 1877, brought an action of ejectment for certain lands, against divers parties in possession. They filed, as their claim of title, two sheriff's deeds, which showed that they had purchased the lands at a sale, made by order of the circuit court in a suit by attachment, in which William B. Dortch et al. were plaintiffs, and Cynthia H. Brown was defendant.

Cynthia H. Brown was, on her application, made defendant in this action, and claiming to be sole owner defended for the whole, the nominal defendants being her tenants.

The issues made by the answer, involved the validity of the order of sale in the attachment suit, and the sale under it. The court tried the case upon the law and the facts, sitting as a jury, held the deeds valid, and rendered judgment for plaintiffs. All the facts are properly brought upon the record by motion for a new trial, and by bill of exceptions. The defendants appealed.

It appears from the transcript of the old case of *Dortch et al. vs. Brown*, that the same was an action of assumpsit, commenced by attachment against Cynthia H. Brown (appellant in this case), as a non-resident, in the circuit court of Phillips county, on the second of September, 1867. The writ was executed by the sheriff, on the seventeenth of the same month, by attaching, with other lands, those involved in the present suit. The return, which was not filed until the fifteenth of April, 1868, shows further, that the defendant, Cynthia Brown, was not found.

Previous to this return, at the November term, 1867, on the twenty-first of December, the plaintiffs filed, as proof of publication, a notice signed by the sheriff, reciting the title of the case, the issuance of the attachment and the amount demanded in assumpsit, and warning the de-

fendant to appear "on or before the third day of the next court, to be held on the twenty-fourth day of November, 1867, there to demur or plead," etc. With this was filed the certificate of one of the publishers and proprietors of the "Southern Shield," a weekly newspaper, to the effect that the same had been published in said paper for two weeks successively—on the twenty-eighth of September, and fifth of October, 1867. Whereupon judgment by default was, on that day, rendered against the defendant, with directions for a writ of inquiry. This writ, at the same term, on the eighteenth of January, 1868, was duly executed, and, by verdict, damages were assessed at $8,000, for which a judgment was rendered.

In this judgment, no notice was taken of the lands. The sheriff's return upon the writ was made, as before stated, on the fifteenth of April following, and nothing more was done in the case until the nineteenth of December, 1870, when a petition was filed by the plaintiffs setting forth the judgment and the lands attached, and praying an order of sale.

The record recites that "on this day came said plaintiffs by their attorney, and the said defendant by her attorney," and that said petition was argued by counsel. The prayer was granted on condition of a bond, to be filed by plaintiffs, and on the twenty-third of December, 1870, the order of sale issued. No sale was made, and on motion of plaintiffs the order was renewed on the fifth of June, 1871.

On the twenty-second of November, 1871, the record says the parties came by their attorneys, and, it being suggested that by consent of both parties the sale had not been made, the order was renewed on motion of plaintiffs.

On the twenty-seventh of November, 1872, there is a record entry to the effect that the parties came, by attorney, and reported that, by consent, no sale had been made, and it was agreed that the cause should be continued without prejudice, with renewal of the order of sale on the first day of May, 1873. In June, 1873, there was another suggestion of failure to sell, and renewal of the order. In December, 1873, there was a continuance by consent; and again, on the twenty-fourth of February, 1874. On the nineteenth of January, 1875, the parties came by attorneys, and "by consent of parties, it is agreed that the order of sale may be renewed."

On the thirty-first of May following, the parties came by attorneys, and the plaintiffs presented to the court the sheriff's report of the sale of the lands to the plaintiffs in this case; which was approved, and the acknowledgment of the execution of the deed was made in open court, and ordered to be indorsed thereon. Another deed was executed by the sheriff after the time for redemption had passed, which was acknowledged before a notary, and recorded. These were the deeds filed with the complaint in the present action.

Upon the trial the plaintiff was allowed to introduce amendments to the original return of the attachment by the sheriff, and to his report of the sale, which amendments had been made by leave of court in the original case, after the present action was brought. The first amendment, added to the return as filed in April, 1868, a certificate of the sheriff that he had caused to be printed in the Southern Shield, "the number of times, and within the time prescribed by law," a statement of the nature and amount of the plaintiff's demand, and notifying the defendant, Cynthia H. Brown, that an attachment had been issued

against her estate, "and that unless she shall appear, by herself or attorney, on or before the third day of the next term of the court, to-wit: on the twenty-fourth day of November, 1867," that judgment will be rendered against her, etc. The sheriff further certified, that he had filed a copy of said publication, in open court, on the twenty-first day of December, 1867, amongst the papers in the suit, to accompany his returns, and as a part and parcel of it. The amendments made to the report of sale were for the purpose of showing that the land had been sold in tracts of 160 and 80 acres, and not *in solido*.

The statute regulating attachments, previous to the act of 1867, after prescribing the manner of attaching lands, tenements, goods, etc., provides that, "from and after the service of any writ of attachment, the property, money or effects, so attached, shall remain in the officer's hands or possession, and be by him secured, to abide the event of the judgment of the court." It was further provided that "the service of *the summons* in the writ of attachment, against the defendant (if he be found in the county) shall be made by reading the same to him in his hearing, or presence, or delivering him a copy thereof." No provision was made for constructive service of the summons by the sheriff, but it was provided that, "if the defendant shall not, on or before the third day of the term (or sooner, if the court shall adjourn before that time,) appear and plead, or otherwise answer, to the plaintiff's action, the court shall order that a publication be made, containing a statement of the nature and amount of the plaintiff's demand, and notifying the defendant that an attachment has been issued against his estate, and that unless he shall appear, by himself or attorney, on or before the third day of the next term, stating the time the court will meet, that judg-

ment will be entered against him, and his estate sold to satisfy the same."

It was made the duty of the plaintiff in the action to have this notice inserted two weeks, successively, in some newspaper printed in the state, within such time as the court should prescribe. See *Gould's Digest, ch. 17, secs. 8, 9, 10, 24, 25.*

Upon failure of defendant to appear, the plaintiff was entitled to judgment by default, as in other cases of default, with a jury to assess unliquidated damages. It was provided that judgment should be entered therefor, as in other cases. *Ib., secs. 31, 32.*

It is obvious, from a contemplation of these provisions, that there is a broad distinction between the service of the attachment, and that of the summons to the defendant. The first is the effective mode of bringing the corpus of the property—the *rem.* sought to be affected—within the grasp and jurisdiction of the court. That jurisdiction attached immediately on the service of the attachment, from which time the property passed under the control of the court, and out of that of the defendant. The service of the summon was still necessary to give jurisdiction of *the person* of the defendant, and to enable the court to bind him with regard to his property generally. It was a matter of justice, even with regard to the property attached, that the defendant should have notice of the peril in which it stood. The law provided amply for such notice, and any disregard of its provisions to that end would be matter of error, to be corrected by any direct or appellate proceeding. But due and proper notice to the defendant, however important, was not jurisdictional, so far as the property already attached might be affected. That was already in the power of the court. Of necessity, the court must order

concerning it some way. The return of the sheriff was necessary, to show that the jurisdiction had attached; but, when shown, it related to the time of the levy. This view of the case is ably presented by the supreme court of Ohio, in *Paine's Lessee v. Mooreland, 15 Ohio, 435,* cited in *Drake on Attachment, sec. 409.* See, also, *Cooper v. Reynolds, 10 Wall. (U. S.), 308.*

Amendments to the attachment law were made by act of March 17, 1867. (*Pamphlet Acts, p. 294.*) Some slight alteration was made in the manner of attaching lands, and it was provided that if the defendant could not be found in the county, it should, at once, be the duty of the officer to make publication in some newspaper, if there should be sufficient time between the levy of the attachment and the term of the court. If there should not be time, the court was to order the publication as formerly. In case the publication were made by the officer it was made his duty to attach a copy of it to his return, "together with his certificate that the same was printed and published in the paper (naming it) the number of times and within the time prescribed by law, which shall be deemed a sufficient service upon the defendant, and upon which the court may proceed to hear the cause, and give judgment according to the right of the matter."

This statute was evidently in extension and aid of the remedy by attachment, and to avoid unnecessary delays in levying the same, and giving notice to the defendant. There is nothing in it to change the terms or conditions of jurisdiction. As before, jurisdiction of the property was acquired by the levy, and of the person, by actual service; whilst, with regard to the disposition of the property, certain regulations with regard to notice, were prescribed, which it would be such error to disregard as would render

the proceedings subject to reversal and appeal, or writ of error.

The attachment upon which the proceedings in the case of *Dortch et al. v. Mrs. Brown* were founded, was properly issued, and duly levied upon the lands. That brought them within the jurisdiction of the court. At the time the court rendered judgment by default, it does not appear affirmatively that the court was advised of the levy. But the court did have proof before it, in the certificate and affidavit of the publisher of the Shield, to show that the sheriff had done his duty in causing the notice to be given, although it then appeared that he had failed in his duty, by neglecting to file a copy of the notice, attached to his return, with his own certificate that publication had been made. The proof by the publisher's affidavit was legal, in accordance with the general law regarding legal advertisements, as it provided before and at the time of the passage of the act of 1867. (See *Gould's Digest, ch. 8, sec. 1.*) It is to be observed that, by force of the act of 1867, the copy attached to the return, with the sheriff's certificate, "shall be deemed sufficient service upon the defendant, and upon which the court may proceed to hear the cause." But there is nothing in the act to repeal the general law which had been in force, regulating the practice in the state since 1839, and, by which, "where any notice or advertisement shall be required by law, or the order of any court, to be published in any newspaper, the affidavit of the printer, or publisher, with a copy of such advertisement annexed, stating, etc., * * * *shall be evidence* of the publication therein set forth."

It was a gross error in the circuit court to have rendered a judgment by default at the November term, without the sheriff's return showing the levy, and without his

certificate of the publication, and a copy. The court should have required the sheriff to do his duty, and taken no action until he had done so. But the court did then *actually* have jurisdiction of the property attached, as shown by relation on the coming in of the return, and did have before it evidence of which it could take cognizance that the sheriff, notwithstanding his failure to return the same, had given the notice required by law. It was apparent, certainly, that he had made a mistake in naming the twenty-fourth of November, instead of the twenty-fifth, as the first day of the term—a manifest clerical error, for which judgment should have been suspended; but none of these matters affect the *jurisdiction* of the court over the property brought under its control by the levy.

The personal judgment, which it has been the practice to render in attachment cases, where there has been no actual service, and which seems to have been contemplated by the statute, is only such in form, and is used merely as an ascertainment of the amount for which the property attached is to answer. No execution issues upon it against the general effects of the defendant. Before the Civil Code, a special execution issued against the property seized, and, since the Code, the practice has been for the court to order the sale and apply the proceeds to the debt as ascertained. The intrinsic power of the court over the property originates with and relates back to the levy. It is not derived from the judgment ascertaining the debt, but antedates it. The *regularity* of the exercise of the power depends upon an entire conformity with the statutory directions. Without that strict observance, there is error, to be corrected upon the appeal, or writ of error. But we can not, nor is the court in this case called upon to

pronounce the proceedings utterly void, and of no effect, *ab initio.*

For whilst the court had jurisdiction of the property, however erroneous the ascertainment of the debt may have been, the defendant, at a subsequent term, appears in the case in open court, and makes no objection to the former proceedings, which are, after her appearance, recited upon the record. She is present when, adopting the ascertainment of damages, the order of sale is made. She saves no exceptions, makes no motion to set any proceedings aside, and takes no appeal. She appears again, term after term, by her attorney; consenting to continuances and postponements of the same, until the same is finally made and confirmed. There was sufficient jurisdiction over the property, and the defendant, during these subsequent proceedings, to give them vitality, unless corrected upon appeal. What was not rightfully done, was merely error, and can not be collaterally questioned.

The doctrine of estoppel plainly applies. Had the defendant, upon her appearance, objected to the judgment by default, the court might have disregarded it, and opened the case for her answer and defense. The lien of the plaintiffs upon the property attached, would have remained, and might have been properly enforced. She did not object, but appeared during several years, consenting to continuances, and making no opposition to renewals of orders of sale, and actually assenting to the last order. No objection was made to the report of the sale, nor to the deed acknowledged in open court by the plaintiff. It is too late, now, to make the objection that the orders of the sale were without jurisdiction, and void.

Whilst consent can not give jurisdiction where none exists, yet, where the court has jurisdiction of the subject-

matter (as of property attached), and certain conditions are made essential to its exercise, they may be waived. Orders made concerning the property, within the general scope of the powers of the court, and in furtherance of the designs for which it was attached, may be made good by consent, and consent may well be presumed where parties ought to object, and fail to do so. The practice is not to be encouraged, of allowing parties to stand mute, seeming to assent, and reserving objections to be used collaterally. It was well said, in the case of *Evans & Black v. Percifull, 5 Ark., 424*, that: "If a person complains of the proceedings of a court, he should take the proper steps, within the prescribed time, to reverse them; and his failure to do so, is the highest evidence of his intention to acquiesce in them. It amounts, absolutely, to acquiescence." It is only where the court has no jurisdiction at all over the property or the person that the proceedings can be collaterally treated as null.

The sale by the sheriff was made in tracts of 160 and 80 acres. This, it is contended, was in violation of *sec. 2681 of Gantt's Digest*, which provides that, "in all sales of real estate under execution, when the tract or tracts to be sold contain more than forty acres, the same shall be divided, as the owner or owners may direct, into lots containing not more than forty nor less than twenty acres," and be sold accordingly. This is plainly directory, and at the option of the owner. It would be highly mischievous to compel the officer, at all times, in the absence of instructions, to sell in this manner. Property might be often sacrificed, and always would be, in the case of plantations having a few acres essential to the enjoyment of the whole, whether for timber, or locations for buildings. It is sufficient to give the defendant the privilege of the division, if

he should regard it as desirable, and, for the rest, the sheriff, in the absence of instructions, must exercise his sound judgment in making the sale. If he should commit any abuse of his discretion, the ready remedy is in the hands of the circuit court, upon the return of the sale. There is nothing in this case to indicate that the property was sold in any injudicious manner, or failed to bring its value. The order of sale was by consent, and the owner was well advised of the time, and might have attended to insist upon a division into forty acre tracts, if desirable. If she had meant to object, she could have done so on the return of the sale.

The sale was not void, and can not be collaterally attacked. The deeds were *prima facie* evidence of their contents, and showed title in the plaintiffs.

We find no material error in the finding, and judgment of the court. Let the same be affirmed.

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ESTES, Ad., etc., vs. MARTIN, Ad., etc.

1. JURISDICTION: *When acquired, continues, etc.*

When a court once rightfully acquires jurisdiction of a cause, it has the right to retain and dec de it.

Jurisdiction of the court depends upon the state of things at the time of the action brought; and, after vesting, it can not be ousted by subsequent events.

APPEAL from *Pulaski* Chancery Court.

Hon. J. R. EAKIN, Chancellor.

B. D. Turner and *U. M. Rose*, for appellant.

Newton, *contra*.

C. B. MOORE, S. J. The original bill in this case was brought in the Pulaski chancery court, to the October term, 1867, by Jasper M. Gonder against James A. Martin, as administrator *de bonis non* of the estate of James B. Johnson, and against his widow, then married again, and his heirs, and Albert Rust and D. J. Hartsook, as executor of Mary W. Cabell, and her heirs.

The bill alleges in substance that, in 1859, James B. Johnson agreed to sell to Gonder certain lands known as the Ben Oak plantation, in Desha county, Arkansas, for the sum of $75,000, one-third of which was to be paid in cash, and the balance in one and two years. On the first of January, 1860, Johnson conveyed the lands to Gonder, receiving $25,000 in cash, and retaining a lien for the unpaid purchase money, which was evidenced by two notes for $25,000 each, due in one and two years.

Before the notes fell due, Gonder made large payments on them; after which he discovered that the lands were incumbered by a prior mortgage, given by Johnson to Albert Rust, to secure a debt of some $50,000, and which mortgage was recorded before he bought the land.

Immediately on discovering this, he applied to Johnson to remove the incumbrance, which he promised to do.

Rust had, in the meantime, assigned his mortgage to Mrs. Cabell, as security for a debt which he owed her. She had died, and Hartsook had qualified as her executor in Virginia, where she lived and died.

That in January, 1861, Johnson requested Gonder to pay the balance of the money due him, to enable him to extinguish the Rust mortgage, and after some negotiations between all the parties, it was agreed that the balance due from Gonder should be paid by him to Rust and Hartsook, upon which the mortgage should be released and canceled. That in

April, 1861, he paid about $10,000 to Rust, which he agreed to credit on the mortgage debt; whereupon Rust agreed that if Gonder would pay him the balance due to Johnson—about $12,000—by January 1, 1862, he would release the mortgage. Still further negotiations seem to have been made, and on the nineteenth of April, 1861, Rust empowered his attorney to enter satisfaction of the mortgage if Gonder would pay the $12,000 by the twelfth of May, 1862. In pursuance of this agreement Gonder, on the third of May, 1862, sent the $12,000 to Hartsook, who acknowlodged its receipt, and according to directions applied it as a credit both on Johnson's debt to Rust, which Hartsook held by transfer, and upon Rust's debt to Mrs. Cabell's estate.

The bill further sets forth that in April, 1861, Johnson executed a second mortgage to Rust, on certain lands in Pulaski county, Arkansas, to secure the original debt to Rust, and which last mentioned mortgage was received by Rust in substitution of the mortgage on the lands in Desha county. Further, that other payments had been made by him (Gonder) to other parties, for Johnson, and that the various payments made, fully extinguished his indebtedness to him. That Johnson died in February, 1862; that the proper credits had never been entered on his notes, which were held by Martin, Johnson's administrator.

On the two grounds of the substitution of the Pulaski mortgage for the Desha mortgage, and payment, he prays, that the Desha mortgage be decreed to be satisfied—that his notes to Johnson be canceled and delivered up to him—and for general relief.

Hartsook, as well as Rust and Martin, answered the bill.

It will only be necessary to notice the answer of Hartsook, as Rust subsequently went into bankruptcy and ceased to have any interest in the suits, and his assignee was never made a party; and Martin, the administrator of Johnson, withdrew from the defense of the suit about the same time.

And we remark here that, for the determination of the questions presented, we pass over and refrain from any mention of a great part of the pleadings of various parties drawn into the controversy from time to time in this protracted litigation, but whose interests in the suit have ceased, or are immaterial to the present inquiry.

Hartsook, in his answer, denies that he ever authorized the payment of the $10,000 to Rust by Gonder, or that he made any agreement for the release of the Desha mortgage, or that Rust had any power to make any such agreement for him; denies that the mortgage on the Pulaski lands was accepted as a substitute for the mortgage on the Desha lands, but consented that it might be regarded as additional security for Rust's debt.

He makes his answer a cross-bill against Gonder and his co defendants in the original bill, and prays that both mortgages might be foreclosed.

This answer and cross bill was filed on the seventeenth of June, 1868. After the suit had been long pending, to-wit: on the ninth of May, 1876, Hartsook filed an amended and supplemental answer and cross-bill, making the occupants and subsequent purchasers of the Pulaski lands, parties, with a view to a more specific claim on them as cumulative security.

It turned out in the hearing, that these Pulaski lands, when Johnson mortgaged them, were subject to prior liens

for purchase money, and that the claim against the occupants and purchasers was barred by limitation.

Several interlocutory decretal orders, on demurrer to the cross-bill, and in reference to the complicated state of the pleadings, were made, in the progress of the suit, by the chancellor, which are not important to be noticed now by us.

Gonder and Rust have both died in the meantime, and after long delays, their legal representatives were brought in as parties in their stead.

So the suit dragged its weary length along until the month of June, 1877, when, after everybody who could be supposed to have any interest possible in the controversy had been brought into it, final decree was rendered.

The chancellor decreed that Martin, the administrator of Johnson, should bring into court, and deposit with the clerk, to be canceled, the notes of Gonder given for the purchase money of the Desha lands, and that they be adjudged to be fully paid and satisfied, and that the administrator was entitled to a credit for the same against his inventory in his settlement with the probate court, and that he or his successor as administrator, be perpetually enjoined from proceeding to collect said notes, or any part thereof.

Further, that as to all other matters, the original bill be dismissed for want of jurisdiction.

Further decreed, that so much of the cross-bill of Hartsook as seeks to foreclose the mortgage on the lands in Pulaski county be dismissed for want of equity, and that as to said lands in Pulaski, the decree be final as between Hartsook and the parties to the suit claiming the lands. Then the decree proceeds as follows: "It appearing that this court has no further jurisdiction of this cause to proceed therein, and to make any decree with regard to the

lands in Desha county involved in this suit, the said cross-bill of Hartsook is dismissed without prejudice of any of the rights, interests or defenses in or to the said lands in Desha county brought into controversy in this suit; but, with regard to said lands in Desha county, to stand as if this suit were never brought," etc.

To the opinion and rulings of the court in this decree, Hartsook excepted, and appealed. No exceptions are insisted on, however, by Hartsook or his counsel, to any part of the decree save the portion above quoted, by which Hartsook's cross-bill is dismissed for want of jurisdiction.

Since the transcript was filed in this court, Hartsook has died, and M. K. Estes, "as sheriff and administrator *de bonis non*" of Mrs. Cabell's estate, has, by proper proceedings, been substituted as the appellant herein.

The learned chancellor having decided (and we think correctly) that the prayer of the cross-bill concerning the Pulaski lands, or any relief whatever concerning them, should be denied upon the merits for want of equity, reached the conclusion, and so decreed, that the jurisdiction over the Desha lands must fail.

It must be borne in mind that this suit was instituted, and all the proceedings had, in the chancery court of Pulaski county. It was brought in 1867, before the adoption of the Code of Practice.

Our present inquiry is limited to the one question of jurisdiction.

The statute in force at the time of the institution of the suit, and under which the Pulaski chancery court was created, provided that the Pulaski chancery court should "possess the same jurisdiction and powers, and be governed by the same rules, as the circuit courts in this state in chancery cases." *Gould's Digest, ch. 28 (Art. 11), sec. 6.*

The general statute then in force, in regard to the venue of suits concerning real estate, provided that "suits in chancery concerning real estate may be instituted in any county in which any part of such real estate may be situated, or in which the defendant, or any of them, may reside."

See *Gould's Digest, ch. 28 (art. I), sec. 3.* Section 4, same chapter, provides that, "In other cases, suits in chancery shall be brought in the county in which the defendant may reside, or in the county in which the plaintiff, or one or all of several plaintiffs, resides; and the defendant, or one or all of several defendants, are found and served with process," etc.

These two sections, construed with the provisions of the section above cited, as to the powers and jurisdiction of the Pulaski chancery court, applied to that court equally with any circuit court in the state.

It is proper to remark, in passing, that these provisions as to the venue in real estate cases in chancery, are modified and materially changed by the Code—and this case was decided long after the Code went into use, and we suppose, was decided by the chancellor with reference to the rules of the Code.

Now, in the case at bar, the suit begun in the Pulaski chancery court by Gonder, related primarily and chiefly, to the lands in Desha county; but the mortgage on the Pulaski lands is referred to distinctly in the original bill of Gonder, and the fact stated and insisted on, that Rust had agreed to accept it in substitution of the mortgage on the Desha lands.

Hartsook, in his answer and cross-bill, lays hold more distinctly and emphatically, of the Pulaski county mortgage, and contends that it was given as cumulative secu-

rity, and asks for its foreclosure as well as of the Desha mortgage.

Both Gonder and Hartsook refer to, and ask relief in good faith, as to the Pulaski mortgage, and there is no ground for the belief that there was any fiction, or pretense, intended by either or any of the parties in regard to it, so as to impose on the jurisdiction of the court.

The suit then clearly "concerned" real estate, situated in Pulaski county, and the jurisdiction attached by the bringing of the suit and the filing of Hartsook's cross-bill, both as to the lands in Pulaski and in Desha counties. There is no question but that if the facts had warranted a foreclosure of the mortgage, and the relief asked as to the Pulaski lands, the court below could and would have gone on and decided the merits of the case as to the Desha lands.

That this could be done in such a case, and was contemplated by the framers of the statute, is clear from the twenty-second section of the twenty-eighth chapter, Gould's Digest, in which it is provided as follows:

"When, under the provisions of this act, any decree or judgment shall be made or rendered in the courts in Pulaski county against persons or property not within its territorial jurisdiction, an authenticated transcript of the entry made in the judgment docket as required by law, shall be immediately transmitted to the clerk in the proper county where the defendant may reside or have real estate, or where the real estate sought to be affected by the decree or judgment is situated; and the clerk receiving such transcript shall at once file for record, and shall record the same upon his judgment docket; and such judgment or decree shall be a lien upon real estate in the

county where the transcript is filed, as if the same had been made or rendered in that county," etc.

Moreover, part of the defendants to the original bill resided in Pulaski county—Rust and Martin, Johnson's administrator, and the administration of Johnson's estate, were in that county. This fact alone, had there been no real estate in Pulaski county to be affected in the suit, would, under the law as it then was, have given jurisdiction to the Pulaski chancery court.

Hartsook did not originally seek that forum, but was brought there in this suit by due and regular process, and saw fit, as he had the right, to make his answer a cross-bill, that all his rights or supposed rights touching the controversy might be settled in and by that suit.

Gonder would have had no right to dismiss his bill after the filing of the cross-bill of Hartsook, if he had so desired.

See *Sale and Wife v. McLean et al., 29 Ark., p. 612, and cases cited.*

"In that case this court approved and reiterated the doctrine as laid down in the case of *Cockrell v. Warner and Wife, 14 Ark.;* that when a defendant filed a cross-bill founded on a matter clearly cognizable in equity, the cross-bill supplies any defect in jurisdiction, if any existed, and placed the court in possession of the whole cause, and imposed the duty of granting relief to the party entitled to it—the original and the cross-bill being but one cause."

We conclude then that the jurisdiction clearly and rightly attached both on the ground of the suit "concerning" real estate in the county of the forum, and the residence of some of the defendants being in that county.

The jurisdiction having once attached, was it competent or possible that it could be ousted or lost in the progress of the suit? We think not, and can not concur with the learned chancellor, that when the cross-bill of Hartsook failed as to the relief sought against the Pulaski land, the jurisdiction failed as to the Desha land.

It is the universal rule, so far as we know, in the courts of the various states, and in the United States courts, that where a court once rightfully acquires jurisdiction of a cause, it has the right to retain and decide. See *Price v. State Bank, 14 Ark., 50; Heilman v. Martin, 2 Ark., 168; Robertson v. Thompson, 3 Ind., 190; Morgan v. Morgan, 2 Wheat., 290.*

In the case last cited, Chief Justice Marshall uses this language: "It is quite clear that the jurisdiction of the court depends upon the state of things at the time of the action brought, and, after vesting, it can not be ousted by subsequent events."

As to the merits of the case made as to the Desha lands, in Hartsook's cross-bill, we decide nothing, as no decree was rendered in the court below touching that part of the controversy.

Let the decree as to all other matters be affirmed, and for the error in dismissing Hartsook's cross-bill, let the case be reversed and remanded to the Pulaski chancery court, with directions to hear and determine the matters arising under the same, not already decided.

Hon. J. R. Eakin, J., did not sit in this case.

SIGMENT VS. THE STATE.

1. PRACTICE IN SUPREME COURT: *Bill of exceptions.*

When the bill of exceptions contains no reference to the motion for new trial, and no exception to the decision of the court overruling it, there is no question of law before the supreme court to decide, on the appeal.

APPEAL from *Garland* Circuit Court.
Hon. J. M. SMITH, Circuit Judge.
Kimball, for appellant.
Henderson, Attorney General, contra.

ENGLISH, C. J. Joseph Sigment and Mary Sigment were indicted in the circuit court of Hot Springs county for selling ardent spirits, etc., on Sunday.

They were tried on the plea of not guilty, the jury found Joseph guilty, assessed a fine against him of ten dollars, and acquitted Mary.

It seems that he moved for a new trial, which was refused, and he took a bill of exceptions, setting out the evidence and instructions of the court, but in the bill of exceptions there is no reference to the motion for a new trial, and no exception to the decision of the court overruling it. There is, therefore, no question of law reserved for this court to decide on this appeal.

Affirmed.

34 421
63 278

34 421
185 495

RAY VS. LIGHT.

1. INSTRUCTIONS: *Error in, when waived.*

When error in giving or refusing instructions is not made ground for new trial, it is waived.

2. EXECUTION SALE: *Purchaser of safe is not, of contents.*

The purchaser of a safe at an execution sale, acquires no title to its contents. It is his duty to preserve them and restore them to the owner when called for.

3. TROVER: *Conversion, what it is.*

A conversion, in the sense of the law, of trover, consists either in the appropriation of the thing to the party's own use and beneficial enjoyment, or in its destruction, or in exercising dominion over it in exclusion or defiance of the plaintiff's rights, or in withholding the possession from the plaintiff, under a claim of title inconsistent with his.

4. SAME: *Conversion—demand and refusal.*

Proof of demand and refusal, or non-compliance, is *prima facie* evidence of conversion.

5. SAME: *Demand too large.*

When the demand is for several articles, only some of which the plaintiff is entitled to, a general refusal, without offering to deliver those he is entitled to, will be evidence of conversion of them.

6. TROVER: *Measure of damages for chose in action, etc.*

The measure of damages in trover for a chose in action, as a bond, bill, note, or other security for payment of money, is *prima facie*, the amount due on the security; the defendant being at liberty to reduce that valuation by proof of payment, or the insolvency of the maker, or of any fact tending to invalidate the security.

7. SAME: *Conversion, joint and several.*

In trover, as in other actions of tort, one or more of the defendants may be found guilty and the others acquitted. But the plaintiff can not recover against all, unless he prove a joint conversion by all.

APPEAL from *Jefferson* Circuit Court.
Hon. J. A. WILLIAMS, Circuit Judge.
M. L. Jones, for appellant.

English, C. J. This was a Code action, in the circuit court of Jefferson county, in the nature of the common law action of trover for the conversion of goods. The suit was commenced, twenty-sixth of April, 1876, by George S. Light against Abraham Ray, David Young and Elizabeth Kite. A schedule of the goods, consisting of numerous articles, was attached to and made part of the complaint.

No question is presented on this appeal as to the form or substance of the complaint or answers.

Henry W. Scull, upon his own motion, was made defendant, and claimed the property described in the first seven items of the schedule attached to the complaint, consisting of drawers, cases, counters, tables, shelving, etc.; and called drug-store fixtures.

In the schedule, among others, were also the following items:

1 gold breastpin and finger-ring (in safe)		$ 15 00
1 lot of county scrip	"	399 10
5 years' interest on same	"	119 11
1 lot county bonds	"	266 00
1 year's interest on same	"	15 96

The jury returned a verdict in favor of defendants, Young and Kite, and they were discharged.

The following verdict was rendered against defendant Ray:

"We, the jury, find for plaintiff, etc., against A. Ray, for value of county scrip and county bonds and interest, as set forth in the complaint, being, in amount, $800.27, at the rate of sixty-five cents on the dollar, being of the value of $520.17, and interest on same from date of complaint, one year and eight months, at six per cent., $52.01; also, for one gold ring and breastpin, $15; interest on same for

one year and eight months, at six per cent., $1.35: Total, $588.53."

The jury also returned a verdict against defendant Scull for the value of the property claimed by him, part of which the plaintiff remitted, and he filed no motion for a new trial, and took no bill of exceptions.

Ray filed a motion for a new trial on the grounds following:

1. Verdict as to him, contrary to the evidence.
2. Contrary to law, as given by the court.
3. Contrary to the law and the evidence.
4. Verdict not supported by any evidence as to the value of the county scrip and county bonds, mentioned in plaintiff's complaint.

The court overruled the motion for a new trial; the plaintiff remitted so much of the verdict against Ray as was in excess of $330.75, for which final judgment was entered, and Ray took a bill of exceptions, and appealed.

I. On the trial, appellee moved a number of instructions, some of which were given by the court, and others refused. For appellant, twelve instructions were asked, and all given, except the seventh and ninth.

Counsel for appellant submits that the court erred in refusing these two instructions, and also in giving the fourth and seventh moved for appellee.

Error in giving or refusing instructions was not made ground of the motion for a new trial, and, therefore, by a familiar rule of practice, was waived, if any occurred.

II. Counsel for appellant also insists that there was no evidence that he converted the county scrip, bonds and jewelry; and (III) that the value of the scrip and bonds was not proved; that the jury fixed their value arbitrarily.

The substance of so much of the evidence introduced

upon the trial, and set out in the bill of exceptions, as relates to the conversion of this property, by appellant, and its value, may be here stated:

George S. Light, appellee, testified that he left Pine Bluff in June, 1875, where, at that time, he was carrying on a drug and fancy store business. He left a safe in his store, and in the safe the county scrip, county bonds, and gold breastpin and finger-ring mentioned in the schedule attached to the complaint. The amount of the scrip was as stated in the schedule. The breastpin and finger-ring were worth $15. Here his counsel held up the schedule, and asked him what was the value of the property scheduled? He replied that it was worth the amount stated in the schedule; that the total value was between $1,600 and $1,800.

(It may be here remarked that the value of each article, or class of articles, put down in the schedule is stated in the margin, and the whole footed up at $1,754.67.)

Witness then proved specifically the value of the first seven articles in the schedule, and of all other articles except the coffin and the county scrip and county bonds.

Witness returned to Pine Bluff in February, 1876, and found Young and Kite in possession of the store-house and of the goods in the schedule, except a few articles; they did not have the county scrip and county bonds, nor the breastpin and finger-ring. He made a demand of them for the articles in the schedule by reading the whole list over, and demanding the same. At another time and place, and before suit, he demanded the same articles of Abraham Ray (appellant), by reading the whole of the schedule over to him, and demanding the same; no specific article was demanded.

It was admitted on the trial that Ray, on the first of Jan-

uary, 1876, had purchased under execution issued against George S. Light (appellee), on a judgment in favor of Joseph Merrill, the stock of drugs and the safe, and certain other articles of merchandise, all of which, except the safe, Ray afterwards sold to Young and Kite, who took possession of the store-house, and the goods and chattels so purchased from Ray.

It was also admitted that the suit was not intended to embrace any of the property purchased by Ray under the execution.

A list of the property purchased by Ray under the execution was attached to the return of the sheriff upon the writ, and was read in evidence.

In the list is a safe appraised at $35, but no county scrip, county bonds, gold breastpin or finger-ring.

A. T. Seymour, witness for appellee, testified that after Ray purchased the stock of goods, etc., at the execution sale, he requested witness to take charge of them for him and take care of them, which he did; that, after he took charge of them, Ray sold the safe to some one, and before the safe was delivered, witness opened it and found in it a lot of county bonds and county scrip.

Here witness gave a list of the county bonds and scrip, which is copied in the bill of exceptions. The amount of each piece of scrip and bond is put down in figures, and the whole footed up at $434.50.

Witness further stated that he also found in the safe a finger-ring and breastpin; that he delivered the county scrip and bonds to Ray. He did not deliver him the breastpin and ring, but kept them in his possession, and still had them. Ray never claimed to own them, and never claimed possession of them. Afterwards, about the last of January, 1876, Ray sold out the drugs and other articles to

Young and Kite, and witness gave up his charge to them. He took possession of all the goods in the safe, as the agent of Ray.

Abraham Ray (appellant) testified that on the first of January, 1876, he bought the stock of drugs at the execution sale, and thought at the time he was buying everything in the house. Among other property, he bought the safe in which was the bonds and scrip. After purchasing and taking possession of the goods, he put A. T. Seymour in charge of them as his agent. About the twenty-eighth of January, 1876, he sold out all the stock he had purchased to Young and Kite except the safe, which he had previously sold to another person. Before he sold and delivered the safe, Seymour opened it, and found the scrip and bonds, and delivered them to him, telling him he had gotten them out of the safe. He did not know what was in the safe. When the scrip and bonds were delivered to him by Seymour he took them and deposited them in the bank of Smart, Hudson & Co., in his own name, to remain until the question could be decided who they belonged to, and they were there yet. Several days before the suit was brought, appellee and his attorney, in the presence of two other persons, came and read over to him the schedule of goods attached to the complaint, and demanded possession of all the goods in the list in bulk. No demand was made of him for any specific article in said list. When the demand was made, he replied that he knew nothing about the matter, and referred them to his attorney. At the time of the demand, he had nothing in his possession but the scrip and bonds. He never claimed ownership of the ring and breastpin, or right to the possession of them. When he purchased the goods under execution, he thought he was buying the contents of the safe with the safe.

II. That appellee had title to the scrip, bonds and jewelry in controversy on this appeal, does not, upon the evidence adduced at the trial, admit of doubt. Counsel for appellant concedes that by his purchase of the safe at the execution sale, he acquired no title to the contents of the safe. There is no evidence that the sheriff opened the safe levied upon, and sold its contents, if he might have done so. *Allen on Sheriffs, p. 110.*

After appellant purchased the safe, he put Seymour, as his agent, in charge of it, who opened it, and found in it the scrip, bonds and jewelry. It seems that appellee was absent when appellant purchased the safe, and when it was opened by his agent. It was the duty of appellant to take care of this property, and restore it to appellee, its owner, when called for.

A conversion in the sense of the law of trover, consists either in the appropriation of the thing to the party's own use and beneficial enjoyment, or in its destruction, or in exercising dominion over it, in exclusion or defiance of the plaintiff's rights, or in withholding the possession from the plaintiff, under a claim of title, inconsistent with his own. It may, therefore, be either direct or constructive, and, of course, is proved either directly or by inference. *2 Greenlf. Ev., sec. 642.*

Proof of demand and refusal, or non-compliance, is *prima facie* evidence of conversion. *Ib., sec. 644; Zachary v. Pace, 9 Ark., 212.*

What response appellant made to appellee, when he read over to him the list of articles contained in the schedule attached to the complaint, appellee did not state in his testimony. But appellant stated in his testimony, that when the demand was made, he replied that he knew nothing

about the matter, and referred them (appellee and his attorney) to his attorney.

It appears that before the demand was made, he had deposited the scrip and bonds in bank, in his own name, and they were there subject to his control when the demand was made, and the breastpin aud ring were in possession of his agent, who had opened the safe, and taken them out of it, by authority from him, and they were likewise, of course, subject to his control, in the hands of his agent.

Saying, under such circumstances, that he knew nothing about the matter, and referring appellee to his attorney, whom appellee was under no obligation to consult, was equivalent to a refusal to deliver the goods, and some evidence of conversion.

The fact that appellant thought that when he bought the safe at the execution sale, he purchased also its contents, was no valid excuse for his refusal, in effect, to deliver its contents to appellee, when demanded. His claim to the contents of the safe was neither reasonable nor well founded. *Zachary v. Pace, 9 Ark., 216.* One, purchasing a house under execution, might as well claim its contents, no matter how valuable; and make such groundless claim an excuse for refusing to surrender possession of goods, found in the house, on demand of the owner.

Counsel for appellant submits that his refusal to deliver the goods in controversy on this appeal, upon a demand of all the articles in the schedule, was no evidence of conversion; citing *2 Saunders' Rep., p. 47, K, notes (t).* So much of the note as bears upon the point made, is as follows:

The demand, in order to make the refusal evidence of a conversion, must be specific. * * * So, where the plaintiff, being entitled to the five best beasts as heriots, marked seven beasts, claiming all as heriots, and left them

in the possession of the defendant, who was the owner up to the marking; and the plaintiff afterwards applied to the defendant, who still had possession of the seven, for the beasts generally, but the defendant refused to give them up, without qualifying his refusal; it was held, no conversion of the beasts, the demand having reference to a seizure of seven, and it not being ascertained that any five were legally chosen. * * * "If the demand be too large, as where the plaintiff, being entitled to five beasts, claims seven, and the defendant refuses the seven, but offers to give up five, and the plaintiff persists in demanding the seven, and declines the five, the demand is wrong, and the refusal justifiable. But if the defendant refuse on the ground that the plaintiff has no right to any one of the beasts, it should seem that such refusal is evidence of a conversion, as to the five, to which he is really entitled." *1 Q. B., 781.* "So, where the plaintiff, being entitled to certain wooden sash frames, in which were fixed some iron pulleys, belonging to the defendant, demanded the sash frames, and the defendant gave an unqualified refusal to deliver them up, it was held, that such demand and refusal was a sufficient evidence of a conversion of the sash frames; though it might have been otherwise if the refusal had been a qualified one, on the grounds that the pulleys were attached to the frames."

On the facts of this case, the note from Sanders does not sustain the point made by counsel for appellant.

Appellee made a schedule of the goods which he claimed as not having been sold under the execution, in which were put down the scrip, bonds, breastpin and ring, which were in his safe when it was purchased by appellant.

He read over the whole list of articles to appellant, and demanded them of him. The fact that appellant was not

in possession of some of the goods in the list, was no valid excuse for his refusal to deliver such as were in his possession, or under his control. He did not put his refusal on the ground that the demand was too large, but replied that he knew nothing about the matter, and referred appellee to his attorney; and the reply, in point of fact, was not true; for he knew, at the time, that he had deposited the scrip and bonds in bank, in his own name, and that the breastpin and ring were in possession of his agent.

In *Breese v. Bange, 2d E. D. Smith, C. P. New York R., 475,* where, as the foundation of an action in the nature of trover, demand was made of numerous articles scheduled, which, at the time, were in remote places; and the defendant, after stating that he was unwilling to do any thing in the matter until he could consider of the matter, requested a copy of an inventory of the articles, which was thereupon promised, but was never furnished before suit, it was held that the demand and refusal were insufficient as evidence of a conversion.

In this case, appellant requested no copy of the list of the articles demanded, and none was promised.

III. It is true that there was no evidence of the actual or market value of the scrip and bonds.

Where the property sued for in trover is a chose in action—as a bill, note, bond, or other security for the payment of money—it seems that the measure of damages is *prima facie* the amount due on the security, the defendant being at liberty to reduce that valuation by evidence showing payment, the insolvency of the maker, or any fact tending to invalidate the security. *Sedgwick on the Measure of Damages, 6th ed., p. 609, and notes.*

The amount of the scrip and bonds, with the interest due upon them at the time of the demand, was stated in

the schedule. If the jury believed the testimony of appellee, they might have rendered their verdict for that amount, in the absence of any evidence that the scrip and bonds were depreciated.

Without evidence, and perhaps from personal knowledge, the jury found that they were worth sixty-five cents on the dollar—which was an error in favor of appellant.

The witness Seymour stated, in effect, that the scrip and bonds, taken from the safe by him, amounted to $434.50. He said nothing as to interest due upon them. If he had been the only witness, the jury could not have found the value of the scrip and bonds to have been greater than the sum stated by him.

It was within the power of appellant to produce the bonds, and show their face value, the interest due upon them, and to prove their market value. This he failed to do.

Appellee remitted so much of the verdict as was in excess of $330.75.

IV. It is further submitted for appellant that the complaint having charged a joint conversion of the goods by him, Young and Kite, appellee was obliged to prove a joint conversion as alleged, or fail in the action as to all of the defendants. The point is not well taken.

In trover, as in other actions of tort, one or more defendants may be found guilty and the rest acquitted. But the plaintiff can not recover against all, unless he prove a joint conversion by all. *Starkie on Evidence, vol. 2, part 2, p. 1164; 2 Sanders R., p. 475, note (i).*

V. It is furthermore submitted for appellant that the scrip and bonds were in the custody of the law at the time the demand was made, and that therefore appellee could not maintain the action.

There was an attempt to prove, on the part of the defense, that the scrip and bonds were attached in the hands of the bankers, with whom they were deposited by appellant, at the suit of Scull; but the return of the sheriff upon the writ of attachment, introduced in evidence, fails to show that fact. Some money of appellee's, in the hands of the bankers, it seems, was attached, but released by order of the court on account of defective execution of the writ.

Upon the whole case, we think there was some evidence to support the verdict, and the judgment must be affirmed.

CROWELL VS. STATE.

1. CRIMINAL PRACTICE: *Bill of exceptions not allowed in time, no part of record.*

When it does not appear that a bill of exceptions, in a criminal case, was allowed by the judge within the time given, or even before the end of the succeeding term, beyond which it could not have been extended by the court, it will not be considered as any part of the record.

APPEAL from *Scott* Circuit Court.
Hon. THOMAS H. BARNES, Special Judge.
Duval & Cravens for appellant.
Henderson, Attorney General, contra.

HARRISON, J. Edward Crowell was, at the June term, 1878, of the Scott circuit court, convicted of the crime of rape, and sentenced to be hanged. He prayed an appeal to this court, and ninety days from the date of the order, which was the fourteenth day of June, 1878, was given

him, in which to prepare and present to the judge a bill of exceptions.

An appeal was granted by a judge of this court.

The bill of exceptions, which was not in the transcript when filed, but has since been brought here in a return to a *certiorari*, is without date, and was filed with the clerk on the twenty-sixth day of December, 1878, and after the term succeeding the trial. It does not appear that it was allowed by the judge within the time given, or even before the end of the succeeding term, beyond which it could not have been extended by the court.

We can not, therefore, consider it as any part of the record.

Our attention has not been called to, nor do we find, anything in the record for which the judgment should have been arrested.

The judgment is affirmed.

HOWARD VS. THE STATE.

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1. CRIMINAL LAW: *Indictment: Good and bad counts: Verdict.*

Where there are several counts in an indictment for the same offense, some good and some bad, and there is a verdict of guilty on the indictment, it will be referred to the good counts, and the bad will be no ground for arresting the judgment.

2. CRIMINAL PLEADING: *Indictment; varying counts.*

It is no objection to an indictment that the different modes in, and means by which an offense is alleged to have been committed, are stated in several and distinct counts.

3. EVIDENCE: *Direct and circumstantial, distinguished.*

When the existence of any fact is attested by witnesses, as having come under the cognizance of their own senses, the evidence of the fact is said to be direct or positive; but when the existence of the principal fact is only inferred from one or more circumstances which have been established directly, the evidence is said to be circumstantial.

4. CRIMINAL LAW: *Intent, when implied.*

Every one is presumed to intend the natural consequences of his act; and though a specific intent may not exist in the mind, the law will imply an intent to produce the effect, when it is the natural and probable consequence of the act.

5. ADMISSIONS: *Jury not bound to believe all a party said.*

The jury are not bound to give equal weight to all the statements of a defendant admitted in evidence.

APPEAL from *Franklin* Circuit Court.
Hon. W. D. JACOWAY, Circuit Judge.
Fielder, for appellant.
Henderson, *Attorney General*, *contra*.

HARRISON, J. The appellant, James Howard, was indicted in the Franklin circuit court, for the murder of Mollie Howard, his wife; and he was convicted of murder in the first degree. He moved for a new trial, which was refused, and then in arrest of judgment, and the latter motion was likewise overruled.

The ground of the motion in arrest of judgment was: that the indictment did not charge the offense with sufficient certainty.

The indictment contained seven counts, or, in other words, alleged the offense to have been committed in so many different ways. In the first, the killing was alleged to have been by choking; in the second, by striking, beating, wounding and bruising with the fists; in the third, by

pulling down and kicking; in the fourth, by kicking; in the fifth, by striking and beating with a club; in the sixth, by choking, striking, beating, wounding and bruising with the fists—by kicking, and by striking and beating with a club; and in the seventh, in some way and manner, and by some means, instruments and weapons, to the jurors unknown.

The form in which the offense was charged, was the same in each count. The sixth count was as follows:

"And the grand jury aforesaid, in the name and by the authority aforesaid, on their oaths, do further accuse the said James Howard of the crime of murder, committed as follows, viz.: The said James Howard, on the eighteenth day of January, 1879, in the county of Franklin, in the state of Arkansas, willfully, deliberately, feloniously, of his malice aforethought, and with premeditation, did kill and murder one Mollie Howard, then and there being, by choking her, the said Mollie Howard; and then and there striking, beating, wounding and bruising her, the said Mollie Howard, with his fists; and by then and there kicking her, the said Mollie Howard, with his feet; and by then and there striking and beating her, the said Mollie Howard, with a certain club, which he, the said James Howard, in his hands, then and there held, with the felonious intent her, the said Mollie Howard, then and there, willfully, deliberately, feloniously, of his malice aforethought, and with premeditation, to kill and murder, contrary to the statute in such case made and provided, and against the peace and dignity of the state of Arkansas."

It is sufficient, the statute says, if the act or omission charged as the offense, is stated in the indictment with such a degree of certainty as to enable the court to pronounce judgment on conviction according to the right of the case;

and the statement of the acts constituting the offense be in ordinary and concise language, and in such a manner that a person of common understanding may know what is intended. *Gantt's Digest, secs. 1781, 1782, 1796.*

The count we have set out, though informally drawn, contains the averment of every ingredient of the crime of murder, and the acts constituting the offense charged were alleged with the requisite precision and certainty.

If it be conceded that the seventh count, because not setting forth the manner of the killing, and the means by which it was effected, was fatally defective, yet, where there are several counts in an indictment for the same offense, some of which are good, and some are bad, and there has been, as in this case, a general verdict of guilty on the indictment, the verdict will be referred to the good counts, and the bad are no ground for arresting the judgment. *3 Whar. Crim. Law, sec. 3047; Brown v. The State, 10 Ark., 607.*

It is not an objection that the different modes in, and means by, which the offense was alleged to have been committed, were stated in several and distinct counts. The counts were but a form of alleging the modes and means in the alternative, which, according to *sec. 1783, Gantt's Digest*, may be done. But one offense was charged. *Thompson v. The Commonwealth, 1 Met. (Ky.), 13.*

The grounds of the motion for a new trial were: that the court misinstructed the jury; that it refused to give them proper instructions, asked by the defendant; and that the verdict was against the evidence.

The proof was, that the defendant and his wife, the deceased, were, on the night of the sixteenth of January, 1879, at a party at the house of Joseph Page. The deceased had danced with a little boy, and was again on the floor

with a man named Robinson, when the defendant came in and took her by the hair and pulled her out of the room. They passed through a back room, making considerable noise, and after getting out of the house, a noise was heard at the wood-pile, a few feet from the door, as if they were falling over the wood, and the deceased was heard to say: "Oh, don't, Jim! I'll go." They continued on home, their house being about one hundred yards from Page's; and when they got there, the door was violently shut, and considerable racket was heard in the house; the deceased crying and screaming; and she was heard to say: "You are choking me to death!" or, "I am choking to death!" and afterwards heard groaning. She was up next morning, and prepared breakfast, but after that took her bed; and she died about four o'clock the following morning. Upon a *post mortem* examination by physicians, a bruise was found upon her upper lip; others, resembling finger-prints, upon her neck; a large one on the back, over the region of the kidneys; and another, about the size of the palm of the hand, over and about the back portion of the left lung and behind the heart; and the blood of the bruised parts was coagulated. The kidneys were found coagulated with blood and urine, and the back part of the right lung was bruised and congested, the left being badly congested, and it was red and hepatized.

The deceased presented the appearance of having been a healthy woman; and it was the opinion of the physicians that these injuries were produced by violence, and were the cause of her death.

The defendant was, in the afternoon of the day after the party, at Page's house, and he said to him and his wife: "When we have cats at our house," meaning, as the witness understood, broils, "we have cats right." He also said

that, had he known she answered him as she did at the party, she would not have done so again.

A club or stick, three, or three and a half feet long, and as large as a man's wrist, was found on the path from Page's house to the defendant's; and he told a witness that he picked up a stick at the wood-pile to frighten her home. but said he did not strike her with it; and another witness, that he took up the stick to scare her home; and in the conversation with this latter witness, said he hurt her only on the lip, hair and back, but did not hit her on the back.

The venue was proved as laid in the indictment.

The defendant asked the following instructions, which the court refused to give:

This case is one depending on circumstantial evidence, and the opinion of medical experts; and in such cases the jury must, in weighing the evidence, be governed by certain rules of law: First—the hypothesis of guilt of the offense charged in the indictment should flow naturally from the facts proven, and be consistent with them all. Second—the evidence must be such as to exclude any reasonable hypothesis but that of the defendant's guilt of the identical offense imputed to him; or, in other words, the facts proved must all be consistent with and point to his guilt only, and must be inconsistent with his innocence. If the evidence can be reconciled either with the theory of innocence or guilt, the law requires the jury to give the accused the benefit of the doubt, and to adopt the theory of innocence, and to acquit.

2. Circumstantial evidence is never sufficient to convict when it raises no more than a definite probability in favor of the theory of guilt, and is always insufficient when, assuming all to be proved which the evidence tends to

prove, some other hypothesis may be true; and the jury in this case must acquit the defendant, unless the evidence discloses to them a state of facts, fully established, which to a moral certainty actually excludes every reasonable hypothesis but that of guilt.

3. If the jury believe from the evidence that the defendant did chastise the deceased, used force and even violence; unless they are also satisfied that he inflicted the same with felonious intent to kill and murder, they can not convict.

4. If the jury believe from the evidence that the defendant, at a party, shortly before the death of the deceased, caught her around the shoulder, or neck and legs, and jerked her out of the house, carrying her several paces in that position; and he accidentally stumbled and fell, and thereby letting her fall on her back; and if they further believe from the evidence that such a fall may have produced the injuries which resulted in her death, they can not convict the defendant of the offense charged. If the proof raises such an hypothesis, it is their duty under the law to reconcile the case upon it, and to acquit.

5. If the jury consider any portion of the confessions or statements of the defendant, they must consider and weigh the whole of such confessions or statements; in other words, his confession or statement, if considered at all, must be considered as an entirety—the jury can not take a portion unfavorable to him, and exclude that which is favorable. They must either reject the whole or accept the whole evidence in the case.

This was not a case depending upon circumstantial evidence, as assumed in the first two of these instructions. There was direct evidence of the assault of the defendant upon the deceased—the principal fact in question.

When the existence of any fact is attested by witnesses, as having come under the cognizance of their senses, the evidence of the fact is said to be direct or positive; but when the existence of the principal fact is only inferred from one or more circumstances which have been established directly, the evidence is said to be circumstantial. *Best, on Presumptions, 246; 1 Green. Ev., 13.*

"Circumstantial evidence," says Mr. Burrill, "is composed of circumstances or relative facts bearing indirectly on the fact at issue, or which is sought to be proved, and requiring in its application to such facts a process of special inference leading to the conclusion denied." *Burr. Circum. Ev., 77.*

These instructions were, therefore, not applicable to the evidence before the jury, and were misleading.

Every one is presumed to intend the natural and probable consequence of his act, and though a specific intent may not exist in the mind, the law will imply an intent to produce the effect when it is the natural and probable consequence of the act; and in cases of homicide, malice is implied, when no considerable provocation appears, or when all the circumstances of the killing manifest an abandoned and wicked disposition.

The third, not distinguishing between a specific and an implied intent, but leaving the jury to understand from it, that a specific intent to kill must have existed in the defendant's mind when he committed the assault, was likewise bad. The court had already instructed, and correctly, with regard to the intent.

The fourth was inapplicable to the evidence, and abstract. Instead of the last, the court gave, against the objection of the defendant, the following:

The jury are instructed that, in considering the admis-

sions of the defendant, they are to take into consideration all he said in the same conversation, as well what he said in his own favor, as against him, and should compare the consistency of such admissions with the other testimony in the case, and by this means form their opinion of the weight to be given to such admissions.

If it was the meaning of that asked by the defendant, that the jury should give equal weight to all the statements of the defendant—and we can only so understand it—it was manifestly wrong. That given in lieu of it was correct.

The instructions asked by the defendant were properly refused.

The evidence fully sustained and warranted the verdict.

Finding no error, the judgment is affirmed.

FLYNN VS. STATE.

1. CRIMINAL EVIDENCE: *Pocre—Stud Pocre.*

Proof of the playing of "stud" pocre will sustain an indictment for playing pocre. The statute can not be evaded by slight variations in the name, or mode of playing the game, nor by paying money to a banker or stakeholder, and taking chips to bet with, nor by obtaining chips from others to bet with, which would draw money.

APPEAL from *Garland* Circuit Court.
Hon. J. M. SMITH, Circuit Judge.
Henderson, Attorney General, for appellee.

EAKIN, J. Appellant was tried before a justice of the peace, upon a warrant ordering his arrest for a misdemeanor, committed by "betting money on a game played

at cards, commonly called pocre." He was convicted, fined ten dollars, and appealed to the circuit court. He was there again tried, convicted, and fined in the same amount. He moved for a new trial, and, failing in that motion, appealed here. He complains of error in the instructions given and refused; and that the proof did not sustain the verdict. The proof, as set forth in the bill of exceptions, showed that he did bet chips, or checks, at a game played with cards, called "stud," or "stud-horse," poker—and that the same was a variation of the game of poker; being somewhat different from certain other games called "straight poker" and "draw poker," but decided, as to results, by show of the cards, and, by high cards, pairs, and threes, as in common poker. The proof further tended to show that the defendant bought the chips, or checks, with money, and that they represented money.

The instructions refused by the court were framed with a view to instruct the jury that, if they believed "stud" or "stud-horse" poker to be a different game from "poker," although of the same class of games; or did not believe, from the evidence, that the defendant bet *money*, or *something of value*, at the game, they should acquit.

The court did fully and clearly instruct the jury, that, in order to convict, they must believe the defendant bet money, or something of value, on the game; but that any thing representing money would be sufficient; and, further, that they must believe the game of "stud" or "stud-horse" poker to come within the class of games designated by the term poker.

The law was correctly given. The statute can not be evaded by slight variations in the name, or mode of playing the game; nor by paying money into the hands of a stakeholder or banker, and taking chips to bet with, nor

by obtaining chips from others to bet with, which would draw money.

In all such cases, the money which the chips represent is the thing actually bet.

Other objections to the verdict and judgment, are not important to be noticed.

Let the judgment be affirmed.

BOYKIN VS. THE STATE.

1. LARCENY: *Evidence—Possession of stolen property.*

Possession of property recently stolen, unexplained, is evidence of guilt to go to a jury for their consideration. In this sense, it is *prima facie* evidence; but not in the sense that it is such evidence as must compel the jury to convict unless it be rebutted.

The presumption that the person in whose possession stolen property is found, is the thief, is not one of law, and a weak one of fact—is not at all conclusive, and, of itself, is not sufficient for a conviction.

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APPEAL from *Lincoln* Circuit Court.
Hon. X. J. PINDALL, Circuit Judge.
Cunningham, for appellant.
Henderson, Attorney General, contra.

EAKIN, J. Appellant was indicted, tried, and convicted of stealing a "black and white spotted hog, marked with a split and overbit and underbit in each ear, of the value of five dollars, of the property of one William Culliford." The indictment was found on the twenty-first of April, 1879. Culliford testified that, some time during that year, appellant had desired witness to let him have charge of his

(witness') hogs, running in the range near Ike Johnson's. Witness told appellant that Johnson had the care of them, and that he (the witness) was satisfied with Johnson's management.

About two weeks after this, witness found one of his hogs in a pen, about forty feet from appellant's cabin, in which he was living with another party. The mark had been changed. Witness took his hog. Appellant was not there. He knew witness' hogs well, from seeing them often around his house. Witness did not know whether or not the mark, as changed, was the appellant's. The old mark was that of the witness, who knew the hog as his own, by that, and other, means. After appellant was indicted and arrested, he said he bought the hog from Ike Johnson, and claimed it for his own. The hog was worth $2.50.

Lord Nelson, who was along with Culliford when he found and took his hog, says that the mark had been freshly changed, and part of the old mark was visible. This, with the venue, was all the evidence.

Amongst other instructions given for appellant and the state which are unobjectionable, the court, against appellant's objection, charged the jury that, "possession of stolen property recently stolen is *prima facie* evidence of the guilt of the party in whose possession the property is so found, unless the possession is satisfactorily accounted for by the evidence. But before the presumption of guilt can arise it must appear that the property was recently stolen."

Appellant moved for a new trial on account of insufficiency of the evidence, and the instruction given as above stated. Also, on account of newly-discovered evidence. He made an affidavit, stating the names of three witnesses by whom he could prove that he bought the hog from Ike Johnson, stating that he "did not know of said testimony

before, or at the trial, and a knowledge of the same could not have been acquired by reasonable diligence." Two of the witnesses named, made affidavit of the truth of the facts stated in such motion.

The motion was overruled, and the points saved by bill of exceptions.

The instruction given by the court is literally correct. Possession of property recently stolen, without reasonable explanation of that possession, is evidence of guilt to go to a jury for their consideration. In this sense, it is *prima facie* evidence, but not in the sense that it is such evidence as must compel the jury to a conviction, unless it be rebutted. It would have been better to have modified the instruction complained of, so as to impress upon the jury the idea that the evidence went to them for their consideration, under all the circumstances, to be weighed as tending to show guilt, but not imperatively imposing upon the jury the duty of conviction, unless rebutted. The defendant, however, asked no such explanation, and the instruction is not erroneous.

The motion for a new trial falls short of showing strict diligence in endeavoring to find out and procure the testimony of the witnesses. It does not explain why it was that the witnesses could know of the sale, and the defendant be ignorant of their knowledge. If they were present, he must have known they could prove his innocence, and he should have had them. If they knew of the sale by other means, the defendant should have shown it, to explain his own ignorance during the trial. If the court had been satisfied with the verdict in other respects, the motion for a new trial upon this ground might have been properly refused.

The evidence is very unsatisfactory, and could not have

brought to the minds of the jurors that moral assurance of guilt necessary to conviction, unless they had misunderstood the law, or acted from passion or prejudice, or without deliberation. It fails to show that the hog was ever taken from Culliford, or his agent, without the consent of one or the other; or when the hog was missed—whether on the first of January, 1879, or before, or after. There is no proof of recent stealing, and but very vague proof of any theft at all. The marking only was shown to be recent. When first notified of the accusation, after the indictment, the appellant said he bought the hog from Ike Johnson. Culliford had notified appellant that Johnson had the control and management of his hogs, and that he was satisfied with Johnson's management. The explanation was natural and reasonable. The state did not attempt, through Ike Johnson, or otherwise, to contradict it. How the jury arrived at an undoubting assurance of guilt, is difficult to conceive on any other supposition than those above suggested.

The rule established in this court with regard to interference with the verdicts of juries is a wholesome one. It is, that where a matter has been fairly presented to the jury, on proper competent evidence, and clear instructions, and the presiding judge has refused a new trial, it will not be granted here, unless there be something in the case to show that the verdict was influenced by passion or prejudice, or was rendered under a misconception of the law.

The jury obviously mistook the law as to the effect of possession. The presumption that the person in whose possession stolen property is found, is the thief, is not one of law, and a weak one of fact; it is not at all conclusive, and of itself is not sufficient for a conviction. *Wharton's Am. Crim. Law, Vol. 1, sec. 729.*

It would have been better to have granted a new trial on the motion. We can not say that the verdict was in accordance with the law and the evidence.

Reverse the judgment, and remand the case for a new trial.

BLAHUT VS. THE STATE.

1. SABBATH-BREAKING: *Keeping open saloon on Sunday.*

Appellant was a nominal partner in a saloon, and he and another bar-tender attended by turns on Sundays to furnish liquor to customers entering at the back door; the front door being kept closed. Held guilty of the offense of Sabbath-breaking by keeping open a dram-shop on Sunday.

APPEAL from *Garland* Circuit Court.
Hon. J. M. SMITH, Circuit Judge.
Henderson, Attorney General, for appellee.

EAKIN, J. Appellant, William Blahut, was indicted, together with J. Blahut, for Sabbath-breaking by keeping open a dram-shop on Sunday. They severed. William Blahut was tried by a jury, convicted, fined, denied a new trial, and then appealed, on the ground that the evidence did not support the verdict.

It tended to show that appellant was a nominal partner in a saloon, and one of the bar-tenders. For a year before the indictment it had been the habit to close the front door of the saloon on Sunday, and leave unfastened a back door, through which persons might, and did, come to buy drinks.

Appellant and another bar-tender attended by turns on Sunday to furnish the liquor.

This, if true, constituted the offense of keeping open a dram-shop. The jury were proper judges of the weight of the evidence.

Affirm.

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34 448
56 561

CARR VS. THE STATE.

1. WEARING CONCEALED WEAPONS: "*Upon a journey.*" *Temporarily stopping.*

Whether a traveler was "upon a journey" in the spirit of the law against wearing concealed weapons, while stopping at a town on his way, is a question for the jury, upon all the circumstances before them. His intent governs, and the question of fact is, was he really prosecuting his journey, only stopping for a temporary purpose; or had he stopped to stay awhile, mingling generally with the citizens, either for business or pleasure.

2. SAME: *What necessary to constitute the offense.*

To constitute the offense of wearing concealed weapons, under *sec.* 1517, *Gantt's Dig.*, the implement must be carried about the person, to be always accessible for use in fight, and so hidden from general view as to put others off their guard. If a pistol, not loaded, or unfit for use, this rebuts the presumption that it was carried as a weapon.

If a pistol be worn concealed, the jury may presume that it was loaded and worn as a weapon. But this is a presumption of fact, and not of law, and may be rebutted by proof.

APPEAL from *Lee* Circuit Court.
Hon. J. N. CYPERT, Circuit Judge.
Henderson, Attorney General, for the State.

EAKIN, J. Appellant, in May, 1875, was indicted in the Lee circuit court, charging: That he "unlawfully did wear a pistol, concealed as a weapon, when not upon a journey." At the spring term, 1879, the case was submitted to the

court as a jury—the defendant fined, and an appeal taken, with bill of exceptions setting forth the evidence.

It appears that appellant had been on a visit to Memphis; and, on his way back to his father's, stopped a few hours in Marianna, in Lee county. Whilst there, he was observed to be wearing a pistol, a portion of it being seen. He was arrested, but discharged. Two pistols were found upon him, neither of which was loaded; and one was without a tube. After his arrest, he deposited the pistols with his baggage.

The court decided the case on the ground that defendant, whilst stopping over at Marianna, could not be said to be on a journey, and should, to avoid a breach of the law, have deposited his pistols with his baggage, and not carried them on his person. This is correct, if the appellant was really wearing them, or either of them, as a weapon. The exception in the statute is to enable travelers to protect themselves on the highways, or in transit through populous places—not to allow them the privilege of mixing with the people in ordinary intercourse, about the streets, armed in a manner which, upon a sudden fit of passion, might endanger the lives of others. Travelers do not need weapons, whilst stopping in towns, any more than citizens do. They should lay them aside, unless the delay be slight, and the journey soon resumed. The jury, or court sitting as such, can best judge of all the circumstances, and determine whether the spirit of the law has been violated. No rule with regard to this can be formulated. The intent governs, and the question of fact is, was the defendant really prosecuting his journey, only stopping for a temporary purpose; or had he stopped to stay awhile, mingling generally with the citizens, either for business or pleasure.

The offense is alleged to have occurred in December, 1874, when the Revised Statutes contained the only act upon this subject, in force. See *Gantt's Digest, sec. 1517.* It is made a misdemeanor to "wear any pistol, etc., * * concealed as a weapon," unless upon a journey. It will be perceived there are three essential elements in the offense. The implement must be worn—that is, placed about the person, and carried around in some way, to be at all times accessible. If it is merely, and in good faith, being transported, to be repaired, or given to another, or for purposes of trade, or any other object, save to be used in fight, it can not be said to be worn. It must be concealed—that is, so hidden from general view as to put others off their guard; and, lastly, it must be carried *as a weapon*—that is, for the purpose of having it convenient for use in fight.

In this case, the implements found on defendant were pistols, and worn concealed. But they were not, either of them, loaded; and one was wholly unfit for use, if it had been. These things, affirmatively shown, rebut the presumption that the pistols were worn to be used as weapons. They could not be so used. If the state, in a given case, should show that pistols were worn concealed, the jury might well presume that they were loaded, and worn as weapons. But the defendant might remove the presumption by proof. It would be one of fact, and not of law.

The attention of his honor, the circuit judge, seems to have been directed to the point of defense, based upon the journey, which he correctly decided. For want of sufficient proof that the pistol was worn as a weapon, a new trial should have been granted.

Reverse, and remand for the purpose.

LUDLOW, Ad., etc., vs. FLOURNOY et al.

34 451
166 630

1. WILLS: *Probate of, on insufficient evidence.*

The granting of probate of a will on insufficient evidence, is only error, which may be corrected by an issue of *devisavit vel non*, on appeal in the circuit court; and the proceedings and orders of the probate court, can not be collaterally attacked; nor even directly in chancery, except for fraud, or perhaps on some other peculiar ground of chancery jurisdiction.

2. SAME: *Executor, authority of, relates to grant of administration.*

The authority of an executor relates to the grant of administration to him by the probate court, and not to the mechanical issuance of the letters testamentary, as evidence of his authority.

3. EXECUTOR: *To whom liable for waste.*

For waste, or loss, a former executor or administrator is liable to heirs, legatees and creditors, but not to an administrator *de bonis non.*

4. SAME: *His powers.—selling land. His receipt to purchaser, sufficient discharge.*

An executor derives his powers from the will. If it authorizes him to sell lands, he may do so without the order of any court. And, in the absence of fraud, his receipt to the purchaser for the purchase money, is a sufficient discharge.

5. FRAUD: *Purchaser concerting with executor.*

One who purchases land at less than its value, by concerting with the executor, may be held to pay its full value, and the land be held to a trust for the purpose.

6. SAME: *Acquiescence—Limitation.*

Acquiescence for a considerable time is often an element against relief; and will prevent creditors from questioning sales by executors.

7. ADMISSIONS: *Trustee's, not admissible against cestui que trust.*

The statements or admissions of a trustee, of a past transaction, can not be admitted against the interest of his *cestui que trust.*

APPEAL from *Desha* Circuit Court in Chancery.
Hon. J. A. WILLIAMS, Circuit Judge.
Pindall, for appellant.
Weatherford, Garland, Clayton, contra.

EAKIN, J. In the year 1861, Thompson B. Flournoy, a citizen of Desha county, died, leaving a large estate, consisting of lands, slaves, personal property and choses in action.

He left a will, with several codicils. It begins as follows: "I desire all my just debts to be paid; and for the payment of any I may contract during my life, I authorize my executors hereinafter named, to sell and convey, or pledge, or mortgage any part of my estate, first commencing with my wild lands." He made other dispositions of his whole estate, in the interests of his wife and children, which it is not important to notice specially, save for this, that in order to carry out the same, he provides that: "It shall be in the discretion of my executors whether the division shall take place in kind, or the property shall be sold and the proceeds divided."

He made his wife trustee for his daughters, as well as executrix (with others), and empowered her, as such trustee, after his daughters should become entitled to the estate, "to sell or exchange any part of said estate; and with the proceeds of said sale, or with the income of said estate, buy other property and hold the same for said daughters."

In a subsequent clause he says: "I wish all my wild lands to be sold whenever my executors shall deem it best for the interest of my wife and children; and I hereby invest them with the power to sell and convey the same." And then goes on to direct the use of the proceeds. Executors were named, his wife among them, and they were relieved from the necessity of giving security for the discharge of their duties. This will bore date the eighteenth of January, 1858, and was duly executed in the presence of two witnesses. Subsequent additions were made at

different times, signed by the testator alone, none of them touching the power of sale, until the twenty-ninth of May, 1861, when he added a formal codicil, executed in due form of law, with the same two witnesses as in the principal will.

This codicil the testator meant to be considered as a modification, and a part of his whole will, taken in connection with what he had done before, which, indeed, is implied by the use of the term "codicil." In it he revoked the nomination of all executors except his wife, who had been named in the original will as one of three; and clothed her with all the powers which had been conferred on all. She was further, by said codicil, advised and empowered "to sell this my home tract whenever in her judgment the proper time arrives." A residence in Kentucky, owned by testator, was also placed at the discretion of the executrix.

On the eighteenth of October, 1861, the affidavit of two witnesses was taken before the clerk, proving the handwriting of the testator in his signature to the will, and of one of the subscribing witnesses. The handwriting of the other subscribing witness was also proved by one of the affiants.

On the sixteenth of April, 1862, the paper purporting to be the last will and testament of T. B. Flournoy, was presented to the probate court of Desha county, then in session, upon the evidence theretofore taken before the clerk of the court, which was held satisfactory. Whereupon the will was admitted to probate, and established as such; and it was ordered, "that letters testamentary issue thereon to Elizabeth J. Flournoy, executrix, named in said will, and that no bond be required from her before issuing said letters, the same being waived by said will."

This order is to be understood of the original paper and the superadded codicils, making altogether one will. The proof of the last being attached to the same paper, and referring to the others, would have been proof of the whole will. See *Barnes v. Crow, and notes, 4 Bro. C. C., p. 2.*

After the war of secession had closed and peace had been restored, at the December term, 1865, the probate court, on the petition of said executrix, reciting the fact that the will had been duly probated in 1862, and that petitioner had been authorized to take upon herself the burden of such trust, ordered again that letters testamentary, with the will annexed, be issued to the petitioner "upon her filing the affidavit required by the statute, and that no bond be required of her."

During the year 1866, as appears from the exhibits, a large amount of debts were probated and allowed against the estate, amongst them, a claim in favor of the estate of James Brown, for $2,158.

At the March term, 1867, upon petition and motion of creditors, a citation was issued against said executrix, to show cause why her letters should not be revoked because of her having become a non-resident. The citation could not be served, and the court, upon proof, heard, at the September term, revoked her letters and ordered her to file her accounts for final settlement. It was further ordered that the sheriff, as public administrator, should take out letters.

Shortly afterwards, in December, 1867, at a subsequent term, she appeared in court, made explanations, showed her continued residence, and, on her motion, her letters were renewed. At the same term, on her petition, the

court granted her dower in said estate, and appointed commissioners to lay it off; which was afterwards done.

At the March term, 1868, Mrs. Flournoy filed an inventory of the estate, with her report and settlement, which was continued and due notice ordered. No exceptions were taken, and all were confirmed at the next term, on the second of June, 1868.

The report shows that she entered upon the duties of the administration in 1861, under the belief that letters testamentary had been issued. She did not then doubt her ability to pay off all the debts, which were in the aggregate less than one fifth of the value of the whole estate. That during the war it was almost impossible to obtain orders of the court, or get officers to administer oaths. She, believing herself authorized by the will, had paid debts which she was satisfied were correct, without waiting for probate, and had educated the children, who were legatees. That she had paid levee subscriptions for the benefit of the estate, appropriating rents and proceeds of personal property to the purpose, and that she had been compelled to sell the home place, for the sum of $4,000, for the purposes of the estate.

She gives an inventory of the personal property, which consisted, for the most part, in slaves and cotton, the former of which had been emancipated, and the cotton, much of it, destroyed during the war. In short, let it suffice to say of this settlement, that it exhibited a management on her part, regardless of the law; but such as many planters during that unhappy period did not surpass in acting for themselves. She brought the estate in debt to her nearly $20,000. In 1869, the will was again probated with additional proof, and the letters theretofore issued confirmed by the court.

Afterwards, in January, 1870, she repurchased from the vendee the land she had sold for $4,000, and took a reconveyance to herself in her character of executrix—repaying to the vendee the original purchase money and $1,000 more for taxes, improvements, etc., and on account of greatly appreciated value.

On the fifteenth of February, 1870, said executrix, acting under her powers in the will, sold and conveyed six hundred acres of the lands, mostly improved, to Clifton R. Sheppard and Charles B. Blackburn, for the expressed consideration of $5,100 paid, and the further consideration of two bills of exchange for $2,550 each.

On the twenty-sixth of March, 1870, she, in the same character, sold and conveyed another portion to Luke P. Blackburn, in trust for his wife, for the express consideration of $8,273. This tract contained 467.05 acres.

On the fourteenth of February, 1870, she also sold and conveyed to Henry B. Blackburn another portion of land for the expressed consideration of $8,000, containing about 600 acres.

On the twenty-sixth of March, 1870, she also sold and conveyed to Henry B. Blackburn another tract, containing about 508 acres, for the expressed consideration of $6,000.

Before either of these, she had, on the twenty-first day of December, 1869, sold and conveyed to Joseph Bryan, for $707, another tract containing about 707 acres.

During the same year she filed a second settlement, in which she charges herself with the proceeds of all these tracts save the last, and asks credit for the $5,000 paid to repurchase the tract originally sold for $4,000, as above stated.

The complainant, Marvin H. Ludlow, appeared in court as the administrator of James Brown, one of the creditors

whose claims had been allowed in 1866, and excepted to this settlement. He objected: First—because of the claim as a credit of balance shown to be due her on first settlement, saying it was for debts which she had assumed, and on which she should only be allowed a pro rata, if anything; second—to the attorney's fees; third—to a dower in lands claimed as money; and fourth—because there was no account of lands in Tennessee. The second and third grounds seem to have been allowed, for the items were struck out, whatever they were, and a balance against the executrix shown of more than three thousand dollars. No exceptions were taken to the sale of the lands or the amounts received. The report, as corrected, was confirmed by the court, save as to the sale of the lands, which the court did not attempt to confirm, apparently because the same was not made under order of the court, but did confirm her report of the purchase money and her disposition of it, and made a charge against her of a balance.

The original bill was filed in this case by Ludlow, as administrator of said James Brown, a creditor, whose claim had been allowed in 1866, against Elizabeth J. Flournoy and others, who had purchased the lands from her, as above set forth, and was for the benefit of complainants and all other creditors that might come in to seek its benefits.

Setting forth the facts substantially as above stated, the bill charges that said Elizabeth was never duly appointed executrix, because she had failed to give bond and make affidavit, as well as because the will was not at first duly probated; but that she had, nevertheless, seized the assets of the estate, and recklessly wasted and squandered them; that she had neglected to obtain the proper orders of the

court in her management of the property, and had acted without any letters testamentary actually issued. It charges that she fraudulently procured the assignment of dower to be made to herself, being already provided for by will; and fraudulently sold the real estate for $4,000, a grossly inadequate sum, afterwards repurchasing the same lands at an advanced price. There are many other charges of fraud against the executrix, touching her management of the estate and her settlements, which it is not important to recapitulate. They amount to this, in effect, that out of the large amount of property received by her, and money which came to her hands from rents and sales of said property, only a very insignificant portion was applied to the debts of the estate; but that the assets were wasted, lost by neglect, squandered, or misappropriated in favor of her relatives and connexions, or by the payment of extravagant expenses, not chargeable on the estate; and that her accounts were fraudulently procured to be passed by the probate court.

The bill further charges, with regard to the several sales of real estate above set forth, that they were made without sufficient authority, and with a corrupt and fraudulent design, to hinder, delay and defraud creditors, and that they were made without notice to creditors; also, that the purchasers were aware that said executrix intended to misappropriate and misapply the assets, without paying the debts, and made the purchasers to aid her therein; that the pretended prices were inadequate, and had not been fully paid.

The prayers of the original bill are: That the probate of the will be declared void; that the deeds made by the said Elizabeth, as executrix, be annulled; that the probated claims be declared a lien upon the lands so conveyed; that an ac-

count of rents and profits be taken against the purchasers from the time of their possession; that a receiver be appointed to collect them, and take possession of the lands, and that the same be sold, if necessary. As against the executrix, the prayer is: That her settlement be corrected and purged of illegal charges and credits; and that she be held liable for the correct balance which may be found against her. There is also the common prayer for general relief.

On the sixth of June, 1873, complainant filed an amended bill, stating that the letters of defendant, Elizabeth Flournoy, had been revoked at the June term, 1871, of the probate court, and that the sheriff had been ordered to take charge of the estate. From this order, an appeal had been taken to this court, which was afterwards dismissed; that the sheriff had never acted in the matter, and that the complainant, pending this suit, on the fourth day of June, 1873, had been duly appointed administrator *de bonis non* of said estate. He exhibits his letters of that date, and files the amended bill in that character, as well as in his former character of creditor, in behalf of himself and others.

In this amended bill, he prays specially that all the acts of the probate court touching the subject-matter before the re-establishment of the relations between Arkansas and the federal government be declared void, and that the pretended settlements of Mrs. Flournoy be held for naught, with a reiteration of the former prayer against the purchasers, and the general prayer for relief.

Answers were filed by Mrs. Flournoy (who attempts to justify her acts as executrix, on account of the losses and confusion of the war, and the difficulty of procuring orders of the court), and by the defendants, who were purchasers. The purport of all their answers, the details of which would

incumber the record, is, that all parties acted in good faith, without any intention of fraud, relying upon the authority conferred upon the executrix by the will. The purchasers claim to be innocent, and say that they paid valuable and adequate consideration. They deny any collusion with Mrs. Flournoy in any fraudulent design.

Depositions were taken on both sides, and the cause was heard upon the pleadings, exhibits and proof.

The chancellor held, upon the whole case, that the complainant was not entitled to any relief in the premises, and dismissed the cause.

Complainant appealed.

Since the bill in this case was filed, it has been repeatedly held by this court, that all the acts of the courts of the state, during the war, done in the ordinary administration of justice, and not adverse to the constitution and laws of the United States, were valid. At the time the will of Thompson B. Flournoy was probated the probate court had full jurisdiction of the matter. If it granted the probate on insufficient evidence, it was only error. It might have been corrected by making an issue of *devisavit vel non* as prescribed by the statute. It is not shown that any fraud was perpetrated upon the court or parties interested in procuring the probate; and the proceedings and orders of the court must stand. They can not be in any manner collaterally attacked, nor even directly in chancery, except for fraud; or, perhaps, some other peculiar ground of chancery jurisdiction. Nothing of the sort is shown. Mrs. Flournoy was afterwards recognized by the court, and the creditors of the estate, in many ways, and upon several occasions as executrix. The latter have no standing in court, except on the allowances of their claims against the estate under her administration. The original

grant to her of the letters was positive and unconditional. Her authority relates to the grant, and not to the mechanical issuance of the letters to her, as proof of her authority. She might take them out at any time. The subsequent renewals of the probate were from superabundant caution. They were meant to cure and not to limit or revoke any previous authority. The original bill itself recognizes her as executrix, in seeking to correct and purge her accounts. If she had not been such, the creditors would have had no ground for relief against her, at all, in equity. She would be merely a trespasser, liable to an action at law.

Considering her as executrix, the original complaint was not demurrable. The charges of fraud were sufficiently specific, and the creditors had the right to ask the court to correct, restate her settlements, and to set aside sales fraudulently made, in order that the assets might be brought back, and the administration proceed properly.

The amended bill altered the aspect of the case. The complainant assumes a new character, that of administrator *de bonis non*. As such he might, indeed, ask the court to remove clouds from the title of lands belonging to the estate, in order that he might take and administer them, by sale and application of the proceeds to the debts; but, as such, he would have no right, without joining heirs or devisees to proceed against the former executrix for a *devastavit*. His duty is only to administer the estate which comes into his hands, and to collect outstanding choses in action. For waste or loss, the former administrator or executrix is liable to the creditors, heirs or devisees—not to the administrator *de bonis non*. The latter can only collect in and administer "goods not administered."

The amended bill, however, although it could not in all things consist with the original, being in its nature multi-

farious, was nevertheless good against the purchasers of the lands. For, if they purchased in fraud of creditors, or from one not having authority to sell, then, a creditor might, in behalf of himself and other creditors, join with the administrator *de bonis non*, to remove clouds from the title of lands belonging to the estate—although they could not, without the heirs or devisees, join in a proceeding to hold the former executrix liable for a *devastavit*. The complainant, in his amended bill, seems to concede this, as he declines to pray any relief against Mrs. Flournoy, individually, but only that her settlements be held for naught. He limits his claim to setting aside the land sales. The attorneys, in argument here, concede that to have been the sole object of the suit, and it so appears from the records.

All questions concerning the liability of Mrs. Flournoy to restate her accounts, and pay balances, pass out of the case. If she has committed frauds, it is still important to establish the collusion of the other defendants therein, when they purchased the lands, but not otherwise.

The powers of an executrix are derived from the will. The probate of the will and the grant of letters testamentary are useful, if not essential, to establish the will and designate the person authorized to execute it. The inventory and the settlements are necessary, that the probate court may see that the will is executed according to its terms. But to the will itself we must look, first, to see if powers of sale are conferred. If so, they may be executed. If not, then, as the law stood when this will was probated, the probate court might, on a proper showing of the necessity, order a sale for the payment of debts. *Gould's Dig., chap. 4, secs. 165, 166, 167.*

In *James et al. v. Williams et al., 31 Ark., p. 175*, the court said: "Probating a will is but the perpetuating the

evidence of a fact by the judgment of a court. The same evidence which is required to establish the validity of the will in court, may, before a competent tribunal, be introduced to establish its validity elsewhere;" referring for authority to the case of *Campbell v. Garvin, 5 Ark., 491.* We are asked to review this decision under section 5781 of Gantt's Digest, which was part of the Civil Code.

It provides that "no will shall be received in evidence until it has been allowed and admitted to record by a *circuit* (in the original, probate) court; and its probate before such court shall be conclusive until the same is superseded, reversed or amended."

This is a new rule of evidence, having no application to the matter before us, as this will was probated in 1862, and the order admitting it has never been superseded, reversed or amended. So far as the case of *James v. Williams*, which it may be remarked arose under the old law, may go to sustain the doctrine that, the will being proven, the powers of the executor are derived from it—it is but the reiteration of a well-recognized principle. The power to sell lands, not only for the payment of debts, but for other purposes, is broadly given by the will, and might be exercised without the order of any court.

And in a case like this, the receipt of the executrix, in the absence of fraud, is a good discharge to the purchaser. He is not bound to look to the application of the purchase money. The distinction in the English equity system is, that where lands are committed to an executor or trustee, for sale, to pay specific debts, the purchaser must see to the application of the money and obtain the discharge also, of the beneficiary; otherwise he may be held liable to a second payment if the trustee should waste the funds. But if the land be charged with the payment of

debts generally, or devised for some specific purpose after payment of debts, it will not be presumed that the testator intends to impose on the purchaser the burden of finding out the creditors to get their receipts, or of taking an account of the debts and payments to see if the necessity has arisen for the sale, but it will rather be presumed that it was intended that the executor or trustee's sole receipt should be a good discharge. The question does not often arise under our system of administration. Sales are generally made under orders of court, and the money paid to its officer or commissioner, or some one authorized to receive it; which discharges the purchaser, of course, on confirmation. Or where lands are devised or conveyed on special trusts, it is usual with careful conveyances to insert a clause making the trustee's receipt a full discharge. The cases are very few indeed, in American practice, where a power of sale is given in such a manner as to require the purchaser to look to the application of the purchase money. The risks attending such sales would greatly discourage purchasers, and the rule requiring purchasers to see to the application of the money has been rather relaxed than favored by the American authorities. It never did extend to personalty, and at no time would it have applied to realty under a will like the one in question. See the leading case of *Elliott v. Merryman, 1 White & Tudor's Lead. Ca. in Equity, p. 59.*

The exceptions to the rule are laid down by Lord Thurlow, as follows: "If one concerts with an executor by obtaining the testator's effects at a nominal price, or at a fraudulent undervalue, or by applying the real value to the purchase of other objects for his own behoof, or in extinguishing the private debt of the executor, or in any other manner contrary to the duty of the office of execu-

tor, such concert will involve the seeming purchaser, or his pawnee, and make him liable for the full value" *Scott v. Taylor, 2 Dick.;* quoted also in notes to *Elliott v. Merryman, supra.*

If, as charged in the bill, the defendant purchasers, or any of them, have been guilty of such concert with Mrs. Flournoy, as is above indicated, then under the prayer for general relief, the court might require them to pay full value for their purchases into the hands of the administrator *de bonis non*, or make such other decree as would insure the application of the full value to the legitimate purposes of the estate, so far as any part of it may not already have been so applied, and might hold the lands bound to a trust for the purpose. This was the real question at issue, which became one of fact for the chancellor.

Certainly the administration of Mrs. Flournoy led to results which in ordinary times, under ordinary circumstances, would seem shocking. A vast estate of near half a million of dollars seems to have melted away like the snows, leaving unpaid the greater portion of a list of debts, which did not amount altogether, perhaps, to more than one-fifth in value, of the estate. Many things were done by her loosely, irregularly, illegally. Extravagant charges seem to have been made by way of credits, and there were many other things which, on their face, bear the impress of such management as this court has in former cases held to be constructive fraud, justifying the interference of a court of chancery. Had the bill been prosecuted against Mrs. Flournoy as begun, there is little doubt that the chancellor would have corrected her settlements and held her to a stricter liability. But this court can not ignore the public history of the times, the pen-

dency of a destructive war, which was flagrant from the time of her appointment, in 1862, until the spring of 1865; the privations and distresses of the masses of population; the prostration of values and the disorganized condition of the courts. These are matters of history and general knowledge, which a chancellor may well consider in judging of the conduct and weighing the motives of parties charged with fraud. There may be constructive fraud compatible with the most honest and honorable intentions. This is important when others are charged with concert.

The evidence shows the loss of $125,000 at one fell swoop by the emancipation proclamation; and the probate court accepted the report of the loss of large amounts of cotton by burning. Stricter proof should have been required. But the report was probable, and not on its face fraudulent. Large amounts were expended, and perhaps wasted, on levee works; and large amounts expended in expenses of the family. The evidence tends to show that Mrs. Flournoy managed throughout with honest intentions to pay the debts, and there is no reason to believe that any one doubted her sincerity. It is the creditors alone who complain. The devisees are satisfied to submit to their losses. There is no proof of any actual design to defeat creditors by the sale of land brought to the notice of the purchasers; nor does it seem to be sufficient even to arouse their suspicions. The sale of the land for $4,000, and the repurchase for $5,000, is explained in such a manner as to rebut fraudulent intent. And as to the matter of dower, it produced no harm to complainants, as far as the court can ascertain from the papers. The same lands assigned to her for dower were embraced in the deeds to purchasers. It amounted to a relinquishment of her rights to the purposes of the will;

and the purchasers might look to the will alone for her authority to sell.

The evidence does not show that the lands were sold at inadequate values. It conduces to prove, taken as a whole, that the purchasers paid the actual values, if not precisely the sums mentioned in their deeds. At least, it can not be said they were so inadequate as to raise the presumption of fraud.

There remains another consideration which may have properly had weight with the chancellor. The complainant in this case, the sole original mover of the litigation, excepted in 1870 to the second settlement of the executrix, and did not then object to these sales, although they were reported in the settlement. It was an acquiescence for more than a year before the commencement of his suit, during which the purchasers may have gone on making improvements. It is not at all a conclusive circumstance against his equity; nor is there any question of limitation. But acquiescence for any considerable time is often an element against relief. It was so considered in the leading case of *Elliott v. Merryman*, although in that case the time of delay was much longer than in this. The principle is recognized in the English cases, that length of time and acqiescence will prevent creditors from questioning sales by executors; even when the sales were attended with suspicious circumstances of fraud. See *Bonney v. Redyard, cited on p. 138 of Bro. C. C., Vol. 4, and ib., note 5, on p. 130.*

The time alone in this case is not sufficient for the imputation of *laches;* but taken in connection with the strong inference, from the evidence, that the principal complainant knew of the sales when made, and the fact that he did appear and object to the confirmation of the second report

of the executrix, without objecting to the sales therein reported, the subsequent delay of more than a year to file this bill is certainly persuasive of acquiescence at the time. The complainant is shown to have been in a situation favorable to the discovery of fraud if any had been intended.

At the hearing, the chancellor rejected, as evidence, a deposition of L. T. Blackburne, made in another case, between other parties, to the effect that he had paid for the land conveyed to him at the rates of $25 per acre. This would make the consideration some $3,500 more than that expressed in the deed. The inference meant to be derived from this was, doubtless, that the excess had been paid as a bonus to the executrix, and not accounted for in her report; thus raising a presumption of fraud. The rejection of this evidence is complained of as error. The parties being different, this evidence was only admissible, if at all, as an admission. L. T. Blackburne was only a nominal defendant in this case. He held the dry legal title for the sale and separate use of his wife, who was the real defendant. The admission was historical, and not offered as a part of the *res gestæ* attending the conveyance. He could not thus prejudice the rights of his *cestui que trust*, the real owner; nor could his admission be used against her. Besides, the same facts appear in the testimony of another witness, and if entitled to consideration, were before the chancellor.

We do not think fraud was shown on the part of any of the purchasers, and upon the whole case, are of opinion that the chancellor did right in dismissing the bill after it had ceased to be pressed against Mrs. Flournoy.

Affirm the decree.

HARRIS VS. THE STATE.

34 469
55 603

1. CRIMINAL EVIDENCE: *Threats.*

Where a threat is not communicated to the defendant before the killing, and there is no evidence by which it may appear that the defendant, in taking the life of the deceased, acted under a reasonable apprehension of danger to his own life, or fear of great bodily injury, and such threat, if it had been communicated to him, could afford him no justification or excuse for the killing of the deceased, it can not be admitted in evidence.

2. CRIMINAL INTENT: *When presumed from the act.*

Where an act, in itself indifferent, becomes criminal if done with a particular intent, there the intent must be proved and found; but where the act is in itself unlawful, the proof of justification or excuse lies on the defendant; and on failure thereof, the law implies a criminal intent.

3. DRUNKENNESS: *When evidence of, admissible.*

Where the question is whether words have been uttered with a deliberate purpose, or are merely low and idle expressions, the drunkenness of the person uttering them is proper to be considered.

4. INSTRUCTIONS: *Abstract, refused.*

The court may well refuse instructions of abstract law, which are not applicable to the facts of the case.

ERROR to *White* Circuit Court.
Hon. J. N. CYPERT, Circuit Judge.
House, for plaintiff.
Henderson, Attorney General, contra.

ENGLISH, C. J. Samuel Harris was indicted in the circuit court of White county for murder; the indictment charging him with murdering S. R. Cox with a large stick. He was tried on the plea of not guilty, at the January term, 1879, found guilty of voluntary manslaughter, and his punishment fixed at imprisonment in the penitentiary for

five years. He filed a motion for a new trial, which the court overruled, sentenced him in accordance with the verdict, and he brought the case into this court by writ of error.

I. The first question presented by the motion for a new trial is, whether the evidence warranted the verdict.

It is not necessary to set out in detail the evidence as disclosed by the bill of exceptions. It is sufficient to state the leading facts and circumstances of the crime.

There was a balloon ascension and some small shows in the town of Searcy on the eighth of November, 1878; many people had collected there, and there was a good deal of drinking among them. Harris, the plaintiff in error, was requested by the town marshal, and with approbation of the mayor, to act as a special deputy, or policeman, and to aid in preserving good order.

About night, of that day, S. R. Cox was in a saloon, intoxicated, dancing, capering, and cursing some boys. Harris went into the saloon, and told him to be quiet and stop making a noise. They came out upon a platform in front of the saloon, where some altercations occurred between them, both using profane and offensive language. Finally, Harris shifting the ends of a stick, which he had in his right hand, and taking it by the smaller end, struck Cox a violent blow with the stick, on the left side of his head, above the ear, felling him limber and senseless to the ground, breaking his skull, and causing blood to flow from his mouth and nose. Harris, calling persons to assist him, removed Cox to a store near by. He was afterwards taken to a house, attended by physicians, and continued in a comatose condition until he died on the night succeeding the next day.

The stick with which Harris struck Cox the fatal blow,

was produced at the trial, and shown to the jury, but its size is not stated in the bill of exceptions. One witness described it as a knotty stick, and another stated that the lick might have been heard a hundred yards. It seems that Cox was not armed, and, at the time he was struck with the stick, was making no hostile demonstrations toward Harris.

Upon a careful reading of the testimony, we have the impression that the blow was reckless and brutal, and the killing of Cox, under the circumstances, at least, voluntary manslaughter, as found by the jury. We find in the evidence no facts upon which the jury might reasonably have found the killing to be excusable homicide in self-defense.

II. The bill of exceptions states that the defendant offered to prove by a witness (George Brooks), "that he had a conversation with Cox, about a half hour before the difficulty, about fifteen or twenty steps from Humphrey's saloon; that the defendant passed along by them while they were standing there, and Cox remarked that defendant had insulted him, and that he intended to make him take it back before he left town—that he had the damned son-of-a-bitch's measure, and he intended to have satisfaction, and, showing the witness a pistol which he, Cox, had partially concealed under his coat-sleeve; that Cox cursed and abused defendant in a very threatening and angry manner, but that this was not communicated to the defendant. To which the attorney for the state objected, upon the ground that the threats were not communicated to defendant before the difficulty; which objection was sustained by the court, and the witness was not permitted to testify, as above stated; to which ruling of the court in not permitting such testimony, the defendant, at the time, excepted."

This ruling of the court is made one of the grounds of the motion for a new trial.

Before Brooks was called as a witness, all of the witnesses for the state, and all of the other witnesses for the defendant, had been examined. Brooks was the last witness called, and the defense proved no fact by him, and offered to prove nothing by him except uncommunicated threats of Cox, as above shown.

At the time defendant offered to prove the uncommunicated threats, all of the facts and circumstances immediately attending the killing, were before the court and jury. No witness proved that Cox was armed with any weapon at the time he was killed. None was found on his person, or at the place where he fell—he was making no hostile demonstrations toward Harris at the time the fatal blow was given. It is manifest, from all the evidence, that Harris did not strike him in self-defense, or through any reasonable apprehension of danger, but that the blow was given recklessly and brutally, on mere provocation by words.

The excluded testimony does not fall within the rule laid down in *Pitman v. The State, 22 Ark., 356*, where non-communicated threats were held admissible as part of the *res gestæ*, or within the ruling in *Palmore v. State, 29 Ark., 263*, which followed *Pitman v. State;* but the remarks of Mr. Justice HARRISON, in *McPherson v. The State, 29 Ark., 229*, are applicable to the facts of this case:

"It was not alleged that the threat had been communicated to the defendant before he killed the deceased; nor is there any evidence by which it might appear that the defendant, in taking the life of the deceased, acted under a reasonable apprehension of danger to his own life, or fear of receiving great bodily injury; and such threat, if the

same had been communicated to him, could have afforded no justification or excuse for the killing of the deceased."

It is difficult to lay down an absolute rule as to the admissibility of proof of uncommunicated threats.

On the facts in the *Atkins* case, evidence of such threats was held inadmissible; so in *Coker's* case (*20 Ark., 55*) and in *Pitman's* case it was held that the threats might be proven as part of the *res gestæ*, and as tending to throw light upon the conduct of the deceased at the time he was killed, etc.

If Brooks would have proven, and had been permitted to prove, the uncommunicated threats of Cox, as proposed by the counsel for plaintiff in error, we do not see, upon the facts attending the killing, that he might have been benefited thereby, or that he was prejudiced by the exclusion of the offered testimony.

III. The counsel for plaintiff in error, moved the court to give the jury ten instructions; the first and second of which the court gave, and refused the others.

In the two given, an attempt was made to define murder in the first and second degrees, and they were favorable to the accused.

(*a*) Instead of giving the eight others, the court read to the jury the sections of the statute defining the two degrees of murder, express and implied malice, the two grades of manslaughter, justifiable and excusable homicide, etc. The sections read are indicated in the bill of exions.

We deem it unnecessary to copy the third, fourth, fifth and sixth instructions asked for plaintiff in error. They are similar to two instructions asked for the prisoner in *McPherson v. The State*, and copied on *page 233, of 29 Ark. Rep.*, and which the court held to have been properly re-

fused by the court below, for reasons given in the opinion of this court, delivered by Mr. Justice HARRISON.

(*b*) The seventh instruction follows:

"The jury are instructed that, in order to justify a verdict of guilty in this case, it must appear from the testimony, beyond a reasonable doubt, that the defendant intended the result of his act; that is, at the time he struck Cox with the stick he must have intended it to be a fatal blow; the act and intent must concur. The criminal intent is an essential ingredient in every crime. That while it is true every man is presumed to intend the result of his act, yet this presumption may be rebutted by positive evidence, or by the circumstances attending the case; and, in determining the question as to the criminal intent of the defendant's mind at the time of the killing, it is the sworn and imperative duty of the jury to weigh and consider all the testimony and the circumstances attending the case, the action, the conduct of the defendant at and immediately after the killing was done, judging of them in the light of reason and common experience, and when they have done this, if they have any reasonable doubt as to the criminal intent, they must acquit."

Where an act, in itself indifferent, becomes criminal if done with a particular intent, there the intent must be proved and found; but where the act is in itself unlawful, the proof of justification or excuse lies on the defendant, and, in failure thereof, the law implies a criminal intent.

Every person is presumed to contemplate the ordinary and natural consequences of his own acts; therefore, when one man is found to have killed another, if the circumstances of the homicide do not of themselves show that it was not intended, but was accidental, it is to be presumed that the death of the deceased was designed by the slayer,

and the burden of proof is on him to show that it was otherwise. *Secs. 13, 14, 3 Greenleaf on Evidence; Howard v. State, ante.*

Upon the evidence disclosed, the plaintiff in error did an unlawful act in striking Cox with the stick. The stick must have been of a size, judging from the effects of the blow, calculated to produce death. The blow was given with sufficient force and violence upon the head of Cox to produce death, and his death followed as an effect of the blow. From these facts, it is a presumption of law that the death of the deceased was designed by the slayer.

The proposed instruction contained some expressions of abstract law, but taken as a whole it was not applicable to the facts in evidence in this case, and was therefore properly refused by the court below. See, also, on the subject of criminal intent, *Lacefield v. State, ante.*

(*c*) The eighth instruction follows:

"The jury are instructed that the law excuses no one on account of drunkenness, and if they believe from the testimony that Cox was intoxicated or under the influence of whisky at the time of the difficulty between him and the defendant, it was no protection to him; and in the determination of this case, they will consider his actions and conduct towards defendant in the same light as though he had been duly sober, and not under the influence of whisky."

It is true as a general proposition that drunkenness is no excuse for crime; (See *Woods v. State, MS.*); and, no doubt, a man assailed by a person intoxicated, would have the same right to defend himself as he would if the assailant were sober; but provoking words uttered by a man drunk would ordinarily be regarded as less excuse for a violent assault than if spoken by a sober man.

Where the question is, whether words have been uttered with a deliberate purpose, or are merely low and idle expressions, the drunkenness of the person uttering them is proper to be considered. *3 Greenleaf Evidence, sec. 6.*

We think it was proper for the jury to take into consideration the fact that Cox was intoxicated at the time plaintiff in error struck him with a stick, and this they would have been denied the right to do, for any purpose, had the eighth instruction been given in the terms proposed.

(*d*) The ninth instruction follows:

"The jury are instructed that if they find from the testimony that, on the day the deceased was killed by defendant, the defendant was acting as a special police or deputy marshal under the appointment of the marshal of the town of Searcy, and, at the time of the killing, was acting as such special policeman or deputy marshal under said appointment; and they find that at the time deceased was killed he was acting in a disorderly way, or otherwise violating the laws and ordinances of said town, then they are instructed that defendant had a right, as such special policeman or deputy marshal, to use sufficient means to quell or suppress such unlawful conduct, and defendant had a right to use a club, or stick, or billet, if necessary, for the suppression of such unlawful conduct.

"And you are further instructed that if you find from the evidence that the deceased, at the time of the killing, was violating any of the laws and ordinances of said town, and the defendant, when he struck the fatal blow, had no intention to kill said deceased, but only intended to carry out his duty as such policeman or special deputy marshal,

and in the discharge of such duty used no more force than a reasonable and prudent man would have used under the circumstances, they will acquit the defendant."

This instruction, on the facts in evidence, was not warranted by statute or common law.

"Justifiable homicide is the killing of a human being in necessary self-defense, or in defense of habitation, person or property, against one who manifestly intends or endeavors by violence or surprise to commit a known felony." *Gantt's Dig., sec. 1279.*

"An attempt to commit murder, rape, robbery, burglary, or any other aggravated felony, although not herein specially named, upon either the person or property of any person, shall be justification of homicide." *Ib., sec. 1281.*

"Every man's house or place of residence shall be deemed and adjudged in law his castle." *Ib., sec. 1282.*

"A manifest attempt and endeavor, in a violent, riotous or tumultuous manner, to enter the habitation of another for the purpose of assaulting or offering personal violence to any person dwelling therein, shall be a justification of homicide." *Ib., sec. 1283.*

"If an officer, in the execution of his office in a criminal case having legal process, be resisted and assaulted, he shall be justifiable in killing the assailant." *Ib., sec. 1286.* See also *Ib., sec. 1287–8.*

There is no evidence in this case that at the time plaintiff in error struck Cox the fatal blow he was attempting to commit a felony, or attempting in a violent, riotous, or tumultuous manner to enter any habitation, etc.; or that plaintiff in error was executing his office in a criminal case, having legal process, and that he was resisted and assaulted by Cox.

If Cox was violating the laws and ordinances of the town of Searcy by being intoxicated in a saloon, making a noise, cursing some boys, etc., the plaintiff in error, acting as a police officer, might have arrested him and taken him before a police judge, to be tried and punished according to the laws and ordinances of the town; but he had no right to strike him with a "club, stick or billet," much less to give him a blow calculated to produce death, and which did in fact kill him.

It is considered better to allow one guilty only of a misdemeanor, to escape altogether than to take his life. *Reneau v. State (recent decision of the supreme court of Tennessee, No. 7, Vol. 2, Memphis Law Journal).* See, also, *2 Bishop Cr. L., sec. 662.*

(*e*) It is sufficient to say of the tenth instruction, that it correctly expressed a proposition of abstract law, but was not applicable to the case made by the evidence. The court is not obliged to give in charge to the jury any and all principles of law that counsel may think proper to move, but may well refuse any that may not be applicable to the facts in evidence.

IV. After the close of the argument, the court instructed the jury, of its own motion, that: "If the jury believe that the defendant used a stick, or bludgeon, which was necessarily deadly in its character, the law presumes an intent to do the necessary result of his act, and in that case, it would not be involuntary manslaughter."

The bill of exceptions states that this instruction was not objected to by the defendant or his counsel, but it is made ground of the motion for a new trial, that the court gave any instruction after the close of the argument.

The constitution provides that: "Judges shall not charge

juries with regard to matters of fact, but shall declare the law," etc. *Sec. 23, Art. VII.*

Judges may not now, as under the former practice, in charging juries, sum up the evidence, and tell them what facts are proven and what are not, and leave them to find such facts only as the court may deem disputed or doubtful, but it is the province of the court to declare the law applicable to the case, and the court is not obliged to be silent after the close of the argument.

It might be important in some cases, either to the state or the defendant, for the court to instruct the jury on some matters of law after the argument.

V. Counsel for plaintiff in error submits that, upon the evidence, he could not have been guilty of a higher grade of homicide than involuntary manslaughter.

If the killing be in the commission of an unlawful act, without malice, and without the means calculated to produce death, or in the prosecution of a lawful act, done without due caution and circumspection, it is involuntary manslaughter. *Gantt's Dig., sec. 1266.*

In this case Cox was purposely and violently struck by plaintiff in error with a stick calculated to produce death, and killed by the blow. There was no misadventure in the case.

Doubtless the jury found him guilty of voluntary manslaughter, and not murder, because they believed, from the evidence, that the killing was without malice aforethought, and upon a sudden heat of passion, caused by a provocation apparently sufficient to make the passion irresistible.

Upon the whole record, we find no substantial error to the prejudice of plaintiff in error, and affirm the judgment.

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BUTLER VS. THE STATE.

1. INDICTMENT: *For "Felony."*

To accuse one of the crime of *felony* is a bad Code beginning to an indictment. *Felony* is the name of no particular crime, but designates a *class* of crimes.

The words "no considerable provocation appearing," are proper in an indictment for an aggravated assault, but are unnecessary and inappropriate in an indictment for an assault with intent to kill, and may be treated as surplussage.

2. WITNESS: *His prejudice may be shown, but not the reasons for it.*

A witness for the state may be shown to be prejudiced, or to have ill-feeling against the accused, but the facts and circumstances causing such prejudice or ill-feeling, can not be stated in detail by the witness.

3. SAME: *Contradiction of. Collateral matter. Test of.*

When a witness is cross-examined on a matter collateral to the issue, he can not, as to his answer, be subsequently contradicted by the party putting the question.

The test of whether a fact inquired of in cross-examination is collateral, is this: Would the cross-examiner be entitled to prove it as part of his case, tending to establish his plea. This limitation, however, only applies to answers on cross-examination. It does not affect answers to the examination in chief.

4. ADMISSIONS: *State may prove, but not, defendant.*

The state may prove any voluntary admissions made by the defendant, but the defendant has no right to prove admissions made by himself to another person at a different time.

APPEAL from *Conway* Circuit Court.
Hon. —— ———, Circuit Judge.
Fletcher, for appellant.
Henderson, Attorney General, contra.

ENGLISH, C. J. At the September term of the circuit

court of Conway county, 1879, Ephraim Butler was indicted as follows:

"The grand jury, etc., etc., accuse Ephraim Butler of the crime of *felony*, committed as follows, viz.: The said Ephraim Butler, on the first day of August, 1879, in the county, etc., aforesaid, in and upon one Green Hill, then and there being, with a certain knife, unlawfully, feloniously, willfully and of his malice aforethought, did make an assault, with intent him, the said Green Hill, then and there unlawfully, feloniously, willfully, and of his malice aforethought, to kill and murder, *then and there no considerable provocation occurring*, against the peace," etc.

He was tried on the plea of not guilty, convicted, and his punishment fixed by the jury at imprisonment for three years in the penitentiary; he filed motions for a new trial and in arrest of judgment, which were overruled. He took a bill of exceptions, and, on final judgment, prayed an appeal, which was allowed by one of the judges of this court.

I. The indictment has a bad Code beginning. *Felony* is the name of no particular crime, but designates a class of crimes punishable in England by forfeiture of lands and goods to the crown, and, by our statute, with death, or imprisonment in the penitentiary. *Gantt's Digest, section 1225.*

In the body of the indictment, however, appellant is distinctly and specifically charged with the crime of an assault with intent to commit murder. The words, "*no considerable provocation appearing*," are proper in an indictment for an aggravated assault, under *sec. 1298, of Gantt's Digest*, but are unnecessary and inappropriate in an indictment for an assault with intent to commit murder, and may be treated as surplussage.

The indictment was good, in substance. See *Lacefield v. State, ante.*

II. There is the usual ground in the motion for a new trial, that the verdict was not warranted by the evidence.

GREEN HILL, the person assaulted, was the principal witness for the state. It appears from his testimony that he was staying at Dan Tucker's house, in Conway county, and making a crop on Levin Hill's farm, on which the house was situated. About the first of August, 1879, he started from the house, on horse, to his field to get a water-melon for Mrs. Levin Hill, and met appellant on the turn-row, walking, and said to him, "You have been talking about me;" and he replied, "Yes, G—d d—mn you; I have, and now I am ready to settle it; G—d d—mn you, I will whip you, or you will whip me." Appellant then took hold of the bridle of the horse of witness, and thereupon he dismounted; appellant struck at witness, and witness knocked him down; he arose and struck at witness again, and again witness knocked him down, and held him down until he agreed to quit; whereupon, witness let appellant up, and went to his horse, which, in the meantime, had walked off some twenty yards—appellant and witness walking together, and talking in a friendly manner. Witness went up on the left, and appellant on the right side of the horse. While witness was standing there, with his right side to the horse, his right arm resting on the saddle, and his face turned from the horse, appellant ran around the heels of the horse, came up in front of witness and stabbed him in the right breast with his left hand. That when he was struck he ran three steps and fell; appellant then jumped on him, and went to cutting him—cut him, in all, three times in the breast, twice in the head, and once in each hand. Witness then arose, threw off appellant,

and ran 150 yards to Dan Tucker's house, appellant running after him. When he reached the house, he ran up on the porch, and said to appellant, "Mr. Butler, if you intend to kill me, I can not run any further." Witness then picked up a drawing-knife; Christiana Tucker then commenced talking to appellant, and he walked away, and witness sat or fell down in a chair.

Appellant, at the time he was stabbing witness, first held the knife in his left hand, witness caught his left hand, and then he changed the knife to his right hand.

CHRISTIANA TUCKER testified that she knew nothing of the fight between appellant and Green Hill until the latter ran up on the porch. Appellant had a knife in his hand. Hill's shirt was bloody. Appellant's shirt and his knife were bloody. Hill picked up a drawing-knife on the porch, and said he could not run any further, and told appellant not to come any further. Appellant picked up a piece of a rail, and she told them not to fight any more. Hill staggered or fell into a chair, etc.

Much more testimony was introduced, but nothing to contradict the leading facts, above stated.

There was an attempt, on the part of the defense, to prove that Hill went into the field armed, to hunt and attack appellant.

HILL testified that when he went to the field he had a pistol in his pocket. That in the first or fist scuffle, while he was holding appellant down, the pistol dropped from his breast-pocket, and when appellant saw it, he said to witness, "You brought that pistol here to shoot me with." Witness replied, "I did not; it is an old and no count pistol, and will not shoot, and is not loaded," and then offered the pistol for appellant's inspection, and he refused to examine it.

There was no want of evidence to sustain the verdict. The conduct of appellant, at the time he stabbed Hill, by the horse, indicates deliberation and malice.

If the wounds inflicted upon Hill with the knife, had caused his death, and appellant had been indicted for murder, we can not undertake to say, that a jury might not, upon the evidence disclosed in the bill of exceptions in this case, have found him guilty of murder in the second degree.

Dr. Gordon, who attended Hill, testified that he was suffering from divers cuts and stabs, the most serious of which was one in the right breast, which was about three inches deep—the knife having penetrated the lung.

II. On cross-examination of Christiana Tucker, witness for the state, appellant asked her if Green Hill had not, a few days before the difficulty, detailed to her scandalous matter as coming from appellant, impugning her character and virtue.

The court sustained an objection to the question, deciding that the witness could not detail the facts and circumstances of such scandalous matter, but that she might be asked if she had any bias or ill-feeling towards appellant.

The bill of exception states that the object of the question was to show bias and ill-feeling on the part of the witness, and also ill-feeling and malice on the part of Hill against appellant.

It may be shown by proper questions that a witness for the state is prejudiced, or has ill-feeling against the accused; but the facts and circumstances causing such prejudice or ill-feeling can not be stated in detail by the witness. *Cornelius v. The State, 12 Ark., 800.*

If Hill communicated to the witness scandalous matter about her as coming from appellant, there was no offer

to prove that the fact was communicated to appellant before the difficulty; it was no part of the *res gestæ*, and could throw no favorable light upon the conduct of appellant at the time he stabbed Hill.

III. Christiana Tucker testified that appellant was in the employment of, and lived with her husband before and to the time of the difficulty. That she afterwards found the bloody shirt, worn by him, rolled up and stuck under the corner of the house. That she took it out and asked her husband, Dan Tucker, if she should wash it; and he instructed her to wash it, and she did wash the shirt and sent it to appellant. This statement about washing the shirt she made on cross-examination by appellant.

Appellant offered to prove by his witness, Dan Tucker, "that he did not request her to wash the blood stains from off the back and front of the shirt worn by appellant on the day of the conflict."

The bill of exceptions states that this testimony was offered by appellant "to show the animus of the state's witness (Mrs. Tucker) towards him; and also by way of impeachment, showing the statement made by her as to the request or order for washing said blood stains was wholly false."

The court ruled that the evidence so offered was inadmissible.

We can not see how it was at all material whether the witness washed the shirt of her own accord or by direction of her husband.

"In order to avoid an interminable multiplication of issues, it is a settled rule of practice that when a witness is cross-examined on a matter collateral to the issue, he can not, as to his answer, be subsequently contradicted by

the party putting the question. The test of whether a fact inquired of in cross-examination is collateral is this—would the cross-examining party be entitled to prove it as part of his case, tending to establish his plea. This limitation, however, only applies to answers on cross-examination. It does not affect answers to the examination in chief." *1 Wharton Evidence, sec. 559.*

IV. Levin Hill, witness for the state, having testified as to admissions made to him by appellant, after he had arrested him on the evening of the difficulty, appellant offered to prove that at 10 o'clock the next day, the same statement in every particular was voluntarily made by him to A. D. Ellis, the constable, who had him in custody; and the court, on the objection of the state, ruled the statement to Ellis inadmissible.

The state had the right to prove any voluntary admissions made by appellant to Levin Hill, but appellant had no right to prove admissions made by himself to another person at a different time.

V. The court, on behalf of the state, gave to the jury eleven instructions; appellant specifically objecting to the sixth and seventh.

The court charged the jury, in the series of instructions given for the state, that to warrant a conviction for an assault with intent to murder, the evidence must be such that if death had ensued it would have been murder in the first or second degree; defined murder, express and implied malice, justifiable homicide, etc., and said to the jury that if they entertained a reasonable doubt of the defendant's guilt of the higher offense charged in the indictment, they might find him guilty of an aggravated or a simple assault, and defined these lesser offenses.

The sixth instruction may be subject to verbal criticism, but is in substance unobjectionable.

The seventh, that "the use of a deadly weapon may be considered by the jury as evidence tending to establish the intent to kill," was not erroneous when considered in connection with the facts and circumstances under which appellant used his knife in stabbing Hill, as disclosed by the evidence.

The appellant asked fourteen instructions, some of which the court gave, and refused others.

Without incumbering this opinion by copying the instructions refused, it is deemed sufficient to say that some of them were inapplicable to the case made by the evidence, and others contained objectionable expressions.

Upon the whole, the law of the case was submitted fairly to the jury by the court, and the evidence warranted the verdict.

Affirmed.

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VOLMER VS. THE STATE.

1. CRIMINAL LAW: *Repeal of penal act; effect of, on offenses before repeal.*

When a criminal or penal statute is repealed, offenses against it committed before the repeal, are, by our statute, still punishable as if it were still in force, unless otherwise specially provided in the repealing statute.

2. INDICTMENTS: *May be joint against several.*

Several may be jointly indicted for offenses arising wholly out of the same joint act or omission.

APPEAL from *Lonoke* Circuit Court.
Hon. J. W. MARTIN, Circuit Judge.
Hallum, for appellant.
Henderson, Attorney General, contra.

HARRISON, J. L. Volmer was indicted, with Abe Volmer, in the Lonoke circuit court, at the March term, 1879, for following the occupation of a vender of ardent spirits without having paid the special taxes required of them.

The indictment contained two counts. In the first, they were charged with selling by quantities of and greater than a quart, or by wholesale; and in the second, with selling in less quantities than a quart, or by retail.

The offense was alleged, in both counts, to have been committed on the first day of October, 1878.

The defendants demurred to the indictment; their demurrer was overruled, and L. Volmer, being separately tried, was found guilty upon the first count, and his fine assessed by the jury at $200.

He moved for a new trial, which was refused, and he excepted to the judgment rendered upon the verdict, and appealed to this court.

The grounds of the demurrer were: That since the finding of the indictment, the provisions of the statute under which it was found had been repealed; that two offenses were charged therein; and that the offenses charged were such as could not have been committed jointly.

The appellant insists that the legislature having, by the act of March 8, 1879, entitled, "An act to regulate the sale of vinous, ardent, malt and fermented liquors," and which went into force twenty days after its passage, repealed the provisions of the revenue act of March 28, 1873, under which he was indicted, the indictment had become void,

and there could be no prosecution for the offense charged in it.

The answer to this objection is found in *sec. 5623, Gantt's Digest*, which is as follows: "When any criminal or penal statute shall be repealed, all offenses committed or forfeitures accrued under it while it was in force, shall be punished or enforced, as if it were in force, notwithstanding such repeal, unless otherwise expressly provided in the repealing statute." *McCuen v. The State, 19 Ark., 634.*

Though, until the act of March 8, 1879, persons selling liquor by retail were required to pay like taxes as those selling by wholesale, the act of May 30, 1874, regulating the licensing of drinking saloons and dram-shops, made it a misdemeanor, and to which a different punishment was affixed, to keep a drinking saloon or dram-shop, or, in other words, to follow the occupation of a retail liquor dealer, without first procuring a license from the county court; and by necessary implication repealed so much of the act of 1873 as made it an offense for following the occupation of a retail liquor dealer to fail to pay the taxes. Although the act of May 30, 1874, required the taxes to be paid before the license was issued, yet if the license had been issued without the payment of the taxes, the holder of the license could not have been indicted for having failed to pay them, as the offense consisted in the keeping of the saloon or dram-shop without license, and not in failing to pay the taxes. The offense created by statute would have been committed though the taxes had been paid, if a license had not been procured. The second count, therefore, charged no offense, and but one was charged in the indictment.

The rule is well settled that several may be jointly indicted for offenses arising wholly out of the same joint act,

or omission; and it is the common practice to indict jointly for the selling of intoxicating liquor without license, the unlicensed keeping of a ferry, and offenses of like character. *1 Bish. Crim. Proceed., 469; 1 Bish. Crim. Law, 957.*

The grounds of the motion for a new trial were: That the verdict was contrary to the evidence; and that the defendant had discovered new evidence since the trial.

The evidence tended to prove that L. Volmer and his brother, Abe Volmer, were doing business together as merchants, on the Steele place, in Lonoke county, in the fall of the year 1878, and that they were selling whisky in quantities greater than a quart, without having paid the special taxes required of them; and if true, and it was the province of the jury to determine the weight to be given to it, it was sufficient to warrant the verdict.

The defendant, in his affidavit in support of his motion for a new trial, swore that he had since the trial, learned that he could prove by Willis Rayford that Abe Volmer did not purchase the store of Rogers McRae, on the Steele place, until the last of October, 1878. The selling was proven to have been about the first of that month.

The court very properly refused to grant a new trial to admit such evidence.

It was not shown or alleged that the fact he wished to establish by this witness, which he must have known, could not have been proven by other witnesses upon the trial; nor was it even alleged to be true; but, on the contrary, it was proven by his own witnesses that it was about the first of October the store was purchased.

The judgment is affirmed.

NEAL VS. BURROWS.

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1. STATUTES: *Mandatory and directory distinguished.*

Those directions in a statute which are not of the essence of the thing to be done, but which are given with a view merely to the proper, orderly and prompt conduct of the business, and by a failure to obey which the rights of those interested will not be prejudiced, are not commonly to be regarded as mandatory; and if the act be performed, but not at the time, or in the precise mode indicated, it may still be sufficient if that which is done accomplishes the substantial purposes of the statute; unless negative words are employed in the statute which expressly, or by necessary implication, forbid the doing of the act at any other time, or in any other manner, than as directed.

Sec. 42 of the act entitled, "An act to maintain a system of free common schools in the state of Arkansas," approved December 7, 1875, is *as to the time* designated for the appointment of a county examiner, directory, and not mandatory.

APPEAL from *Crawford* Circuit Court.
Hon. J. H. ROGERS, Circuit Judge.
Neal, pro se.

HARRISON, J. This was an action by Berkley Neal against John J. Burrows, for the office of county examiner, of which he claimed he had been deprived by the usurpation of the defendant.

The facts were these: The plaintiff was appointed county examiner by the county court, at the October term, 1866, the next term after the general election in that year, and he was commissioned, took the oath, and entered upon the duties of the office.

At the October term, 1868, the next term after the last preceding general election, the county court appointed S. R. Cox, but he dying before he received his commission and qualified, the county court, at the January term, 1869,

appointed the defendant, and he had been commissioned; and had qualified by taking the oath, and was then in possession of the office.

The plaintiff had continued in the office until the defendant took it.

The defendant demurred to the complaint as not stating facts sufficient to constitute a cause of action; the demurrer was sustained and judgment was rendered for him. The plaintiff appealed.

Sec. 42 of the act entitled, "An act to maintain a system of free common schools for the state of Arkansas," approved December 7, 1875, is as follows:

"Sec. 42. That after the passage of this act, the county court of each county of this state shall, as soon as practicable, appoint in each county in this state a county examiner of high moral character and scholastic attainments, who shall hold his office until his successor is commissioned and qualified, as hereinafter provided; said county shall thereafter, at the first session of the court after each general election, appoint said examiner; and it shall be the duty of the county clerk to issue a commission to the person so appointed, and to certify his name and post office to the state superintendent of public instruction."

The appellant contends that the county court has no authority to make an appointment, at any other than at the first session, or term, after the general election; and that he was therefore entitled, inasmuch as Cox had not qualified, to hold over until an appointment should be made at such a session or term.

The decision of this case depends upon whether the provision in the statute, as to the time when the county court is to make the appointment of county examiner, is mandatory or directory.

Judge Cooley gives the following as a rule for determining whether statutes are mandatory or directory: "Those directions which are not of the essence of the thing to be done, but which are given with a view merely to the proper, orderly, and prompt conduct of the business, and by a failure to obey which the rights of those interested will not be prejudiced, are not commonly to be regarded as mandatory; and if the act is performed, but not in the time or in the precise mode indicated, it may still be sufficient, if that which is done accomplishes the substantial purpose of the statute. But this rule presupposes that no negative words are employed in the statute which expressly or by necessary implication, forbid the doing of the act at any other time or in any other manner than as directed." *Cooley's Const. Lim., 93.* The rule, as thus laid down, was approved in *Edwards et al. v. Hall et al., 30 Ark., 31,* as founded in reason and upon authority; and we again express our approval of it.

It follows, therefore, as a clear conclusion, that the provision of the statute referred to, so far as it relates to the terms of the court at which the appointment was directed to be made, is directory only; and that the appointment of the appellant was valid.

The judgment is affirmed.

St. L., I. M. & S. Ry. Co. vs. Yocum.

1. Summons: *Judgment by default, on good service and bad return of.*
Where a summons has been, *in fact,* duly served, the defendant must take notice of it, unless all defense be waived. He can not shelter himself under a defective *return,* from the consequences of his default, if the true facts be at any time brought properly upon the record; which may be done by amendment, even after an appeal. | 34 493 / 58 42

2. PAUPERS: *Suits by, without attorney's certificate of cause of action.*
It is too late, after judgment, to object that a complaint in *forma pauperis* was not accompanied with the certificate of an attorney, that, in his opinion, the plaintiff had cause of action. It affects the cost alone; not the merits of the action, nor jurisdiction of the court.

3. RAILROADS: *Negligence causing death of child. Who may sue for.*
For damages for the death of a minor, killed by the running of a railroad train, the father, if living, must sue. If the mother sues she must show affirmatively and positively that the father is dead. The allegation that she is a widow, is not sufficient.

APPEAL from *Clay* Circuit Court.
Hon. L. L. MACK, Circuit Judge.
Winfield, for appellant.
Crawford (of St. Louis), *contra*.

EAKIN, J. On the sixth of February, 1878, Catherine Yocum sued the appellant railroad company in Clay county, under the act of February 3, 1875, to recover damages for the death of her son. She states: "That she is a citizen of the state of Missouri, that she is a widow, and that she was the mother of Morris Collins, who was her son by a former marriage," and who, on the fourteenth of February, 1877, was under the age of twenty years, and unmarried; that, on said last named date, he "was in the employ of the defendant as fireman of its passenger trains," and whilst discharging his duties as such, he was, without any carelessness or negligence on his part contributing thereto, but solely through the defective and misplaced track of said defendant, thrown under and instantly killed by the overturning of the car or cab of defendant, while said train was running south at a point" in the county of Pulaski.

Upon this complaint a summons was issued, which was returned by the sheriff, indorsed as follows:

"I served the within summons on the within named company, by delivering a true copy to Harry Clemmons, depot and managing agent of said company, at Corning, on the seventh day of February, 1878, at Clay county, Ark."

There was judgment by default for the sum of $5,000 as found by a jury impanneled to assess damages. The defendant prayed an appeal which was allowed by the clerk of this court.

Afterwards, on the twentieth of February, 1879, the circuit court of Clay county allowed the sheriff to make an amended return, showing that the copy of the summons had been delivered to Harry Clemmons, at the depot house of defendant, in the town of Corning, county of Clay, and that said Clemmons was there, the depot and managing agent of said company, and that "the president or other chief officer of said company are absent from Clay county."

This amendment is brought up by *certiorari.*

It has been the practice of this court to allow amendments of returns, to be made by leave of the circuit courts in accordance with the facts, even after an appeal. The act of February 3, 1875, which gives this action, prescribes that service shall be by copy of summons "on any agent of the railroad company sued, at any depot house in the county where the suit is brought." The first return fails to show with sufficient certainty that the copy of the summons was delivered at the depot house. This is cured by the amended return. Where a summons has been *in fact* duly served, it is the duty of the defendant to take notice of it, unless all defense be waived. He can not

shelter himself under a defective return from the consequences of his default, if the true facts be at any time brought properly upon the record. He could not, in the action, question the truth of the return in either case, and his remedy for a false return would be as effective in the case of the amended as the original return.

The complainant sued as a non-resident *in forma pauperis*, and failed to append to her petition for that purpose, the certificate of an attorney of the court, of his opinion that she had cause of action. This, if urged in the court below, might have been good ground in abatement or for a motion to dismiss the suit, on failure to file a bond for costs, but can not affect the judgment rendered upon the complaint by default. The question affects costs alone, and not the merits of the action nor the jurisdiction of the court.

But more serious objections are urged against the complaint. It is contended that complainant shows no cause of action in herself.

Section 3, of the act, provides: "Where 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." This is a change of the common law which, as was announced by this court in the case of *L. R. and Fort Smith R. R. Co. v. Barker and Wife*, gave no right of action for the death of a human being. The right of action is not given by the first section of the act, which makes the railroad liable for "all damages to *persons and property;*" which was only a declaration of the common law, and would not of itself include damages for death. The remedy is novel and *sui generis*, dictated by humanity and adapted to modern social neces-

sities. The benefits of the section can only be claimed by those who bring themselves within its provisions. In the case of a minor killed by the running of a train, the father, if living must sue. If the mother sues, she must show affirmatively and positively that the father is dead. Nothing short of that will answer. The complainant in this case shows that she is the mother of the minor who was killed; that his father was her former husband; that she was, at the time of bringing the action, a widow. It may be inferred that she married a man named Yocum, after having been the wife of the father of deceased, and that Yocum had died, leaving her a widow; but under our laws concerning divorce, it can not be logically inferred from a second marriage that the first husband is dead, or has lost his rights over the children of the marriage. Nor, if it could, would it follow that an allegation of widowhood, at the time of bringing the action, would be equivalent to an allegation of the death of the youth's father almost a year before, at the time of the accident. It might well be, from all that appears, that the father was then living, and had afterwards died, and the mother had married Yocum, who had died also before suit. In such case, no right of action would vest in the mother.

The remedy is purely statutory, and the right to it must be clearly shown. The complaint in this respect is fatally defective, and the judgment upon it erroneous.

It is further urged that no negligence is charged on the part of the company. Negligence is an essential element of liability for damages in all cases where corporations or individuals are pursuing a lawful business. Even where negligence may be presumed from acts or circumstances, and when the *onus* of exoneration may be on the defendant, it must, nevertheless, be considered in issue; and, as has

been held in Alabama, must be charged in the complaint. The laws for the protection of stock or persons can not impose an absolute liability upon railroads, regardless of all care and caution. It would be to destroy their business and infringe their charter rights. In the case of injuries by death of persons, it has ever been held, under the laws giving the new remedies, that it is essential to aver negligence.

The case of the *Little Rock and Fort Smith Railway Company v. Barker and wife* (*supra*) proceeded, and was argued by counsel on both sides, upon the just and true grounds, that negligence was an essential element of liability, without which there could be no cause of action. To say that the death was caused solely by accident "through the defective and misplaced track of defendant," is certainly a very vague and argumentative assertion of an important fact; that is to say, of negligence; inasmuch as that might consist with the utmost human caution on the part of the officers and agents of the company. Such an allegation might, and would doubtless, be cured by verdict, but whether or not by default, it is not necessary now to determine.

For the errors above pointed out, let the judgment be reversed, and the cause be remanded, for further proceedings in the circuit court, where pleadings may be amended and time given to answer, under the sound discretion of the court.

BABCOCK VS. THE CITY OF HELENA.

1. MUNICIPAL CORPORATIONS: *Effect of act of the ninth of April*, 1869.
Sec. 9 of the act of April 9, 1869, for the incorporation, etc., of cities and towns (*sec.* 3202, *Gantt's Dig.*), clearly indicates an intention of the legislative body to produce a strict conformity in the organization and government of all the cities and towns in the state, each after its class; but did not mean to take away any special powers theretofore granted them by special acts, and not affecting their organization or government.

2. STATUTES: *Repeal of, by implication.*
Repeal of statutes by implication must be necessary, or, at least, arise from a clear and unmistakable intention.

APPEAL from *Phillips* Circuit Court.
Hon. J. N. CYPERT, Circuit Judge.
Kimball, for appellant.
Brown, *contra*.

EAKIN, J. This suit was begun by appellant, before a justice of the peace, upon a coupon for $20 of a $500 bond, issued by the city of Helena, in favor of the Arkansas Central Railway company, on the first of October, 1872.

Upon trial, upon appeal to the circuit court, it was agreed that, in the year 1870, the city, by ordinance, submitted the question to a vote of the people, and the vote was in favor of a subscription to the stock of said railway company. The bond in question was one of those issued in conformity with said vote; and the coupon sued upon came into the hands of complainant, before maturity, for value, and in due course of trade; upon which the judge, against the objections of complainant, declared the law to be: that, at said date, the city had no authority to subscribe stock to

said road, or to issue said bonds; and that they and the coupons were void.

There was judgment for the defendant, from which the plaintiff appealed. The evidence and instructions are shown by bill of exceptions.

The city of Helena was chartered by act of December 5, 1856. Amongst other powers granted to the city council, was that of levying such taxes as might "be authorized by a majority of the voters of said city, qualified, etc., voting at special elections, held for that purpose, for the payment of stock subscribed on behalf of said city, by said council, or a majority thereof, in any railroad," etc.

On the sixth of February, 1867, the legislature, in an act "to aid in the construction of the Iron Mountain and Helena railroad, and for other purposes," provided, "that if the city of Helena has, or may hereafter vote to take, stock in the Iron Mountain and Helena railroad, or any other road beginning or terminating at said city, the mayor, by the consent of the council, may issue the coupon bonds of the city."

The constitution of 1868, *Art. V, sec. 49*, made it obligatory upon the general assembly to "provide for the organization of cities and incorporated villages by general laws," and "to *restrict* their power of taxation, assessment, borrowing money, contracting debts and loaning their credit, so as to prevent the abuse of such power." The same constitution continued in force all laws consistent with its provisions. It is obvious that all existing corporations, with all their powers, were carried over and continued until the general assembly might choose to restrict their powers. This clause was *directory*. It was not self-executing, and no restrictions were imposed by it whatever. The general assembly was directed hereafter to impose such as, in its

judgment, might be proper. We must look to subsequent legislation for such restrictions, and their extent.

The first general assembly which sat under this constitution, on the twenty-third day of July, 1868, passed a prospective act for the incorporation of cities and towns, which did not attempt to interfere with any powers of existing corporations—merely extending to them the privilege of surrendering their charters, and accepting corporate character, and authority, under said general act. The city of Helena did not do that, and still retained its powers unimpaired.

Another general act for the incorporation, classification, and government of cities and towns, was passed on the ninth of April, 1869. This act took into its scope and purview all corporations which were in existence when said constitution was adopted, classing them, and continuing their corporate existence under the new act, with their old territorial limits (*Gantt's Digest. sec. 3201*), and providing further (*sec. 3202*) that "all acts now in force *for the organization or government* of any such municipal government or corporation, shall be and they are hereby repealed. Provided that such repeal shall not destroy or bar any right of property, action or prosecution which may be vested or exist at the time this act takes effect." It is to be observed that, then, no right of property, action, or prosecution, had vested, either in the said railway, or said city. The ordinance for submitting to the vote of the people, the question of subscribing for stock in said railway was not passed until the next year.

The original charter of Helena was doubtless repealed by said act of 1869, and she became classed and continued her organization under said last named act, which afforded the measure of her *general* powers, and the restrictions

upon them. Our attention has not been called to, nor have we observed, any clause in the last named general act which *expressly* limits, or denies to pre-existing corporations, special powers theretofore conferred by special acts. If such be the effect of the act of 1869, it must result from its general intent. Its language does not repeal the act of February 6, 1867; for in no proper sense can the latter be considered an act for either the *organization* or the government of the city of Helena. It had been already organized, and its organization was in no wise changed. Nor is it easily conceivable how the power to subscribe stock affected the government of the corporation. This clause clearly indicates an intention of the legislative body to produce a strict uniformity in the organization and government of all the cities and towns in the state, each after its class, but there is no warrant for going further, and presuming that the legislature meant to take away any special powers, theretofore granted them by special acts, and not affecting their organization or government.

The city of Helena is a very important port, or landing, upon the great river which connects our state with the commerce of the world. The citizens of a very large area of the state are interested in having ready access to that point, for themselves, and their products. Previous legislation had seemed to recognize the advantage to the state of a concentration of railroads there; and had indicated the policy of allowing the city to encourage them by subscriptions of stock. We can not suppose that these things were unknown to, or overlooked by, the general assembly of 1869. Its cautious language in the general act would rather indicate an intention to save the cities and towns all special powers, not interfering with that uniformity of organization and government, which was the true aim of

the act. The acts consist. Repeals, by implication, must be necessary; or, at least, arise from a clear and unmistakable intention. Had the legislature of 1869 intended to bring the organization and government of Helena in harmony with that of other cities and towns, and, at the same time, save to her all special powers, granted by special acts, for the public good, it could not well have used apter language, without indeed expressly declaring that the act of 1867 should remain in force. Although such declarations are usual, to remove all doubt, they are not necessary.

The court erred in declaring the coupon invalid. Reverse the judgment, and remand for a new trial.

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TALIAFERRO, EX'R OF MCGEHEE, VS. ROLTON.

1. DEED: *Cancellation or surrender procured by fraud.*

The cancellation or surrender of a deed will not revest the title in the grantor. But where such cancellation has been made under circumstances which would render it a fraud on the part of the holder of the legal title to retain it; such circumstances, for instance, as would render a restoration to the *statu quo* impossible, a constructive trust will be adopted as a convenient machinery for the fulfillment of justice; saving, always, the rights of innocent parties.

APPEAL from *Dorsey* Circuit Court in Chancery.
Hon. D. H. ROSSEAU, Special Judge.
M. L. Jones, for appellant.
McCain, *contra*.

EAKIN, J. McGehee sued Rolton in equity to enforce a

lien on land, stating in his bill: That he had sold the tract to Rolton on the fifteenth of April, 1875, for $983.33, and given him a bond for title, to be made on payment of the purchase money, that defendant gave him his note of that date, for the amount, due at twelve months, with ten per cent. interest from maturity until paid. The note is exhibited by copy, and made part of the bill, from which it appears that it bore the date alleged, but was due, and bore interest from date.

This discrepancy, developed by oyer in a suit at common law, might have been grounds of demurrer. Under our Code practice, in law or equity, the note sued upon, being part of the pleadings, may correct the allegations, which would be amendable to conform to the legal effect of the instrument. It need be no further noticed. The note expressly states that it was given for 200 acres of land bought of complainant, describing it as in the bill.

Complainant says, further, that defendant was put in possession of the land; and that, on the seventh of August, 1876, complainant tendered a deed, and demanded the purchase money—which was refused, and no part has been paid.

Defendant is alleged to be insolvent, and the bill prays foreclosure, and general relief.

Defendant, in his answer, admits the execution of the note, but denies that the complainant, at that time, sold him the land, or gave him the title bond, as alleged, or placed him in possession. He admits the tender of the deed as alleged, but denies that complainant had any lien for the sum demanded.

He proceeds to make his answer a cross-bill, and charges: That he bought the land of complainant in 1869, for seven bales of cotton; to be delivered, three of them in the fall

of 1870, three in the fall of 1871, and one in the fall of 1872; and that complainant, at the time of the purchase, made him a warranty deed in fee simple, reserving a lien for the consideration, and gave him possession. That he paid the three bales, respectively, in the years 1870 and 1871, and that, afterwards, the complainant requested to see his deed, which he delivered to him accordingly, for the purpose of examination; and that complainant ever afterwards refused to return it. He says that he was then largely indebted to complainant for goods, wares and merchandise, and was, consequently, in great trouble and distress. That complainant, "by deceit, fraud and misrepresentation," compelled him to take a title bond, which is exhibited. It bears date April 15, 1873, and provides for title to be made on the payment of $1,000—with interest at ten per cent., one half on the first of the next January, and the balance in a year afterwards; to be void, however, if one half should not be paid by the first of January, 1875, or if all should not be, by the first of January, 1876, with a further proviso that if the bond should thus become void, complainant would return all part payments. Defendant avers that, although he took this bond, he did not consent to receive it instead of his deed.

He further avers that, on the day of the date of said title bond, being largely indebted to complainant for supplies, the latter required him to make a partial settlement of existing indebtedness. Whereupon, complainant prepared and defendant executed the note sued on. That the note was procured through "fraud and misrepresentation, and executed through mistake and inadvertence;" the true consideration being supplies of merchandise, etc., save the one bale of cotton then due on the land, and which has

since been paid in cotton. And so he claims that he owes nothing on the land, and that the lien is discharged.

He further claims credits for payments on account, which have not been allowed by complainant.

He prays that the original notes which he gave for the cotton may be surrendered, and that his original deed may be produced and his title quieted, and for other relief.

Complainant, responding to the cross-bill, admits the sale and execution of the deed in 1869, and the consideration alleged; but says that, before anything was paid, defendant came to him and requested that the contract be changed, saying that he preferred to have it in the shape of a title bond. That the deed was taken back and the title bond set forth by defendant was executed at defendant's special request, in order to give him an extension of time and enable him to pay the land out, and to prevent a foreclosure of the original lien. He denies all fraud and misrepresentation. That, afterwards, having paid but a small portion of the $1,000 due on the bond, on the fifteenth of April, 1875, defendant still expressed a desire to hold the land. Complainant agreed to take his note for the balance, amounting to $983.33, and defendant thereupon executed the note in suit. The original deed made to defendant and returned, has been mislaid or destroyed, and can not be produced. That in 1870, defendant became indebted to complainant, for advances and supplies to the amount of $400.69; and, to secure the same, executed to him a mortgage of his personal property and interest in said land; that he continued to make advances and receive payments from defendant upon an account separate from the land matters; and that defendant, to secure successive balances struck on said accounts, renewed said mortgage and executed others. Exhibits

are made of such other mortgages, on the dates and for the sums following:

On the fifteenth of November, 1871, $963.05; on the fifteenth of April, 1873, $1,152.75, expressly for plantation supplies; on the thirtieth of June, 1874, $755.64; on the seventh of May, 1875, $723.77; and on the twenty-sixth of February, 1876, for $406.39.

The last is expressly for supplies. It recites that there are three bales of last year's crop in complainant's hands, undisposed of, the net proceeds of which are to be credited "either on this note, or another note that McGehee holds of $988.33, for two hundred acres of land in the same section 21, dated April 15, 1875." It further provides (being a crop mortgage in part), that "McGehee is to have the privilege of crediting the half of the receipts, more or less, on land note, that may arise from this mortgage after the amount of this mortgage is paid, except the recording of this mortgage."

Complainant denies the failure to give credits, save as to a small clerical error—says the accounts were truly stated whilst the matters were fresh, and admits payment of all save the land note sued on.

The cause was heard before a special chancellor, upon the pleadings and voluminous mass of testimony—concerning which it is only necessary to say that, taken as a whole, it is very confused and conflicting; but there is not a particle of evidence of fraud, deceit, misrepresentation or mistake in the whole series of transactions between the parties. If there could be a suspicion even of anything improper, it would be of undue influence or oppressive conditions imposed by a creditor on a debtor. But that is not charged, and, we may add, the proof would not sustain it. The chancellor did not find any fraud; but

found, as a fact, that six bales of the cotton originally agreed to be paid had been delivered, and announced as law, that the title was not revested by the surrender of the deed, but remained in defendant; that neither the title bond nor the note for $983.33, nor any subsequent transaction, gave any additional lien to complainants, but that the land was bound for the value of one bale of cotton only—for which a decree was rendered. Both parties appealed.

This court has heretofore, on mature deliberation, and comparison of authorities, adopted and announced the broad doctrine that "the surrender or destruction of a deed will not operate to revest the grantor with the title," whether the first deed be registered or not; and has intimated that this doctrine should apply, on principle, even to cases between the parties, conducted in perfect fairness and good faith, and with due regard to the rights of creditors of the grantee. *Strawn v. Norris et al., 21 Ark., p. 80.*

The question presented by the record, in that case, did not require the court to go so far, nor to announce the rule so broadly. It was a case of fraud and misrepresentation, in which the grantor had been induced to believe that the first deed had not been recorded, and, under that impression, to receive it back, and execute a deed to one alone of two grantees in the first deed. Meanwhile, between the execution of the two deeds, the grantees in the first had conveyed a part of the land to a third party, by which the original grantor had become bound to the third party on the covenant of general warranty. This court held that the grantor was entitled to relief, and that the second deed should be canceled. This relief would have been proper under all or any of the authorities determining the effect, upon the legal title, of the surrender of a deed. All hold

that such a surrender can not affect the intervening rights of others, and the jurisdiction on the ground of fraud was, moreover, independent of this question.

In the case of *Neal v. Spingle*, *33 Ark.*, a deed of land, with a mortgage back for the purchase money, had both, by agreement of the original parties, been destroyed, with the design of thus canceling them, and rendering them of no effect. At the time this was done, the vendee had caused his deed to be recorded, and falsely represented to the administrator of the grantor that it had not been done. He afterwards sold the land to Neal, who was aware of the agreement to cancel, and who afterwards claimed to hold against the unrecorded mortgage, through the recorded deed of the original vendee. Chief Justice ENGLISH, conceding the principle as to the legal title, announced in *Strawn v. Norris*, held, nevertheless, that as the administrator of the first vendor acting under the agreement had neglected to record the mortgage, and destroyed it, so that he could not be placed *in statu quo*, it would be a fraud upon him if the original agreement for cancellation were not effected. This the court ordered to be done, not by restoring the administrator to his lost mortgage, but in effect, by holding Neal as a trustee of the legal title for the purpose of the agreement, which he knew had been made and carried into execution, and which he had co-operated in endeavoring to defeat. The deeds were directed to be canceled, so as to revest the legal title in the estate of the original vendor. He had died after the agreement had been made for the destruction of the instruments, and his administrator, knowing all the facts, had carried it out. This is but an application of the familiar principle in equity, upon which rests the whole doctrine of part performance. The courts of chancery will not allow any one to make use of the statute of frauds as

an instrument to perpetrate a fraud; and in general, where the action of one party with regard to land has been so influenced by the agreement of the legal owner that the former can not be placed *in statu quo* if the latter should recede from his agreement, will make use of the machinery of a constructive trust, and compel performance. Legal titles are subject to the statute of frauds, and must be transferred by writing. Cancellation or surrender will not answer. But where such cancellation or surrender has been made under circumstances which would render it a fraud on the part of the holder of the legal title to retain it, such circumstances, for instance, as would render a restoration of the *statu quo* impossible, a constructive trust will be adopted as a convenient machinery for the fulfillment of justice, saving, always, the rights of innocent parties. Constructive trusts are not themselves within the statute. In their nature they can not be created by writing. In the absence of fraud on the part of the complainant in this case, the circumstances are such as would make it fraudulent in the defendant to insist upon the terms and conditions of the original conveyance of 1869, and to have the land subject only to the payment of the original consideration. He is now insolvent, and the collection of the debt of $983.33, which is the balance due upon the title bond of 1873, would, without the lien, be rendered precarious, if not hopeless. But for his taking that title bond, the original lien might have been at once enforced, and the complainant would not have given him the further credits, which seem to have been quite extensive, and very beneficial, through a course of years, during which, up to the last mortgage, he recognized the debt now sued upon as a lien upon the land. If he had not given the note in 1875, for an extension, the lien of the title bond might have been

at once enforced, and the land taken for the debt of $1,000. To remand the complainant now to his rights of 1869 would defraud him of the advances subsequently made under the new arrangement.

We think the chancellor erred in holding that he should be so remanded. An account should have been taken of what was due on the note sued upon, whether that note was for original purchase money, or whether other advances had been added in. The equity is the same for either, and the whole new contract should be carried out. The court below will determine all questions of the application of payments which may arise in taking the accounts, and for the balance found due on the note in question, a lien should be declared, and enforced by proper proceedings.

Reverse the decree upon the appeal of complainant, and remand the cause for further proceedings consistent with equity and this opinion.

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Halbrook vs. The State.

1. Bigamy:

If A marries B, and afterward, while B is alive, marries C, and afterward, when B is dead, or divorced, marries D while C is living, this last marriage is not bigamous, the second being absolutely void.

2. Same: *Evidence of marriage: Admissions—Cohabitation, etc.*

In prosecutions for bigamy, the deliberate admissions of a defendant that a woman was his wife, and evidence that he cohabited with, treated and held her out to the community as such, may go to the jury for what they are worth, as tending to prove an actual marriage.

3. Marriage: *Divorce decree, evidence of.*

The record of a decree of divorce, in a suit of which the defendant has had legal notice, is evidence of the marriage.

APPEAL from *Conway* Circuit Court.
Hon. W. D. JACOWAY, Circuit Judge.
Fletcher, for appellant.
Henderson, Attorney General, contra.

ENGLISH, C. J. It appears from the transcript in this case, that, on the first day of the October term, 1875, (eleventh of October), of the circuit court of Conway county, a grand jury was impanneled, and retired to consider of their duties.

Then follows an indictment against Jeremiah H. Halbrook for bigamy, indorsed by the clerk: "Filed in open court, this sixteenth day of October, 1875," but no record entry is copied in the transcript, showing that the indictment was presented in court by the grand jury.

Supposing there was such an entry, as there should have been, and that the clerk had failed to transcribe it, a *certiorari* was ordered, upon which the clerk has returned that no entry showing that the indictment was presented in court by the grand jury, appears of record.

The indictment charges, in substance. that on the second of November, 1866, the defendant was married, in Conway county, to Jane Honeycutt, and that, on the twenty-sixth of July, 1875, when she was living, and still his wife, he feloniously married Mary Mahan, in said county.

He was tried at the September term, 1879, found guilty, and the jury fixed his punishment at imprisonment for three years in the penitentiary; a new trial was refused, he was sentenced, took a bill of exceptions, and prayed an appeal, which was allowed by one of the judges of this court.

It appears from the bill of exceptions that, on the trial, the state proved by the record of marriages of Conway

county, that appellant was married to Jane Honeycutt, on the second of November, 1866, in Conway county, by a justice of the peace of said county, he then being forty-three years of age, and Jane seventeen.

The state also proved, by the same record of marriages, that defendant was married, under a license, on the twenty-seventh of July, 1875, to Mary Mahan (seventeen years of age), by a minister of the gospel.

The state then proved, by two witnesses, that they were present and saw defendant married to Jane Honeycutt, on the second of November, 1866, and were present, subsequently, and witnessed a marriage, on the twenty-seventh of July, 1875, in Conway county, between defendant and Mary Mahan, and that Jane Honeycutt was still living in Conway county at the time defendant was married to Mary Mahan.

The court excluded all of the evidence offered by appellant, as shown below.

I. The first ground of the motion for a new trial is that the verdict was not warranted by the evidence.

The statute provides that: "Every person, having a wife or husband living, who shall marry any other person, whether married or single, except in the cases specified in the next section, shall be adjudged guilty of bigamy. *Gantt's Digest, section 1312.*

The next section makes five exceptions, which are matters of defense. *1 Greenleaf Evidence, sec. 208.*

The indictment (says Mr. GREENLEAF) states the first and second marriages, and alleges that, at the time of the second marriage, the former husband or wife was alive. The proof of these three facts, therefore, will make out the case on the part of the prosecution. In regard to the first marriage, it is sufficient to prove that a marriage, in fact, was

celebrated according to the laws of the country in which it took place; and this, even though it were voidable; provided it were not absolutely void. This may be shown by the evidence of persons present at the marriage, with proof of the official character of the celebrator; or, by documents legally admissible—such as a copy of the register, where registration is required by law, with proof of the identity of the person; or, by the deliberate admission of the prisoner himself.

In proof of the second marriage (he continues) the same kind of evidence is admissible as in proof of the first. But it must distinctly appear that it was a marriage in all respects legal, except that the first husband or wife was then alive; that it was celebrated within the county, etc. Proof of the second marriage, by reputation alone, is not sufficient. *1 Greenleaf Ev., secs. 204, 205.*

The state proved both the first and second marriage, alleged in the indictment, by the record of marriages, which our statute makes evidence (*Gantt's Digest, sec. 4140*), and by witnesses present at the marriages.

The case was well made out on the part of the state.

II. After the state had closed, appellant introduced Miles Price and Thomas Halbrook, who stated, after being sworn as witnesses in the case, that they had been acquainted with the appellant for many years; that he was married when about nineteen years old to one Margaret Halbrook, in Perry county, Tennessee; that he was now (time of the trial) fifty-seven years of age; that they were not present at such marriage, but, by reputation, such marriage occurred within ten miles of where they resided, and that, within a few days thereafter, appellant brought his wife into the immediate neighborhood of witness Price, and there they remained together as husband and wife for

two or three months, and that appellant and his said wife, Margaret, lived and cohabited together as husband and wife, in the state of Tennessee, and later in the states of Arkansas and Missouri, for many years, and had born to them, and reared by them, a large family of children; that some of said children now reside in the neighborhood of witness, and that witness had, within the last three months, seen letters from Margaret, wife of appellant, who, by reputation, still lives in Green county, Missouri, but witness had not seen her since 1863.

But the court ruled that such evidence was irrelevant and incompetent, and excluded the same from the jury; to which ruling appellant excepted.

Appellant then offered in evidence a certified transcript of the record of a decree, rendered in the circuit court of Phillips county, in the state of Missouri, on the twenty-eighth of November, 1866, in a suit for divorce by Margaret J. Halbrook against Jeremiah H. Halbrook, dissolving the bonds of matrimony theretofore contracted between them, and giving her the care of their infant children, and alimony to be charged upon certain real estate of the defendant in that suit. The decree shows that the defendant therein had notice by publication, and that there had been a previous default entered against him, but does not show when the bill was filed, nor when the marriage dissolved by the decree had been entered into by the parties to the suit.

The court refused to permit appellant to read in evidence the transcript of the record of the decree, and he excepted.

Appellant offered no other evidence.

The appellant asked the court to give the jury seven instructions. The court gave the first, which defined the

crime of bigamy (having given a similar instruction on the part of the state), and refused the others.

(*a*) The court having excluded all of the evidence offered by appellant, there was nothing on which the instructions refused could be based. They were mere abstract propositions of law.

The instructions refused presented, in different forms, the propositions that appellant's marriage with Jane Honeycutt, when his first wife, Margaret, was living, and undivorced from him, was null and void, and that his marriage with Mary Mahan, after the first wife obtained the divorce, was not bigamous, because he then had no lawful wife.

(*b*) If the facts hypothecated in this proposition had been proved by competent evidence, it would have been good law.

Upon the hypothecated facts, the case would have been similar, on principle, to Lady Madison's case, reported in *1 Hale's Pleas of the Crown, p. 693*, thus: "A takes B to husband in Holland, and then in Holland takes C to husband, living B, and then B dies, and living C, she marries D; this is not marrying a second husband, the former being alive, for the marriage to C, living B, was simply void, and so he was not her husband; but if B had been living, this had been felony to marry D in England; ruled at Newgate sessions, about 1648, in the *Lady Madison* case."

Mr. GREENLEAF, after stating the points that the state is required to prove, as above, adds: "The defense may be made by disproving either of the points above stated. Thus, where a woman married a second husband abroad, in the lifetime of the first, and afterward the first died, and then she married a third in England, in the lifetime of the second, and for this third marriage she was indicted; upon proof that the first husband was living when the second

marriage was had, it was held a good defense to the indictment; the second marriage being a nullity, and the third, therefore, valid." *3 Greenleaf Ev., sec. 208, citing Lady Madison case; State v. Goodrich, 14 West Va., 834,* is similar to the case now before us.

So in this case, if appellant was married to Margaret Halbrook in Tennessee, and she was living when he married Jane Honeycutt, the latter marriage was null and void; and if Margaret Halbrook had obtained a divorce from him before he married Mary Mahan, this third marriage was valid, and not bigamous, as alleged in the indictment; but the marriage with Jane Honeycutt was bigamous

Appellant, however, could not be convicted on this indictment for the bigamous marriage with Jane Honeycutt, because that is not the offense with which he is charged.

(*c*) Did the court err in excluding all the evidence offered by appellant, as incompetent and irrelevant?

In indictments for bigamy, proof of marriage is required to be more strict than in civil cases.

But it is reasonable to hold that appellant should have been allowed to introduce any evidence conducing to prove his marriage with Margaret Halbrook, relied upon by him to defeat the case made by the state, which the state might have been permitted to introduce to prove the same marriage, had the indictment alleged it to be the first marriage, and a subsequent marriage to be the bigamous marriage.

It is established by the current of adjudications, that in prosecutions for bigamy, the deliberate admission of the defendant that a woman was his wife, and evidence that he cohabited with, treated and held her out to the community as such, may go to the jury for what they are worth, as tending to prove an actual marriage. *Regina v. Simmons, 1 Carrington & Kirwan, N. P., 164, 47 Eng. C. L., 164;*

Commonwealth v. Jackson, 11 Bush. (Kentucky), 679, in which the English and American cases are reviewed; *Warner v. Commonwealth, 2 Virginia cases, 95; Cameron et al. v. State, 14 Ark., 546; Cook v. State, 11 Georgia, 54; State v. Britten, 4 McCord, 255; Wolverton v. State, 16 Ohio, 173; Clayford's case, 7 Greenleaf, 57; State v. Hodskins, 19 Maine, 158.*

In New York, where it has been held that an actual marriage must be proved, and that the prisoner can not be convicted on mere admissions, or evidence of cohabitation (*People v. Humphrey, 7 Johnson, 314*), yet in *Gahagan v. People, Parker's Cr. R., 380,* such admissions and proof of cohabitatien as husband and wife, were held to be admissible as tending, with other facts, to prove an actual marriage.

In this case, appellant offered to prove, by two witnesses, a reputed marriage with Margaret Halbrook in Tennessee; that they cohabited as husband and wife there, and later in this state, and in Missouri for many years, and reared a family of children. This cohabitation occurred before there could have been any object on the part of appellant to make evidence to be used in this prosecution.

Presumption of marriage arises from cohabitation as husband and wife.

There was also a presumption that appellant's marriage with Jane Honeycutt was lawful, innocent, and not criminal. It is supposed that a man will not incur the guilt of felony and danger which attends it by marrying another woman during the life of one to whom he has previously been lawfully married. *2 Wharton's Evidence, sec. 1297; Jones v. Jones, adm'x, 48 Maryland, 39.*

Had appellant's evidence of cohabitation been admitted, it would have been the province of the jury, under proper directions from the court, to weigh the presumptions in making up their verdict.

(*d*) But the court also excluded the transcript of the record of the Missouri divorce decree.

With some evidence *aliunde* of identity of parties, this decree would have proven that on the twenty-eighth day of November, 1866, about twenty-six days after appellant's marriage with Jane Honeycutt, and before he married Mary Mahan, Margaret Halbrook obtained a divorce from him.

The decree would also have proved that Margaret Halbrook was living at the time appellant married Jane Honeycutt, because she obtained the decree, and was awarded by it care of her infant children after that marriage. The decree was also evidence that a marriage had been contracted between the complainant and defendant in that suit, because courts do not grant divorces without proof of marriage.

Marriage is the foundation of the whole proceedings, and the decree or sentence granting a divorce, in form and effect, affirms the marriage as well as declares the separation. *Bishop on Marriage and Divorce, sec. 315.*

The decree would also have conduced to prove that appellant's marriage with Margaret Halbrook occurred before his marriage with Jane Honeycutt, but about twenty-six days having transpired between the dates of the latter marriage and the time of the decree, which was obtained on publication. These twenty-six days were periods of appellant's honeymoon with Jane Honeycutt, a young woman whom, according to the theory of his defense, be it said to his shame, he deceived and deluded into an illegal marriage, and made her in law an adulteress. But a man indicted for one crime can not be convicted on proof that he has committed another.

After offering the decree in evidence, appellant offered

no evidence of identity of parties, but the decree having been excluded, this would have been useless.

The evidence of cohabitation should have gone to the jury for what it was worth, and the decree should have been admitted.

The judgment must be reversed, and the cause remanded for further proceedings.

If the indictment was in fact presented in court by the grand jury, it may be shown by a *nunc pro tunc* entry when appellant is in court, and he may be tried again on the same indictment. Otherwise he may be held to answer a new indictment if the state elects further to prosecute him. *Green v. State, 19 Ark., 178; Halcomb v. State, 31 Ark., 427.*

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EBOS VS. THE STATE.

1. EVIDENCE: *Medical expert, opinion, etc.*

A medical witness, after examination of a wound upon the head, inflicted by a blow with a club, may testify his opinion that the blow produced the death of the party by concussion of the brain, without opening the skull and examining the brain.

ERROR to *Garland* Circuit Court.
Hon. J. N. SMITH, Circuit Judge.
G. W. Murphy, for appellant.
Henderson, Attorney General, contra.

ENGLISH, C. J. Indictment in the circuit court of Garland county, charging in substance that John Ebos, on the twenty-sixth of April, 1878, murdered Mary Ebos, by

striking her on the right side of the head with a large stick or club.

The accused was tried by a jury, on plea of not guilty, found guilty of manslaughter, and his punishment fixed at imprisonment in the penitentiary for seven years; a new trial was refused him, and he was sentenced in accordance with the verdict, took a bill of exceptions and brought error.

The court gave all of the instructions to the jury, moved for the prisoner, which were fair and favorable, and he objected to none given on the part of the state.

I. In the motion for a new trial there were the usual assignments, that the verdict was contrary to law, the instructions of the court, and the evidence.

It will be sufficient to state the leading facts, which the evidence introduced at the trial conduced to prove.

About dark, on the evening of the twenty-sixth of April, 1878, when *Mary Ebos*, wife of Bertrand Ebos, and step-mother of the prisoner, was in her kitchen with a half-sister of the prisoner, Josie Ebos, about ten years old, getting supper, the prisoner went into the kitchen, and struck her (*Mary*) on the right side of the head, with a piece of board timber, which, with other pieces, had been brought into the house to kindle a fire. She fell on the stove, rolled off the stove on to the floor, and remained there awhile, sitting, supporting her head with her hands, and then pulled herself up by the safe and got on a bed. She seems to have said but little after she was struck, but to exclaim, "Oh, my head!" She finally became speechless and died shortly after midnight. This was in Garland county.

Immediately after the prisoner struck her with a stick,

"he took down a pistol," went to a neighboring house where he lodged, and put it under the head of his bed.

That he disliked his step-mother is shown by expressions made by him, both before and after he struck her the fatal blow.

Had the jury found him guilty of murder, we should not have disturbed the verdict.

II. Dr. William H. Barry testified that on the twenty-seventh of April, 1878, he was called upon to make a *post-mortem* examination upon the body of Mary Ebos, and did make a superficial examination of it. That he found upon the right side of her head, just above the temple bone, a severe contused wound, about six inches in length, and from about one and a half to two and a half inches in width, to the skull.

That the skull was not fractured, and he discovered no injury to it. That this was the extent of the *post-mortem* examination. That there was a burn on the left breast and arm, which, however, did not contribute to the death. That he did not open the head or examine the brain.

That he was a graduate of medicine, and a practicing physician and surgeon. That the body had been dead for several hours, and was offensive when he saw it.

The attorney for the state then asked the witness his opinion as to the cause of the death of the deceased. The prisoner objected, on the ground that no sufficient foundation had been laid for such opinion. The court overruled the objection, and the prisoner excepted.

Witness then testified, in answer to the question, that such a wound as that upon the head of deceased might produce death, and frequently did, and that in his opinion, said wound did cause the death of the deceased by concussion of the brain.

The ruling of the court, permitting the witness to give his opinion as to the cause of the death of the deceased, upon examination made by him, was made ground of the motion for a new trial.

The medical witness examined the wound, its character, extent and dangerous location, and was aware of the length of time that had transpired between the giving of the blow and the death of the subject, the appearance of the body, etc. *2 Beck Med. Jurisprudence, pp. 330, 338.* From the examination which he made, his observation, experience, and professional reading, he formed the opinion that the wound caused the death; and we are aware of no law that required him to open the skull and examine the brain before he could be permitted to express such opinion to the jury. Of course, the opinion of a medical witness in such case would have more or less weight with the jury, according to the extent of the examination, the professional rank and character of the witness, etc.

III. The prisoner asked a witness (J. Bull) whether the deceased was not addicted to excessive use of snuff, and violent fits of passion. Objected to by the state, ruled out by the court, and made ground of the motion for a new trial.

"Counsel for the prisoner stated that they asked the question for the purpose of proving that deceased was subject to extreme fits of passion, and had been for many years excessively addicted to the use of snuff, and they desired the evidence as a basis for the introduction of medical witnesses to prove that the habits and temperament indicated the probable presence of a condition from which sudden death might well have resulted, without reference to the blow."

It has been held not admissible for a medical witness to give an opinion on merely speculative data. *1 Wharton Evidence, sec. 441.*

No evidence was introduced, and none was offered, to prove that the deceased was in a violent fit of passion, or had taken an overdose of snuff, at the time the prisoner struck her with a stick. She appears to have been engaged in getting supper, and manifested suffering and increasing stupor from the time of the blow to her death.

If she was addicted to fits of passion and excessive use of snuff, such habits furnished no excuse for the prisoner to strike a woman, and his step-mother, a blow with a stick, that manifestly, from all the evidence, caused her death.

Affirmed.

NATHAN et al. vs. SLOAN.

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1. PRACTICE AT LAW: *Findings of court, when reduced to writing.*
The findings of the court may be reduced to writing after judgment.

2. SAME: *When findings not special.*
The conclusion of facts found, are in the nature of a special verdict; and, when the finding of facts is not special, or such as the law requires, the party desiring it, may have them made so, by motion in the circuit court; and if he fails to make such motion, this court will not reverse.

3. PROMISSORY NOTES: *Indorsers, when joint makers.*
Parties who indorse their names in blank upon an obligation to another, at the time it is executed by the maker, and for the same consideration, are joint makers with him, and not guarantors.

APPEAL from *Jefferson* Circuit Court.
Hon. J. A. WILLIAMS, Circuit Judge.
T. B. Martin, for appellants.

HARRISON, J. This was an action by M. Sloan against Henry Nathan, J. C. Meyer and Sol. Meyer, Jr., indorsers upon the following instrument of writing:

"PINE BLUFF, ARK., August 15, 1874.

"Ninety days after date I promise to pay M. Sloan the sum of seven hundred and fifty dollars—being balance of purchase money of five-twelfths (5-12) interest in the steamer 'Ella Hughes;' and it is hereby further provided that this note is only valid and of force after expiration of ninety days, when said M. Sloan will make full title to me; and any claims arising against his five-twelfths interest in said steamer 'Ella Hughes,' shall be an off-set against this note. JOHN CLACOMB."

The indorsements were in blank, and made at the time of the execution of the instrument; and it was alleged in the complaint that the indorsements were a part of the consideration upon which the sale, mentioned in the instrument, was made. It was also alleged that the plaintiff, within the time stipulated, made Clacomb a good title to the part of the steamer sold him, and delivered the steamer to him; and that, when the debt fell due, payment was demanded of him, and notice of its non-payment given the defendants.

The defendants, in their answer, denied that the plaintiff had made Clacomb a good title; and averred that by his failure to do so, the steamer had been taken from him to satisfy a claim against her, existing at the time of his purchase, and that the consideration for which they indorsed the instrument had failed.

The trial was by the court, which found in favor of the plaintiff. The defendants moved for a new trial, which was refused, and judgment was rendered against them for the debt and damages.

The defendants appealed.

The only grounds for a new trial, assigned in the motion for it, were: that the court did not state, in writing, its conclusions of fact found, and that the finding was against the law and evidence.

After the motion for a new trial was filed, the court, as its conclusions of fact, found the following:

"The court finds the facts as stated in the complaint; and finds for the plaintiff the sum of seven hundred and fifty dollars for his debt, and the further sum of one hundred and thirty-five dollars for interest on the same."

The findings of the court may be reduced to writing after the judgment. *Apperson & Co. v. Stewart, 27 Ark., 619; Insurance Company v. Boon, 5 Otto, 117.*

Its conclusions of fact found, are in the nature of a special verdict. *Obermier & Co. v. Core, Thompson & Co., 25 Ark., 562; Woodruff v. McDonald et al., 33 Ark.*

A special verdict is a special finding of the facts of a case; the design of which is to submit the questions of law arising upon the matters of fact specially found, to the consideration of the court, and must state the facts as proved, and not the evidence of them; and must leave no room for presumption. *Bac. Abr. Verdict, (D); Gantt's Digest, sec. 4678.*

There may be some question whether the finding in this case was a special or a general one; but we have no occasion to consider it, for, if not special, or such as the law requires, the defendants, if they had wished, could have required it to be made such; and this court will not reverse a judgment for an error, which might have been corrected on motion in the court below, unless motion has been made there and overruled. *Sec. 1100, Gantt's Digest.*

There was but one issue in the case, and that was upon

the averment in the complaint that the plaintiff had made title to Clacomb to the shares or part of the steamer sold him; and the only evidence in the case was the plaintiff's deposition. He testified that he had, when he sold the five-twelfths of the boat to Clacomb, a clear title to, and there was no lien on, or claim against the same; and that he made him, through the custom-house at Nashville, within ninety days from the date of the instrument, a good title thereto. The evidence sustained the finding.

The defendants were not guarantors; they became, by their indorsement of the instrument at the time of its execution, and upon the same consideration for which Clacomb executed it, joint makers with him, the same as if they had written their names under his upon the face of it; writing their names upon the back, did not change the nature of their liability; it was not the making of a new contract, but simply becoming sureties in that then being made. *Killian v. Ashley et al., 24 Ark., 511; Nelson v. Dubois, 13 Johns., 175; Moies v. Bird, 11 Mass., 436; Rey et al. v. Simpson, 22 How., 341; Burton & Co. v. Hansfield et al, 10 West Va., 470; 1 Pars. on Con., 244.*

The judgment is affirmed.

CHANDLER VS. SMITH.

1. REPLEVIN: *For bales of cotton, seed cotton not to be taken.*

An order of delivery directing the officer to replevy bales of cotton, gives him no authority to seize seed cotton.

2. SAME: *Interpleader. Judgment against.*

On the trial of an interplea in an action of replevin, no verdict or judgment for either property or money (except for cost) can be rendered against the interpleader, where the property has never been delivered to him.

ERROR to *Montgomery* Circuit Court.
Hon. L. J. JOYNER, Circuit Judge.
Gallagher & Newton, for plaintiff.
Battle, contra.

HARRISON, J. This was a suit in replevin for two bales of cotton, commenced before a justice of the peace, by J. B. Smith, the defendant in error, against C. B. Hazleton.

The return of the constable on the order for the delivery of the property to the plaintiff was as follows:

"I executed the within by proceeding to the residence of C. B. Hazleton, and seized about three thousand pounds of seed cotton, and told plaintiff to take charge of it and haul it away; went to Caddo Gap gin of M. M. Chandler, seized one bale of cotton weighing four hundred pounds, and about thirteen hundred pounds of seed cotton, which I pointed out to plaintiff, and told him to take possession of it."

At the return day of the summons, M. M. Chandler, the plaintiff in error, filed with the justice a claim to the property, and interpleaded therefor.

Upon the trial, the plaintiff recovered judgment against the defendant for the sum of $95 *principal*, and the further sum of $40 damages. No disposition appears to have been made of the interplea.

Both Hazleton and Chandler appealed to the circuit court.

There was a trial upon the interplea in the circuit court, and the jury returned the following verdict: "We, the jury, find in favor of the plaintiff, two bales of cotton valued at $120;" and the court rendered judgment in favor of the plaintiff, against Chandler, for the $120, or a return of the cotton to him.

No bill of exceptions was taken.

Chandler brought error.

The proceedings, from beginning to end, were very irregular.

It does not appear that Chandler delivered to the constable an affidavit that he was entitled to the possession of the property, in order that the constable should not deliver it to the plaintiff, as he might have done, under *sec. 5044, Gantt's Digest;* and the return of the constable to the order of delivery does not show whether he retained the possession, or delivered it to the plaintiff. Indeed, the return is so defective as not to clearly show that the property mentioned in it was in fact replevied. The plaintiff, in his affidavit, claimed two bales of cotton, but no seed cotton; and the order of delivery only directed the constable to replevy the two bales, and he had no authority to take seed cotton. How there could be a verdict for either cotton or money against Chandler, who was but an interpleader or claimant of the cotton, or judgment against him in the case, except for costs, we are unable to conceive.

The judgment is reversed, and the cause remanded for further proceedings.

WILLIAMS VS. SKIPWITH.

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1. ATTACHMENT: *Release bond, where there is no attachment, void.*

In a suit in which no affidavit or bond for attachment was filed, nor order for attachment issued, the defendant filed the bond of a surety to perform such judgment as should be rendered in the case. Afterwards, judgment was rendered against both defendant and the surety, without notice to him, for the plaintiff's demand; and execution was issued, and the surety gave a stay bond; and afterwards appealed to the supreme

court. *Held*, That the bond of the surety was unauthorized by law, and answered no purpose in the suit; that it gave the circuit court no jurisdiction as to him, and the judgment against him was *coram non judice*, and void; and that, there being no judgment against him, the execution and stay bond were also void.

APPEAL from *Pulaski* Circuit Court.
Hon. T. C. PEEK, Special Judge.
Gallagher & Newton, for appellant.
Dodge & Johnson, contra.

HARRISON, J. E. H. Skipwith sued the Memphis and Little Rock Railroad company, before a justice of the peace, on an account for $250.

The suit was commenced on the seventeenth day of March, 1873, and the summons was served the same day.

No affidavit, nor bond, as required in suits by attachment, was filed, nor order of attachment issued; but the defendant, on the eighteenth day of the same month, filed with the justice, and which was approved by him, the bond of B. D. Williams, to the plaintiff, in the sum of $500, conditioned that the defendant would perform the judgment that should be rendered in the case.

Upon the trial, the justice found in favor of the defendant; and the plaintiff took an appeal to the circuit court.

The case was tried in the circuit court, at the May term, 1876, by the court without a jury, which found for the plaintiff the sum claimed in his account, $250, and rendered judgment therefor against the defendant, and also, without any notice to him, against Williams.

An execution on the judgment was issued on the second day of October, 1876, to Jefferson county, and Williams gave a stay bond. After the return of the execution, he applied for, and obtained, an appeal to this court.

There was no attachment against the defendant's property. The bond filed with the justice was unauthorized by law, and answered no purpose in the suit.

It could, therefore, give the circuit court no jurisdiction as to the appellant, and the judgment against him was *coram non judice*, and void.

There being no judgment against him, the execution and stay bond were also void.

The judgment of the circuit court against the appellant is, therefore, reversed, and, together with the subsequent proceedings, set aside and held for naught.

JACKS et al. vs. NELSON & HANKS.

1. JUSTICE OF THE PEACE: *Practice before. Filing account, etc.*

In ordinary actions before justices of the peace, the plaintiff must indicate in the paper filed as his cause of action, the matter upon which his claim is founded; but he is not held to exhibit in any paper or written statement (unless he chooses to proceed by regular pleading), a complete cause of action, unaided by proof *aliunde*.

The instruments filed are not pleadings. If a proper paper or statement be not filed, the suit may be dismissed on motion. If the paper filed is sufficient to indicate a cause of action, the plaintiff may supply full proof *aliunde*.

2. NEGOTIABLE INSTRUMENTS: *Certificate of deposit.*

A certificate of deposit is *prima facie* evidence of a chose in action, which is assignable by statute, and gives a right of action to the assignee. It, itself, implies a contract to pay the amount deposited.

APPEAL from *Phillips* Circuit Court.
Hon. J. N. CYPERT, Circuit Judge.
Palmer, for appellant.
Thweatt, *contra*.

EAKIN, J. Appellants sued defendants before a justice of the peace, filing, before summons, the following paper:

"*Nelson & Hanks, Bankers:*

"HELENA, ARK., 12–19–1877.

"Deposit for credit of Charles Hicks $143.60-100, 3–B–6.

"N. & H."

This was indorsed, in writing, by Hicks to Mayfield & Co., and by them to plaintiffs. Judgment was rendered by the justice for plaintiffs, and defendants appealed to the circuit court.

There, defendants filed a written demurrer "*to the instrument*" sued on; first, because it does not show cause of action; second, because there was no account nor written contract, or written statement of the facts on which the action was founded; and, third, because there was nothing on file showing cause of action.

The court sustained the demurrer; and, refusing to allow plaintiffs to amend by filing a written complaint, gave judgment for defendants. Plaintiffs appealed.

The statute regulating the practice before justices requires that ordinary actions shall be commenced by summons, and that the plaintiff shall first file, "the account, or the written contract, or a short written statement of the facts on which the action is founded." This is for the convenience of defendant, that he may not be surprised; and to protect him from a second suit on the same ground. The plaintiff is required to indicate the matter upon which his claim is founded, but is not held to exhibit in any paper, or by written statement—(unless he should choose to proceed by formal pleading)—a complete cause of action unaided by proof *aliunde*. That would not be done by filing an account.

The demurrer in the circuit court was not proper prac-

tice. The instruments filed are not pleadings. If there is no compliance with the statute by filing any proper paper, or written statement, the suit might be dismissed on motion. If the paper filed is sufficient to indicate the cause of action, the plaintiff should be allowed to supply full proof *aliunde*, or, failing in that, should have judgment against him.

A certificate of deposit, although not commercial paper, negotiable by the law merchant, when not containing a promise to pay, is, nevertheless, *prima facie* evidence of a chose in action, which is assignable by statute, and gives a right of action to the assignee. If there be any defense to it, of any nature, it should be made out by defendant. The certificate, itself, implies a contract to pay the amount deposited. That is meant by a deposit. Something left in another's hands; not for his use, but the depositor's. The doctrine laid down by Mr. Daniels, in section 1704, of his excellent work on Negotiable Instruments, to the effect that such a certificate "is nothing more than a receipt, and could not be the basis of an action against the bank," does not mean that it can not be used as evidence of an implied contract. The case he cites, shows this more plainly. *Hotchkiss v. Mosler, 48 N. Y., 482.*

The better doctrine, upon reason and authority, is to consider certificates of deposits by a bank, if payable at a future day, as promis ory notes. If not accompanied with an express promise to pay, as simple evidences of indebtedness, subject to defenses. *Morse on Banks and Bankruptcy, p. 52.*

The plaintiffs below sufficiently complied with the statute, and the court erred in rendering judgment against them for costs.

Reverse the judgment, and remand the cause for further proceedings.

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JACKS VS. CHAFFIN et al.

1. COLLECTOR'S DEED: *Uncertainty in description makes void.*

A collector's deed which recites that a quarter section of land was offered for sale, and that B purchased 35 acres of it, and then conveys to him said land, is void upon its face for uncertainty.

2. SAME: *Recital of survey of part sold.*

If a collector's deed for land sold under chapter 128, Revised Statutes, be otherwise sufficient, a failure to recite in it the survey and return of the part sold, will not invalidate it; they may be shown *aliunde.* But, in the absence of any recital of a survey, or any evidence of it *aliunde,* the deed itself, describing nothing, is an absolute nullity.

3. TAX SALE: *For territorial taxes.*

There was no law in existence in 1847, authorizing the sale of lands for territorial arrearages of taxes.

4. TITLE BY POSSESSION: *Statute limitations.*

Possession of land during the full period of limitation, under such circumstances as would make a valid defense, amounts to an investiture of title, which may be actively asserted in all respects, as effectively as if acquired by deed. The continuity of possession has reference to the time the statute is running, and is not necessary after the bar has attached.

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

EAKIN, J. Jacks, in September, 1875, sued Chaffin and others, to recover a tract of about thirty-five acres of land (less a few acres described by special metes and bounds), in the southwest quarter of section fourteen, in township two north, of range three east; claiming it in a square off the southeast corner.

He set forth his documentary evidences of title, and exhibited copies. They consist of two certificates of the county clerk; one, to show the collector's advertisement of the sale of delinquent lands, for taxes, to be made on the first of November, 1847, including said quarter section, which had been assessed for the taxes of twenty-one years; and the other, to show that, on the day appointed, thirty-five acres of said tract had been purchased by George Bond, for the taxes and penalties. Appended to the advertisement was a notice: That, "if a less quantity than the whole of any tract be sold, it will be surveyed off of the southeast corner of said tract. If less than the whole of any tract be sold, and more than one-half, it will be surveyed off the south side of the tract, so as to avoid the improvements, if possible to do so."

Then followed an exhibit of the collector's deed, reciting other usual matters, that at the sale George W. Bond bid the amount of taxes due on said quarter section, for thirty-five acres of the same, and that the time for redemption had expired. Whereupon, the collector conveyed to said Bond "the above described tract or parcel of land." There was no more definite description. Then followed exhibits of other conveyances, bringing down Bond's title to plaintiff. In one of them, dated February 5, 1855, the land is described as "thirty-five acres in the southeast corner" of said quarter section, without defining the shape as a square. No other deed in the chain contains a more definite description than did that of the collector, which is taken throughout as the basis of all.

Plaintiff charged that defendants held possession without right, and for a year and a half had unlawfully kept him out.

Defendants answered, denying the right of plaintiff, and

setting up their own claims, as all derived through mesne conveyances, from an original patent from the United States, issued upon a military bounty warrant in 1823. They excepted to the documentary evidence of plaintiff; amongst other reasons, for the following: First, because the collector's deed to Bond does not describe the land set forth in the complaint; second, because it appears upon the face of the deed that thirty-five acres were sold off of said quarter section; and does not appear that the county surveyor ever laid off said land, or made out, and returned to the collector, a certificate of survey; third, because the deed showed, on its face, the tax to be illegal—and failed in necessary recitals; and, fifth, because it showed that the sale was for the back taxes of a period of twenty-one years.

The first of these was overruled, and the second, third and fifth sustained. Both parties saved exceptions to the ruling.

Plaintiff then, by leave, filed an amended complaint, in which he set forth, as before, the circumstances of the purchase by Bond at tax sale, and the subsequent chain of title to himself; and alleged, in effect, that those under whom he claimed had been in the peaceable, adverse possession of the lands, so purchased, from the year 1848 to 1870. That, at the latter period, some of the defendants first begun to assert their claims; that the defendants now hold possession without right, and have for a year and a half unlawfully kept plaintiff out.

Defendants demurred to the amended complaint, because of general insufficiency; and, especially, because it showed that defendants were in possession, and did not allege that they acquired possession forcibly and illegally. The demurrer was sustained by the court. The plaintiff declined to amend, and the suit was dismissed.

Plaintiff moved for a new trial on the ground that the court had erred in sustaining the exceptions to the evidences of title filed with the complaint. This motion was overruled. The plaintiff brought the evidences offered, and the action of the court, upon the record by bill of exceptions, and appealed.

The act of 1875 prescribes a new and anomalous practice for the recovery of land; which accords with neither common law nor chancery practice, throughout; but is *sui generis*. It requires the plaintiff to set forth and exhibit, by copies, his evidences of title; and the defendant, in his answer, to set forth exceptions to any of the documentary evidences so filed.

The defendant must also exhibit, in like manner, the evidences upon which he relies, to which the plaintiff may except. The exceptions are passed upon by the court, and if any exception is sustained, to any documentary evidence, the same can not be used on trial; unless "the defect for which the exception is taken shall be cured by amended complaint." The practice, under this act, will be most easily harmonized with our general system by assimilating the record to one in chancery. The exhibits and exceptions thereto will thus become parts of the record, but not of the pleadings, which are still required to be sufficient of themselves. No motion for a new trial, nor bill of exceptions, will be considered necessary to bring to the notice of this court any error in ruling upon exceptions.

The defendants have saved their exceptions to the action of the court in overruling the first ground of their exceptions to plaintiff's evidence. The fourth need not be noticed, as it concerns only dower. But defendants do not now appeal, and it is necessary only to consider the exceptions that were sustained, against the exceptions of plaintiff.

It appeared from the face of the deed that thirty-five acres were sold off of the 160 acre tract; and did *not* appear that the county surveyor laid off the tract, and returned a certificate of survey to designate the land. The exception on this ground is to be considered in connection with the whole of the collector's deed, which is before us, and is clearly void, *upon its face*, for uncertainty. It recites that the quarter section was offered for sale, and that Bond purchased 35 acres of it, and conveys to him said land. That passes nothing, *proprio vigore*, and would give the plaintiff no right, in equity even, to have the deed reformed; without a showing *aliunde* of some matter by which a more definite intention than that expressed might be manifested.

The law then in force (*Revised Statute, chap. 128, sec. 78*), required, in case of the purchase of a part of a tract at a tax sale, that it should be laid off *in a square*, adjoining *one or other* of the corners of the tract, "so as not to include the improvement, if any, if it can be avoided," and directed the collector, in his advertisement, to state, "from what part of any tract," any portion less than the whole, which may be sold, shall be laid off. He was also directed (*sec. 91*) to specify in the certificate of purchase given to the buyer, "at what part of the tract the same shall be laid off," and, in the same certificate, to require the county surveyor, on the request of the purchaser, to lay off such tract by metes and bounds. If the lands should not be redeemed, it was made the duty of the collector, after the lapse of a year, on production of the county surveyor's return of the survey, in conformity with the requisition of such certificate, to execute a deed accordingly. (*Ib., sec. 95.*)

It is plain from the law, and the collector's notice, that the right of a purchaser to a square off the southeast quarter of any tract, did not become absolute on his bid for a

certain number of acres generally, and the failure of the former owner to redeem,—at least not to the extent of supplying a failure in the deed to define with certainty the shape and locality of the partial purchase. The legislature had not considered it sufficient to designate the figure of a square, even in a fixed corner,—although this court may judicially know that such a designation is as certain as anything in mathematics. It still required a survey by metes and bounds to be made—perhaps from some policy of notice and due information to such purchasers, and owners of main tracts, as might not have sufficient education to calculate the side of a square in yards, or rods, from a given area in acres, but who ought, nevertheless, to know, and be held to observe their true boundaries. Besides, the designation by the collector of the southeast corner as the one from which partial purchases were to be taken, was qualified, not only by the law, but the notice itself. It must not include improvements, if it could be avoided.

For this reason, also, a survey was important. If the deed itself had been certain, and had failed to set forth the survey and return, that, like any other material matter, might have been shown *aliunde* (*Bonnell v. Roane, 20 Ark., 114*), and the deed would not be invalid. But when the deed itself is so imperfect that, unaided, it would convey nothing at all at law, the want of some evidence or recital which might supply the requisite certainty, is obviously ground of exception. A recital of the survey and return would have been proper; and, if made, would have given certainty to the deed. If it had been shown by other documentary evidence, it might, at least, have given the plaintiff a vested right in equity. But in the absence of any recital of a survey, or any evidence of it *aliunde*, the deed,

itself, describing nothing, is an absolute nullity. The exception on the second ground was well sustained.

The third and fifth grounds may be considered together.

The right of the state to collect taxes which had accrued under the territorial government, is unquestionable. But it is a sovereign right, to be exercised under sovereign direction. Mere agents of the state, without express authority of law, have no right to collect them. There was no law in existence in 1847 authorizing the sale of lands for territorial arrearages of taxes. *Sec. 24, of chap. 128, of the Revised Statutes*, approved in 1838, applies only to prospective omissions.

Upon this, and the former ground, the court did not err in sustaining the second, third and fifth exceptions to the evidence filed with plaintiff's complaint. He did not then rely upon possession and the statute of limitations, and the question of admitting the deeds to stand as color of title was not presented by the parties.

In the amended complaint the land claimed is not described with any more certainty than was shown by the original complaint with its exhibits. There should have been a motion to make it more definite. It can not be said there was no cause of action. It was defectively stated, which is not ground of demurrer.

The demurrer admits that those under whom plaintiff claims, had been in the quiet, peaceable, continuous, adverse possession and enjoyment of the land claimed, from 1848 to 1870—that since the latter date the defendants had asserted a title, were in possession at the beginning of the suit, and wrongfully keeping plaintiff out. It is based upon the idea that the statute of limitation is a mere negative prescription, affording a defense, but conferring no

right which may be actively asserted, beyond the mere redress of the tenant against a *tort-feasor*.

The weight of authority in the United States seems now in favor of the doctrine that possession of land during the full period of limitation, under such circumstances as would make a valid defense, amounts to an investiture of title; which may be actively asserted, in all respects as effectively as if acquired by deed. (See cases referred to in *Wash. on R. Property, Book III, chap. 11, sec. 7, sub. sec. 48.*) This court has repeatedly approved this view of the effect of the statute. It was applied to a case of personal property in *Hicks v. Flint, 21 Ark., p. 463*—and is announced, or underlies the reasoning in *Sharp v. Johnson, 22 Ark., 79; Walker v. Towns, 23 Ark., 147; Kirby v. Vantrue et al., 26 Ark., 368; Mayo & Jones v. Cartright, 30 Ark., 407; Mooney et al. v. Coolidge, ib., 640; Farguson v. Pelin (MS.)* The continuity of possession, always insisted upon, has reference to the time during which the statute is running—and is not necessary after the bar has attached.

The demurrer should have been overruled. No question of the nature of the possession, or of color of title is presented. These may arise on issues to be made, and will not be anticipated.

Reverse the judgment of dismissal, and remand the cause for further proceedings consistent with law and this opinion.

ADAMS et al. vs. JACOWAY.

1. ATTACHMENT: *Forthcoming bond, when broken. Pleading on.*

The obligors in a delivery bond, executed under sec. 406, Gantt's Digest, have a right to retain the property attached until the court orders a sale of it to satisfy the judgment against the defendant; and when such order is made, they may pay off the judgment, or *must*, by the terms of the bond, deliver the property or its value to the sheriff. Until such failure, there is no breach. And a complaint against the obligors on such bond, which fails to allege any order of court concerning the attached property, shows no cause of action.

2. MISTAKE: *Suit and bond in wrong name.*

Where a suit is brought against one in a wrong name, and a bond is given to secure some action on his part, describing him by the same name, and there is no doubt of identity, the bond is for the action of *the person.* The insertion of the true name by the court in the subsequent proceedings, and the judgment against *the same individual* for whom the obligors became bound, although by a different name, is sufficient; and the change made, with or without notice to the obligors, can not affect their liability. But when the persons are *actually* distinct, a bond given for the conduct of one can not, by change of names in the proceedings, be made to stand good for the action of the other. The test is, *the person* had in view by the obligors in executing the bond. If judgment is rendered against the same person by a different name, the bond holds good. If it be a different person not contemplated in the bond, the obligation can not be transferred.

APPEAL from *Yell* Circuit Court.
HON. THOS. W. POUND, Special Circuit Judge.
Ratcliffe, for appellant.
Clark & Williams, contra.

EAKIN, J. Mrs. Jacoway sued the appellants, as obligors in a forthcoming attachment bond, which is set forth at length in the complaint. It appears to have been executed

before a justice of the peace, on the fifteenth of December, 1874, in a suit entitled "M. Jacoway v. G. A. Parsons." It is in the penal sum of $200, conditioned that the defendant, *G. A. Parsons*, should perform the judgment of the court in said action; or that the obligors would have forthcoming 100 bushels of corn, attached in the action, or its value ($100), subject to the order of the court. The complaint then proceeds to state:

That, on appeal to the Yell county circuit court, at the June term, 1876, it appearing that by mistake, in all the pleadings and proceedings in said cause, the defendant had been *G. A. Parsons*, when his proper name was James H. Parsons; and the constable who served the process having appeared in court and identified James H. Parsons as the person actually served, he was allowed to amend the return on the order of attachment in accordance with the facts; and, on motion of the plaintiff in said cause, due notice of which was given to said James H. Parsons and these defendants, all the pleadings and proceedings in the cause were amended by striking out the said initials, "G. A.," and inserting "James H.," after which the suit proceeded in the new style. The plaintiff obtained judgment at said last named term against James H. Parsons, for $200 debt and interest, and $14.05 costs, upon which an execution was afterwards issued, and was returned *nulla bona*, of which defendants had notice. Breach alleged, that neither James H. Parsons nor defendants, nor any one for them, had complied with the conditions of the bond, but had refused to pay the judgment or render the corn or its value.

Defendants answer that they executed the bond for, and on behalf of, *G. A. Parsons*, and no one else, and to release *his* property. They deny that there was any mis-

take on their part as to the person for whom they executed the bond. They say they were well acquainted with "G. A." as well as with "James H." Parsons, who were distinct persons, reported to be brothers, residing near each other and not far from defendants. They had both cultivated land on the Jacoway farm. That on the trial before the justice, of the suit in which the bond was made, judgment was rendered against *G. A. Parsons*, who appealed to the Yell county circuit court, and there filed his written answer to the complaint, praying that the cause might be dismissed and the attachment discharged; and they say that cause has not yet been tried. That at the May term, 1876, on the petition of plaintiff, and by consent of *G. A. Parsons*, the cause was transferred to the Dardanelle district. That it is still there pending, and no judgment has been rendered against said G. A. Parsons. They deny liability upon any pretended judgment against *James H. Parsons*, or that they had any notice of the motion set out in the complaint for the substitution of the name of *James H.* for *G. A.* Parsons, or that they authorized or consented to the change. They say further that *G. A.* Parsons is solvent, and James H. insolvent. They close with a demurrer to the complaint, which demurrer was overruled.

The court sustained a demurrer to this answer. Defendants rested upon it, suffered judgment and appealed.

The bond was executed under *section 406 of Gantt's Digest*, and conditioned that the defendant "shall perform the judgment of the court in this action," *or* that the obligors "will have the one hundred bushels of corn attached in this action, or the value—one hundred dollars—forthcoming, *subject to the order of the court*, for the satisfaction of such judgment." The defendants had the option

on the failure of defendant to pay the judgment, to pay in the value of the corn, or deliver the corn itself, subject to the order of the court.

It was the duty of the court, on rendering judgment for the plaintiff against the defendant, first to apply to its payment any moneys which may have arisen from sales of perishable property, or from proceedings against garnishees. In case there should be none, or they should be exhausted, then, and not before, the court should order a sale by the sheriff of any other attached property which may be under its control. Property bonded under section 406 is presumed to be left in possession of the obligors instead of the officer, but remaining virtually subject to the control of the court, for the purpose of ordering a sale at the proper time, if necessary to satisfy any judgment against defendant. Perchance it may not be necessary, even in case of such judgment. The judgment may be personal, without sustaining the attachment. It may be satisfied by proceeds of sales of perishable property, or by funds recovered from garnishees. Until the contingency occurs, of an order of sale of the property attached in the action, the obligors may keep it. They hold it subject to such order, and when such order is made, may pay off the judgment for defendant, or *must*, by the terms of their bond, deliver the property bonded or its value, to the sheriff. Until such failure, there is no breach. The obligors must have the right to exercise their option when the contingency arises, and if they fail to do either, the court may force them by attachment at once to bring up the property, or order the sheriff to retake and sell it. *Ib., sec. 425 to 431.*

It is not alleged in this case that any judgment was rendered in the attachment suit against the obligors, under

the act of November 10, 1875, and it is not necessary to determine how far that act applied to bonds already executed.

The demurrer to the answer reaches back to the complaint, which fails to allege any order of the court concerning the attached property, and therefore shows no cause of action. The complaint should have been held insufficient.

It is good enough so far as it regards the change of the name of defendant during the suit, from "G. A." to "James H. Parsons." Where a suit is brought against one by a wrong name, and a bond is given to secure some action on his part, describing him by the same name, and where there is no doubt of identity, the bond is for the action of *the person.* The insertion of the true name by the court in the subsequent proceedings, and the judgment against *the same individual* for whom the obligors became bound, although by a different name, is sufficient. The name is merely a means of identification. The change, made with or without notice to the obligors, can not affect their liability. It only imposes on the obligee the burden of alleging and proving the identity of the person intended.

But when the persons are *actually* distinct, a bond given for the conduct of one can not, by substitution of names in the proceedings, be made to stand good for the action of the other. The test is, *the person* had in view by the obligors in executing the bond. If judgment is rendered against the same person by a different name, the bond holds good. If it be a different person not contemplated in the bond, the obligation can not be transferred. The true state of the case depends on proof, to be taken on issues duly made by pleading.

The answer states that there were two distinct persons—brothers—both cultivating portions of the Jacoway farm; "G. A." being solvent, "James H." insolvent. That they gave the bond for "G. A.," to release his property, having him in view—meaning to be responsible for him, and no other. The mere statement of the case is sufficient to show that on no just principle can they be held answerable for the default of "James H.," although his name may have been afterwards substituted in the action for that of "G. A." They say they had no notice of this. But if they had even had notice, they were not bound to interfere. They were not parties to the suit, and might well have rested under the belief, that if the plaintiff desired to change the party defendant, and obtain a judgment against a different person, he was content to waive his advantage under the bond, or, in other words, accept the legitimate legal consequences of his election. If the complaint had not been defective, the demurrer to the answer should have been overruled. It set up a valid defense.

For the errors indicated, let the judgment be reversed and the cause be remanded for further proceedings consistent with this opinion, and with leave to all parties to amend their pleadings.

Logan et al. vs. Jelks.

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1. Statute Limitations: *Title by possession.*

A void patent may be used to give color of title and fix the limits of possession, and a continuous adverse possession under it, or without any color at all, when the limits of possession may be shown, for a period of over seven years, as against parties whose rights are not saved, will create a title which may be used to maintain ejectment.

APPEAL from *Woodruff* Circuit Court.
Hon. J. N. CYPERT, Circuit Judge.
Coody, for appellant.
Turner, contra.

EAKIN, J. Jelks sued appellants in ejectment, claiming under parties who had entered the land at the United States office at Batesville, on the first of January, 1852, and obtained a patent on the first of September, 1856. He alleges that from the date of the patent until some time in 1876, when defendants obtained possession, he and those under whom he claimed were in the continuous, peaceable possession of the land, holding in person or by tenant, by virtue of said patent, adversely to all others. The patent and some mesne conveyances are exhibited.

Appellants, in their answer, denied the right of plaintiff, and also his continuous adverse possession, as alleged. They claim title by showing that the land in controversy had been selected and confirmed to the state, as swamp and overflowed, and bought from her on the twenty-seventh of January, 1872, by appellants, who obtained the patent of the state on the twenty-seventh of February, 1872.

It appeared upon trial, from the certificate of the state land commissioner, that the land was confirmed to the state on the fourth of August, 1860, and sold by her to appellant, Logan, and the ancestor of the other appellants, on the fourth day of March, 1862. They perfected their title under act of March 23, 1871, and obtained a state patent, as alleged.

The plaintiff testified that from the twentieth of April, 1864, the date of his own purchase, until some time in 1870, when he sold it again and delivered possession to his

vendee, he was in the continuous, peaceable possession of the land, holding the same as his own under his deed; that the person to whom he sold in 1870 "kept it" about two years, when, being unable to pay, the trade was canceled and possession returned; and that afterwards plaintiff, by himself and his tenants, had been in possession until dispossessed wrongfully by defendants in 1876.

The court, sitting as a jury, found the facts as above stated, and held the plaintiff entitled to recover on his adverse possession under color of title. Judgment was rendered accordingly, and defendant appealed.

In the absence of any conflict of evidence as to the nature of the possession, the court properly found the possession of the plaintiff and those under whom he claimed to have been adverse, from the year 1866 to the year 1876.

Conceding the patent from the United States to have been void, it may be, nevertheless, used to give color of title and fix the limits of possession, and a continuous adverse possession under it, or without any color at all, when the limits of possession may be shown for a period of over seven years as against parties whose rights are not saved, will create a title which may be used to maintain an action of ejectment. This question has been directly decided in the case of *Jacks v. Chaffin*, at the present term, and the principles of that case govern this.

The purchase from the state in 1862 was valid, and gave the purchaser a right to the possession of the land, and to bring an action as soon as the statute of limitation should commence running again, which period has been fixed at the second day of April, 1866. More than seven years had elapsed before plaintiff lost possession, and his title had ripened. The act of 1871 did not extend the time

of limitation or fix a new period for rights accrued. The defendants might have sued upon their entry in the swamp land office, without the patent. See *Gantt's Digest, sec. 2257.*

Affirm the judgment.

Hearn vs. The State.

1. Criminal Pleading: *Using insulting language to a crowd.*

When an offensive denunciation is addressed to a company of men, and intended to apply to all of them, it may be charged as having been made to all, or any one or more of them.

APPEAL from *Mississippi* Circuit Court.
Hon. L. L. Mack, Circuit Judge.
Henderson, Attorney General, for appellee.

English, C. J. This was an indictment in the circuit court of Mississippi county, under the statute known as the peace and tranquility act. *Gantt's Dig., sec. 1512.*

The indictment charged, in substance, that Jeff. A. Hearn, in the county, etc., on the twelfth day of August, 1878, did unlawfully use insulting language towards one John Lamberson, in his presence and hearing, which language, in its common acceptation, is calculated to cause a breach of the peace.

The defendant was found guilty by a jury, and fined $10. A new trial was refused by the court, and he took a bill of exceptions, and appealed.

I. The evidence conduces to prove that about the time alleged in the indictment, a company of men were working

a road in Mississippi county, and at noon stopped for dinner in front of appellant's house, which was near the road, some of them having brought food with them, and others, living near, going to their homes to eat their dinners.

After dinner, the company assembled in the road in front of appellant's house, near his yard gate, to resume labor.

Appellant walked out from his gallery to the gate, with a pistol in his pocket, and said to John Lamberson, one of the company: "Don't you owe me $2.50?" Lamberson replied: "Yes; I owe you for marrying me, and I will pay you in corn." Appellant responded: "Damn you, and your corn too!" And then, turning to the crowd, said: "Any man that made fun of my dinner is a damned son-of-a-bitch, and his mother is a bastard!"

Lamberson replied: "I have not said so much about your dinner."

Other words passed between them, and appellant said: "I learn you have said I was a mean man, and I don't know what made you say it, unless it was because I married you, and you did not pay me the $2.50 fee." Lamberson replied: "I did not have the money, but I will pay you in corn."

During the altercation, Lamberson approached appellant, with his spade in both hands, not uplifted, but so as to be easily used. Appellant had his hand upon his pistol, partly drawn, and Lamberson said: "Don't draw that pistol on me." Appellant replied: "If I do, I will use it." Lamberson kept close to him, with the spade in his hands, and no fight occurred.

Lamberson testified substantially to the above facts, and stated that he took it that appellant was addressing himself to him when he said: "Any man that made fun of my din-

ner is a damned son-of-a-bitch, and his mother is a bastard!"

The witnesses agree that he turned to the crowd when he made this offensive denunciation, but it is probable, from all the facts and circumstances in evidence, that he intended it for Lamberson.

The words were calculated to produce a breach of the peace, and very nearly caused a conflict between appellant and Lamberson with pistol and spade, and the verdict was warranted by the evidence.

II. The court charged the jury as follows, to which appellant excepted:

"If the jury find, from the evidence, beyond a reasonable doubt, that the language used by defendant was addressed to a company of men approached by defendant, of which company John Lamberson was one, that said language was intended for the entire company, or John Lamberson individually, and the same was, in its common acceptation, calculated to cause a breach of the peace, etc., they will find defendant guilty."

No doubt when an offensive denunciation is addressed to a company of men, intended to apply to all of them, it may be charged as having been made to all, or any one or more of them.

The latter part of the instruction, however, was more appropriate to the facts of this case, but the defendant was not prejudiced by the form in which the whole instruction was given. He was rightly convicted on the evidence.

Affirmed.

THOMAS VS. CITY OF HOT SPRINGS.

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1. MUNICIPAL CORPORATIONS: *Power to punish drumming.*

A corporation may make it a penal offense for any person to drum customers to gaming houses and strumpet houses, and such other immoral and pernicious occupations, as it has power under its charter to suppress. But it has no power to make it a crime to solicit custom for hotels, competent practitioners of medicine, or other ordinary lawful and useful occupations.

APPEAL from *Garland* Circuit Court.
Hon. J. M. SMITH, Circuit Judge.
Benjamin, for appellant.
Henderson, Attorney General, contra.

ENGLISH, C. J. On the twenty-third of May, 1879, Harry Thomas was arrested under a warrant issued by the police judge of the city of Hot Springs, on a charge of having committed the offense of drumming John West to Dr. C. J. Weatherby, etc.

The defendant was tried before the police judge, convicted, and appealed to the circuit court of Garland county, where the case was submitted to the court, by consent of parties, on the plea of not guilty. The court found defendant guilty upon the evidence, and fined him $10. He moved for a new trial, which the court refused, and he took a bill of exceptions, and appealed to this court.

On the trial, the following ordinance was read in evidence:

"ORDINANCE ON DRUMMING.

"CITY OF HOT SPRINGS, May 5, 1879.

"*Be it ordained by the Mayor and Board of Aldermen of the City of Hot Springs, that:*

"WHEREAS, The laws of the state for the incorporation,

organization and government of municipal corporations, approved March 9, 1875, give power to the city council to license, regulate and suppress ordinaries, corn doctors, private and venereal hospitals, and to make and publish by-laws and ordinances which to them shall seem necessary to secure such corporations and their inhabitants against thieves and other persons violating the public peace, and to promote the prosperity, and improve the morals, order, comfort and convenience of such corporations and their inhabitants, against thieves and other persons violating the public peace, and to promote the prosperity, and improve the morals, order, comfort and convenience of such corporations and their inhabitants; and,

"WHEREAS, It is well known that persons who run, drum and solicit patronage for physicians and quacks, boarding-houses, bath-houses and gambling dens, cause great inconvenience to this resort, provoke disorder, and greatly injure the morals, comfort and business thereof;

"Sec. 1. Therefore, be it ordained by the mayor and board of aldermen of the city of Hot Springs, that any person who shall be found drumming, running, or soliciting strangers or visitors to this place for any hotel, boarding-house, bath-house, physician, or pretended physician, quack, or vendor of nostrums—and any person who shall employ another for any such purpose, or shall in any way encourage or countenance such drumming, running or soliciting for any hotel or boarding-house he or she may control, or for any business, profession or vocation he or she may be engaged in, or for any purpose whatever in the limits of this city, shall be deemed guilty of a misdemeanor, and on conviction shall be fined in any sum not less than ten dollars nor more than twenty-five dollars.

"Sec. 2. If any physician, or pretended physician, quack or vendor of nostrums, hotel or boarding-house keeper, or any other person, shall receive patients, boarders or customers at the hands, and upon the recommendation or reference of such persons as are recognized as drummers, he or she shall be deemed guilty of a violation of section one of this ordinance, and punished as therein provided.

"Sec. 3. Any person engaged in drumming, running, or soliciting strangers or visitors for any hotel, boarding-house, bath-house, physician or pretended physician of this city, by going back and forth from this city on the railroad train, shall be deemed guilty of a violation of section one, of this ordinance, and upon conviction shall be punished as herein provided.

"Sec. 4. Every person engaged in drumming, running, or soliciting strangers or visitors, for any hotel, boarding-house, bath-house, physician or pretended physician, shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in any sum not less than ten dollars; and every day such person continues so engaged drumming, running or soliciting, he shall be deemed guilty of a violation of this section, and for each repetition of the offense made punishable under this section, he shall be fined double the sum of the fine imposed at the former trial, until the same amounts to fifty dollars.

"Sec. 5. Any person furnishing information leading to arrest and conviction of any person for a violation of this ordinance, and any police officer arresting such person at his own instance, shall receive one-half of the fine that may be collected out of the defendant upon conviction for violation of this ordinance."

Section 6 repeals conflicting ordinances, etc., and puts this ordinance in force from its passage.

The parties consented to try the case on an agreed statement of facts, as follows:

"That on the twenty-second day of May, 1879, in the city of Hot Springs, etc., defendant, Harry Thomas, by words of request and persuasion, solicited or drummed John West, a visitor to said city, etc., to employ Dr. C. J. Weatherby, a graduate of medicine and practicing physician in said city, etc.; and by such request and persuasion induced him to employ said Weatherby as his physician, and that defendant received therefor pay from said Weatherby; that he was then, and had been for some time, engaged in so soliciting for a firm of physicians, and that for procuring patients he is paid at the rate of five dollars per patient, and was so paid by said Weatherby, and that he has not and does not drum or solicit for any physician or physicians save such as are graduates, and skillful in their profession."

The above being all the evidence, appellant moved the court to declare, as a proposition of law applicable in this case:

"That the solicitation of business and patronage is matter of common right, and that no municipal corporation can prohibit the same; and that the ordinance introduced in evidence in this case, and upon which this case is based, is unreasonable and void."

But the court refused so to declare the law, and found appellant guilty, etc.

The twelfth section of the act of March 9, 1875, for the organization and government of municipal corporations (*Acts of 1875, p. 8*), empowers such corporations to license, regulate, tax or suppress a large number of occupations, exhibitions, amusements, etc., which are named, but drumming is not among them. Nor is there any pro-

vision of this act, or any other act, which authorizes such corporations to license or prohibit drumming.

A drummer is one who solicits custom.—*Webster.*

Drummers are, and have been for ages, a large and active class of commercial and business agents. They, it must be presumed, were as familiar to the law-makers as brokers, hawkers, peddlers, pawn-brokers, and others mentioned in the above act; and yet they are not named, nor has our legislature, by any act, thought proper—if it might do so in the exercise of the police power—to require drummers to obtain license from any source, or undertaken to make it a criminal offense to drum for any lawful business.

It was conceded by the Attorney General, who argued this case for appellee, that drummers are not embraced in the twelfth section of the act, but he submitted that appellee had power, under the latter part of the twenty-second section of the act known as the general welfare clause, to make it a criminal offense for any person to drum for lawful occupations.

In *Tuck v. Town of Waldron, 31 Ark., 462,* the corporation attempted, under an ordinance passed by its council, to punish Tuck criminally for selling a half-gallon of whisky without obtaining license.

By the twelfth and seventeenth sections of the above act, municipal corporations are expressly empowered to license, regulate, tax or suppress tippling-houses and dram-shops, and also to regulate and prohibit ale and porter shops and houses, and public places of habitual resort for tippling and intemperance, etc.; but they are not expressly empowered to require persons selling ardent spirits, as Tuck did, to obtain license, and it was claimed that the corporation ot Waldron had power, under the

general welfare clause, to require persons selling in any quantities to procure license. This court said:

"The rule seems to be, as stated by Judge Dillon, that when there are both special and general provisions, the power to pass by-laws under the special express grant can only be exercised in the cases, and to the extent as respects those matters allowed by the charter or incorporating act; and the power to pass by-laws under the general clause does not enlarge or annul the power conferred by the special provisions in relation to their various subject matters, but gives authority to pass by-laws, reasonable in their character, upon all other matters within the scope of their municipal authority, and not repugnant to the constitution and general laws of the state."

Under this rule, it was decided that the council at Waldron had no power to pass the ordinance under which Tuck was convicted.

So in *Martin, ex parte, 27 Ark., 467*, Martin was fined for violating an ordinance of the city of Little Rock, regulating sales by auctioneers. The ordinance was passed when the city derived its powers from the general act of incorporation of April 9, 1869, in which authority was not expressly given to tax and regulate auctioneers. Auctioneers were only mentioned in the act in connection with selling horses or other domestic animals on the streets. Martin was an auctioneer of merchandize in a house, and it was held that the ordinance under which he was convicted was void, for want of power in the corporation to pass it.

No doubt a corporation may make it a penal offense for any person to drum customers to gaming-houses, gambling-tables, banks, etc., strumpet-houses, and other occupations which are immoral and pernicious in their character and

tendencies, such as it has power under its charter to suppress.

But the keeping of hotels, boarding-houses, bath-houses, and the practice of medicine, by competent persons, are ordinary, lawful and useful occupations, and to make it a crime to solicit custom for them, is an unwarranted interference with constitutional rights and privileges of citizens under our form of government.

In this case appellant was charged and convicted for soliciting a patient to a physician, who was a graduate of medicine, and skilled, it is admitted, in his profession. It may be in bad taste, and a violation of the ethics of his profession, for a physician to employ a drummer to procure patients for him, but appellee had no legal power to make such drumming a crime, and punish it as such.

The judgment must be reversed, and the cause remanded with instructions to the court below to discharge appellant from further prosecution upon the charge made against him.

MEDICAL AND SURGICAL INSTITUTE VS. CITY OF HOT SPRINGS.

34 559
85 232

34 559
88 358

1. INJUNCTION:
Chancery does not enjoin criminal prosecutions.

APPEAL from *Garland* Circuit Court in Chancery.
Hon. JABEZ M. SMITH, Circuit Judge.
Benjamin, for appellant.
Henderson, Attorney General, contra.

ENGLISH, C. J. The appellant corporation filed the bill

in this case against the city of Hot Springs, in the circuit court of Garland county, to enjoin said city from prosecuting its agents, etc., under the ordinance (copied in *Thomas v. City of Hot Springs*, *ante*) to prohibit and punish drumming. The court granted a temporary injunction, and, on final hearing, dissolved it, and appellant obtained from the clerk of this court an appeal.

Chancery does not enjoin criminal prosecutions, as held in *Portis v. Fall et al.*, *MS.*

Affirmed.

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34 560
f80 316

DuVal vs. City of Hot Springs.

1. Appeals to Supreme Court: *In misdemeanors, how obtained.*
It is in civil suits only, including suits at law, in chancery, and penal actions, that the clerk of the supreme court is authorized by the Civil Code of Practice to grant appeals.

2. Appeals from judgments of the circuit court for offenses less than felony, must be prayed and granted in the circuit court, and the transcript filed in the supreme court within the time prescribed by law.

APPEAL from *Garland* Circuit Court.
Hon. J. M. Smith, Circuit Judge.
Harrell, for appellant.
Henderson, Attorney General, contra.

English, C. J. In November, 1878, Harry DuVal and Edward Smith were arrested under a warrant issued by the mayor of the city of Hot Springs, charging them with a violation of ordinances Nos. 37 and 65, of said city, by "*roping and steering one Otto Leifer to a game* known as

three-card monte, and of exhibiting said game in said city," etc.

DuVal was tried by a jury, before the mayor, found guilty, fined $25, and appealed to the circuit court of Garland county.

On demurrer to the charge, the court required the attorney for the city to elect upon which of the two ordinances he would prosecute the accused, and he elected to prosecute under ordinance No. 65.

The case was submitted to the court, by the parties, for a trial *de novo.*

The evidence conduced to prove that DuVal and Smith were partners in low gaming. That on the arrival of Otto Leifer, as a visitor to Hot Springs, from Montana, DuVal enticed him to a place where they met his partner, Smith, who was disguised as a Texas cattle dealer, and who had with him cards for playing three-card monte. By betting upon the game several times himself with Smith, and winning, DuVal finally induced Leifer to bet, and he was cheated out of several hundred dollars by tricks of the partners.

The court, upon the evidence, found DuVal guilty, and fined him $25. A new trial was refused, and he took a bill of exceptions, but prayed no appeal to this court—at least none appears to have been granted by the circuit court.

Afterwards, on the third of February, 1879, on the application of DuVal, the clerk of this court granted him an appeal.

The case has been submitted on its merits, as well as upon a motion on behalf of appellee to dismiss the appeal, on the ground that the clerk of this court has no power to grant an appeal in a criminal prosecution.

This was in the nature of a criminal prosecution for vio-

lation of an ordinance of the city of Hot Springs. *Gantt's Dig., secs. 1638 to 1641.*

It is in civil suits only, including suits at law, in chancery, and penal actions, that the clerk of this court is authorized by the Civil Code of Practice to grant appeals. *Civil Code, chap. 29; Gantt's Dig., secs. 1056 to 1068; Sykes v. Lafferty, 26 Ark., 414.*

From a judgment of the circuit court in a criminal prosecution for an offense less than felony, whether upon presentment presented there, or in a case brought into the circuit court on appeal from a justice of the peace, or police court, an appeal to this court must be prayed and granted in the circuit court, and the transcript filed here within the time prescribed by law. *Criminal Code, title I; ib., title IX, article III; Gantt's Dig., secs. 1638 to 1661; ib., 2101 to 2147.*

The appeal must be dismissed at appellant's cost.

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34 562
80 313

STATE OF ARKANSAS VS. HUNNICUT.

1. EMBEZZLEMENT: *Officer failing to pay over.*

A failure by an officer to pay over money found due from him upon settlement, is, without a good or satisfactory reason, evidence in proof of a conversion; but where there has been no conversion or misapplication of the money or funds, a failure to pay over is not of itself sufficient to constitute the offense of embezzlement by an officer.

APPEAL from *Saline* Circuit Court.
Hon. J. M. SMITH, Circuit Judge.
Henderson, Attorney General, for the State.
Fletcher, contra.

HARRISON, J. Indictment for embezzlement. The indictment charged that the defendant, having been county treasurer during the years 1875 and 1876, upon a settlement between himself as such treasurer and the county, made in the county court on the third day of January, 1877, was found to have in his hands $1,017, in state scrip, belonging to the common school fund of the county, and he was, by order of the court, required to pay the same over to his successor in office, on or before the fifteenth day of January, 1877; and that he had feloniously failed for more than thirty days to pay it over in obedience to said order.

The defendant demurred to the indictment, as not stating facts sufficient to constitute an offense. The court sustained the demurrer, and the state appealed.

The defendant was not charged with a conversion, or a misapplication of the scrip; but only with having failed to pay it over. A failure to pay over, where there has been no conversion or misapplication of the money or funds, is not of itself sufficient to constitute the offense of embezzlement by an officer.

The statute upon the subject is as follows:

"Sec. 1371. Every officer of the state, city, county or township, employed in the collection of the public revenue, or who may have any public funds in his hands, who shall convert the same to his own use, or otherwise misapply any part of the money or funds so collected by him, or which may have come to his possession by virtue of his employment, and every such officer who shall fail or omit to pay the amount found due from him upon settlement, shall, on conviction, be fined not less than $500 and be imprisoned in the penitentiary not less than one nor more than five years."

Good reasons may exist for the failure of the officer to pay over; such as the loss of the money or funds by robbery or theft; their destruction by fire, and an honest controversy as to the correctness of the settlement, and the sum or amount which should be claimed from him.

The failure to pay over would, of course, without a good or satisfactory reason, be evidence in proof of a conversion.

The demurrer to the indictment was properly sustained.

The judgment is affirmed.

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34 564
185 88

OLIVER VS. VANCE, Jr., et al.

1. ADMINISTRATION: *Distribution of property: Jurisdiction.*

Claims for the distribution of personal property of an estate in administration must be made to the probate court; and when not needed for payment of debts, claims for the real property may be asserted by action at law. Equity ordinarily has no jurisdiction.

2. DESCENTS AND DISTRIBUTION: *Rules in Kelley's case.*

The rules of descent educed from the statute and then formulated, in the case of *Kelley's Heirs v. McGuire et al.*, 15 *Ark.*, 555, have become rules of property, to be disturbed only by the legislature.

By the first section of the statute, the personal property of which an intestate dying without wife, children or father, was possessed, or in which he had a vested interest in remainder after the death of another, goes, after payment of debts, to his mother as his sole distributee.

Real property given by a paternal uncle is ancestral, as if it came from the father; and upon the death of the donee, intestate, it will descend to his nearest relations who are of the blood of the donor, to the exclusion of those who are not of his blood. The donee, or person last entitled to possession, and not the donor, remains the *propositus*, whose nearest relations of the donor's blood must be traced for heirs.

APPEAL from *Crittenden* Circuit Court in Chancery.
Hon. L. L. MACK, Circuit Judge.
Lyle, for appellant.
Brown, contra.

EAKIN, J. The complainant, a sister of John M. Jones, shows that said John M. died about the year 1871, leaving a will, by which he devised and bequeathed two-thirds of all his property, real and personal, to his wife Mary; and the remaining third to his nephew, Van R. Jones, the son of a deceased brother. Providing further: That upon the death of the wife, the said Van R. should have one-half of her estate, real and personal. He left a considerable estate, consisting of several tracts of land, cattle, horses, a storehouse with a stock of goods, and other personal property.

Each took possession of their respective shares, and administration, with the will annexed, was taken upon the estate, first by the wife, and after her subsequent marriage, by her husband. This is not closed.

Van R. then died a minor, and intestate, leaving him surviving his mother and four brothers Administration upon his estate was granted to defendant, William Vance, jr. The wife afterwards died, leaving a second husband.

The mother, administrator and brothers of Van R. are made defendants, charging that they claim to be entitled, as his heirs, to the third of the estate bequeathed and devised to him directly by John M., as well as the half of the two-thirds given to said testator's wife; that they have drawn from said administrator, Vance, large amounts of property; and applied to the chancery court for a partition of all.

She claims as heir of the testator, John M., and as his nearest in blood—calls for a discovery of the amounts

drawn by the mother and brothers of Van R. from Vance, the administrator; and, as to the latter, that he reveal in his answer the present status, description and place of the estate—where it is, and how much he has paid over to the claimants, and by what authority. She prays that all the property left by Van R. be vested in her, and that the defendants be enjoined from setting up their claims, or disposing of the property, or disturbing her in its enjoyment—that they be ordered to restore to Vance what he has paid out, or make refunding bonds; and that Vance be enjoined from paying them any more. There is also the usual prayer for general relief.

To this bill there was no demurrer.

Vance and the mother answered separately, and the brothers adopted the mother's answer.

Of these answers it may suffice to say that they disclose nothing materially modifying the facts stated in the bill; nor do they set up any new matter constituting a defense, if any was necessary. Voluminous depositions were taken, upon which, with the bill and answers, the cause was heard. The chancellor dismissed the bill for want of equity, and held the mother entitled to the personal, and the brothers to the real estate of Van R. Complainants appealed.

It is not easy to perceive, in this bill, any of the peculiar grounds which call for the interference of a court of equity, even if the rights of complainant as heir and distributee of the estate of Van R. be conceded. Both the estates of John M. and his nephew, Van R. Jones, are in due course of administration in the probate court. Claims for distribution of personalty, after payment of debts, may be first made and determined there, and when not requisite for payment of debts, claims to real estate may be asserted,

by action at law. Since the power is given to compel parties to testify, bills of discovery have, except in a few cases, been prohibited by the Code; and this court has often announced the doctrine, that courts of chancery can not lift the administration of estates out of the probate courts, and proceed to settle them. They may correct frauds, but if there be anything further to be done beyond the mere distribution of a fund, the practice is to remand the administration to the probate court to proceed upon the basis of the correction.

The bill was not demurred to, however, and this court will proceed to review the decree of the chancellor upon its merits.

This court, after full argument, and patient consideration, in the case of *Kelly's Heirs v. McGuire & Wife et al., 15 Ark., 555*, endeavored to shape into form and order, our confused and incongruous law of descents and distributions. The rules educed from the provisions of the statute and then formulated, have met with the approbation of the profession, and have been since followed until they have become rules of property—so much so, that the rules in Kelly's case in our state, have been oftener cited, and are more familiar to the profession than the rule in Shelly's case. It must now be left to the legislature to disturb them, if right and justice may ever seem to require it. Nothing in our judicature calls more emphatically for the application of the policy of the courts: "*stare decisis.*"

Drawing from that source, our rules of construction, it is plain, under the first section of said act, that all the personal property of Van R. Jones, of which he died possessed, or to which he had a vested interest in remainder after the death of Mary Jones, went, after payment of his

debts, to his mother, as his sole distributee. The complainant had no right to any of it.

As to the real estate, it came from a relative in blood of Van R.'s father, and must be considered as ancestral. The court in holding this, in Kelly's case, did not mean that in such cases the donor or devisor, became himself the *propositus* from which the descent was to be traced. The person last entitled to possession, or last invested with the vested remainder, remains the *propositus*, whose nearest heirs are to be traced. They must, however, be of the blood of the person from whom the benefit came, that is to say, the line of descent must be traced on that line, leaving off the side which bore no relation to the donor. In the case in judgment, we drop the mother altogether, since the land did not come through her, nor any of her blood. We take the father's line, because we find the lands came from a relative of the blood of the father. But we retain the deceased Van R. as the *propositus*, and seek *his heirs on that side*, and not the heirs of the original donor. In other words, an estate given by a paternal uncle is ancestral, *as if* it descended from the father, because it comes, of bounty, from one of the father's blood; and the same rule would apply on the mother's side.

Any construction of the law, which, on failure of descendants of a donee, would make the donor the *propositus*, would, in effect, enable one by gift or devise of land to a kinsman, to reserve a reversion to his heirs after an estate of inheritance given to another. This would contravene the policy of our laws.

After the death of Van R. Jones, his real estate descended to his brothers to the exclusion of his mother. His brothers were his nearest heirs on that side, and they took,

not only real estate in possession, but also vested interests in remainder.

Affirm the decree.

FISHBACK et al. vs. WEAVER et al., Ad. Ex.

34 569
65 407
34 569
73 179

1. SPECIAL JUDGES: *Special adjourned courts.*

If the regular judge is not present to take the bench, at the commencement of an adjourned term of the court, if necessary, it would be his duty, or the clerk's, to certify to the bar his inability to hold the court. They should then proceed to elect a special judge for general business, who would, perhaps, supersede a special judge elected at the regular term for special business. Where this is not done, the presumption arises from the record that the regular judge was present.

A decree rendered at an adjourned term, by a special judge elected at the regular term, is a judicial act from which an appeal lies.

2. DECREE IN REM: *When superseded by appeal without bond.*

A decree for the sale of land, against several defendants, is superseded by an appeal without bond, if any of the appellants are administrators, or executors, having an interest in the land.

3. SALES PENDING APPEAL: *Title of purchaser.*

When a decree for the sale of property is reversed in the supreme court, all the rights acquired by parties to the suit as purchasers of the property under the decree, fall with the reversal of the decree and dismissal of the bill. They do not stand upon the same equities with strangers who purchase under an order, still valid, and pay valuable consideration.

4. SUBROGATION: *Surety voluntarily paying bond.*

A surety who has paid money for a guardian, which the guardian owed upon his bond, and which the surety is bound to make good, is not obliged to wait for judgment or execution, but, by paying without them, undertakes the burden of showing that he was actually bound to pay. Showing that, he has the right to pay at once, and be subrogated to all the securities which the creditors or beneficiaries in the bond has, and to all securities put into the hands of his co-sureties, even though intended to indemnify the latter alone, except such as he has consented to be given to them to his exclusion.

APPEAL from *Sebastian* Circuit Court in Chancery.
Hon. JAMES BRIZZOLARA, Special Judge.
Gallagher & Newton, Du Val & Cravens, for appellant.
Garland, Benjamin, contra.

EAKIN, J. George S. Birnie, the intestate of appellees, became co-surety with Nicholas Spring, in a bond of William H. Norton, for $4,000, given by him as guardian of Mary Jane Miller, one of the minor heirs of Joseph Miller, deceased. The bond was filed in the Crawford county probate court, after due approval at the January term, 1851.

Norton had married the widow of Joseph Miller, and was also appointed guardian, separately, of seven other minor children of said Miller, giving a bond in each case.

Spring became alarmed at the mismanagement and imprudent habits of Norton, and demanded indemnity; whereupon Norton, on the third of June, 1853, executed to him a mortgage of four lots in Fort Smith, which was filed for record on the twenty-sixth of the following July. It was properly conditioned to save Spring harmless against any loss on account of his suretyship on the bond given by Norton, as guardian of Mary Jane.

Afterwards, on the nineteenth of December, 1853, Norton executed a second mortgage of the same property in favor of J. R. Kannady.

Afterwards the eight children and heirs of Joseph Miller, being still minors, including Mary Jane, brought a joint suit in chancery against their guardian, Norton, and many other defendants supposed to be interested in the subject matters, including said Birnie, Spring and Kannady. In the course of this suit, which was pending many years, one of the heirs died without issue, reducing

the number to seven. The others reached full age. Mary Jane intermarried with Hightower, Adeline with Fishback, and other female heirs with others unnecessary to mention. All their husbands were duly made parties. A final decree was rendered at the October term, 1867, of the Sebastian circuit court, by which the lots in question were ordered to be sold, and a commissioner was appointed for the purpose. All the defendants appealed, but no supersedeas was obtained. Some of the defendants had been made parties to the suit during its progress, as administrators of original parties deceased; but what interest they claimed for their respective estates, in said lots, is not clearly shown.

Pending the appeal, the commissioner proceeded to sell the lands under the decree. The pleadings admit, on both sides, that he sold, amongst other property, the lots in controversy, although they are not included in the deed exhibited; and that they were purchased by William M. Fishback and Louis Miller, who—the latter in his own right, and the former in right of his wife—were amongst the parties complainant in the cause appealed. There is no evidence that any formal report was made of such sale to the court, or confirmation of it, save by inference. The commissioner's deed, reciting the facts, was acknowledged in open court, and the acknowledgment ordered to be indorsed. The disposition made by the court of the proceeds of the sale does not appear.

Afterwards, in January, 1868, the decree of the chancellor was, by this court, reversed and set aside, and the court below was ordered to dismiss the bill for want of jurisdiction. See *Norton et al. v. Miller et al., 25 Ark., 108.*

On the fifteenth of August, 1868, Birnie filed the

original bill in this case against Norton, the guardian, Spring, his (complainant's) co-surety, Mary Jane Hightower, the former ward, Fishback and Louis Miller, the purchasers; Kannady, the second mortgagee, and others claiming interests in, or liens upon, said lot. The object and prayer of the bill is to obtain subrogation to the benefits of the mortgage given upon said lots by Norton to Spring, his co-surety; and to annul the purchase made by Fishback and Louis Miller. He sets up in detail the foregoing facts, and bases his claim to subrogation upon the following allegations, to-wit:

That on the sixth of May, 1868, he paid off to Hightower and wife, and wholly discharged the amount due them from Norton—"the balance due them at that time being nine hundred dollars; said William H. Hightower and wife having previously received of and from your orator the sum of twenty-five hundred dollars, making in all the sum of three thousand, three hundred dollars, in full payment and satisfaction of the said guardian bond;" and alleging further, that upon the receipt of said nine hundred dollars, Hightower and wife executed to complainant and Spring a full and entire release from all liability on the guardian bond. Their receipt is exhibited. It is for the sum of nine hundred dollars, and has no allusion to prior payments. It expresses entire satisfaction of all claims on the guardian's bond of Norton, in which Birnie and Spring were sureties, and contained an express assignment to Birnie of all their rights against the guardian on his bond, and their rights under the mortgage given by Norton to Spring.

At the May term, 1870, Fishback and Louis Miller answered the bill. They say that the bond, as guardian of Mary Jane, although given separately by Norton, was

in truth one of eight; although intended to secure his faithful conduct as guardian of the eight children and heirs of Joseph Miller, that the property came into his hands in mass, and was managed together. This point will not be further noticed, as the decision in the case of Norton v. Miller (*supra*) to the contrary, is the law of the case. The bonds are to be separately considered, as if given by several guardians.

They insisted that the appeal in the former case only operated as a supersedeas, so far as the decree affected the appellants, who were administrators; and that the effect of the joint appeal by all the defendants without supersedeas was to leave the decree free to be enforced against Norton, Spring and the complainant, who were parties, and gave no bond; and that, therefore, their purchase under said decree was valid, and extinguished the right of the mortgagee, Spring, under whom the subrogation was sought. They say further that the mandate was never filed below, nor was the suit formally dismissed.

They say that any payments made by complainant to Hightower and wife, of which they deny all knowledge, were voluntary; and deny the right of said parties to release the guardian on said bond beyond their interest in it of one-seventh, which remained after the death, without issue, of one of the heirs. The latter point fails, of course, under the former decision. The bond was exclusively for the protection of Mary Jane Hightower.

Afterwards, complainant filed an amended bill, containing more specific charges with regard to other liens, and clouds upon the title, but not materially varying the aspect of the case, or the relief sought against appellants, Fishback and Miller. To the amended bill, the said appellants demurred.

On the thirty-first of July, 1877, the regular circuit judge being disqualified to sit in this and many other cases pending in the Sebastian circuit court, a special judge was elected to try said causes; and afterwards the regular judge adjourned the court until the first Monday in December. On the day last named the court convened, the special judge presiding, and proceeded to business. On the twenty-fourth of December, the decree in this cause was made, reciting that it had been submitted before the adjournment. The court overruled the demurrer of Fishback and Miller to the amended bill. They declined to plead further, and the cause was heard upon the "bill, answer, exhibits and proof." The court found as a fact, that on the twenty-sixth of July, 1862, said Birnie had paid on said bond, in full satisfaction thereof, $1,200, and on the sixth day of May, 1868, the further sum of $900—in all, $2,100, "which was due and owing from the said Norton, as guardian," and is now due the administrators of Birnie, who had died pending the suit. For the payment of this, they were held entitled to subrogation, and the commissioner's deed to Fishback and Miller was set aside. A decree for $2,100 was rendered against Norton, with the usual orders for foreclosure of the mortgage by sale, in case of non-payment.

An appeal was granted by the clerk of this court to Fishback, Louis Miller and other defendants.

It is necessary first to determine whether any final decree has been rendered in the case by a competent court. Appellants contend that the Hon. Special Judge BRIZZOLARA had no power to open and hold a special term of the court, in the absence of the regular judge; and that all the proceedings after the adjournment of the regular August term, 1877, on the first of September, were *coram non judice*, and

void. If this be so, the case still stands in the circuit court of Sebastian, continued over by operation of law, in the status it had on said first of September.

It was held in *Dunn v. State, 2 Ark., 230*, that it was a power incident to all courts, to adjourn their sittings to a distant day; and that the proceedings, at the adjourned session, will be considered, as the proceedings of the same term.

Sec. 28 of chapter 43 of the Revised Statutes, approved in 1838, authorized the holding by any court of *special adjourned sessions, in continuation of the regular term*, "upon its being so ordered by the court or judges in term time; and entered by the clerk on the record of the court."

The act of the sixth of April, 1869, section 1, provided that: "Every circuit court shall continue in session, at each and every term thereof, until the business therein pending is disposed of, or until it becomes necessary for the judge thereof to adjourn the same, in order to reach the court next to be holden in his circuit."

The constitution of 1874 left it to the legislature to prescribe the times and places of holding the terms of the circuit courts (*Art. VII, sec. 12*), and continued in force all laws upon the subject not in conflict with any of its provisions (*Schedule to same, sec. 1*). Generally, in the provisional arrangements for the circuits, made by the constitution, the times for the beginning of the terms in all the courts were fixed, but no limit was fixed for their duration. The sixth circuit was in some respects exceptional in this regard; but that does not affect the general system, nor touch this question now before us. *Art. XVIII.*

The act of March 8, 1877, creating the Twelfth circuit, provided that the court should be held in the Fort Smith district, on the last Monday in February and July; and in

the Greenwood district on the fifth Mondays, respectively, after those above designated. (*Pamph. Acts of 1877, p. 41*). The record shows that the circuit court was in regular session at Fort Smith on the thirty-first day of July, 1877, which the court judicially knows was on Tuesday, the day after that fixed by law for the beginning of the term. It will be presumed that the court was regularly opened. The judge gave notice to the bar of his disqualification to preside in a number of cases, including this, and the said special judge was duly elected for those cases. He made an order in this case on the twenty-eighth of August, 1878. Afterwards, on the first of September, which the court knows was on Saturday, preceding the court for the Greenwood district, the regular judge adjourned the court until the first Monday in December, 1877. This he had the right to do. He had fulfilled his duty in holding the court for the Fort Smith district, until it became necessary to leave for the Greenwood district. He might then have adjourned the court until the next term, if he had chosen to do so. But he had still the power to adjourn it to a day near or distant.

On the first Monday in December following, it was as proper for the court to be in session, in continuation of the business of the term, as if it had only adjourned over for two days, for a local holiday, or public convenience. We must not lose sight of the distinction between "special adjourned sessions" of the circuit court, and "special terms." The latter, without any adjournment for the purpose, might, between terms, be held by the judge, for the special purpose of trying persons confined in jail. For this purpose, certain notices were prescribed, and certain formalities requisite. (See *chap. 43, Rev. Stat., secs. 29 to 34.*) These terms were not continuations of the foregoing regular

terms. They were separate and independent. It was held in *Brown v. Fleming, 3 Ark., 284,* that a special judge for certain cases, in which the regular judge might be disqualified, could not hold one of these special terms. "The law," it was said, "contemplated that the special judge would attend at the regular term of the court, as less inconvenient to the community." The court, in that case, said: "It does not appear to have been at, or during the continuance of, the regular term; nor at a special session to which the circuit court had been adjourned by any previous order of the court, or of the judge." This is a plain intimation of the view taken of the difference taken between "an adjourned session," and a "special term," and also of the opinion that there would be no objection to a special judge presiding, at any time, during the continuance of an adjourned session.

The forms and modes of proceeding between the regular and special judges of all courts are dictated generally by judicial courtesy, convenience, mutual respect and a decent regard for the dignity of the tribunal. None are presented by law. To constitute a valid court, it suffices for the record to show that there was a body in session at the time and place prescribed by law, with legal officers, and held by an authorized judge, presiding therein. (*Dunn v. State, 2 Ark., 253*). Where the judge is elected for special cases only, and the regular judge is presumed to be present, it is the more orderly and better practice for the latter to open the court each day, attend to such general business as may be of immediate importance on morning motions, and then give place to the special judge, at some agreed time. But the observance of this rule is not essential to the validity of the proceedings.

We are called upon, in this case, to inquire into the

power of a special judge to open the court at an adjourned session, and proceed with the business, in the absence of the regular judge. If the regular judge had not been in attendance, to have taken the bench, if necessary, it would have been his duty, or the clerk's, to have certified to the bar his inability to hold the court. They might then, and should, have proceeded to elect another special judge for general business, who might, perhaps, have superseded the special judge, elected for special business. As this was not done, the presumption arises, from the record, that the regular judge was there. The maxim applies: "*Omnia præsumunter rite et solemniter esse acta, donec probitur in contrarium.*" Besides, the record does show that on the day this decree was made he vacated the bench to give place to the special judge.

The circuit court had regularly, in term time, appointed an adjourned session, in continuation of the term. Upon the day fixed, we find the court again in session, presided over by a judge duly authorized to sit therein. We find the court continued by successive adjournments till the day of this decree, upon which day we find the regular judge actually presiding, and yielding the bench to the special judge who pronounced it. We think it a judicial act, from which an appeal lies.

This is a direct proceeding to attack and set aside the commissioner's sale, made, under order of the chancery court, upon a decree in a former case, after said decree had been appealed without bond for supersedeas. It must be determined whether, under the particular circumstances, the sale must stand. An appeal, in chancery, formerly, by the English practice, operated as a supersedeas, or not, within the discretion of the chancellor, who, in its exercise, was governed by the circumstances of the case. Upon

that practice our statute, at an early day, engrafted the following provision:

"The appeal, when the appellant is not an executor, administrator, or guardian, suing or sued, shall not operate so as to stay the proceedings, unless a recognizance be entered into before the supreme or circuit court, or a judge thereof, and filed in the office of the clerk of the circuit court." (*Revised Stat., chap. 23, sec. 139.*) This was the law at the time of the sale; and, by inference, the appeal did operate as a supersedeas in the reserved cases.

There were administrators, appellants in that case. What their interest was in the property to be sold is not made clearly apparent, but that they had some, is to be inferred from the facts. They were made parties for some purpose; they were dissatisfied and appealed. As to them and their interest in the land, the decree was superseded under the statute. The decree was a whole, and ought not to have been executed, when no clear title could be made by the sale, barring the future claims of all parties to the suit. Chancery is averse to relief by piecemeal, leaving matters open for future litigation, which appertains to the case before it, and which, by proper delay, may be all settled at once. There could be no adequate price obtained on such sale. The purchaser would buy a lawsuit. Perhaps, in the case of a money decree, where each defendant was personally liable for the whole, a supersedeas by some appellants, or a saving instead of it, might not have been held available for the others, but that question does not arise now. In a proceeding *in rem*, there can be no such division of interests.

The court is further of opinion that if the sale had not been superseded as to the appellants, who were not administrators, all the rights acquired by parties to the suit,

as purchasers, fell with the reversal of the decree and the dismissal of the bill. They do not stand upon the same equities with strangers who purchase under an order, still valid, and pay valuable consideration. The parties are bound to follow the case to this court, and are bound by the decree here, as fully as they were bound by the decree below. The decree in this court annulled the decree below, which forms the basis of their title, and restored the former status of the property. If they have any equities in following any portion of the purchase money, they are not set up in this proceeding. *McBain v. Same, 15 Ohio St., p. 337*, and cases cited by Judge Waite.

As to the complainant's right of subrogation, there can be no question, so far as it appears that he paid money for the guardian, which the guardian owed on the bond, and which the complainant was under obligation to make good. He was not obliged to wait for judgment or execution; but, by paying without them, undertook the burden of showing that he was actually bound to pay. Showing that, he had the right to pay at once, and be subrogated to all the securities which the creditors or beneficiaries in the bond had, as well as to all the securities put into the hands of his co-surety, even though intended to indemnify the latter alone, except such securities as he had contracted or consented, might be so given to his exclusion. The right of subrogation does not arise from contract, though it may be defeated by it. It is the machinery adopted by courts of justice to enforce fair dealing towards those secondarily bound for a debt, not only against principals and creditors, but amongst co-sureties themselves. The latter must share with each other every plank in the shipwreck. They are under mutual trusts towards each other, and for each

other's protection, to do all in their power to avert or diminish the common liability.

It is distinctly alleged, not specifically denied, shown by the receipt, and found by the court, that Birnie paid Hightower and wife $900, which *Norton owed on the bond.* If Norton owed it, the subrogation *pro tanto* was right.

The bill further alleges that Birnie had previously paid for Norton on the bond about $2,400, but does not sufficiently allege that Norton properly *owed* that on the bond, or show that Birnie was bound to pay it. The surety has no right to pay out money for his principal by way of compromise, or otherwise, which the principal may not actually owe on the debt—and the surety may not have been bound to pay. This might be unjust, and no right to subrogation can be based upon it. The answer says these payments were voluntary, and the receipt of Hightower and wife does not allude to them. The chancellor found that $1,200 had been so paid, for which Birnie (or his administrator) was entitled to subrogation, making $2,100 in all. We find nothing in the record to justify that conclusion. If the record had left any room to suppose that any oral testimony had been used, or that there had been any agreement of counsel concerning facts, we might well have presumed that the finding of the chancellor had sufficient support. But no such presumption can be entertained. The cause was heard upon "the bill, answer, exhibits, *and proof filed herein.*" All these should be in the record, and we find nothing there that satisfies us, with reasonable certainty, that Birnie was bound under the bond to pay for Norton any of the sums which he paid Hightower and wife for Norton, in discharge of the bond previous to the $900. It may, for aught that appears, have been an officious interference, or the result of unnecessary alarm.

The decree is for too great an amount, and, therefore, erroneous. It should, on the pleadings and proof, have been only for $900, with interest. For this error, reverse the decree, and remand the cause, with leave to parties to amend the pleading, and take further proof; and for further proceeding, consistent with equity and this opinion.

NOTE.—At a subsequent day the appellee asked leave to file a *remittitur*—remitting all the decree except as to the sum of $900, with interest, and releasing all claim on the supersedeas bond, and agreeing to pay the costs of this court—which was allowed; whereupon, the decree was affirmed as to $900 and interest, not remitted.

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34 582
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34 582
90 530

COLE VS. MOORE.

1. TAX SALES: *Purchase at, by county clerk, illegal. Owner, how far relieved in chancery.*

The county clerk being required by law to advertise delinquent lands for sale, to attend and make a record of the sales, and to issue certificates of purchase to the purchaser, and certificates of redemption to the owner when he redeems, and finally a deed to the purchaser if it is not redeemed, is forbidden by public policy from purchasing at such sales. But the owner seeking relief in chancery will be required to refund to him the legal taxes, penalty and costs charged against the land, and interest from the date of sale; and also all subsequent taxes paid by him, and interest thereon from the dates of payment. The purchaser will also be entitled to receive from the officer having the custody of it, any excess above the taxes, etc., which he may have paid for the land.

2. TENDER: *When it stops interest.*

An unconditional tender, which is kept good, stops interest from the date of the tender.

APPEAL from *White* Circuit Court in Chancery.
Hon. J. N. CYPERT, Circuit Judge.
Coody, for appellant.
B. D. Turner and J. M. Moore, contra.

ENGLISH, C. J. The bill in this case was filed by Israel M. Moore, on the chancery side of the circuit court of White county, on the nineteenth of April, 1870, against John A. Cole, and alleges in substance:

That at a sale of lands and town lots, for the non-payment of taxes for the year 1868, made in White county, on the second of August, 1869, the time prescribed by law—block No. one, in the town of Searcy, which then was and still is the property of complainant, was offered for sale for the aggregate sum of $19.70, for state, county, convention, school and military taxes and penalty, besides costs, and was struck off and sold to defendant, Cole, for the sum of $100; and afterwards defendant, who is and was at the time county clerk of said county, issued to himself, as complainant supposes, a certificate of purchase for said block.

That on the fifth day of March, 1870, complainant applied to defendant to redeem said block, and offered to pay and tendered to him the whole amount said block sold for, and the amount paid for his certificate of purchase, and all other costs paid by him, and also interest on the whole amount, at the rate of twenty-five per cent. per annum from the date of sale, and also the fee allowed by law for issuing the certificate of redemption, and the fee for advertising said block; but defendant refused to accept said offer, or to issue said certificate and allow complainant to redeem, unless he would pay him what he had paid for said block and one hundred per cent. thereon.

Complainant submits that it was contrary to public policy and the laws of the state for defendant, who was, and acted as, county clerk at the sale, to be in any way, either directly or indirectly, concerned or engaged in the purchase of any land at said sale, and that such purchase made by him was fraudulent and void, and should be set aside.

That by reason of the fraud of defendant in connection with said sale, and in the purchase of said block, he is not entitled, in law or equity, to any return for his purchase money for said block, or, if anything, to not more than the amount paid out by him; but if the court shall be of opinion that he is entitled to it, complainant is ready to pay him the entire amount paid out by him, with interest at the rate of twenty-five per cent. per annum, from the time of said sale to the date of the tender so made by complainant to him.

Prayer that said purchase by defendant be declared by the court to be void; that said sale be canceled, and for general relief.

Defendant answered, admitting that he purchased the block at the tax sale, for $100; that he was county clerk at the time, and issued a certificate of purchase to himself. Denies any fraud on his part in connection with the sale, and submits that, though clerk, he had the right to make the purchase, etc.

Admits that complainant offered to redeem, as alleged, and he refused to permit him to do so, unless complainant would pay him back the $100 purchase money, all costs, taxes paid by him on the block since the sale, with one hundred per cent. upon the amount so paid, with the addition of six per cent. per annum upon the original

purchase money, costs and taxes, and also the fee for issuing certificate of redemption, etc.

Denies that complainant made him an actual tender by counting out the money, etc. To the answer a demurrer to the bill is added.

The court sustained the demurrer for want of some formal allegation of the bill, which was amended by interlineation, and the answer and demurrer were made to apply to the bill as amended.

Two depositions were taken and read on the hearing, which proved the tender and refusal as alleged in the bill.

The court, upon the pleadings and depositions, decreed that the purchase of the block in controversy, at the tax sale by defendant was illegal and void, and set aside and vacated the same, and defendant appealed.

I. The revenue act of twenty-third of July, 1868, under which and its supplements the block in question was, doubtless, sold for the taxes, etc., of 1868, allowed the owner to redeem from the purchaser, within one year from the sale, by paying twenty-five per centum penalty. *Acts of 1868, p. 277; Wolf v. Henderson, 28 Ark., 304; Pack v. Crawford, 29 Ark., 492.*

II. The court below did not err in deciding that appellant, who was county clerk at the time of the tax sale, could not become a purchaser at the sale. It was his duty to advertise delinquent lands for sale, to attend the sale and make a record of the lands and lots sold, the sums bid for them, the names of purchasers, etc.; to issue certificates of purchase, and certificates of redemption when lands or lots were redeemed, and finally to execute deeds to purchasers on failure of owners to redeem. *Act of twenty-third July, 1868*, and supplemental *Acts of nineteenth*

February, 1869, and ninth March, 1869. Having these and other important official duties to discharge relating to tax sales, and designated in the statutes, it is contrary to public policy for him to become a purchaser at such sales. *Livingston, ad., v. Cochran et al., 33 Ark., 295; West et al. v. Waddill et al., ib.; Chandler v. Moulton, 33 Vermont, 247; Mills v. Goodsell.*

III. But the court below erred in simply declaring the purchase of appellant at the tax sale to be invalid, and vacating it, requiring appellee to restore to appellant nothing.

Appellee states in his bill that the block was offered for sale for the aggregate sum of $19.70 for all taxes charged upon it, and penalty, besides costs. There is no allegation that any part of this sum was illegal or excessive. These taxes, etc., were justly due from him to the public. There was a lien in favor of the state upon the block for the sum so charged upon it, which is paramount to all other claims, and which he could not avoid or discharge otherwise than by paying it. It must be assumed in this case, that it was because of his failure to pay the taxes that the block was advertised as delinquent, and brought to a sale. Appellant, though forbidden by reason of public policy from becoming a bidder at the sale, nevertheless bid, and became the purchaser of the block for $100, which, it must be supposed in the absence of any allegation to the contrary, he paid to the collector, and thereby satisfied the amount due from appellee to the public, and discharged the lien of the state upon the property. Appellee applied to a court of chancery to set aside the sale, and the court granted the relief without terms—without requiring appellee to refund to appellant the amount for which the block was offered for sale, and which he should have paid, but failed to do so, and which appellant did pay on his bid.

It has been decided by this court that where the owner of land sold for taxes files a bill against the purchaser to set aside the sale, though the sale be held illegal and void, the owner must be required to refund to the purchaser the amount of the taxes, etc., paid by him, with interest, and also taxes paid subsequent to the sale, with interest, etc. *Twombly v. Kimbrough, 24 Ark., 459.*

Appellee was more liberal in his tender before the suit than he need have been. He tendered to appellant not only the $100 bid by him at the sale, costs, etc., but a penalty of 25 per cent. thereon, which was the amount of penalty allowed by the statute, under which the sale was made, to purchasers having the right to bid at such sales. But a court of equity will not permit appellant to speculate upon a bid and purchase which he was forbidden by public policy to make.

The court below should have required appellee to refund to appellant the amount of the taxes, penalty and costs charged upon the block at the time of the sale, with interest; and if appellant had paid any subsequent taxes upon the block, not paid by appellee, the amount paid, with interest from the date of payment, should have been decreed to him.

But the further question arises: Should appellee have been required to refund to appellant, or bring into court, the whole of the $100 bid by him for the block, with interest, or only so much thereof as went to discharge the taxes, penalty and costs, which were a charge upon the block when it was offered for sale?

By the act of the twenty-third of July, 1868, the collector was required to offer each tract of land or town lot for sale to the bidder who would pay the taxes, penalty and costs charged thereon, for the least quantity thereof, as had

been the mode of selling under previous statutes. But by the supplemental act of the nineteenth of February, 1869, he was required to offer for sale the whole of each tract or lot to the highest bidder, but where several tracts or lots were taxed to any person, and one or more of them sold for a sum sufficient to pay the taxes, etc., charged on all of them, no further sale could be made. *Pack v. Crawford et al., 29 Ark., 493.*

In this case, a single block was sold, and, it seems, bid off at about $80 in excess of the taxes and penalty charged upon it. The amount of the costs is not shown by the bill.

Section 17 of the act of the nineteenth of February, 1869, provided that:

"Should any tract, lot or part of lot, so advertised as aforesaid, sell for more than the amount due thereon for taxes, penalty and costs, the excess shall be by the collector paid into the state treasury, and placed to the credit of the person in whose name the tract of land, lot or part of lot, was advertised for sale; *Provided*, he or she be a non-resident, and the person or persons entitled to such excess, upon making the proper showing to the auditor of state, shall be entitled to a warrant on the treasurer therefor, and said auditor is hereby required to draw such warrant when satisfactory evidence has been produced to him."

This section seems to provide for payment of the excess into the state treasury in cases only where the lands or lots were advertised in the name of non-residents. It is silent as to what disposition the collector should make of the excess where the land or lot was advertised in the name of a resident.

Whether the block in controversy was advertised in the name of a resident, or non-resident, does not appear from the pleadings in this case.

But by section 129 of the act of April 8, 1869 (which repealed the act of July 23, 1868, and its supplements, but required the taxes of 1868 to be collected under them), the collector was required to deposit such excess in the state treasury, to the credit of the person in whose name a tract or lot was advertised, regardless of residence.

Whether the collector deposited the excess in this case in the state treasury under either act, does not appear from the pleadings.

But no matter where it was deposited, if appellee had applied for, and accepted the excess, it might perhaps have been treated as an affirmance by him of the sale.

As appellant thought proper to venture his money on a bid which the law of public policy forbid him to make, it is but reasonable that the decree should leave him to hunt up and obtain the excess; but appellee should be required to relinquish to him all claim upon it, and he, or the decree, should vest in appellant authority to collect it from any public officer who may be its custodian.

IV. Appellee made an excessive tender before suit. The effect of the tender was to stop interest if kept good. But in the bill he made no unconditional offer to pay appellant, or bring into court any sum. He submitted that appellant was entitled to nothing, and offered to make his tender before suit good, if the court should hold him obliged to do so, thereby inviting a litigation which has been protracted for many years.

We think, therefore, that it is but just and equitable that he should be required to refund to appellant the amount of taxes, penalty and costs, charged upon the block at the time it was offered for sale, with interest at 6 per cent. thereon from the date of the sale. See *Hamlett v. Tallman et al., 30 Ark., 511.*

V. The court was right in setting aside the sale, but erred in doing so without terms.

The decree for this error must be reversed, and the cause remanded, with instructions to the court below to ascertain by its master, or otherwise, the sum due from appellee to appellant, in accordance with the above rulings, and to render a decree setting aside and vacating the tax sale, and vesting the excess of purchase money in appellant as above indicated, upon appellee paying to appellant, or bringing into court, the sum found due from appellee to him.

In taking the account, if it is found that appellant paid the taxes, penalty and costs, in depreciated scrips, or warrants, he will be allowed their money value only.

KOUNTZ et al. vs. DAVIS.

1. INFANT: *When he may disaffirm deed.*

An infant has seven years of the period of limitations, in which, upon coming of age, to disaffirm his conveyance executed in infancy.

2. DESCENTS: *Dying intestate without issue.*

J and W, brothers, were joint owners, by purchase, of land. J died, leaving surviving him his father and mother and brothers and sisters. Afterwards, W died, leaving a child, and soon afterwards the child died, without issue, leaving its grandfather and grandmother and uncles and aunts on its father's side. *Held,* That upon the death of J, his interest in the land ascended to his father for life, remainder in fee to his brothers and sisters; and upon the death of the child, its interest in the land ascended to its grandfather and grandmother and uncles and aunts on the father's side in equal parts.

3. QUIT-CLAIM DEED: *What it conveys.*

A quit-claim deed conveys only such interest as the grantor then has.

4. GUARDIANS AD LITEM: *None for unknown infant heirs.*

Where the number and names of infant heirs are unknown, it is not practicable to appoint guardians *ad litem* for them.

APPEAL from *Benton* Circuit Court in Chancery.
Hon. E. S. McDaniel, Special Judge.
Pettigrew, Clark & Williams, for appellant.
J. D. Walker, contra.

Harrison, J. Jesse and William Kountz were joint and equal owners by purchase of two tracts of land—one containing 349 acres in Benton county, the other containing 80 acres in Washington county.

Jesse Kountz died in 1861, intestate, leaving surviving him his father and mother, and the following brothers and sisters: his co-tenant, William Kountz, Joseph Kountz, Samuel Kountz, Isaac N. Kountz, Mary Davis, Nancy C. Henry, wife of Frank Henry, and Susan W. Kountz.

William Kountz died in 1863, intestate, leaving a widow, Amanda, who afterwards married Parson S. Packard, and one child. The name or sex of the child is nowhere stated.

The child died in about a month after its father, and when only four months old; and there were living, at the time of its death, its mother, the said Amanda, its grandfather and grandmother, on its father's side, and the before-mentioned brothers and sisters of its father—its uncles and aunts.

William Kountz, at the time of his death, resided on the tract in Benton county.

Michael Kountz, the father of Jesse and William, and grandfather of the child, in 1867, sold and conveyed, by warranty deed, both tracts of land for $800, to William F. Shreve; and Joseph Kountz, Samuel Kountz, Nancy C. Henry and her husband Frank Henry, and Susan W. Kountz, on the eighth day of December, 1869, made him,

but without any consideration therefor, a quit-claim deed to the same.

Shreve, on the thirtieth day of January, 1873, conveyed the lands, without warranty, to the plaintiff, James E. Davis. Isaac N. Kountz, on the first day of May, 1874, conveyed his interest in the tract in Benton county to Amanda Packard.

Mary Davis died in 1866, intestate, leaving children—but whose names, or the number of them, does not appear—who, at the time of her death, were infants. The grandmother of the child, its father's mother, died in 1870, and Michael Kountz in 1872.

James E. Davis filed his complaint in equity against Isaac N. Kountz, the unknown heirs of Mary Davis, and Amanda Packard and her husband, Parson S. Packard, for partition of the lands. He filed with his complaint an affidavit that Isaac N. Kountz, and the heirs of Mary Davis, were non-residents of the state; and an attorney for them was appointed by the clerk, and they were summoned by publication of warning order. The complaint was filed and the suit commenced on the twenty-sixth day of July, 1875.

Joseph Kountz, Samuel Kountz, Nancy C. Henry and her husband Frank Henry, and Susan W. Kountz, were, on their application, made defendants, and filed an answer.

They alleged in their answer that the deeds to Shreve were procured by the fraud of the plaintiff; that Michael Kountz, at the time of his conveyance to Shreve, resided in the state of Tennessee, and had never been in Arkansas, and knew nothing of the quality or value of the lands; that he employed the plaintiff, who lived in Washington county, near the lands, and with whom he was well acquainted—he having lived a near neighbor to him in Ten-

nessee—as his agent to sell the lands, supposing and believing that he was the sole and absolute owner of them—being unacquainted with the law of Arkansas as to the descent of real property, and being so informed by the plaintiff.

That the lands were of good quality, and worth from three thousand to four thousand dollars; and that the plaintiff was well acquainted with them, and knew their value; but Michael Kountz, being an old man, and his mind greatly impaired by age and disease, and having implicit confidence in the plaintiff, and the plaintiff pretending to have found a purchaser for the lands in Shreve, and falsely representing to him that the lands were of inferior quality, and not worth more than $800, he was induced to sell them to Shreve at that price; and that though the purchase was pretendingly by Shreve, and the deed was made to him, it was, in fact, for the benefit of the plaintiff, or he was interested with Shreve in the purchase.

That the quit-claim deed from Joseph, Samuel and Susan W. Kountz, and Henry and wife, which was without consideration, was also procured by the imposition and fraud of the plaintiff, and that they were induced to execute the same, by his false representation to them, who were residents of the state of Tennessee, and ignorant of the law of Arkansas in regard to the descent of real property, and of the fact that they had an interest in the land—that their father was the sole heir of both their brother Jesse, and their brother William's child, and that they had no interest in the estate of either or title to the lands; he pretending to them that his only object in desiring a quit-claim deed from them to Shreve was to satisfy Shreve, who, he said, was a suspicious and whimsical man, and had become uneasy about the title, and censured him, who had acted as the

friend of their father in the matter, for inducing him to purchase the lands, and assuring them that, except as affording satisfaction to Shreve, it could do neither harm nor good.

And Susan W. Kountz averred that she was, when she executed the deed of quit-claim, an infant, and she denied for that reason, also, its validity as to her, and disaffirmed it.

They made their answer a cross complaint, and prayed that the deeds to Shreve be set aside and canceled.

Mrs. Packard and her husband also answered the complaint, and their answer, which was substantially the same as the other, was likewise made a cross complaint, and prayed a cancellation of the deeds. Mrs. Packard, besides, claimed dower, in the part or share of the lands of which William Kountz died seized.

The plaintiff filed a reply to the cross complaints.

He denied the misrepresentations and fraud charged against him in respect to Shreve's purchase of the lands, and that he was in anywise interested in the purchase, or acquired any interest in the lands until several years after. Denied that he had any agency in procuring the quit-claim deed, except in writing to Michael Kountz for Shreve, that Shreve had understood that he had had but a life estate in the lands, and that he, Shreve, wanted his children, who owned the remainder in fee, to make him a quit-claim deed. Denied that he in any way influenced the grantors to execute it, but averred that it was given by them in compliance with the wishes of their father, and in consideration of the money Shreve had paid him for the lands.

He admitted that Susan W. Kountz was, at the execution of the quit-claim deed, a minor.

There was no appearance by Isaac Kountz and the heirs of Mary Davis.

Partition of the lands was decreed, subject to the dower of Mrs. Packard in four-sevenths thereof, which was directed to be assigned and set apart to her; and to the plaintiff was adjudged five-sevenths, and to the heirs of Mary Davis, one-seventh of the whole; to Isaac Kountz, one-seventh of the tract in Washington county; and to Mrs. Packard, one-seventh of the tract in Benton county; and commissioners were appointed to make the partition, and to allot and set apart dower.

The defendants, who appeared and made defense, appealed.

The charge of fraud against the plaintiff was not sustained by the evidence.

Some of the witnesses said the lands were worth, in 1869, eight or ten dollars an acre, but it was proven by a letter the plaintiff wrote Michael Kountz, in 1867, but a short time before the sale, produced by the defendants themselves, that he told him that his interest in them—which he then supposed was but Jesse's part—was worth $1,500 or $1,600; and in a later letter he wrote him that he had since been informed by a lawyer, whom he consulted, that Mrs. Packard, whom he had supposed had the title to the other part, had only a life estate in it, and that the remainder in fee, in that also was in him.

The charge of misrepresentation as to the value of the land was, therefore, disproved; and there was no evidence that any representations whatever were made by him to the appellants to induce them to make the deed of quit-claim; but it, on the contrary, clearly appeared that it was made by them in compliance with the wishes of their father, who had been informed by the plaintiff that

Shreve understood that he had only a life estate in the lands, and that the remainder in fee was in his children.

But the court erred in decreeing to the plaintiff four-sevenths of the lands. Susan W. Kountz was, at the time of the execution of the quit-claim deed, a minor, and did not, as was shown by the proof, become of age until 1871; and she had seven years—the period of limitation in which, upon becoming of age, to disaffirm the conveyance. *Bozeman et al. v. Browning et al., 31 Ark., 364; Cresinger v. Lessee of Ketch, 15 Ohio, 156; Drake v. Ramsey, 5 Ohio, 152; Shoul. Dom. Rel., 581.*

It was not alleged, nor attempted to be proven, although her infancy was admitted by the reply, that she had, after becoming of age, done anything in affirmance of it.

Upon the death of Jesse, his father took a life estate in his part of the lands, and his brothers and sisters the remainder in fee; and upon the death of the child of William, its part having come by its father, ascended to its grandfather and grandmother, and uncles and aunts on its father's side, in equal parts in fee. *Kelly's Heirs v. McGuire and Wife, 15 Ark., 555; West v. Williams, ib., 682; Campbell and Wife v. Ware, 27 Ark., 65; Beard et al. v. Mosley and Wife, 30 Ark., 517; Oliver v. Vance, Jr., ante.*

William took one-seventh of Jesse's part. There descended to his child, therefore, four-sevenths of the whole.

Upon the death of the child, one-eighth of this ascended to Michael Kountz, its grandfather, and this, with his life estate in Jesse's half, since expired, he conveyed to Shreve.

The grantors in the quit-claim deed, who were of age, conveyed to him only the interest they then had—the shares that afterwards descended to them from their

mother, who had an equal part with their father and each of the uncles and aunts of the child, have not been parted with; and but three-sixths of six-sevenths, or three-sevenths, were conveyed by them.

Instead, therefore, of five-sevenths, the plaintiff has a half only.

Susan W. Kountz has thirteen-eighty-fourths; Mrs. Davis' children or heirs, thirteen-eighty-fourths; Joseph Kountz, one-eighty-fourth; Samuel Kountz, one-eighty-fourth; Nancy C. Henry, one-eighty-fourth; and Isaac V. Kountz, thirteen-eighty-fourths of the tract in Washington county; and Mrs. Packard thirteen-eighty-fourths of that in Benton county.

The decree, as to the dower of Mrs. Packard, was right.

It is objected that *guardians ad litem* should have been appointed for Mrs. Davis' children or heirs, and without that no decree should have been made.

Although the heirs of Mrs. Davis were said in the complaint to be her children, and infants at the time of her death, it was also alleged that their names and the number of them were unknown, and the suit was brought against them as unknown heirs. As their number and names were unknown, it was not practicable to appoint guardians; and they were in fact unknown heirs.

The decree of the court below must be reversed, and a decree will be rendered here in accordance with this opinion, and the cause be remanded that it may be carried into effect.

CLEMENTS VS. LAMPKIN et al.

1. AMENDMENTS: *To answer must be pertinent to defense.*

L. and others sued T. in chancery for specific performance of a contract to convey the southeast and southwest quarters of a section of land, making C., who was claiming the southeast quarter under color of title, a defendant; and praying to quiet their title to the southeast quarter as against him, and also for specific performance against T. C. answered as to the southeast quarter, and afterwards asked and was refused permission to file an amendment alleging his acquisition of title *pendente lite* to the southwest quarter.

Held, That the acquisition of title to the southwest quarter was no defense to the charges as to the southeast quarter, and the amendment was foreign to his defense, and was rightly refused.

2. CHANCERY PLEADING: *Multifariousness, how corrected.*

Multifariousness is not ground for demurrer under the Code practice. It may be corrected by motion to strike out, or to make the bill more specific, or a court of chancery may compel the plaintiff to elect on which ground he will prosecute the suit.

3. CHANCERY PRACTICE: *Pleading a decree. Bill of exceptions.*

A decree relied on and referred to in pleading should be brought upon the record literally. It is loose practice to give the purport of it in a bill of exceptions.

4. ADVERSE POSSESSION: *Continuance of, presumed until, etc.*

Possession once established by material acts of visible, notorious ownership, must be presumed to continue until open, notorious and adverse possession be proven to be taken by another.

APPEAL from *Crittenden* Circuit Court in Chancery.
Hon. L. L. MACK, Circuit Judge.
Peters, of Tennessee, for appellant.
Lyles, of Tennessee, contra.

EAKIN, J. Appellees, the heirs of John W. Lumpkin, the administration upon whose estate had been closed,

sued the heirs of Robertson Topp, a non-resident, deceased, upon whose estate no administration had ever been taken in Arkansas; for specific performance of a title bond to convey a tract of land in Crittenden county, executed by Topp to John W., in the lifetime of both. The lands were described as the fractional northeast quarter, the southeast quarter and the southwest quarter of section twenty-three, in township eight north, range eight east. No defense was made by Topp's heirs, nor is there any complaint of the decree on their part.

Appellant, A. M. Clements, together with divers tenants, were joined as parties defendants, charging that said Clements claimed title to a part of the land, to-wit: the southeast quarter, and that he, with said tenants, was interfering with the possession of complainants and molesting them in the enjoyment of the land, under color of an invalid title. Against him the prayer of the bill was to remove a cloud from the title of complainants, and to enjoin him from further disturbance of complainants in the quiet enjoyment of their rights.

The tenants made default; Clements alone defended. In his answer he demurs to the bill for want of equity, sets up his own claim of title, denies the validity of that of complainants, and relies upon his adverse possession, and the statute of limitation.

Pending the suit, and before final hearing, he asked, and was denied, leave of the court to file an amended answer, showing that, *pendente lite*, he had purchased the southwest quarter of the same section for taxes, and praying that the suit (as to him) be dismissed.

Upon the hearing, the court granted the relief, substantially, as prayed by complainants, decreeing against the heirs specific performance, and against Clements the re-

moval of the cloud, with proper injunctions. Clements appealed.

The court properly refused leave to defendant to amend his answer. He was not charged, in the bill, with anything in reference to the southwest quarter of the section. That part of the bill was directed against Topp's heirs alone. The acquisition by him of title to the southwest quarter was no defense to the charges as to the southeast quarter, and the decree could only bind him as to the issues made, and as to facts involved in the issues. The amendment was foreign to his defense, and not necessary to his protection. If he has a good tax title to the southwest quarter, there is nothing in the decree to preclude its assertion in another proceeding.

The bill was clearly multifarious under the old chancery practice. Clements had no connection with either vendor or vendee. His claim of title was wholly separate and independent, and he could not properly, against his consent, have been brought in to litigate it collaterally, in a contest between a vendor and vendee, with neither of whom he had any privity. But, even under the old practice, the objection to multifariousness was required to be made early, and before expense incurred. It could be taken advantage of only by demurrer, and it would have been too late at the hearing—unless the court itself should be impressed with the impropriety of the bill, and dismiss it, upon its own motion. *Story's Eq. Pleadings, sections 271, and notes, 272.*

But multifariousness is not ground of demurrer under the new Code of Civil Practice. It may be corrected upon appropriate motion to strike out, or make the bill more specific; or a court of chancery, which can always, in exercise of a sound discretion, prescribe equitable terms for the

invocation of its aid, might compel the complainant to elect the grounds upon which he desired to prosecute his suit. The court did not err in refusing to dismiss the bill on this point.

The complainants traced title, in their bill from a patent to Andrew Hodge, in 1847, who, they say, afterwards sold to Samuel Hodge; and further allege that, "on the eleventh day of May, 1853, the title to said quarter section was, by decree of this honorable court, vested in one Robertson Topp," and reference is made to the decree. They show then the title bond from Topp to their ancestor, and prove, with reasonable certainty, that said ancestor, about the year 1854, entered into possession of said land, and deadened a large area, for clearing. The *purport* of the decree alluded to is set forth in a bill of exceptions, which is loose practice. It should have been brought upon the record literally. It shows, however, sufficiently for this case, that the certificate of entry had been found by the court to have been assigned to Samuel Hodge, and by him to Topp. The chain of title, from the entry of Andrew Hodge, was thus established, to the extent of binding all within the chain; and also the possession of Topp's vendee in 1854.

Clements derived title from a supposed entry by one Elliott of said southeast quarter, in the United States land office, in 1840, through divers mesne conveyances to himself. There was no proof of loss of the original certificate of entry beyond the general ignorance of the witnesses as to what had become of it. They testified, in general terms, that Elliott had entered it. All the mesne conveyances from Elliott described this quarter section amongst other lands.

With the patent of 1847 to Hodge, before it, and considering the length of time intervening between the supposed

entry by Elliott, in 1840, and the testimony of witnesses during the trial, the court might well conclude that the insertion of this quarter section in the divers conveyances, in defendant's chain, was one of those mistakes so very common in the description of our lands by the government surveys, and that the chain of title on the part of defendant had failed.

The possession of Topp's vendee, once established by material acts of visible notorious ownership, which was done by putting negroes upon it, and making a deadening long known afterwards as the Lampkin deadening, must be presumed to have continued, until open, notorious and adverse possession be shown to have been taken by another. There are no acts of this kind shown on Clements' part, beginning at a time sufficiently remote to cover a period of seven years before the commencement of this suit, save this: that in 1869, during a leisure day in summer, he, with another man, went upon it and cut away from one-half to one and one-half acres of undergrowth, and then left it. This work of an idle day did not establish a *bona fide*, open, notorious and adverse possession, unless continued, or followed up by other acts looking to improvement or occupation. Such work as that, in our wide, dense, low-land forests, might pass long unobserved, even by neighboring proprietors, and would not be apt to have much significance to them if afterwards noticed. A large deadening every one understands. It is the first step towards the conversion of swamp forests into cotton fields; is attended with considerable expense, and attracts attention in the neighborhood. A small spot of undergrowth cleared away in the solitude and abandoned, means nothing as to ownership or future intention. Questions of adverse possession must be decided upon principles of reason and good

sense, applied to the habits of the people, and the circumstances of the country.

The next evidence of possession on Clements' part is by putting tenants on in 1872. That was within the period, and the statute of limitation did not apply.

There is no substantial error in the decree.

Affirm.

TAYLOR, CLEVELAND & CO. VS. CITY OF PINE BLUFF.

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1. INJUNCTION: *Illegal municipal exactions enjoined.*

By sec. 13, Art. XVI, of the constitution of 1874, chancery has power to inquire into the validity of municipal exactions, and to enjoin their collection when found invalid. But to enjoin a city from prosecutions for violations of its ordinances, is beyond its usual relief.

2. CITIES: *Power to provide for weighing produce, etc.*

By sec. 12, act of March 9, 1875, for the creation and government of municipal corporations, a city has the power to pass and enforce by proper penalties, an ordinance "to provide for the measuring or weighing of hay, wood, or any other article for sale," within its limits. But if such ordinance be unreasonable, or directed to the end of raising a revenue, chancery will declare it void.

APPEAL from *Jefferson* Circuit Court in Chancery.

Hon. X. J. PINDALL, Circuit Judge.

McCain, for appellant.

Elliott, *C. B. Moore*, *contra*.

EAKIN, J. The city of Pine Bluff, which is of the second class, established, by ordinance, the office of city weigher, and directed him to weigh all articles brought to him for that purpose; and to give the party applying a certificate

of any weight so ascertained. In weighing cotton, he was to be governed by the rules of the board of trade of New Orleans, La. It was then provided, that all cotton, hay, or fodder, brought to the city for sale, should be weighed by the city weigher, as thereinafter specified; and that any person violating the provisions of said ordinance should be fined within the limit of $25 for each offense. It was made the duty of the weigher to furnish sufficient labor, and he was directed to charge the sum of twenty-five cents for weighing and certifying each bale. It was further provided that the amount of money received by the city scales should be appropriated for public improvements alone, and not for general city purposes.

The city weigher was allowed $30 per month in currency for his services; and was required to report his receipts, weekly, to the treasurer.

On the twenty-first of November, 1877, appellants filed this bill against the city, the mayor and city attorney, alleging:

That they were citizens of Pine Bluff, which was a large cotton market, and a city of the second class, and were there engaged in the business of buying and selling cotton. They set forth and exhibit the ordinances of the city upon the subject, and say that it has provided scales to weigh cotton and other articles for sale. They charge that the ordinance to compel all persons to weigh upon the city scales, and to pay a fee of twenty-five cents per bale therefor, was designed for revenue; and actually produces one of $3,000 per year. They say that they and other cotton-buyers have their own scales for weighing, and are put to great inconvenience and expense, and obliged to go a great distance to have their cotton weighed upon the city scales.

They charge that the mayor and city attorney combin-

ing, are used to procure the arrest, fine and imprisonment of persons who sell cotton in violation of said ordinance, and that when an appeal is taken in such cases the prosecution is dismissed to avoid a decision of the higher courts, upon the validity of the ordinance; and the city still continues said illegal exaction; and that, thus, the people who bring in cotton for sale are intimidated, and submit to pay, rather than to incur the expense, delay and vexation of defense.

They sue on behalf of themselves, and all others interested, seeking to restrain the defendants from making any further arrests for this cause, or instituting further proceedings to collect the fee; and to have the ordinance declared void; and for other relief.

Defendants show, by their answer, that to keep up said scales they incur considerable expenses; and deny that they derive revenue therefrom, to the extent alleged. They deny that any other citizens, save complainants, are prepared with scales to weigh cotton, or that they are put to any considerable inconvenience by weighing at the city scales. Upon the other hand, they claim that the ordinance is a protection to all who bring cotton for sale, and to all purchasers in the city, against unfair weights; and that it is cheerfully acquiesced in by all other merchants, and by vendors from the country. The charge of collusion between the mayor and attorney to avoid a decision upon the right, is emphatically denied.

The answer contains a demurrer in six paragraphs, amounting, in effect, to two causes: Misjoinder of parties defendants, which is not urged in argument; and want of equity in the bill.

The cause was heard upon the pleadings, and evidence, from which it appeared that there were parties who would

be willing to take the contract for the city weighing at ten cents a bale. For the rest, it did not affirmatively appear, that the ordinance was considered hard or oppressive by a majority of citizens, or cotton producers, seeking that market. On the other hand, the weight of evidence largely preponderates to establish the fact that the practice of requiring cotton to be weighed upon the scales, is a protection to both buyers and sellers, and contributes to the commercial prosperity of the place as a cotton market. It is proven, also, that the city derives a revenue, to some considerable extent, from the scales.

The court, in its decree, sustained the power of the city to compel buyers and sellers to weigh upon the established scales; and to charge a reasonable fee; and to punish those refusing to comply; but denied her power to raise a revenue therefrom. The court found the fee of twenty-five cents per bale to be excessive; and that all necessary and proper charges would not exceed fifteen cents per bale. Whereupon the city was enjoined from charging more, and costs were decreed against her. Complainants appealed.

So much of the bill as sought to enjoin the city from prosecutions for violation of the ordinance, was without the usual ambit of chancery relief. They are quasi-criminal, and are not directed to the specific object of collecting the tax or exaction, but claim to punish; and to collect fines and penalties; which are different from the fees for weighing. Equity is chary of all interference with criminal or penal prosecutions for violations of state or municipal law, although quick to relieve against penalties and forfeitures arising *ex contractu*. Against the former, if invalid, the remedy by defense at law is complete. If, in truth, it were, as complainants charge, but fail to prove,

that any persons had combined to institute a number of prosecutions for violation of the ordinance, knowing the same to be invalid, they would not only be themselves liable to a criminal prosecution, but to a civil action, also, on the part of persons aggrieved. There would be no occasion to invoke the protection of chancery.

As to other aspects of the bill our constitution provides (*article XVI, section 13*) 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 exactions whatever." For this purpose, a bill in chancery is most appropriate.

This widens the range of equity jurisdiction, and will sustain this bill, to the extent of giving the court power to inquire into the validity of the *exactions*, and if found void, so to declare it, and restrain the city authorities from its collection. After such a decree, its collection by any process whatever would be a contempt. But when ordinances are simply to prohibit and punish acts, they stand upon a different footing. No *exactions* are made of any one. They are merely prohibitory, and not in the contemplation or equity of the clause above quoted. Those who violate such ordinances do not seek to avoid an exaction, but to promote their interests, pleasure, or convenience, and may take the risk of a defense at law.

Under the general act for the creation and government of municipal corporations (March 9, 1875, section 12), the city had an express grant of power "to provide for the measuring or weighing of hay, wood, or any other article for sale." This excludes the particular subject-matter from general grants of power in the same act, and to this clause alone we must look for the authority of the city with regard thereto. Appellants contend that to *provide for*, means

simply to furnish convenient facilities for those who wish to use them, and to charge for their use, but does not empower the city to compel citizens to use them, and thus give the city the monopoly of the business of weighing.

Before the passage of this act it had been the habit of legislatures in other states (as we know from numerous cases in the books) to confer upon municipal corporations the control of weighing and measuring articles brought within their limits for sale, and the power to compel vendors to submit to the municipal regulations. They were not intended for the convenience of vendors. It is not within the ordinary range of municipal duties to furnish individuals with facilities for their private emolument, independent of any police considerations. The object of all such regulations had been to protect the citizens as purchasers—and this object would have been entirely defeated by leaving it in the option of the vendor to comply or not with the requirements of weighing or measuring. When our legislature granted the authority to "provide for" weighing and measuring, it is not to be presumed it was thought necessary to give the power to purchase and fix scales for public convenience; but rather that the city should be empowered to establish *the system* of requiring articles for sale to be weighed and measured. The court did not err in holding that the city had power to pass, and enforce by proper penalties, an ordinance of this nature. But, being a police regulation, it must not be unreasonable nor directed to the end of raising a revenue. Of course, the city council must first judge of what may be reasonable, and what fees will fairly compensate for the costs and expenses of the system, without regard to revenue. The courts will respect any fair exercise of this discretion, and will not be nice to take new accounts of expenses and

correct small excesses. But the police power is too vague, indeterminate and dangerous to be left without control, and the courts have ever interfered to correct an unreasonable exercise or mistaken application of it.

This ordinance was imposed for revenue, and produced it. That, indeed, was clearly the object sought by its passage. The court did not err in considering it void to the extent of the excess over reasonable costs; nor, if the court had the right to apportion the fee, was there any error in fixing it at fifteen cents. It might have been done by contract for ten, but upon the whole evidence, and allowing a fair margin, fifteen cents was not too much. If the ordinance had itself fixed the fee at fifteen cents, it would have been fairly sustained by the proof as reasonable.

But *non constat* that the council would have thought it necessary to pass any such ordinance as a police regulation, or with that sole object. The ordinance was properly declared void, but the court should not have made a new one, according to its own views of what it should be, as a police regulation alone, shorn of its fiscal features. That should have been left to the action of the city authorities. So much of the decree as permits the city to proceed and charge fifteen cents is erroneous.

Let the decree below be reversed, and enter a decree here declaring void all existing ordinances of the city, imposing fines or penalties upon any persons who refuse to weigh their cotton at the city scales; and restraining the city, under the present ordinances, from any proceedings to collect any exaction for the weighing of cotton—without prejudice to the right of the city to receive for the use of her scales any sums which may be voluntarily paid, or contracted to be paid; or her right to pass reasonable

ordinances to provide for the weighing of cotton, or other things offered for sale; and to make the same compulsory with the payment of a reasonable fee.

REEVE et al. vs. THE STATE.

1. SURETIES ON BAIL BOND: *Bad indictment against principal, no defense.* The sureties on a bail bond can not show, in answer to a *sci. fa.* on forfeiture, that the indictment against the principal was bad.

APPEAL from *Saline* Circuit Court.
Hon. J. M. SMITH, Circuit Judge.
A. D. Jones, for appellants.
Henderson, Attorney General, contra.

ENGLISH, C. J. On the third of October, 1874, James Wyatt being in custody, in Saline county, on arrest for burglary, was admitted to bail on application to the circuit judge, David Reeve, John M. Murphy, S. G. Garrett and F. M. Chrisman becoming his sureties. The bail bond was in the penal sum of $500, and in the form prescribed by *section 1723 of Gantt's Digest*, conditioned that Wyatt should appear in the Saline circuit court, on the first day of its October term, 1874, to answer said charge of burglary, and should at all times render himself amenable to the orders and process of said court, in the prosecution of said charge, and if convicted surrender himself in execution, etc.

The October term, 1874, of the Saline circuit court, commenced on the twelfth of October. The court was opened, but no grand jury was impanneled and no busi-

ness was done; a general order of continuance was entered, and the court adjourned until next term.

At the March term, 1875, the grand jury returned into court an indictment against Wyatt for burglary; he and his sureties were called, and failed to appear, and a forfeiture was entered upon the bail bond.

A summons was entered upon the forfeiture, ninth of July, 1875, to the sheriff of Pulaski county, returnable to the September term following, and duly served on Reeve, Murphy and Chrisman, and returned *non est*, as to Garrett.

At the return term, all the sureties appeared by attorney, and moved for a continuance, on the ground that they had heard that Wyatt was dead. The motion was overruled; no exception taken to the decision; no defense interposed; and final judgment was rendered against them for the amount of the penalty of the bond.

At the March term, 1877, a petition was filed for Reeve and Chrisman, praying the court to set aside the judgment and grant them a new trial, on the ground that they had discovered, since the final judgment was rendered, that the indictment against Wyatt, when returned into court by the grand jury, did not contain the words, "*in the night time*," and that these words had been afterwards fraudulently inserted, and that, therefore, the indictment, as found, was invalid as an indictment for burglary.

The court sustained a demurrer, interposed by the state, to the petition, and being the last day of the term, the sureties asked that the matter be continued, with leave to them to file an amended petition, within ten days, making the allegations of fraud more specific, which the court refused.

On the twenty-third of March, 1878, the clerk of this court granted all of the sureties an appeal.

The proceedings, down to and including the final judgment, appear upon the face of the record to have been regular.

If it be true, as stated in the petition to open the judgment, that the indictment, when returned into court by the grand jury, did not contain the words, "in the night time," and was not, therefore, a good indictment for burglary, and that these words were afterwards fraudulently interpolated, Wyatt was, nevertheless, bound, when called, to appear and answer the indictment, and his sureties were obliged, by the condition of the bail bond, to produce him in court. If he had appeared, and the indictment, for any cause, was bad, it might have been quashed on his motion, and his sureties would have been discharged; but the court might have ordered him into custody to answer a new indictment. On his failure to appear, the court would not have entertained a motion by the sureties to quash the indictment in his absence. It was his duty to be there and make defense for himself.

In *State v. Lockhart, 24 Georgia, 420*, it was held that the sureties in a bail bond, in answer to a *sci. fa.*, on forfeiture, might show that the indictment against the principal was bad; but we most respectfully decline to follow that decision. The contrary adjudications are founded on a better reasoning, and are more in accordance with principles of law. *State v. Edwards, 3 Ala., 343; Weaver v. State, 18 Ala., 243; Williams v. State, ib., 63.*

In the case last cited, the court said:

"The recognizors (except the accused) have no connection with the indictment, and the question of its regularity or irregularity, in this respect, is wholly disconnected from

their undertaking. They bind themselves that their principal shall appear and answer the charge against him, and if he fail to do so, the condition is broken, and they become liable for the penalty."

In the Georgia case, though the sureties were discharged from the forfeiture recited in the *sci. fa.*, on account of the bad indictment, it was, nevertheless, held that they were not discharged from the bail bond, but would be bound for the appearance of the principal on the finding of a good indictment against him.

Affirmed.

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GEORGE VS. ST. L., I. M. & S. R'Y CO.

1. PLEADING: *No reply to mere answer.*

A plaintiff is not entitled to reply to an answer which contains no set-off, or counter-claim.

2. RAILROAD COMPANY: *Liability for injury to passengers: Negligence, when presumed.*

To the liability of a railway company as a passenger carrier, two things are requisite—that the company be guilty of some negligence or omission, which mediately or immediately produced or enhanced the injury; and that the passenger should not be guilty of any want of ordinary care and prudence which contributed to the injury.

Prima facie, when a passenger, being carried on a train, is injured without fault of his own, there is a legal presumption of negligence, which the carrier must remove by proof.

If a car is thrown from the track and crushed, and there is a broken rail the jury may infer negligence from these facts; and the *onus probandi* will be shifted to the carrier.

3. SAME: *Bound to utmost diligence.*

Railway carriers of passengers are bound to the utmost diligence which human skill and foresight can effect; and if injury occurs by reason of the slightest omission in regard to the highest perfection of all the appliances of transportation, or the mode of management at the time the injury occurs, the carrier is responsible.

4. INSANE PERSONS: *Contracts of, not void.*

Insane persons have no complete power of contract, but their contracts are not, in general, absolute nullities.

APPEAL from *Clark* Circuit Court.
Hon. L. J. JOYNER, Circuit Judge.
Witherspoon, Battle, for appellant.
J. M. Moore, contra.

ENGLISH, C. J. On the sixteenth of March, 1877, Bailey R. George commenced this action in the circuit court of Clark county, against the St. Louis, Iron Mountain and Southern Railway company, the complaint alleging in substance:

That defendant was running and operating a line of railway in this state, transporting passengers and freight, and about the seventeenth of November, 1876, plaintiff procured and paid for a ticket on said railroad from Little Rock to Texarkana, and got aboard of one of defendant's trains, and while on said train, and seated in one of the passenger cars, the said train, from the negligence of the employés of said company, ran off the track, and the plaintiff thereby received a serious injury upon his head, which caused him great pain for several months, and from which he might never recover; damages laid at $5,000.

At the October term, 1877, the defendant corporation filed an answer, containing three Code paragraphs:

1. Admitting that plaintiff took passage on its said rail-

road, as alleged in the complaint, and that the train ran off the track, as alleged, but denying that the same occurred by reason of the negligence or unskillfulness of defendant's servants or employés.

2. Alleging that, on the twenty-ninth of November, 1876, plaintiff, in consideration of the sum of one hundred dollars, at the time paid by defendant to him, did release defendant from all damage by him sustained by reason of the matters and things alleged in said complaint, and did at the time execute and deliver to defendant his writing releasing it from all liability, by reason thereof, and defendant herewith files said release, and sets up and pleads the same in bar of plaintiff's alleged cause of action.

3. Alleging that, on the —— day of ———, 1876, plaintiff and defendant, by way of compromise, and settlement of the matters and things alleged in said complaint, agreed that defendant should pay plaintiff the sum of one hundred dollars, and the plaintiff would accept the same in full and complete satisfaction of any liability that might accrue to him from defendant by reason of the injuries complained of; and, thereupon, defendant did pay plaintiff the sum of one hundred dollars, as was agreed by and between them.

The instrument pleaded as a release, by the second paragraph of the answer, and filed with it, follows:

"ARKADELPHIA, ARK., Nov. 29, 1876.

"In consideration of the sum of one hundred dollars, to us in hand paid, the receipt whereof is hereby acknowledged, we, Bailey George and E. J. George, his wife, hereby release unto the St. Louis, Iron Mountain and Southern Railway company, all damages sustained by, and all rights of action accruing to us, or either of us, by reason of injuries sustained, or expense, or loss incurred by us, or

either of us, by the wrecking, near Donaldson station, of the second section of passenger train No. 1, of said railway company, on the seventeenth day of November, 1876; W. A. Chambers being the conductor.

(Signed.) "B. R. GEORGE,
"E. J. GEORGE.

"Signed in presence of
"S. MORRISON,
"C. D. HOBSON."

The plaintiff filed the following reply:

"Plaintiff says that it is probable that he did sign the receipt filed with defendant's answer, but charges that the same was executed when his mind was so affected, in consequence of the injury upon his head, that he did not know what he was doing, and he now has no recollection of signing the same, or receiving the money, and charges that he was *non compos* at the date of said instrument."

The reply was sworn to, and, during the trial, plaintiff was permitted to file an affidavit, about in the language of the reply.

On the trial, plaintiff testified, in substance, that about the seventeenth of July, 1876, he, with his family, was traveling in one of the passenger cars belonging to defendant, having paid his fare as a passenger on said railway from Little Rock to Texarkana, and was seated in said passenger car when, somewhere between Malvern and Arkadelphia, the car that he was in was thrown from the track and smashed, and he received a very severe wound on the head, from which his mind was so affected that he had no knowledge of what was transpiring, or what he did, for three or four weeks after the occurrence. That he suffered great pain from the wound, and was disabled from work or labor for about three months, and his labor was

worth, when well, about $1 per day. That he had no recollection of ever giving the railway company, or its agent, any receipt for $100, or any amount, in full satisfaction for damages, by reason of his injuries by said accident on said road, and did not recollect that he ever received any money from them.

That when he came to himself he learned from his wife that he had signed some sort of receipt, or paper, to said defendant, and went to its agent at Arkadelphia, Mr. Morrison, and asked to see it, and he said he had sent it off. Witness asked if he could give him a copy of it; he promised he would, but never did so, though he called upon him several times.

On cross-examination, he testified that he had never returned, or offered to return, the one hundred dollars that was paid his wife and himself by the defendant, and for which the receipt was given.

R. E. Reams, witness for plaintiff, testified that plaintiff and his family were brought to his hotel, near the railroad depot, on the seventeenth of November, 1876; that plaintiff seemed to be very badly wounded on the head, and to be suffering a great deal. That he and his family remained at the house of witness from the seventeenth of November to the first of December, when his family went to Texas, and he remained until the sixth of January, 1877. Witness was in his room every day from the time he came until after the sixth of December, and some days he seemed not to be in his right mind, talked at random, and flighty, and sometimes he seemed to be rational.

That defendant, by its agents, paid the board of plaintiff and family, which was about $330.

Dr. Wallis, of Arkadelphia, testified that about the seventeenth of November, 1876, he and four other physi-

cians, were called, by agents of defendants, to attend upon a large lot of men, women and children, who had been wounded by an accident on the railway between Arkadelphia and Malvern. Dr. Dale and himself attended to plaintiff's wound, which was a severe scalp-wound—removing the scalp and soft part of the bone of the skull back. They drew it back to its place and sewed it up. Did not notice that his mind was much affected, but only saw him a few times, he being the patient of Dr. Dale. Saw plaintiff on the twenty-ninth of November, and his mind was clear. The railway company paid bill of witness for attending on the wounded.

STANTON testified that he was engineer on the train which was wrecked on the seventeenth of November. The rear cars ran off the track, were turned over, and badly broken up. The engine and baggage car remained on the track. Did not know what caused the accident. When he went back he found a broken rail. Did not know whether this was the cause, or some part of the rear cars giving way. There was no carelessness or negligence on the part of the men in charge of the train.

Here plaintiff closed.

Defendant read in evidence the release pleaded.

SOLOMON MORRISON, for defense, testified that he was agent for defendant at Arkadelphia, at the time of the running off of the train by which plaintiff was injured. He, as such agent, settled with plaintiff for the injury done him by the accident; paid him for the company $100, with the understanding that the company would also pay his board bill, doctor's bill and drug bill, while he was disabled, which were paid through witness. He settled with other parties who were injured at the same time, and then went to settle with plaintiff. There had

been a release drawn up for him to sign, in consideration of the receipt of $60. He declined to accept that amount. Witness then asked him what amount he would accept. He said he thought $100 would be about what was right. Witness told him he would telegraph Mr. Dudley his proposition immediately; did so, and received in reply, "Pay Mr. George one hundred dollars." Witness then drew up a release with a consideration of $100, went over to plaintiff's room and paid him $100, and he and his wife signed the release. Mr. Hobson went with witness to the room, and was present during the whole transaction.

Plaintiff and wife seemed to understand what the payment of the money and the signing of the release were for. They made no objections to it, and seemed perfectly satisfied. Plaintiff was sitting up in the bed at the time he signed the paper. Witness saw no difference in his mental condition then and at any other time since. He seemed perfectly sane. The payment of the money and the signing of the release occurred about two weeks after the accident.

C. D. Hobson testified that he was present in plaintiff's room when the $100 was paid, and the release signed, and witnessed it. Plaintiff was sitting up in bed when he signed the receipt. His wife, and several other persons, whom he took to be members of his family, were present, and his wife also signed the paper. Witness was in the room twenty or thirty minutes, and plaintiff seemed to talk rational—seemed to be in his right mind; did not observe anything unusual in his deportment. Had not seen him before, and did not notice him particularly. Was conductor of one of defendant's trains, and was asked by Morrison to go with him to plaintiff's room and witness

the payment of the money and the execution of the release.

STANTON, called for defense, testified that he was engineer on the train that was wrecked; was running at the customary rate of speed for passenger trains. There was no carelessness or want of skill or negligence on the part of the employés in charge of the train. The conductor was a competent man.

DR. WALLIS testified that he was one of five physicians who were called upon by the attorney and agent of defendant to assess the probable damage by loss of time on account of injuries received, and, as he remembered, assessed plaintiff's at fifty or sixty dollars—supposing that this would cover the time he would probably be prevented from his usual occupation, the expense being borne by defendant.

H. W. MCMILLAN, attorney at-law, testified in substance, that he submitted the proposition of defendant to pay plaintiff fifty or sixty dollars. His family were in the room, and a Mr. French, a friend of the family; and they all talked over the matter, mostly between Mr. French and the family, and it was decided that they would not take less than $100 for injuries to plaintiff. Plaintiff also talked about it, and witness did not notice that his mind was affected; he was sitting up in the bed, with his head bound up. The basis of the proposed settlement was that the company was to pay all expense incurred by persons who were injured—board bill, drug and physicians' bills, and such an amount for loss of time as would be assessed by a board of physicians (who were agreed upon), in view of the time the physicians thought would be required to cure them, and the value of the time. The doctors esti-

mated the amount that ought to be paid plaintiff at $50, and he refused to take it, but wanted $100.

JOHN M. MOORE testified that, as attorney for the railway company, he went to Arkadelphia on the next day after the accident, to arrange for and compensate the wounded for their injuries, and, with the representative of the injured parties, called upon five physicians in attendance to assess the probable damages, and they did so, and it was paid in most of the cases. Plaintiff's, as he remembered, was fixed at $50 or $60. Defendant was to pay the board of the injured parties, and for medical attention, medicine, etc.

The above being in substance all the evidence introduced at the trial, plaintiff moved the following instructions, which the court refused:

"1. If the jury find from the evidence that plaintiff received personal injuries while traveling upon the cars or railroad of defendant as a passenger, they will find for plaintiff such damages for the injuries as the proof in the case will justify, not exceeding the amount in the complaint.

"2. If the jury believe from the evidence that plaintiff's mind was in a state of derangement at the time he signed the release introduced by defendant, they will disregard the same, and find for plaintiff such damages as he has proven.

"3. That if they believe from the evidence that, in consequence of the injuries received by plaintiff, he was not of sound mind at the time the release was signed and executed, they will find for plaintiff."

Defendant moved five instructions, to all of which plaintiff objected. The court gave the first and fifth, and refused the others. But part of the second and none of

the third and fourth are copied in the bill of exceptions, the clerk stating their loss.

The first and fifth given are as follows:

"1. If the jury find from the evidence that the servants and employés of the defendant, in charge of the train at the time of the accident which produced the plaintiff's injuries, were not at the time of the accident guilty of any negligence or unskillfulness, they will find for the defendant.

"5. If the jury find that plaintiff was at the time of signing the release suffering from temporary insanity, from which he has since recovered, it was his duty upon recovery, if he desired to repudiate the contract, to restore or offer to restore the money paid him by the defendant; and if he has not done so, they will find for the defendant."

The bill of exceptions states that during the argument of the instructions, plaintiff's attorney proposed that he would admit that the jury should allow defendant credit for the amount which defendant had paid, provided they should find any damages in favor of plaintiff for his injuries.

The jury returned a verdict in favor of defendant.

The plaintiff moved for a new trial on the grounds that the verdict was contrary to law and evidence, and that the court erred in refusing the three instructions moved by plaintiff, and giving the first and fifth moved for the defendant.

The court overruled the motion, and plaintiff took a bill of exceptions and appealed.

I. The answer setting up no set-off or counter-claim, appellant was not entitled to reply under the Code practice. *Gantt's Dig., secs. 4577–8–9.*

He should have filed the affidavit before the trial, im-

peaching the release pleaded by the second paragraph of the answer, and filed with it. *Ib., sec. 2495.*

Appellee complains that the court permitted him to file the affidavit during the progress of the trial, but as the verdict and judgment were in its favor, and it is not appealing, it was not prejudiced by the error, if any. The court doubtless may exercise discretion in such matters in furtherance of justice.

II. Passing, for the present, the question of negligence, the weight of evidence seems to be that appellant was not insane at the time he executed the release. He was the only witness that swore that he was insane at that time. Reames testified that some days he seemed not to be in his right mind, and at other times he appeared rational. He did not state that he was present when the release was signed, or what the condition of appellant's mind was on that day. The testimony of the attesting witness, and others, conduced to prove that he was not *non compos mentis* when he executed the release, and no fraud or imposition appears to have been practiced upon him by agents of appellee. The question of insanity, however, was for the jury, and if properly submitted to them by the court, they were the judges of the evidence.

III. As a proposition of law, the first instruction moved for appellant, and refused by the court, was not correct, because it ignored negligence. The complaint averred, and had to aver, negligence to be good pleading. *St. Louis, Iron Mountain and Southern Railway Company v. Yocum, ante.*

To the liability of the railway company, as passenger carriers, two things are requisite—that the company shall be guilty of some negligence or omision which mediately or immediately produced or enhanced the injury; and that

the passenger should not have been guilty of any want of ordinary care and prudence which contributed to the injury, etc. *2 Redfield Law of Railways, p. 223.*

It is a familiar rule, that what is essential to be alleged, must be in some mode, and by some kind of competent evidence, proved, if denied.

"The rule of responsibility differs from the rule of evidence. *Prima facie*, where a passenger, being carried on a train, is injured without fault of his own, there is a legal presumption of negligence, casting upon the carrier the onus of disproving it. This is the rule when the injury is caused by defect in the road, cars or machinery, or by want of diligence or care in those employed, or by any other thing which the company can and ought to control as part of its duty, to carry the passengers safely; but this rule of evidence is not conclusive. The carrier may rebut the presumption, and relieve himself from responsibility, by showing the injury arose from an accident which the utmost skill, foresight and diligence, could not prevent." *Meir v. Pennsylvania Railroad, 64 Penn. State, 230,* and cases cited; *Cooley on Torts, p. 663; Wharton Law of Negligence, sec. 661.*

Appellant proved that the car in which he was seated was thrown from the track and crushed, and that there was a broken rail. The court should have charged the jury that they might infer negligence from these facts, and that thereby the *onus probandi* was shifted to appellee.

IV. The first instruction given for appellee was too narrow, because it confined the question of negligence to the servants and employés of the corporation in *charge of the train* at the *time of the accident*, when it might have been the result of previous negligence on the part of the company, or other employés than those in charge of the train

at the time of the accident and injury to appellant. What was the condition of the track; why was the rail broken, and when was it broken? Was the car badly constructed, or out of repair? The evidence is silent as to these matters.

Railways are not insurers of passengers, and not responsible for unavoidable accidents, but "the cases all agree that passenger carriers by railway are bound to the utmost diligence which human skill and foresight can effect, and that if injury occurs by reason of the slightest omission in regard to the highest perfection of all the appliances of transportation, or the mode of management at the time the damage occurs, the carrier is responsible." *2 Redfield Law of Railways, p. 219.*

V. The second and third instructions asked for appellant, and refused by the court, were, in substance, that if the jury believed, from the evidence, that his mind was in a state of derangement when he signed the release, or that in consequence of the injury he was not of sound mind, they should find for him. This was in effect assuming, upon the hypotheses stated, that the release was absolutely null and void, and incapable of ratification.

Persons who are insane have no complete power of contract. Yet their acts of this sort are not, in general, absolute nullities. *Bishop on Contracts, sec. 284.*

"There are cases," says MR. BISHOP, "which seem to hold, or in which the judges incautiously state the doctrine to be, that, where a contract is impeachable for insanity, it is absolutely void. And perhaps there may be circumstances in which this is so by the better doctrine. If the insanity is complete and profound, the law ought, in reason and justice, to be so held. But in most of the cases the insanity is, on the facts, only partial; and the contract is generally

adjudged to be merely voidable by the insane person, or his legal representative, and, while not so avoided, binding on the other party. It may be ratified by the insane person on his restoration to reason. But, before ratification, if, for example, it is a deed of real estate, it conveys a seizin to the grantee." *Ib.*, *sec. 296*, and cases cited. *Allis v. Billings*, *6 Metcalf* (*Mass.*), *417*.

If appellant was in fact not in his right mind when he executed the release, as he stated, it was not a case of such insanity as would render the contract absolutely null and void, so that he could not ratify it on becoming rational.

VI. The fifth instruction given for appellee, in effect, submitted to the jury the question whether or not appellant was suffering from temporary insanity when he signed the release, but declared, as a matter of law, that he could not recover unless he had restored or offered to restore to appellee the money paid him as a consideration for executing the release.

A similar proposition was disapproved in *Henry*, *ad.*, *v. Fine*, *23 Ark.*, *417*, where Brandon had made a bill of sale for a slave when insane, and his administrator brought replevin for the property.

In *Allis v. Billings*, *sup.*, the court said: "Adopting, as we do, the principle that the deed of an insane person is only voidable, this, while it gives the insane grantor full power and authority to avoid the deed, and thus furnishes full protection to him against all acts injurious to his interests, done while he was *non compos*, also entitles the other party to set up the deed, if he can show a ratification or adoption of it, by the grantor, after he is restored to a sound mind. If the grantor, when thus capable of acting, and with full knowledge of his previous acts, and of the nature and extent of them, will deliberately adopt and

ratify them; if he will knowingly, and in the exercise of his proper faculties, take the benefit of a contract made while he was insane; it is competent for him to do so. But the consequence will be to give force, effect, and validity to the contract, which was before voidable." See, also, *Arnold v. Richmond Iron Works, 1 Gray (Mass.), 413.*

Appellant testified that he had no recollection of receiving any money from the agent of appellee.

If insane when he received it, the money having been paid him in the midst of his family, whether he remained ignorant of the fact, after the restoration of his mind, and down to the time of the commencement of the suit, was a question of fact, which should have been submitted to the jury, as well as the question of his insanity at the time of the execution of the release.

For the errors of law above indicated, we think it safer to reverse the judgment, and remand the case, that the issues of fact may be again submitted to a jury, with proper instructions from the court.

McMinn et al. vs. Shultz.

1. Bill of Exceptions: *Must be signed by judge.*

A bill of exceptions not signed by the judge, and apparently otherwise incomplete, can not be considered as part of the record, in this court.

APPEAL from *Jackson* Circuit Court.
Hon. A. C. Pickett, Circuit Judge.
Coody, for appellant.

Harrison, J. This was replevin for two bales of cotton,

commenced before a justice of the peace by appellee against appellants. The plaintiff recovered judgment before the justice, and the defendants took an appeal to the circuit court. In the circuit court the plaintiff, as before the justice, recovered judgment for the cotton, or, if delivery could not be had, for the value thereof, found—and for his damages assessed.

The record presents no question for our decision. There appears in the transcript what purports to be a bill of exceptions, but which is not signed by the judge, and is, apparently, otherwise incomplete, which can not be considered as a part of the record.

The judgment is affirmed.

ANTHONY VS. LAWSON.

1. USURY: *How to avoid, in equity.*

He who comes into a court of equity for relief against a judgment, conveyance, or other security, upon the ground of usury, must have paid or offered to pay what is really and *bona fide* due from him, in accordance with the maxim that he who seeks equity must do equity.

APPEAL from *Lonoke* Circuit Court in Chancery.
Hon. J. W. MARTIN, Circuit Judge.
Hallum, for appellants.
Trimble and *Chapline*, *contra*.

HARRISON, J. This was a suit in equity, by Philip Lee Anthony and L. M. Anthony, his wife, against Henry C. Lawson and C. L. Kline, to enjoin the sale of certain lands under a mortgage with power of sale.

The plaintiffs alleged, in their complaint, that the lands, which were the separate property of the said L. M. Anthony, and of which there were about 1,770 acres, and worth $5,000—having been sold at a judicial sale for a grossly inadequate price, and the plaintiffs being allowed by the purchaser to redeem them by refunding to him the sum paid, they, on the fourteenth day of November, 1877, for that purpose, borrowed from the defendants $410 for thirty days, at six per cent. interest per month—for which they gave them their note, including therein the interest as part of the principal—and, as security for the note, a deed of trust upon the lands; that when the note fell due they paid $100 upon it; and, on the seventeenth day of December, 1877, gave to the defendant Lawson a new note, payable in thirty days, for $345.05—the balance, and interest on it at three per cent. per month, and executed to him a mortgage, with power of sale, on the lands to secure it—and took up the former note and deed; that Lawson assigned this latter note, before maturity, to the defendant Kline, who was conversant with the transaction, and knew that the usurious interest was included in the note; and that the note having become due, Lawson was about to sell the lands under the power in the mortgage for its payment.

They made in their complaint no offer to pay the sum borrowed, with legal interest, or to pay anything.

The defendants demurred to the complaint, as not stating facts sufficient to constitute a cause of action. The court sustained the demurrer, and dismissed the complaint. The plaintiffs appealed.

Since the appeal was taken, Philip Lee Anthony has died, and the suit has been abated as to him.

It is a well settled and established rule, that he who

comes into a court of equity for relief against a judgment, conveyance, or other security, upon the ground of usury, must have paid, or offered to pay, what is really and *bona fide* due by him, in accordance with the maxim, that he who seeks equity must do equity. *Ruddell et al. v. Amble, 18 Ark., 369; Pickett et al. v. Merchants' National Bank of Memphis et al., 32 Ark., 346; Rogers v. Rathbun, 1 Johns. Ch., 367; Fanning v. Durham, 5 Johns. Ch., 122; Tiffany v. Boatman's Institution, 18 Wall., 375; 1 Story Eq. Ju., 64, e; Bisp. Eq., 222.*

But it is, however, insisted by the appellant, that as all contracts for a greater rate of interest than ten per cent. per annum are, by section 13, Article XIX, of the Constitution of the State, declared to be void, as to *principal and interest*, a court of equity now has no authority to require, as a condition of relief, that the plaintiff shall pay what he justly owes the defendant.

When the case of *Ruddell et al. v. Amble, supra*, was decided—the statute, *section 7, chap. 92, Gould's Dig.* (which has been re-enacted—*Act of February 9, 1875*), made all such contracts void, and except as an inhibition to the legislature to authorize a greater rate of interest, we are unable to see any more force in the constitutional provision than in the statute. The statute made them as wholly and entirely void as does the constitution.

The doctrine, as to the interposition of courts of equity to relieve against such contracts, is most clearly stated by Judge Story. He says: "In cases of usury, this distinction has been adopted by courts of equity. All such contracts being declared void by the statute against usury, courts of equity will follow the law in the construction of the statute. If, therefore, the usurer or lender come into a court of equity, seeking to enforce the contract, the court will refuse

any assistance, and repudiate the contract. But, on the other hand, if the borrower comes into a court of equity, seeking relief against the usurious contract, the only terms upon which the court will interfere, are, that the plaintiff will pay the defendant what is really and *bona fide* due to him, deducting the usurious interest, and if the plaintiff do not make such offer in his bill, the defendant may demur to it, and the bill will be dismissed. The ground of this distinction is, that a court of equity is not positively bound to interfere in such cases by an active exertion of its powers; but it has discretion on the subject, and may prescribe the terms of its interference; and he who seeks equity at its hands, may well be required to do equity. And it is against conscience that the party should have full relief, and, at the same time, pocket the money loaned, which may have been granted at his own mere solicitation. For then, a statute, made to prevent fraud and oppression, would be made the instrument of fraud. But, in the other case, if equity should relieve the lender, who is plaintiff, it would be aiding a wrong-doer, who is seeking to make the court the means of carrying into effect a transaction manifestly wrong and illegal of itself." *1 Story Eq. Jur., 301.*

There was no error in dismissing the complaint; but should the appellant yet tender the sum borrowed, with legal interest, she would, upon its refusal, be entitled to ask the aid of the court, and have the sale of the lands enjoined.

Affirmed.

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57 415
57 467
34 632
70 386

OLIVER VS. THE STATE.

1. NEW TRIAL: *When circuit court should grant.*

The circuit judge has the discretion to grant new trials in all cases, where he is satisfied that the ends of justice will be best subserved thereby; and should not hesitate to exercise it where he is dissatisfied with a verdict, as being the result of excitement, passion or prejudice, or any other influence save a calm consideration of the facts in evidence.

2. SAME: *For want of evidence to support verdict.*

The following rules seem to result from all the previous decisions of this court in relation to setting aside verdicts for insufficiency of evidence:

1. Where there has been a conflict of evidence, a new trial will not be granted by the supreme court, merely because the preponderance of evidence in the mind of the court, may seem to be against the verdict.
2. But in all cases, even in those of conflict, the supreme court will direct a new trial, when, upon inspection of the evidence, the verdict is so clearly and palpably against the weight of it as to shock a sense of justice.
3. A new trial will be granted where there is no evidence at all to support the verdict, or where it fails in some material link. The jury will not be allowed to supply the missing link by inferences and presumptions from other facts, unless they be legitimate and fair presumptions, such as naturally follow.

APPEAL from *Phillips* Circuit Court.
Hon. J. N. CYPERT, Circuit Judge.
Tappan & Horner, *Rose*, for appellant.
Henderson, Attorney General, contra.

EAKIN, J. The appellant was charged with the murder of Robert N. Yerby, convicted of manslaughter, and sentenced to five years' imprisonment in the penitentiary.

There is no complaint of any error in the admission or rejection of testimony. Up to the rendition of the verdict the trial is conceded to have been fair. The instructions

were all that the appellant asked, and as favorable as he could have desired. A new trial was asked, simply on the ground that the verdict was contrary to the law and the evidence. The court refused, and the propriety of this refusal is all that we have to determine. The evidence presents, substantially, the following history:

Upon the fourth of July, 1875, a bitter quarrel occurred between the deceased and his friends on one side, and the appellant on the other. Very insulting language had been used on both sides; the deceased having, first, accused the father of appellant, to his son, of having broken open a letter improperly. In the course of the quarrel, the deceased had been taunted with his improper relations with a negro woman, and had responded by saying she was as good as any white woman in the "diggins," and explained that he meant it for Oliver's wife. The result of the quarrel on the fourth was that Oliver fled from the crowd, which was composed mostly, if not wholly, of Yerby's friends, and was pursued by some of them a short distance, but reached his home in safety. The proof shows generally that there was bitter feeling between Yerby on one side, and the Olivers on the other, and passionate threats had been made by both Yerby and R. H. Oliver.

The parties, it seems, lived on the same side of the Mississippi river, at no great distance from each other, but using different landings. Yerby lived at the landing below, and the elder Oliver, the father, at the upper landing, *and above*, the distance around by the river being eight or ten miles, the distance across being short, and all below Helena. The appellant lived in the bend, but used the upper landing.

Upon the evening of the quarrel, Yerby returned home much excited and stung by the taunt regarding the negro

woman. He wrote, and sent by a friend, to R. H. Oliver a note, denouncing him as "a scoundrel and a damned puppy," offering to give him satisfaction, and referring to the bearer of the note as his friend. It was evidently intended as a challenge. Oliver replied, verbally, to the bearer, that he would not fight Yerby in a duel; but that *he* was going up to Helena next day to institute proceedings at law against Yerby.

That night Yerby got upon the steamer A. J. White, passing up. He was much excited, drinking and crying; spoke of his quarrel with the Olivers, and declared that it would have to be settled that night. It is in proof that although quiet when sober, he had the reputation of being a desperate and dangerous man when drinking; and that he was more often drinking than cool and sober.

On approaching the landing of the Olivers, the boat was hailed by R. H. Oliver discharging a gun for the purpose. The boat neared the landing, when Yerby discovered the Olivers, father and son, coming aboard. He exclaimed: "Here they come, now!" ran down the steps from the boiler-deck, and took a position behind a stancheon at the foot of the first flight of steps, with a pistol in his hand. When the Olivers came aboard, the torch-light was extinguished, which had been held out on the land side, and the Olivers started up the steps. The father, being before, passed Yerby without seeing him. The son came after, with the empty gun in his hands. The lock of one barrel was out of order, and the other barrel had been discharged to hail the boat. Yerby seized hold of the gun with his left hand, held the pistol in a threatening attitude with his right, and accusing Oliver of having brought the gun aboard for him. R. H. Oliver explained that the gun was not loaded, and Yerby said it was a damned lie. The father,

hearing the noise, turned, and some quick words passed between him and Yerby. There is some proof that Yerby turned the pistol on the father; others say he had it by his side, but still holding the gun with his other hand, when R. H. Oliver drew a pistol from his pocket with his left hand, shot Yerby, and killed him. The father shot about the same time, but the shot did not take effect.

After the death of Yerby, the Olivers had the boat stopped and were put ashore. They explained it by showing they had no loaded arms, and feared they might be injured by Yerby's friends. The gun-barrel was empty, and the pistol of the father had only one chamber loaded, which had been discharged in the fracas.

This is all the material evidence. The verdict, being for manslaughter, is an acquittal of murder, and positive against malice. This excludes from consideration all that happened on the fourth of July, except so far as it may have contributed to make the impression on R. H. Oliver, at the time of the contest, that his or his father's life was endangered by Yerby's assault. This excludes also from consideration all the threats made by Oliver, as the killing could not have been in pursuance of the threats without murder. It also excludes any supposition that the Olivers went aboard the boat with intent to attack Yerby. Indeed the proof is positive that they went aboard for peaceful and proper purposes, and that their arms were not prepared for a fight, in any suitable manner. There is no proof that either of them knew that Yerby was on board the boat.

The only question left for the jury to determine was this: Did Oliver kill Yerby under a reasonable apprehension that if he did not, Yerby would either kill him or his father, or inflict upon one or the other of them great

bodily harm, and were the circumstances such that he could not safely withdraw from the contest? If he had such reasonable apprehension, and could not safely withdraw by the exercise of ordinary prudence and presence of mind, he was justified in killing.

This was a question for the jury in the first place, and they found, in effect, that Oliver did not kill Yerby in malice, but under circumstances which did not justify the act in self-defense. In other words, to sustain the verdict, they must have found either that Oliver had no reasonable ground to apprehend the death or bodily harm of himself or his father, or that he might by ordinary prudence have avoided it without the necessity of killing Yerby.

The attack of Yerby upon appellant was sudden, unexpected and menacing. He seized Oliver's gun with one hand, using violent and angry language; and when Oliver explained to him that it was not loaded, he answered that it was "a damned lie." He had a pistol in his right hand, which in a second could be pointed and fired in any direction. The struggle for the gun continued on the narrow steps of a steamboat staircase, boarded up on each side, leaving no reasonable chance to escape with safety. Yerby was known to be a deadly enemy, a man much exasperated, desperate and dangerous when drinking, and likely to cut and shoot. He had been drinking then. There can be little doubt that he meant it should result fatally to himself or one of the Olivers. It is most probable that, if Yerby had not been killed, he would in his excited condition have discharged his pistol at appellant or his father before the contest was over.

It devolved, in the first instance, upon the honorable circuit judge to determine, upon the motion for a new trial, whether or not the verdict was contrary to the law

and the evidence. This is a duty of great delicacy, but imperatively required, especially in criminal cases where the law itself compels the jurors to give to the prisoner the benefit of all reasonable doubts. The jurors are, nevertheless, the judges of the facts, and of the law in its application to them. It is the duty of the circuit judge so far to respect their province as not to interfere with their verdicts rendered without misconduct upon proper instructions; and weighing the evidence. At the same time, the strict rules established here for the regulation of this court do not apply to the circuit judges. They preside in the courts and take personal cognizance of all that occurs in the progress of causes. It is their duty to see that juries do not transcend the proper limits of their authority, and that all trials are fair and in accordance with law. The circuit judge has the discretion to grant new trials in all cases where he is satisfied that the ends of justice will be best subserved thereby, and should not hesitate to exercise it where he is dissatisfied with a verdict, as having reason to believe it the result of excitement, passion, prejudice, or any other influence save a calm consideration of the facts in evidence.

Upon the refusal of the circuit judge to grant a new trial, a stricter rule has been applied here, which must govern our action in the case in judgment. This rule, as originally laid down in the case of *Howell v. Webb, 2 Ark., 360,* was that "to authorize a new trial, the verdict must have been against the weight of evidence—so much so that on the first blush of it, it would shock our sense of right and justice." This principle has been recognized and the language repeated in many subsequent cases. [See *Vandever v. Wilson, 5 Ark., 407; Hazen v. Henry, 6 Ark., 89; Lewis v. Read, 6 Ark., 428; State Bank v. Woody*

et al., *10 Ark.*, *638; Calvert v. Stone 10 Ark.*, *492;* and many subsequent cases]. In the case of *Drumer v. Brown*, *10 Ark.*, *140*, Justice Walker referred with approbation to *Howell v. Webb* (*supra*), but announced the doctrine in another form, to-wit: That a new trial would never be granted here on the *mere weight* of evidence, unless it were *clearly insufficient.* It is obvious that the effect of the declarations is, in each case the same. In the case of *Hubbard v. State*, *10 Ark.*, *378*, it was not essential that the evidence should show guilt beyond question, but only necessary that it should not appear *actually insufficient.* So in the case of *Mayers v. State*, *7 Ark.*, *174*, it had been held that a new trial could not be granted here on the *mere weight* of evidence; and in *Robinson v. State*, a new trial was refused because there was no "palpable injustice" in the verdict—*7 Ark.*, *122.* So also, in *Spratt et al. v. Vaughn*, *10 Ark.*, *474*, this court refused a new trial where the verdict turned on the *weight of conflicting* evidence; and in *Bivens v. State*, it was held that a *slight dissatisfaction* with the verdict was not sufficient for reversal. [See *11 Ark.*, *455*]. In *Sparks v. Beavers*, *11 Ark.*, *630*, Mr. Justice Walker, delivering the opinion of the court said: "This court has repeatedly decided that it will not reverse the decision of the circuit court for refusing a new trial when the only ground presented was the mere weight of evidence, unless there is a *total lack* of evidence upon some point indispensably necessary to a recovery, *or* unless the verdict is *clearly and palpably contrary to the weight of evidence.*"

There is another class of cases, in which there has been evidence of some facts, from which the jury has inferred other facts necessary to sustain the verdict, in which this court has granted a new trial on the grounds that the

facts shown did not warrant the inference, and that therefore the evidence was insufficient. Of this nature are the cases of *Wait v. White, 5 Ark, 640;* and especially *Pogue, use of Calvert, v. Joyner, 7 Ark., 462.* These are not cases of *conflict*, but want of evidence. I have cited only the earlier cases, because in these the principles governing this court in such cases, have been announced, and an effort has been made to formulate them into rules. The cases have been followed in the subsequent decisions, to be found in almost every volume of the reports. Of course, no positive rules can be announced of strict and unvarying application, but the general policy of the court may be fairly understood from what has been said.

It will be seen, and in view of a very common misapprehension it is worth noting, that this court has never adopted the rule of refusing a new trial in all or any cases, where there has been *any evidence whatever*, however weak, to support the verdict—what is called a *scintilla* of evidence. The following more rational rules seem to result from all the decisions:

1. Where there has been a *conflict* of evidence a new trial will not be granted here, merely because the preponderance of evidence, in the mind of the court, may seem to be against the verdict. That deference will be accorded to the jury whose peculiar province it is to compare, sift, and weigh the evidence; and to the circuit judge, whose duty it is to supervise the trial, and grant a new one, if, in his opinion, the verdict has resulted from improper influence misconduct of jurors, excitement, prejudice, hasty judgment, misapprehension of the law, or any other of the recognized causes for a new trial.

2. But in all cases, even those of conflict, this court will direct a new trial, when, upon inspection of the evidence,

the verdict is so clearly and palpably against the weight of it as to shock a sense of justice. The line lies between a mere preponderance within the bounds of a fair difference of opinion, and that gross preponderance which indicates an unreasoning passion or prejudice on the part of the jury, or misapprehension of the law, or disregard of the legitimate sphere of their action.

3. A new trial will be granted when there is no evidence at all to support the verdict, or where it fails in some material link. The jury will not be allowed to supply the missing link by inferences and presumptions from other facts—unless they be legitimate and fair presumptions, such as naturally follow.

We come now to the delicate and responsible duty of applying these rules to the case before us. There is little conflict of evidence concerning the occurrences at the time of the killing, and nothing to affect materially the credit of any witness. Indeed they agree in an exceptional manner.

The indictment was for murder, and the burden was on the state to prove the killing. This she did, and in so doing showed, substantially, the circumstances relied upon for justification. Her proof was supplemented on this point by witnesses for defendant, so that the jury had all the facts before them, without any room for presumptions. They were properly instructed, and declared, upon those facts, that the act was *not* one of necessary self-defense. The verdict upon the matter they had to consider, after the killing was divested of malice, amounted simply to a negation. They did *not* consider that Oliver killed Yerby under a reasonable apprehension of death, or great bodily harm to himself or his father, unless he did so.

We, as jurors do, must judge of men and their actions from our knowledge of human passions, human motives,

and the ordinary conduct of men in given positions. We have to judge of those of a man who had unfortunately put himself out of the pale of society by subjecting himself to the general opinion, in the neighborhood, of living in adultery with a colored woman; one who had abandoned himself to drinking; a man, plainly of violent resentments and reckless of consequences—a baffled duelist, chafing under Oliver's refusal to give him a meeting, and also under Oliver's allusion to his woman. He is known to be bitterly hostile to the Olivers and attacks them in the manner described. Almost any man would have apprehended death to himself under such circumstances, and would have little hope of finally withdrawing from the conflict unharmed. Considering the character and motives of Yerby, it is so plain to us that the Olivers were in danger, and so probable that death would have resulted to one of them had Yerby not been killed, that it shocks our sense of justice, under the evidence presented, to deny him the benefit of self-defense. We think the verdict plainly and palpably contrary to the weight of evidence, and that this case falls legitimately within the exception to the rule against disturbing verdicts.

We have intentionally refrained from any more comment on the evidence than this opinion required. It must come again before another jury, to be all considered *de novo*, with such other evidence as may be adduced.

Reverse and remand, with directions to grant a new trial, on the charge of manslaughter alone.

DENTON et al. vs. RODDY.

1. EVIDENCE: *Decree.*

The certified copy of a decree alone, is sufficient evidence that such a decree has been made.

2. DECREE: *By consent of unauthorized attorney, not void.*

Though an attorney appears for a party to a suit without his authority, and consents to a decree, it is only voidable for fraud, and can not be collaterally attacked.

APPEAL from *Woodruff* Circuit Court in Chancery.
Hon. J. N. CYPERT, Circuit Judge.
Coody, for appellants.
Turner, *contra.*

EAKIN, J. On the thirteenth of May, 1844, a tract of land in Jackson (now in Woodruff) county, owned and occupied by Elias B. Roddy, a married man, was sold under execution against him from the circuit court, in favor of Bennett, Morrill & Co., and purchased, at said sale, by William F. Denton, at a price much below its actual value, or the amount of the execution. The sheriff's deed was duly executed.

The plaintiffs in that case, charging that said Denton was their attorney, and had taken the lands to secure the full payment of their judgment, and had died, filed a bill in the Jackson circuit court, on the tenth of July, 1849, against said Roddy, and the widow, executors and heirs of Denton, to subject the lands to the payment of their debt, in accordance with the trust. Roddy filed a cross-bill in that case and died. The suit was revived against his administrator, widow and heirs, who came in and adopted

the cross-bill of Roddy. His widow (the appellee in this cause, and a party in that) also filed her separate cross-bill against all the other parties, claiming dower.

At the May term, 1860, of said court, a decree was made sustaining the lien of complainants to the full amount of their judgment at law, and dismissing the cross-bill of the representatives and heirs of Roddy for want of equity. The dower of the widow was allowed upon her separate cross-bill, and commissioners were appointed to assign it. They reported at the December term, 1860, but their report met with exceptions from the Denton heirs, which were sustained. The cause was afterwards continued, from term to term, without further action upon the matter of dower, until the April term, 1869.

Meanwhile, Roddy, and his wife after his death, remained in the possession of the lands, enjoying the full use thereof, until about the first of January, 1867, after which, until the occurrences hereinafter set forth, she occupied by tenants. In March, 1868, the lands were sold for the taxes of 1867, and bought by R. W. Martin, who obtained a certificate of purchase, and on the twenty-third day of March, 1869, assigned it, for valuable consideration, to the heirs of William F. Denton.

This had been procured by Franklin D. Denton, the executor, and one of the heirs of William F., who had come from Batesville to Augusta upon affairs of the estate of his father. He found said doweress, Martha Roddy, preparing to go, with a married daughter, to live in Texas, and selling off her personal property to obtain money for the purpose. He demanded of her rents, for two-thirds of the place since her husband's death, claiming that to be due, and estimating the amount, together with some taxes he had paid, at $1,500. She expressed herself utterly unable to

pay that amount. He insisted that she should do so, or release any further interest in the lands, which he would take in satisfaction of the debt. She declined, and he became angry, and threatened if she did not comply by a certain hour of the day, at which he meant to start on his return to Batesville, he would sue her, and attach her personal property, and her interest in the dower, as well. She became alarmed and distressed. She was satisfied that he would execute the threat. Her heart was set upon going to live in Texas with her daughter, and the course threatened would render it impossible. She yielded, and executed the release.

At the succeeding term of the Jackson circuit court, this release was brought in; and, it being shown further that the heirs of Denton had paid the whole judgment of Bennett, Morrill & Co., and the parties to the original and cross-bills appearing by their solicitors, a final decree was made, reciting that said Martha had, in due form of law, since the last continuance, conveyed all her interest to the heirs of William F. Denton, and quieting their title and possession. And so the matter rested.

More than six years afterwards, on the seventh of July, 1875, Martha Roddy filed this bill in Woodruff county (to which the territory including the lands had been transferred) against the Denton heirs, renewing the claim of dower, and basing her equity upon her ignorance of her rights at the time she executed the release, and the conduct of the executor, F. D. Denton, in obtaining it. The charge amounts, in effect, to this, that his manner was harsh, overbearing and unkind; that her happiness and comfort depended on going with her daughter; that she executed the instrument under a sort of moral duress; and that she had only recently discovered her rights in the matter, with

regard to her liability for rents. She makes no allusion to the former suit or decree, and prays that her release be canceled, that her dower be assigned, and that she have mesne profits.

Defendants deny fraud or oppression in obtaining the release; set up the decree in the former case as *res judicata;* and rely, also, upon the tax title and the statute of limitations.

Upon the hearing, complainant sought to avoid the effect of the decree of the Jackson circuit court, on the ground of fraud in obtaining it, and want of jurisdiction.

The chancellor gave the relief asked as to dower, and ordered an account of rents and profits since the possession of the Denton heirs—giving complainant a decree for one-third, after deducting taxes and improvements. Defendants appealed.

The first question presented by the record, regards the jurisdiction of the Jackson circuit court to render the decree of April, 1869, quieting the title of the Denton heirs, against the creditors and widow of Elias B. Roddy.

Enough appears from the pleadings, evidence and exhibits, to show that the parties to this bill were all parties to that suit.

The certified copy of the decree alone was sufficient evidence that such a decree had been made; and by its recitals and direct effect, it showed conclusively that all her right of dower, the object of this suit, had been vested in the Denton heirs, in a manner to bind her, whilst it remained in force. There were, also, certified copies of all the original papers in the case, showing the pleadings and subject-matter in controversy.

Although, in her testimony, the complainant, Mrs. Roddy, says her attorney had no authority to appear for her,

and consent to the decree, yet, if that were true, it would only make it *voidable* for fraud, and it could not be attacked collaterally. Her bill did not allude to it at all, nor, when pleaded by defendants, did she seek to amend her bill by proper averments to attack it for fraud. If the court had no jurisdiction, the decree is absolutely nothing, and no proceedings are necessary to avoid it. It binds nobody. Was it void, or valid, until reversed or annulled?

The county of Woodruff, composed of portions of Jackson and St. Francis counties, was established by a valid act of the legislature of Arkansas, approved November 28, 1862. The lands in controversy, upon which Mrs. Roddy and her children, the heirs of said Elias, then resided, were in the portion of Jackson transferred to Woodruff.

The act, which is not in print, provided, in section two, "That it shall be the duty of plaintiffs in all civil cases, and of the clerk of the circuit court of the county hereby established, in all criminal cases, to procure from the clerks of the circuit courts of the counties of St. Francis and Jackson a transcript from the records of their respective counties of all suits, both civil and criminal, pending against any person or persons *residing within* the county hereby established; also, the depositions and other papers on file, relating to any of said cases, so pending in any of said counties, on or before the first day of the circuit court, at the first term thereof, of the county of Woodruff, which transcript, depositions, and papers, so filed, shall be taken and considered as records of the circuit court of the county of Woodruff, and be *proceeded in* as though said suit or suits had originated in said county of Woodruff."

By section five of the act it was provided, "That it shall be the duty of the clerk of the county of Woodruff, immediately after his election, to give notice, in writing,

under the seal of his office, if there be any seal, if not, under his private seal, to the clerks and sheriffs of the counties of Jackson and St. Francis, of his election; also, of the election of sheriff of said county of Woodruff; whereupon it shall be the duty of the clerks of the different counties of Jackson and St. Francis, *upon the application of the plaintiff or plaintiffs*, in any case or cases, which may be pending in any of said courts, *who* reside in the county of Woodruff, to make out a true and perfect transcript from the record of all such matters and things as pertain to any of the said cases, and to certify the same to be true and perfect, and to attach the seal of his office thereto." * * * * "And to envelop the transcript in each case, together with the papers thereto belonging; to seal them up, and direct it to the clerk of the county of Woodruff."

These are all the sections of the act bearing upon the question before us. It will be observed that neither of them have any reference to the location of the real estate in controversy. The transfer of jurisdiction was made to depend upon residence. The policy of the act was to compel plaintiffs, having suits pending against citizens residing in the territory composing the new county, to transfer their cases there, so that the defendants might have the advantage of litigating nearer home, and at their own county seat. A like advantage, at their option, was given to plaintiffs residing within the new county, having suits pending against defendants residing elsewhere. The policy of the last provision is not so obvious, unless it were directed to encouraging business in the new county to give it a favorable start.

There is nothing imposing upon the courts of Jackson and St. Francis counties the duty of ascertaining, upon

their own motion, the residence of litigants. These things were matters *in pais*, of which a court could not take judicial cognizance, as it might of the boundaries of counties, and locations of land described by government surveys. During the progress of suits, residences frequently change. Unless something should be done to bring the fact of residence before the courts, it was not anticipated that the jurisdiction of the court should be lost over all cases against defendants resident in the new county of Woodruff. That would lead to such confusion and uncertainty of rights as to preclude any such construction of the act. It is sufficient that defendants residing in the new county were given the right, upon proper showing and motion, to insist upon the transfer, and that plaintiffs residing therein might have the option.

When the decree, in the case of *Bennett, Morrill & Co. v. The Heirs of Denton*—the heirs of Roddy and his widow—was pronounced, she was, as to them, defendant. The court had been advised that, in 1855, she was an *occupant* of the lands, but could not judicially know her to be a *resident* upon them, or anywhere else in Woodruff county. As complainant in the cross-bill against the Dentons, she made no motion to transfer the cause. It is clear that the Jackson circuit court retained jurisdiction, and that the decree of 1869 remains binding until reversed or annulled by direct proceedings in chancery.

This disposes of the case. It is unnecessary and improper in anticipation to dispose of the other questions affecting the merits. If the complainant can successfully attack the decree upon any ground recognized in equity, she would have the right to do so in the Woodruff court, as incidental to, and connected with, the principal end of her bill, to-wit: to be endowed of lands in Woodruff county

The jurisdiction of the court for that purpose will draw to it the jurisdiction to remove the impediment of a fraudulent decree of another tribunal. Fraud is not imputable to the courts, but to actors in them, and there is neither lack of comity nor contravention of policy in one court removing from its road to equitable relief, an impediment created by the fraud of the parties in another tribunal.

But the fraud should be directly charged and put in issue, and proved under the issue, and the relief should be in answer to a specific and direct prayer for the purpose. The general prayer will not cover relief as to matters which can not be collaterally considered, however plainly made out in evidence.

Reverse the decree, and remand the cause, with directions to allow the complainant, if so advised, to amend the bill, and if she should decline, to dismiss the same at her cost. She will pay the costs of this appeal. The whole costs of the court below will be adjusted by the chancellor, if the suit progresses.

FORD VS. THE STATE.

1. TRANSCRIPT IN CRIMINAL CASE: *Must show impanneling of grand jury, etc.* 34 649 58 239 58 368

The entries showing the impanneling of the grand jury and their return of the indictment into court, are parts of the record in every criminal case brought to this court; and the omission of the circuit clerks to include them in the transcripts after the publication of this opinion, will be treated as contempt.

2. CRIMINAL PRACTICE: *Insufficient verdict.*

Upon the return into court of a verdict of "guilty as charged in the indictment," which charges murder in the first degree, the court should order the jury to retire and return a verdict in proper form; but if instead, a new trial is granted, such verdict is no bar to a trial and conviction of the defendant for murder in the first degree.

3. INSTRUCTIONS:

There is no error in refusing an instruction which is sufficiently embraced in other instructions given by the court.

4. CRIMINAL EVIDENCE: *Confessions.*

The confessions of a defendant should be cautiously received, but when deliberately and voluntarily made, they are among the most effectual proofs in the law.

5. SAME: *Testimony of other crimes than the one alleged.*

When a man is charged with one crime it is not competent to prove that he has committed others; but a witness of a conspiracy may state the whole plan or purpose of the conspirators to rob several parties, though it does not appear that they executed their plan except as to the one for the murder of whom the defendant is indicted.

6. ARGUMENT OF COUNSEL: *When subject to review in supreme court.*

The subjects and range, as well as the length, of the arguments of counsel, must necessarily be left to the sound discretion of the presiding judge; and, unless grossly abused to the prejudice of a party, it is not the subject of review in the supreme court.

7. WITNESS: *Defendant in criminal case, incompetent.*

A defendant in a criminal case can not testify or make a statement to the jury contradictory of the evidence.

APPEAL from *Crittenden* Circuit Court.
Hon. L. L. MACK, Circuit Judge.
Henderson, *Attorney General*, for the State.

ENGLISH, C. J. When the transcript in this case was presented to one of the judges of this court for the allowance of an appeal, though there was attached to it the certificate of the clerk of the court below, that it was a full, true and complete transcript of the record, etc.; yet it contained no entry showing the impanneling of the grand jury, nor any entry by which it was made to appear that the indictment was returned into court by the grand jury.

In favor of human life, an appeal was allowed, and in furtherance of public justice, in accordance with the

practice of the court, a *certiorari* was awarded, upon which the clerk has returned a transcript of the entries which were wanting in the original transcript.

It seems difficult of late to get the clerks to understand that the entry showing the impanneling of the grand jury is a part of the record in every criminal case brought to this court on appeal or writ of error, and should be included in the transcript; and also the record entry showing that the indictment was returned into court by the grand jury.

To cure these omissions, the Attorney General or the court has had to order writs of *certiorari* in a number of cases, at the present and former terms; and the failure of clerks to discharge a duty, which they ought to understand and must learn, has retarded in this court the administration of public justice.

Supposing that the omissions were not willful on the part of delinquent clerks, we have not heretofore thought proper to order rules for contempt against them, but will feel compelled to do so, if such omissions occur after the publication of this opinion.

It now appears that on the sixteenth of December, 1879, Cal. Hughey, John Potter, L. L. Ford and Hiram Jeffrey, were indicted in the circuit court of Crittenden county, for murdering John Broadway, by shooting him with a pistol, on the twenty-sixth of November of that year; the indictment charging the offense in the usual form, as murder in the first degree.

Potter and Ford were arraigned, tried on the plea of not guilty, and the following verdict was returned: "We, the jury, find the defendants, John Potter and L. L. Ford, guilty, as charged in the indictment." Signed by the foreman.

They moved for a new trial on a number of grounds, and among them that the verdict was contrary to law.

The court sustained the motion, and granted a new trial

on the ground that the verdict did not fix the degree of murder of which the defendants were found guilty.

A *nol. pros.* was entered as to Potter, and he was discharged. Ford was again put on trial, and the jury found him guilty of murder in the first degree, as charged in the indictment. He moved for a new trial, which the court refused, and he took a bill of exceptions; was sentenced to be executed on the twenty-seventh of February, 1880, and prayed an appeal, which, as above shown, was allowed by one of the judges of this court.

I. The first verdict was no bar to a trial and conviction of appellant for murder in the first degree. *Allen v. State, 26 Ark., 333.*

When the first verdict was announced, however, being insufficient, the court, before discharging the jury, should have ordered them to retire, and return a verdict in proper form. *Gantt's Dig., sec. 1957; Thompson v. State, 27 Ark., 328; Levells v. State, 32 Ark., 585.*

But that was not done, and, hence, the verdict was set aside and a new trial ordered.

II. It appears from the evidence set out in the bill of exceptions, that John Broadway lived near the Mississippi river, in Crittenden county. About dark of the evening of the twenty-sixth of October, 1879, four men armed with pistols and guns, and masked, went to his house for the purpose, it seems, of robbing him of money. His wife and step son, William Daniels, were in the house with him. The leader, or "*captain*," of the masked men, as the others called him, jumped on to the porch, and exclaimed, with an oath, "Throw up your hands! We want money!" or some such words. Broadway sprang up and took hold of a chair, and the leader shot and killed him. Two or three of the men then went through the house, but what money

they obtained does not appear. The four men then took William Daniels to the woods, robbed him of some money he had, tied him to a sapling with a fishing line, and left him there.

John Potter, who was made a witness for the state, identified the four masked men to be Hiram Jeffrey, the leader, Cal. Hughey (or Hewey, as it is spelled in the bill of exceptions), appellant, Ford, and himself.

Some expressions of Ford, and circumstances, were in evidence conducing to prove that he was one of the four men.

There was no want of evidence to convict appellant, and our sense of justice is by no means shocked by the verdict.

III. It was proven that on the next morning after Broadway was murdered, seven men crossed the river in search of appellant, and found him in a cotton pen in Tennessee. Several of them testified that he said "it was a damned cold morning to call a fellow up out of his bed." One of them replied: "Yes, and a damned cold murder was committed on the other side of the river last night." To which appellant responded: "Did that damned fellow puke on me?" The word "puke" was perhaps intended for *peach.*

One of the arresting party testified that when appellant remarked "it was a damned cold morning," etc., he asked: "How many have you all got?" And witness replied: "Three, with Mr. Potter."

The same witness testified that when Potter was being examined before the committing magistrate, appellant said to him: "Do you know that I could present the bullets you wanted to kill John Broadway with?" Potter replied that he did not think he could do it.

Appellant's counsel moved to exclude the above expres-

sions made by him, as incompetent and irrelevant, and the court overruled the motion.

The witnesses proved that the expressions objected to, were voluntarily made by appellant. The court treated them as in the nature of confessions, and they were competent to go to the jury for what they were worth. *Meyer v. State, 19 Ark., 156; 14 ib., 556.*

IV. A witness also testified that, at the magistrate's trial, Hewey said to appellant and Jeffrey: "Boys, I am out of this, and, if Potter don't turn state's evidence, we are all right." To which, it does not appear that appellant made any reply.

Counsel for appellant moved to exclude this statement of the witness as incompetent and irrelevant, and the court overruled the motion.

The silence of appellant when Hewey, who was implicated with him in the crime, made the above remarks to him and Jeffrey, who was also implicated, was worth but little as a tacit admission, and such admissions should be received with great caution. We can not say, however, that the court erred in admitting it as competent for what it was worth. If appellant had felt that he was innocent of any participation in the crime, it would, perhaps, have been natural for him to have made some response to the remarks of Hewey indicating it. See, as to character and weight of such admissions, *1 Greenleaf Evidence, sec. 199; Burrill on Circumstantial Evidence, 48.*

V. Among others, appellant moved the following instruction:

"3. The jury will place little reliance on the testimony of John Potter, the accomplice, and should not convict the defendant on his evidence, unless the same be strongly corroborated by other evidence material in this case."

This instruction the court refused, but, before it was asked, the court had given nine instructions, which were not objected to by appellant, and which very fairly submitted the case to the jury upon all of the evidence, and among them the following, relating to the credit to be given to the testimony of an accomplice:

"4. An accomplice is a competent witness against his co-defendants after he has been *nol. prossed* and discharged. But the jury should weigh his evidence with great caution, and should not find the defendant guilty upon his evidence unless he be corroborated, as to all material matters, by other unimpeached witnesses, or facts and circumstances proven in the cause.

"5. But if, upon comparing his evidence with the whole evidence in the cause, they find his testimony corroborated by other witnesses, and facts in proof as to all matters material to the charge, so the jury can say, upon their oath as men, we verily believe the statements to be true, and every matter material to the issue, and their consciences approve such conclusions, they should believe and act upon his statements, relying on them as true.

"6. Unless the jury find, from the evidence, that John Potter is corroborated in every material point, and that every material allegation in the indictment has been proved by him, with such corroboration, or some other witnesses, they should find the defendant not guilty."

These instructions, unobjected to, sufficiently covered the matter embraced in the fourth instruction moved for appellant, and refused by the court. It is needless to multiply and repeat instructions announcing, substantially, the same proposition of law.

VI. The court refused the following instruction, moved by appellant:

"3. The confessions of defendant should be received with great caution, and carefully weighed, and if the evidence against the defendant consists of his confessions, unsupported by other evidence, the jury will find the defendant not guilty."

True, the confessions of defendant should be cautiously received, but when deliberately and voluntarily made, they are among the most effectual proofs in the law. *1 Greenleaf Ev., secs. 214, 215.*

In this case, the confessions of the defendant were but a small part of the evidence, and were not unsupported by other evidence.

When Broadway was murdered, his wife and step-son, William Daniels, were present, and proved, on the trial as witnesses, all of the material allegations of the indictment, except that they were unable to identify appellant as one of the masked men who perpetrated the horrid crime. He was identified by the direct testimony of Potter, which appears consistent, and was corroborated by circumstances and other evidence.

As framed, and upon the evidence and after the court had fully and fairly charged the jury upon the whole case, the third instruction asked for appellant, was properly refused—at least, we do not see that he could have been prejudiced by its refusal.

VII. The court also refused the following instruction, which, it seems, was moved for appellant during the argument, and in consequence of remarks made to the jury by the prosecuting attorney:

"5. The jury will disregard and exclude from their consideration any statement made by John Potter, a co-conspirator in the alleged crime, which tends to criminate the defendant, L. L. Ford, in other crimes contemplated by the

conspirators; such statements are not evidence in this case."

The portion of Potter's testimony, probably, referred to in this instruction, is as follows:

"The plan was formed at Hewey's boat, just before dinner. Ford was not present on the boat. Jeffrey, Hewey and another man said they were going over to plunder Broadway, Clarke, and James' store, and wanted Ford and myself to go with them. They offered Ford a lot of clothing and twenty five dollars in money. The offer was made that evening on the island to Ford. We went across that evening in a skiff, and went on down to a bluff bank about one hundred yards from the house. They then put some concerns on their faces. I had one made out of cloth over my face. Nothing was said. Ford had on a mask at Broadway's house, and had, also, a gun."

In a previous portion of his testimony he had stated what was done at the house, and how Broadway was killed.

When a man is charged with one crime, it is not competent to prove that he has committed others. Ford and his co-conspirators were charged with murdering Broadway. It was proved that he was killed in an attempt by the conspirators, to commit robbery, which made the killing murder in the first degree. And all present, aiding and abetting, were principals. *Gantt's Dig., secs. 1253, 1238.* It was competent for the witness, Potter, to state the whole plan, or purpose, of the conspirators—to plunder Broadway, Clarke and James' store—though it does not appear that they executed their plan or purpose, except as to Broadway.

VIII. The bill of exception states that "the attorney for the state, in his opening argument to the jury, dwelt with

great stress and vehemence on the evidence elicited from witness Potter, that on the night of the killing of John Broadway the conspirators contemplated robbing Clarke and James' store; that Clarke and James were the moneyed men of the county; and, if such crimes were unpunished, any of us would be liable, at any time, to be robbed and murdered by that gang."

"To which line of argument, in dwelling on crimes contemplated by the conspirators, other than the one under investigation, defendant's counsel objected, and moved the court to restrain the attorney for the state;" but the court permitted him to proceed, etc.

Counsel, on both sides, in their zeal for their clients, or causes, sometimes overstep the bounds of prudence and fairness in their arguments to juries.

The remarks objected to were made in the opening address of the attorney for the state, and the able counsel for the prisoner (Adams, Frierson and Whitsitt) had the opportunity to reply. It may be that, if we had before us the full argument on both sides, instead of a fragment of the opening speech of the prosecuting attorney, it might be seen that counsel for the defense wandered in as wide lines as the attorney for the state.

Be this as it may, the subjects and range, as well as the length, of the argument of counsel, must necessarily be left to the sound discretion of the presiding judge. And, unless grossly abused to the prejudice of a party, is not the subject of review here. *Dobbins et al. vs. Oswalt, ex., 20 Ark., 619.*

IX. It appears from the bill of exceptions that after the evidence was closed, and before the argument commenced, "the counsel for defendant asked the court to allow the defendant to make a statement to the jury." The court

stated that it would allow defendant to make an argument before the jury, on the evidence, but would not allow him to make any statements contradicting the evidence that had been introduced. To which ruling, defendant excepted.

In criminal trials, the accused has a right "to be heard by himself and counsel." *Sec. 10, Declaration of Rights.*

By the common law, the accused can not be a witness for himself on the trial, and we have no statute changing the rule.

The court offered appellant the privilege of making an argument before the jury on the evidence. This was his constitutional right. But the court announced that it would not permit him to make any statement contradicting the evidence. There was no error in this. The court may well deny counsel the right to make statements contradicting the evidence, though they may discuss the probable truth, consistency, or falsity of evidence.

Upon a careful examination of the whole record, we find no error of law to the prejudice of appellant, for which the judgment should be reversed, and it must be affirmed.

SHEPHERD VS. THE STATE.

1. NEW TRIAL: *Surprise. Discretion of court.*

A motion for new trial on the ground of surprise is addressed to the sound discretion of the circuit court, whose judgment upon it will not be overruled by this court unless clearly wrong.

ERROR to *White* Circuit Court.
Hon. J. N. CYPERT, Circuit Judge.
House, for plaintiff in error.
Henderson, Attorney General, contra.

HARRISON, J. The plaintiff in error was indicted for an assault and battery upon one Bruin Edwards, and was convicted and fined ten dollars.

He moved for a new trial upon the grounds that (1) the court excluded from the jury competent and relative evidence offered by him; (2) he was surprised by the evidence of the state's witness, Bruin Edwards; and (3) the verdict was against the evidence—which motion was overruled.

Bruin Edwards testified for the state that he was, on the evening of December 24, 1878, at the academy in the town of Judsonia, and that whilst there he was arrested and put in the custody of two men, one of whom was Horace Turner—the other he did not know—who took hold of him immediately in front of the academy, and led him, one walking on each side of him, to the guard-house, about a quarter of a mile from the academy. That after his arrest, and just before or after he passed through the academy inclosure, which was some thirty or forty feet from the academy, he was struck a severe blow on the back part of the head, which caused the blood to flow, and that when he reached the guard-house, he asked who it was that struck him after he was arrested, and the defendant answered: "I am the man that did it."

Upon cross-examination, he said he was arrested outside of the academy, but had just before been in it; and whilst standing in the aisle, he was seized by the defendant around the arms and waist, and a crowd rushing up to them, eight or ten persons—himself among them—fell out of the door.

He was then asked what he was doing in the academy, and what was going on in it when the defendant seized him, and to state all that occurred in connection with the defendant's conduct in throwing his arms around

him. But upon objection by the state's attorney, the court refused to allow him to answer the question, and so to state.

The state then proved by two other witnesses that they heard the defendant tell Edwards at the guard-house, when he asked who struck him, that he did.

The defendant then called C. C. Shepherd, who testified that Edwards, as soon as he got up after falling out of the door, commenced cutting at those around him, and he cut the defendant slightly on the wrist, and the town marshal severely about the hip. That he was immediately arrested and taken to the guard-house. The witness followed, starting after them at about fifteen or twenty steps outside the inclosure, and keeping three or four steps behind, and that no assault was made upon him whilst he was behind them. That the two men who took him to the guard-house were Horace Turner and Mitchell Riley.

J. C. White, another witness for the defendant, testified that when Edwards was taken to the guard-house, he walked on just behind up to town, and that he was struck by no one whilst he was along.

Dr. J. S. Eastland also testified for the defendant—that he saw the defendant when he caught hold of Edwards in the academy; and that after falling down the steps in the scuffle which ensued, Edwards sprang up and commenced cutting right and left with his knife, and cut the defendant on the wrist, and stabbed the marshal severely in the groin. That he went along when Edwards was taken to the guard-house until he got in town, walking about thirty feet to the left of him, and he did not think any one could have struck him without his seeing it, and was satisfied he was not struck by any one after his arrest.

The defendant offered to prove by these and other witnesses—but which the court upon objection by the attorney for the state would not permit him to do—that Edwards came drunk into the academy where there were a great many persons assembled, many of them women and children, it being a Christmas-tree occasion, and was cursing and swearing, and so loud as to be heard all over the house, to the annoyance of the persons in it; that the town marshal went up to him and politely requested him to be quiet, but when he turned away from him he began talking and cursing very loud again, and the marshal again went to him, and in a gentle manner put his hand upon his shoulder and walked down the aisle with him to near the door, and pointing out a seat to him asked him to take it and be quiet; and as the marshal then turned a little from him, Edwards took his knife from his pocket, and opened it in a threatening manner and as if he was going to cut the marshal, when the defendant sprang forward and caught him around the arms and waist.

The evidence rejected by the court was irrelevant to the issue, and was properly excluded from the jury. If admitted, it would not have tended to disprove the charge or mitigate the punishment.

The defendant, in support of his motion for a new trial, swore that he was surprised by the testimony of Edwards. That he always supposed he was indicted for catching hold of Edwards in the academy, and did not know until he heard his testimony, that he accused him of striking him after his arrest; and that he would prove by Horace Turner and Mitchell Riley, who took him to the guard-house, that he did not strike him; but that not supposing Edwards would testify as he did, he did not have them summoned. And he filed the affidavit of Turner and

Riley, that Edwards was not struck by him or any one after his arrest.

A motion for a new trial on the ground of surprise is addressed to the sound discretion of the court, whose judgment upon it this court will not overrule unless it be clearly wrong. *Nelson v. Waters, 18 Ark., 574; Cocker v. The State, 20 Ark., 62; Hill on New Trials, 379.*

The discretion of the court in this case was soundly exercised, for it was not shown that the testimony of Turner and Riley might not have been had at the trial, though not summoned—and for anything appearing to the contrary, they may have been present or conveniently near.

There can be no question as to the sufficiency of the evidence.

The judgment is affirmed.

WATKINS VS. TURNER et al.

1. WITNESSES: *Husband and wife. Magness v. Walker*, 26 *Ark., overruled.* 34 663 / 58 452

Husband and wife can not testify for or against each other in civil cases. And the incidental benefit which the husband, though a formal party, may derive from the wife's success in a suit for property, can not be noticed as a legal or equitable interest to authorize his admission as a witness. 34 663 / 70 544 / 34 663 / 76 436

The decision in *Magness v. Walker*, 26 *Ark.*, 470, that a husband or wife acting as agent for the other, may testify as to the matters of the agency, overruled.

2. SPECIFIC PERFORMANCE: *Discretion of chancellor.*

Courts of equity have always reserved the right of exercising a sound discretion in suits for specific performance, and generally refuse relief where the case is not clear, or where the complainant is in the wrong, or there are considerable countervailing equities. In such cases equity refuses to interfere, and leaves the parties to their rights and remedies at law.

3. CONTRACT: *Consideration.*

If the purchaser of land at execution sale agree with the owner, to convey the land to his wife and children, upon certain conditions to be performed by the wife, and he thereupon refrain from redeeming the land from the execution sale, this is sufficient consideration to support the contract.

4. PARTIES: *Trustees. Powers, etc.*

A contract to convey land to a wife and such of her and her husband's children as she and he shall designate, constitutes them trustees of a power to designate the children to receive, with the wife, the conveyance; and a suit for the conveyance can not be maintained until the designation is made. If either parent die before it is made, all the children will take equally with the mother. Chancery will exercise the power on the principle of equality.

APPEAL from *White* Circuit Court in Chancery.
Hon. SIDNEY M. BARNES, Special Judge.
Coody, for appellant.
Turner, pro se.

EAKIN, J. This is a bill for specific performance, growing out of the matters involved in the case of *Turner v. Watkins et al., 31 Ark., 429.* The transcript of that case, already on file here, is, by agreement of counsel and leave of the court, brought to our notice in this case, together, and in connection, with the transcript of the case appealed.

After the decision in that case, the wife of Thomas Watkins, Mrs. M. E. Watkins, who was not a party thereto, filed this original bill in the White county circuit court in chancery, on the fifteenth of December, 1877, against B. D. Turner, as principal defendant, together with. J. N. Cypert, trustee, and John G. Holland, a receiver of the court. In the bill and amendments thereto, she sets forth the deed of trust executed by herself and her husband to Cypert, on the ninth of June, 1869, to secure the notes to Sallie F.

Dougan for about $3,500; the judgment of Moses Greenwood & Son against her husband for about $1,930; on the fourth of November, 1869; the levy, *ven. ex.*, and sale of the lands in controversy under said judgment for a balance of $916.43 then due thereon; the purchase of all of said lands by plaintiffs in execution, at said sale, on the fifth day of August, 1871; the redemption of the same by defendant, Turner, as a judgment creditor, on the first day of August, 1872, by paying off the bid and crediting his execution with the whole amount of his judgment, and his receipt of the sheriff's deed, on the eighth of the same month—all substantially as set forth in the former opinion.

She says, further, that she and her husband had great confidence in, and reliance upon, the friendship of Turner, who had been, and was then, their attorney and confidential adviser, and whose advice they followed without question. They relied upon him to advise and assist them in taking some steps to prevent the land from passing beyond their control, and expected his advice in redeeming the lands from the Greenwoods, which they had intended to do. When he redeemed, on the first of August, 1872, they felt confident, she says, that the redemption was made for their benefit, except in so far as it might be necessary for Turner's own security. Her husband and Cypert went to Turner, however, before the time of redemption expired, to ascertain more definitely his intentions, when he assured them, verbally, that he did not wish to deprive her and her husband of the property; that he desired only security for what her husband owed him, and certain other specified claims which he held for collection; and that if complainant, through herself or her friends, would pay these off in a reasonable time, he would convey the property to her and her children. This he agreed, at a future time, to reduce

to writing; and she charges that, relying upon this, neither she nor her husband made any further effort to redeem the lands from him, but allowed the sheriff's deed to be executed. But for this she would have caused the land to be redeemed.

She charges that the contract for renting the lands to her husband, made by Turner on the fourteenth of January, 1873, and which is partly set forth in the opinion in the former case, was executed in pursuance of the previous verbal agreement—except that the terms concerning the renting were superadded. She says Turner did that to estop Watkins from denying his title as landlord, in case he should attempt to question the regularity of the sale under the Greenwood execution. For the rest, she says that it was *her* part, and sets it forth, and exhibits it, with the bill.

This contract is signed by Watkins and Turner, and is the instrument upon which she relies for specific performance.

By it, Watkins agrees to rent the lands from Turner for the year 1873, and to pay therefor the sum of $1,650 by the twenty-fifth day of December next following, and to return the premises in good order on the first day of January, 1874. Turner, on his part, agreed thereby, upon the payment of said rent, and also upon the payment to him, "by Mrs. Margaret E. Watkins, or any friend for her," of the sum of $4,635.67-100, being the amount of Watkins' indebtedness to Turner, at that date, exclusive of legal services in a case pending in Jefferson county, between Watkins and Brodie and King; and a sum of $285, and interest, due Turner & Moore (late law partners), "and whatsoever sum may, by agreement, arbitration, judgment, or otherwise, be ascertained to be justly due from said Thomas Watkins to Emily S. Quarles, or to Quarles and

wife, for balance of purchase money for part of said lands, unless the same shall be sooner paid, in which event, it shall be the same as if paid by her;" and, also, all taxes accrued on said land for the year 1872, or any previous year; and, "shall also save me from the payment of any mortgage or other incumbrance on said lands, existing before the judgment lien, under which I obtained title; and shall also pay me any other sum that said Watkins may then owe me;" then, on the first day of January, 1874, to convey said lands, by special warranty deed, "to her, and such of the children of her and said Thomas Watkins, or of either of them, or to a trustee for them, as he and she, by writing, may designate, to their separate and exclusive use and benefit, free from all rights and liabilities of said Thomas Watkins." But, it was provided, "if any of the above-mentioned items, or debts, shall not be paid, or if I shall have to pay, or discharge in any way, any mortgage or other incumbrance, or any part of such mortgage or other incumbrance on said lands, or any part of them, in order to protect my title to them, this obligation on my (the said B. D. Turner's) part, to convey said lands, shall be absolutely void."

In another clause it was stipulated, on the part of Turner, that if any part of his debt of $4,635.67-100 should be paid before the twenty-fifth of December, it should be credited upon the rent, with interest on the said payment at the rate of 3½ per cent. per month until said twenty-fifth of December.

This instrument is set up as a declaration of trust, on the part of Turner, based upon the parol agreement made with Watkins in the preceding month of August, in which, time for the performance of the conditions was not of the essence of the contract; at least, it is contended, that none of

them needed to be performed before the first of January, 1874.

She says that, in compliance with said agreement, she has paid all taxes due upon the lands at the date of the contract, as well as those that have since accrued.

By way of further performance, and excuse for non-performance, of conditions on her part, she says: That she and her husband *allowed* the trustee, Cypert, to take control of the lands, and rent them out to Greer & Baucum, and G. B. Greer, for the years 1874, 1875 and 1876, for the aggregate amount of $4,800, which, after deducting substantial improvements and repairs, was to be paid on the trust-debt, then held by Greer & Baucum, which, together with the rents for 1877, now in the hands of the receiver, Holland, will be sufficient to remove the incumbrance of the trust-debt. Moreover, the receiver had again, at the time of the filing of the bill, rented the lands for the year 1878, the proceeds of which she was anxious should go to defendant as a credit upon the indebtedness of plaintiff to Turner; and she further desired, if needed, to leave the lands in the hands of the receiver until the rents should discharge all she owed him.

As to the claim of Quarles and wife, alleged to be a lien upon the land, being for the purchase-money of a portion, she says it was afterwards sued upon, and a judgment recovered against Watkins for $2,523; which judgment she bought for a valuable consideration on the fifteenth day of December, 1877, and took an assignment, and so settled it. The assignment is to her individually, together with all liens, and rights to enforce them.

Amongst the debts estimated to make up the amount to be paid Turner, was one secured by a deed of trust, with power of sale, upon a house and lot in Searcy, which was

the homestead of Watkins and his wife. This debt was for $800, with 10 per cent. interest from the thirtieth of August, 1867, due October 1, 1868. Complainant did not join in the deed of trust. Turner caused this property to be sold by the trustee, on the twenty-first day of April, 1873, and purchased the same for $1,610, which, she alleges, was less than one-third of its value. They had rented out the dwelling that year for $400, expecting to use it as a part of the money to be paid Turner. This rent they failed to collect, on account of the sale, and she was thereby, to that extent, deprived, by the wrongful act of defendant in selling before the time he had given, of the means of fulfilling the conditions of the agreement. She submits that he should be held chargeable with all the rents of the homestead since that time, which would be sufficient to discharge his lien upon it. She says that she and her husband tendered Turner the full amount of the debt due on the house, on the thirty-first of December, 1873, which he refused.

Further, she says that, in 1873, Turner instituted suit against Watkins, in the circuit court, upon divers other debts included in said estimate, for $700 or $800; and that, in the fall of 1873, he attached the crop grown on the place, for the rent reserved against Watkins, whereby it became tied up in litigation, and, until recently, could not be used, and was, of necessity, otherwise applied.

In further explanation, she says that, by litigation with other parties, Turner's title became very doubtful, and she was uncertain of obtaining title under the declaration of trust, if she carried it out. Now that the title has been declared good, she desires to pay the balance of the debts specified in the trust, and offers to pay into court, under its orders, whatever may be found due. She has applied to

Turner to receive the consideration and execute a deed to herself and children, and he has refused, claiming the land as his own property.

She, therefore, insists upon the execution of the declaration of trust, which, she claims, gives her an equity which lasts until properly foreclosed. She prays relief, accordingly, with appropriate accounts to be taken of rents; that the sale of the homestead be set aside, and an account of the rents for that be taken also, and charged against Turner; or, if the sale stands, that the value of the property be credited; and for general relief.

Defendant, Turner, denies all confidential relations between himself and Watkins and wife regarding this subject-matter; or that either of them sought, or intended to act upon, his advice, or had any reliance or confidence that his redemption of the land was for her benefit. He denies that her husband and Cypert sought an interview with him regarding his purpose in redeeming. He says the only purpose they disclosed to him was to induce him to take back his bid, and to let Watkins redeem in his place, which he refused. Mrs. Watkins had no interest whatever in the land save prospective dower. He denies, also, that he, by any means, directly or indirectly, prevented them from redeeming; or that she had the ability, or right to do so had she been able.

He denies that she or her husband ever occupied said lands as their own under any claim of a trust for her use, or made improvements under the supposition that the lands were hers, subject only to his claim for debts. She never claimed under defendant until after the decision of the supreme court in the other case.

Within less than two months after the renting, on the fourteenth of January, 1873, complainant's husband denied

his title, and conspired with others to defeat it and avoid the sale made under Greenwood's execution.

This produced the former suit. In these efforts Watkins had the sympathy and co-operation of his wife. He says the necessary legal services of himself and others on his behalf in that litigation, were worth about $2,000, besides considerable expenditure made by him in cash. He says that of the $4,635.67, set forth in the instrument, only about $1,550 has ever been paid, and no part of that by the plaintiff, but was made by forced collections against Thomas Watkins. He says that the whole of the matters and issues made in the complaint are mere after-thoughts arising after the decision of the title adversely to Watkins in the former case, and directed to retrieving in the wife's name what was there lost to the husband. He relies upon the former case as *res judicata*, and also upon the statute of frauds. The purport of his answer is to deny all the circumstances alleged to raise a trust or confidence regarding the land, although he admits that he had no disposition to deprive Watkins and his family of the property, and promised to convey to her the lands on the terms alleged, which he would have performed without the profit of a dollar. But he says no time was given beyond the first of the succeeding January, and Mrs. Watkins herself, never acceded to the proposition. She was not present; neither Cypert nor her husband pretended to represent her, and never claimed for her any rights under the supposed trust until the filing of the bill; nor did she ever promise or undertake to perform the conditions on which he proffered to convey. He denies that he received the sheriff's deed by permission of complainant, but says she was not able to prevent it.

He denies that the contract of renting made with Wat-

kins in 1873 was in execution of the previous promise. The conditions of that promise had not been complied with, and it was on both sides considered as abandoned. Upon that occasion, Watkins requested defendant to renew his offer to allow him to reclaim the lands, which defendant did, giving him twelve months more to do so. He says that this promise was independent of the contract for renting, and there was no consideration for it whatever, but that it was on his part a gratuitous act of kindness. He denies that he attached any property of complainant or drove her from her homestead; she had no separate property, nor any interest in the land claimed as a homestead; she and her husband had moved from the same and were living on the lands in the country.

He denies that the Quarles debt was a lien upon the land; also that complainant paid any taxes upon the land, as alleged, but says the same were paid by G. B. Greer, who is now seeking to recover them of defendant. He says that in place of endeavoring to comply with the conditions of his offer in the contract for renting, the said Watkins, by consent and encouragement of complainant, within less than three months after its execution, repudiated it and set to work to prevent its performance, by acts and conduct set forth and explained in the pleadings and record of the former suit, by which they hoped and expected to recover the lands without the payment of a dollar.

He says that in place of paying the Quarles debt of about $2,000, her husband repudiated it, and he was compelled to bring suit and recover the judgment after long litigation. At the time of complainant's pretended purchase of the same, defendant was entitled to a fee of about

$300, of which he notified her attorney, and of which he has only received $80.

He denies that complainant, or her friends for her, ever paid any of the debts specified in said promise, or that Watkins himself has ever done so, except under legal compulsion, and under that, only a part.

He insists that his promise was made for the benefit of complainant and her children, and in contemplation of payments to be made by herself or her friends for her, in such a way that the lands would not be fairly subject to her husband's debts, as would be the case if the money should be furnished out of his means.

There were other denials of matters of less significance, and a demurrer to the bill for want of equity, which was overruled.

The cause was heard upon the pleadings and evidence, from which the deposition of Watkins was excluded on motion of defendant, Turner, upon the ground that he was the husband of the complainant. To this appellant excepted.

The court, upon the whole case, denied relief, and dismissed the bill at the cost of complainant. She appealed.

The first point to be noticed is the exclusion of the deposition of Thomas Watkins, the husband of complainant. He was not a party to the suit, or only *pro forma*, nor, technically, did he have any interest in the result. The incidental benefit which he might derive from his wife's success can not be noticed as a legal or equitable interest. The deposition was not offered as that of one testifying in his own behalf, but as that of the husband in behalf of the wife.

This testimony of husband or wife for or against each other, at common law was not admissible; whether on

grounds of *interest*, or those of *public policy*, has been a matter of much discussion. Lord Coke said (*Co. on Lit.*, *6 b*), "It might be a cause of implacable discord and dissension between the husband and wife, and a means of great inconvenience," a very strong statement of the theory of public policy, and which excludes all question of interest. The weight of modern authority, although sometimes recognizing community of interest as an element of disqualification, has placed it on the ground of inconvenience and public policy. The authorities on this point have been sufficiently presented by the present Chief Justice in the case of *Collins v. Mack*, *31 Ark.*, *684*.

It was there held that the disqualification resting upon public policy was not removed by the constitution of 1874, (*Schedule*, *sec. 2*), which provides that, "In all civil actions no witness shall be excluded because he is a party to the suit, or interested in the issue to be tried." It is now settled as the *general* rule in this state that, in civil cases, husband and wife can not testify for or against each other. This, also, is expressly provided by statute (*Gantt's Digest*, *sec. 2482*). So much of the remarks of the justice who delivered the opinion in *Magness v. Walker*, *26 Ark.*, *470*, as announces that husband and wife may in any and *all* civil cases, testify in behalf of each other, was not required by the case then in judgment, and can not be accepted as law.

That case, like this, presented the question whether a husband or wife, acting as agent for, and in the absence of the other, might testify regarding the matter of the agency. If this exception to the common law rule of exclusion existed before the constitutional change of the rules of evidence, it exists yet. There was certainly nothing in the constitution of a disabling nature. The wife's testimony

as her husband's agent was held admissible in *Magness v. Walker* (*supra*), but as the ground of the opinion had no regard to the agency, and was erroneous, it can not be held as binding this court yet, to any conclusion on the point. It presents itself again for direct decision.

There are numerous cases which hold that where a husband may be a witness for himself, the marital disqualification ceases. That applied to cases where, *ex necessitate*, an exception had been made to the common law rule that one could not testify in his own case. The instances cited in the text-books are cases of proving the contents of lost trunks, account-books, etc. Its application is not allowed under our constitutional provision which makes parties competent witnesses generally. That would be in the teetth of *Collins v. Mack.*

The cases in Vermont, cited to sustain the right of the wife to testify as agent, depend on statute. A careful examination of the cases cited by counsel in this, and the former case of *Magness v. Walker*, fails to satisfy us that either husband or wife became competent to testify for each other upon the sole ground of agency. It would afford too ready means of evading the general policy of the disqualification. The testimony of Thomas Watkins was not admissible.

The result of the cases here, and elsewhere, upon this subject is, that the common law disability to testify for or against each other, as between husband and wife, remains. That in all cases where they act as agents for each other, their acts, declarations and admissions, in the course of the business of the agency, may be proven by others, and will bind the principal, but they can not themselves testify in the case.

We recognize the fact that this, in some degree, militates

against the principle of mutuality, allowing one party to testify, and disqualifying the agent, who may be husband or wife of the other. The harmony of the rules of evidence has been broken by the restricting nature of the enabling clause of the constitution, removing only the disqualification of *interest*, and allowing that springing from *policy* to remain. The constitution itself restores the mutuality in cases of suits for or against the estate of persons deceased, but does not proceed further. We can not do so without judicial legislation. "*Expressio unius est exclusio alterius.*" If it be desirable, the change is within the power of the legislature. Meanwhile, husbands and wives who avail themselves of each others' agency, must rest upon the common law modes of proof. In this case, the matter is of little consequence. The evidence of the husband does not materially vary the case from that made by the pleadings and other evidence.

Decrees for specific performance were not originally granted in any case as matter of course. They rested in the sound discretion of the chancellor upon all the equities of the particular case, the manifest right of complainant, the hardship of the case, and the inadequacy of the legal remedy. Afterwards, when the principles upon which this kind of relief was usually granted became established, it came to be considered the duty of the courts to grant it, upon clear cases coming within the principles, but they have always reserved the right of sound discretion, and generally refuse the specific relief, where the case is not clear, or where the complainant is in the wrong, or there are considerable countervailing equities. In such cases, it remains competent for courts of equity to refuse to interfere, but to leave the parties to those rights and remedies at law established for the general administration of justice.

The relief is of an extraordinary nature. By this view this case is to be determined.

A careful review of the evidence satisfies the court that the promises made by Turner, in behalf of the wife, in August, 1873, were such as might have prevented Watkins from the exercise of his right to redeem.

Whether he could have done so, and would, but for the promises, is not clearly apparent.

He might, by an effort, have done it; and the effect would have been, upon payment of the Greenwood and Turner judgments according to the provisions of the law, to deprive Turner of the legal right to demand the deed of the sheriff. Turner, after the promises, received the benefit of securing his title without further intervention on the part of Watkins to prevent it; and it will not be presumed, nor is it clearly proven, that Watkins might not have prevented it had he persisted in his efforts. Turner is estopped now from saying that he could not have redeemed; and would have been held to specific performance if Mrs. Watkins had accepted the terms and made reasonable efforts, within a reasonable time, to perform them on her part.

This she did not do; at least the proof does not show it. The inference is, that the terms were not accepted on her part, and that the contract had been abandoned. It is not clear, however, that the time for performance had so far lapsed, on the fourteenth of January following, as to have then precluded her from the exercise of her right. The doubt upon that subject, with the benefit to Turner which accrued from the avoidance of litigation to settle it, might well support the written contract of the fourteenth of January, 1873. That closed past transactions, and must afford the basis of any equities she may now assert. To its terms alone can we look.

By it Watkins recognizes the title of Turner, agrees to pay rent, and accepts, on behalf of his wife and children, the terms upon which they may become the owners. It was not an agreement on the part of Turner to allow Watkins a right of redemption, nor, strictly, to hold the lands as a mere security for the specified debts due from Watkins to himself and others whose interests were in his charge. Turner expressly excludes the obligation to convey on payment of the sums by Watkins, which he would have been obliged to do, on the supposition that the lands were to be held as a security. The provisions are, that on the first day of January, 1874, he will, by special warranty deed, convey the lands to complainant, Mrs. Watkins, "*and such of the children*" of her and said Thomas Watkins, or of either of them, or to a trustee for them, as he and she, by writing, may designate, to their separate and exclusive use and benefit, free from all rights and liabilities of said Thomas Watkins, upon condition:

1. That the rents for that year be paid.

2. *That Mrs. Watkins, or some friend for her*, pay to Turner the estimated amount of $4,635.67, then due him, exclusive of services in a certain case of *Watkins v. Brodie & King*, in the Jefferson circuit court.

Also, the sum of $285, with interest, due Turner & Moore.

Also, what sum may be found due from Thomas Watkins to Emily S. Quarles, or to Quarles and wife, balance of purchase money for part of said lands, unless the same shall be sooner paid, in which case it shall be the same as if paid *by her*.

Also, all taxes for 1872 or any previous year.

Also, shall save Turner harmless from any mortgage or incumbrance existing on said land before the Greenwood judgment lien.

And, finally, all sums which Watkins shall *then* owe Turner.

It was further provided that if any part of the said debt of $4,635.67 shall be paid before the twenty-fifth of December following, the *interest* on such payment, at the rate of 3½ per cent. per month, shall be credited on the rent.

The construction of this contract in connection with the circumstances presents no difficulties. It is an agreement for a conditional sale, and the terms are remarkably clear and explicit. It is a renewal of a former offer, with the time extended for a year. It provides that the whole consideration must emanate from *Mrs. Watkins or her friends,* save the accruing rents for the year, and payments which might be made on the Quarles incumbrance, the latter to be considered as made by her, if any should be made at all. The deed was not to be made to her alone, nor to her and her children. She and her husband were made trustees of a power to designate in writing, such children as were to be, with her, the recipients of the benefits; and provided for an abatement of the rent to be paid by Watkins of three and a half per cent. per month upon any amount paid before the twenty-fifth of December, by Mrs. Watkins upon the debts of her husband. There was no consideration whatever moving from Mrs. Watkins or her children—no obligation on their part to perform the conditions. They were mere volunteers, recipients of a benefit resting upon conditions proposed by the obligor and based upon a consideration moving originally from Thomas Watkins alone, who acted as their agent, and which consisted of his refraining from all efforts to redeem the land whilst he might legally have done so. The consideration was good, and would support the contract; but as it moved solely from him and, they claim, through his agency, it is but

just that they should be bound by all his action with regard to the subject-matter at a subsequent time, which may appear to have been with their assent.

It is further apparent that the design of Turner was to give Mrs. Watkins and her children alone, the benefit of the promise, and that he did not intend Watkins to have it. Payment made by him, or out of his means, would have rendered a conveyance to Mrs. Watkins and her children nugatory. They would have taken on trust for Watkins' creditors. Turner never meant that the benefit of his purchase should thus pass to other creditors. He had no bounty in his intentions towards them, and could not, under his agreement, have been called upon to make a conveyance of lands which Mrs. Watkins and children could not have held.

The proof fails to establish any confidential relations between Watkins and Turner regarding the subject-matter. They dealt at arms-length. All the promises of Turner seem to have been prompted by a feeling of sympathy for Watkins' wife and children.

The whole evidence regarding subsequent events reveals that Mrs. Watkins never made any effort, nor did her friends for her, to perform in good faith the conditions upon which she and her children were to receive title. Her husband, soon after the contract, set to work to defeat the legal right of Turner in the land altogether. Long and expensive litigation ensued, resulting in the decision of this court in the former case, establishing the title of Turner. Pending this, no efforts were made on Mrs. Watkins' part to perform the conditions. She repudiated Turner's title, and awaited the result of her husband's litigation. Nearly four years elapsed from the time of the contract until the filing of her bill. She evidently acted

under the advice of her husband; and her friends who perchance, had it in view to aid her, speculated upon the chances of her husband's success, and declined to come forward. Meanwhile, from the first of January, 1874, till the fifteenth of December, 1877, the defendant, Turner, had no claim against the complainant whatever, nor power to coerce her to the fulfillment of the conditions. He had not released his debts against Watkins, and was not in fault in exercising diligence to collect them, after he had reason to believe, as we must think he did, that Mrs. Watkins and her friends had abandoned all efforts to purchase, and her husband had set to work to defeat his title.

It is not necessary to determine whether time was of the essence of the contract or not. It passed and the legal force of the contract was lost. The complainant comes in to be relieved of the consequences of delay, and to have a performance now. She must show equitable circumstances to account for and excuse the delay, or she can not invoke the aid of chancery. She fails to do so—she does not show any genuine effort on the part of herself or friends to perform the conditions. The legal proceedings against Watkins on his debts afford her no excuse. The funds she was to furnish were not to be derived from her husband. She has suffered years to elapse, and has never proffered to do her part until it was decided by the highest tribunal of the state that her husband could not deprive Turner of his title altogether.

Whatever sympathy may be due her and her children, the courts can not dispense with general principles to afford her relief, and her right to specific performance does not fall within the principles which govern that remedy.

We have reviewed this case upon the merits. It is plain, however, that she can in no case maintain this bill

alone and without further proceedings. She and her husband are living. If there were merits in the case, they should first designate in writing the children to share with the mother in the conveyance. They would take in common and as purchasers. Upon refusal, the suit should have been in their names. If the parents, or either of them, had been dead, all the children would take equally with the mother. Chancery would exercise the power on the principle of equality.

For this reason, as much as upon the merits, we think the chancellor did not err in dismissing the bill.

Affirmed.

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34 682
56 191

MARTIN et al. vs. GODWIN & Co.

1. WRITS: *Irregular, amendable.*

A summons against several partners in the partnership name may be amended by the proper insertion of the names of the individual partners.

2. SAME: *Defective return of service, when waived.*

A defendant can not avail himself, in the supreme court, of a defective return of service of a summons against him, when he has appeared in the circuit court and made no objection to the return there.

APPEAL from *Chicot* Circuit Court.
Hon. F. F. SORRELS, Circuit Judge.
Valentine, for appellant.
Reynolds, *contra*.

ENGLISH, C. J. This suit was upon a note executed by

A. G. Martin and John W. Neal to J. R. Godwin & Co. The plaintiffs were named in the complaint as John R. Godwin, Lorenzo D. Mullens and Samuel M. McCollum, partners, under the firm name of J. R. Godwin & Co.

The writ commanded the sheriff to summon the defendants to answer the complaint of Messrs. J. R. Godwin & Co., failing to follow the complaint in setting out the names of the partners. In other respects the writ was regular and in good form. The clerk seems to have had an aversion to writing names, and especially Christian names, which is a common fault, and a very loose one under the Code practice.

At the return term the defendants filed a motion to quash the writ for variance from the complaint in the matter of the individual names of the plaintiffs.

On motion of the plaintiffs, the court permitted the writ to be amended by inserting their names so as to make it correspond with the complaint, and thereby the variance complained of was cured.

Defendants making no further defense, judgment was rendered against them for the amount of the note sued on, and they appealed.

The writ was not void, but amendable. (*Mitchell v. Conley, 13 Ark., 315.*) A more defective writ than the one now before us was held to be amendable after motion to quash, filed in *Galbreath et al. v. Mitchell, 32 Ark., 278.* See, also, *Richardson v. Hickman, ib., 407.*

In the brief of counsel for appellants, our attention is called to the fact that the sheriff's return of service upon appellant Martin, as indorsed upon the writ, is defective, and a reversal of the judgment is asked on that ground.

No motion was made in the court below to quash the return of service, but both appellants went back of the return in their motion to quash the body of the writ for variance from the complaint. Had a motion been made to quash the return, plaintiffs might have caused the sheriff to amend it, and thereby cured its defect.

It is bad practice to allow the objection here, in such case, for the first time. It should have been made in the court below. *Filer v. Robinson & Co., 30 Ark., 487; Cairo & F. R. R. Co. v. Frout, 32 ib., 28.*

Affirmed.

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34 684
62 341
34 684
66 182

UNION COUNTY VS. SMITH.

1. CLAIMS AGAINST COUNTIES: *Excessive allowances forbidden.*

The allowance of charges against a county above the cash value, in consequence of the depreciation of county scrip, is forbidden by statute, and contrary to public policy.

2. MOTION FOR NEW TRIAL AND BILL OF EXCEPTIONS: *None necessary where error apparent in judgment.*

Where error appears upon the face of a judgment, it can be reviewed in the supreme court without motion for new trial, or bill of exceptions, in the court below.

ERROR to *Union* Circuit Court.
Hon. J. K. YOUNG, Circuit Judge.
Henderson, for plaintiff in error.
Dan. Jones, contra.

ENGLISH, C. J. It appears from the transaction in this case, that at the July term, 1877, of the county court of

Union county, James S. Smith, sheriff of the county, presented for allowance the following account:

UNION COUNTY,

1877. To James M. Smith, Sheriff,	Dr.
April 28. To hiring 16 guards, by order of the circuit court, at the April term, for 11 days, at $8 per day	$1,408 00
April 28. To amount of board for 16 men for 11 days	273 00
April 28. To amount of provisions for guards before order of the court ordering new guards	35 35
April 28. To amount of hire for wagon and team in transporting the prisoners from El Dorado to Camden	100 00
Total	$1,816 35

The account was certified as approved by his honor, the circuit judge.

The county court pronounced all of the items of the account, except the third, to be exorbitant, and not warranted by law, and cut—

The first item down to	$66 00
The second to	25 00
Allowed the whole of the third	35 35
And cut the fourth item down to	20 00
And rendered judgment of allowance in favor of the claimant for	$146 35

Smith appealed to the circuit court, where the cause seems to have been submitted to the court sitting as a jury, upon an agreed statement of facts, and the court rendered judgment in favor of Smith against the county for the whole amount of the account, $1,816.35, and ordered it certified to the county court, etc.

No motion for a new trial was made, and no bill of exceptions taken.

Union county brought error.

It appears from the recitals of the judgment, that the county scrip of Union county was, at the time the expenses charged for in the account were incurred, not worth more than fifteen cents on the dollar in lawful money, and it is manifest from the face of the judgment, that the charges in some of the items of the account were greatly enhanced by the claimant, and allowed by the court, on account of the depreciation of the county scrip, which was forbidden by statute, and contrary to public policy. *Gantt's Dig., sec. 602, Goyne v. Ashley County, 31 Ark., 552.*

It may have been difficult for the sheriff to procure guards, etc., and feed them at ordinary money charges, when the county, owing to its financial condition, could not meet its current expenses otherwise than by the issuance of depreciated scrip, but the enlargement of allowances on account of such depreciation enhances the evil, is a ruinous public policy and forbidden by law. All who serve the public must receive such compensation for their service as the law provides.

Error appearing upon the face of the judgment, it can be reviewed here without a motion to set it aside, or for a new trial in the court below, as held in *Badgett v. Jordan, 32 Ark., 154.*

The judgment must be reversed, and the cause remanded for further proceedings.

34 687
54 349

SENTELL VS. MOORE.

1. LANDLORD AND CROPPER: *Title to crop.*

A. contracted to raise a crop on B.'s land, in consideration that B. would furnish tools, team and feed for the team, and give him one-half the crop raised; and out of A.'s half B. was to retain sufficient to pay what A. should owe him for supplies. The contract was never filed in the recorder's office. Afterwards A. mortgaged the growing crop to C. to secure a debt he owed him. A. raised five bales of cotton. B. sold three of them, and C., with A.'s consent, took the remaining two bales under his mortgage. A.'s indebtedness to B. for supplies, exceeded the value of his half of the cotton. In replevin by B. against C. for the two bales, *held:*

1. That the crop was B.'s, and A. had no interest in it to mortgage.
2. It is only when the laborer is tenant in common with his employer in the crop raised, that the employer is required by the statute to file a copy of the contract in the recorder's office to secure his lien for advances and supplies.

APPEAL from *Lafayette* Circuit Court.
Hon. J. K. YOUNG, Circuit Judge.
John Cook, for appellant.
W. & Moore, contra.

HARRISON, J. This was an action of replevin by George W. Sentell, against Henry Moore, for two bales of cotton. The defendant pleaded that the cotton was his own, and not the property of the plaintiff.

The cause was submitted to the court, sitting as a jury, upon the following agreed statement of facts:

One Foster, with six other laborers, on the sixteenth day of January, 1877, entered into the following contract, in writing, with the plaintiff:

"We, the undersigned, * * * do hereby contract and agree to work a part of the Crowell planta-

tion for G. W. Sentell, of the city of New Orleans, Louisiana, for the year 1877, upon the following terms: We agree to work well and faithfully 5½ days each week; plant, cultivate and gather the crops of corn and cotton; gin and deliver the same on said plantation; we agree to repair fences and levees; perform all labor necessary to the making of good crops, and take good care of, and be responsible for, all stock, or other property, placed in our charge; also, to furnish our own rations and clothing. In consideration of a full and complete performance of our duty and agreement, as herein stated, the said G. W. Sentell agrees to give us one-half of the corn and cotton made by us during the year; also, to furnish the farming implements, plow-teams, and feed for same, at his own expense. It is furthermore agreed, by us, that the said G. W. Sentell shall retain enough of the corn and cotton due for our services to pay him whatever money we now, or may hereafter, owe him for supplies, or other purposes—it being understood that only the balance remaining, after the said G. W. Sentell has been paid whatever we may owe him, is to be delivered to us; cotton to be ginned on the said G. W. Sentell's gin.

"Given under our hands and seals this, the sixteenth day of January, 1877."

No copy of the contract was filed in the recorder's office.

On the fourth day of April, 1877, said Foster was indebted to the plaintiff $117.19 for supplies and other things, and there were, after that date, and before the first of January, 1878, other dealings between them. Foster raised on the plantation five bales of cotton—three of which the plaintiff shipped to market and sold. On the first of January, 1878, Foster, after being credited with $68.50—one-half the proceeds of the three bales—was indebted to the

plaintiff for supplies furnished him during 1877, a balance of $85.83. Foster, on the fourth day of April, 1877, was indebted to the defendant $43.50, for which he gave him his note, payable on the twelfth day of December following; and, to secure its payment, gave him a mortgage on the cotton he was cultivating, with a power of sale, which was duly acknowledged and recorded the same day; and the note not having been paid, the defendant, on the eleventh day of February, 1878, with the consent of Foster, but without the plaintiff's, took, and carried away from the plantation, the remaining two bales, which he still retained. The cotton had not been set apart to either Foster or the defendant, and the value of the two bales was $65.88.

The court declared, as a conclusion of law, from the agreed facts, that the plaintiff was not the sole owner of the cotton raised by Foster; and that, by failing to file a copy of the contract in the recorder's office, he had no lien on the share Foster was to have for his services; and that the defendant was entitled, under his mortgage, to the possession of the two bales in controversy, and found for the defendant. The plaintiff moved to set aside the finding, as not sustained by the agreed statement of facts; and for a new trial. His motion was overruled, and he appealed.

This case is not materially different in principle from that of *Ponder v. Rhea, 32 Ark., 436.* We decided, in that case, that when one let another have land to cultivate and raise a crop, and furnished part of the team, and provender, and supplies, for making the crop, which was to be his property, but, after a certain portion had been reserved for the use of the land, and a certain indebtedness paid, the raiser of the crop was to have what remained of it, the raiser of the crop had no interest in it that he could sell or mortgage.

Although not expressly so stipulated, the clear meaning of Foster's and the other laborers' contract with the plaintiff, was, that the crops to be produced with their labor were to be the property of the plaintiff. The language of it is: "*In consideration* of a full and complete performance of our duty and agreement, as herein stated, the said G. W. Sentell agrees *to give* us one-half of the corn and cotton made by us during the year."

Foster was to be paid, as wages for his services, one-half the corn and cotton he raised, but was to receive no part of it until his indebtedness for supplies, whatever it might be, was satisfied, and the remainder, after the indebtedness was paid, only was to be turned over, or delivered to him. *Christian v. Crocker et al., 25 Ark., 327; Appling v. Odom and Mercier, 46 Ga., 583; Leland v. Sprage, 28 Vt., 746; Chase v. McDowell, 24 Ill., 236.*

It is only when the laborer is a tenant in common with his employer in the crop raised by him, that the employer, to secure his lien for advances and supplies, is, by the act of March 6, 1875, to regulate the labor system, required to file a copy of the contract in the recorder's office.

The plaintiff, being the sole owner of the cotton, it could have answered him no purpose to file a copy; and a failure to do so, could not affect his title. The defendant, before taking the mortgage, should have ascertained, by proper inquiry, the extent of Foster's interest. No presumption could arise from the fact, that he was working on the plaintiff's plantation, that he was an owner in common with him of the crop.

The court below erred in its declaration of law, and in finding for the defendant. The judgment is, therefore, reversed, and the cause remanded to it for further proceedings.

VOLMER VS. WHARTON.

34 691
67 364.

1. LANDLORD'S LIEN: *Not lost by sale of crop to purchaser with notice.*

A landlord's lien on cotton for rent is not affected by the sale of the cotton by the tenant to a purchaser with notice, nor by his furnishing to the tenant bagging and ties for, and paying freight on it to market; nor is the lien waived by the landlord's accepting, in part payment of the rent, part of the money paid by the purchaser for the cotton, although he knew, at the time of accepting it, that it was a part of that money; unless he was party to the transaction between the tenant and purchaser, or consented to the sale.

APPEAL from *Pulaski* Circuit Court.
Hon. J. W. MARTIN, Circuit Judge.
Cohn, for appellants.
Oliphint, contra.

HARRISON, J. Charlotte Wharton brought suit against Lucius Martin, before a justice of the peace, by attachment, to enforce a landlord's lien for rent, in which eight bales of cotton were attached. Reichardt & Eicholz claimed, and interpleaded for, two of the bales, and L. Volmer for the other six.

Upon the trial of Volmer's interplea, the cotton was found by the justice not subject to the plaintiff's lien, and she appealed to the circuit court.

The circuit court, which tried the case without a jury, found the cotton subject to the lien, and rendered judgment for the plaintiff.

Volmer moved for a new trial; his motion was overruled; and he appealed to this court.

The proof was: The cotton was raised by the defendant, Martin, in 1878, on land which he rented that year

from the plaintiff, and the rent became due on the first of November, 1878. Volmer bought the cotton from Martin, with knowledge of plaintiff's lien. Martin paid $100 of the money received from Volmer for the cotton to the plaintiff, who, when she received it, knew that it had been paid him by Volmer in the purchase of the cotton. Martin, when he sold the cotton to Volmer, was owing him $108 for bagging and ties, and for freight paid upon the cotton to Little Rock.

The suit was commenced on the twenty-eighth day of December, 1878.

The grounds of the motion for a new trial were: That the court erred in declaring the law, and that its finding was contrary to law and evidence.

The declaration by the court complained of by the appellant was: That the plaintiff's lien upon the cotton was not affected by Volmer's purchase of it with notice; nor by his claim against Martin for bagging and ties for, and freight upon, it to Little Rock.

The declaration was correct. *Gantt's Digest, secs. 4098, 4103.*

Volmer, manifestly, had no lien upon the cotton.

Appellant insists that appellee, by receiving a part of the price of the cotton, waived her lien upon it, and was estopped from asserting it. This would be true had she been a party to the transaction between Martin and Volmer. But there was no evidence that she consented to the sale of the cotton to Volmer; and her agent, to whom the money was paid, swore that he was not present when the cotton was sold.

It was the plaintiff's right and *duty* to accept the $100 when tendered her by Martin. It was so much towards the

satisfaction of her demand against him; and to that extent, extinguishing the lien, a benefit to Volmer.

There was no error in the finding and judgment of the court.

Affirmed.

POWELL VS. THE STATE.

34 693
56 518
34 693
58 102

1. LARCENY: *Conversion by servant of master's goods.*

The servant has a mere custody of the master's goods. His possession is that of the master. If he appropriates them to his own use, with intent to steal, it is larceny at common law. The trespass occurs when he changes his custody of his master's goods into an adverse possession in himself with a felonious intent.

APPEAL from *Pulaski* Circuit Court.
Hon. J. W. MARTIN, Circuit Judge.
Oliphint, for appellant.
Henderson, Attorney General, contra.

EAKIN, J. Appellant was indicted, tried and convicted of grand larceny, and sentenced to the penitentiary for one year.

It was shown that appellant was the general servant of S. N. Marshall, the owner of the property taken, which consisted of a lot of tools. They were kept in a room, partly used as a stable, in which a horse was kept, which it was appellant's duty to take care of. He had access to the tools at his pleasure, and the right, by virtue of his employment, to use them at any time; although no directions were given him to use them, nor was any occasion

shown for his using them. He took them without the owner's consent, and *feloniously* converted them to his own use. This is brought up by agreed statement, made part of the record in the bill of exceptions, and there was no other evidence.

The court refused, on prisoner's motion, to instruct the jury that if they believed he was a general servant of the owner, and, by virtue of his employment, had a general possession of and right to use the tools, and that if he took them away he would be guilty of embezzlement, and not of larceny. But, on the other hand, of its own motion, did charge the jury that a servant could not commit the crime of *embezzlement* of property coming to him from the possession of the master, but that to constitute the crime the effects must "come to the servant first, in the course of his employment from the hands of another person, other than his master."

A new trial, for supposed error in refusing and giving instructions, was asked for and refused.

The possession of the servant is that of the master. The former has a mere custody. If he appropriates the property of the master to his own use, with intent to steal, it is larceny at common law. The trespass occurs when he changes his custody of his master's property into an adverse possession in himself, with a felonious intent. This remains the law under our statute, defining larceny as "the felonious stealing, taking, carrying, riding or driving away the personal property of another." The evidence in this case made out the offense of "larceny," and the court properly refused the instructions asked.

Counsel for appellant urges that the statute has made that *embezzlement* in regard to the servant which before was larceny; and relies upon the case of *Fulton v. State, in*

13 Ark., to show that the crimes must be distinctly charged, and that a conviction for *larceny* can not be had upon a state of facts which constitute the statutory crime of embezzlement.

Section 1367 Gantt's Digest provides, among other things, that if any servant of any private person or corporation "shall embezzle or convert to his own use, or shall take, make way with, or secrete with intent to embezzle or convert to his own use, without the consent of his master or employer, any money, goods, etc., * * * *belonging to any other person*, which shall have come to his possession, or under his care or custody, by virtue of such employment or office, he shall be deemed guilty of larceny, and, on conviction, shall be punished as in case of larceny."

This section was made also to apply to clerks, certain sorts of apprentices, officers and agents of incorporated companies, etc., and was manifestly intended to afford the protection of the penalties against larceny in cases which before were not so punishable, by declaring them cases of embezzlement and punishing them as if they were larceny.

It was not intended to change a crime, which had been larceny at common law, into another name, and require it to be indicted as "embezzlement."

We do not now adopt the instruction given by the court of its own motion as technically correct. The intention of the statute was to make many acts punishable as larceny which had been formerly only embezzlement. It is not confined to *servants*, and may embrace some cases where the property came to the possession of the agent, clerk or servant from the employer. This is the New York view of a similar statute. (*Bishop on Crim. Law*,

sec. 366, 6th ed., n. 1.) The exact scope of the statute will be considered when the occasion arises.

The instruction given in the case before us was speculative. There was no evidence of any other possession of the defendant than the mere custody of his master's tools. To steal them was plain larceny, and it was admitted he did. He was properly convicted, and no proper instruction would have justified any other verdict.

Affirm.

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RANDOLPH et al. vs. McCAIN, Ad., etc.

1. PRACTICE IN SUPREME COURT: *Pleadings found in bill of exceptions not noticed.*

A copy, in a bill of exceptions, of a paper, said to be an answer in the case, is out of place there, and will not be noticed in the supreme court.

2. RECORD ENTRIES: *Imperfect, when sufficient.*

When an imperfect entry upon the record plainly shows without doubt, what the court intended to do, the effect intended should be given to it.

3. INSTRUCTIONS: *Intimation of court's opinion of the evidence, improper.*

An instruction should not be given that intimates to the jury the opinion of the court as to the weight of the evidence.

4. LANDLORD'S ATTACHMENT: *What removal of crop sufficient for.*

The actual removal by the tenant of any part of the crop, even for honest purposes, without consent of the landlord, will justify the attaching of the crop, although enough remains upon the premises to satisfy the rent, and the tenant does not intend to remove the crop in bulk.

5. INSTRUCTIONS: *Attachment.*

An instruction which denounces the landlord's attachment, a remedy given by the legislature, as harsh, should not be given.

6. WITNESS: *Party as, put under rule.*

A party who becomes a witness in a suit may be put under rule, as other witnesses.

APPEAL from *Jefferson* Circuit Court in Chancery.
Hon. J. A. WILLIAMS, Circuit Judge.
M. L. Jones, for appellant.
Pindall, McCain, contra.

EAKIN, J. Susan R. Kimbrough, executrix of Berkly Kimbrough, sued Geo. C. Randolph, in Lincoln county, on the sixth of December, 1876, for the rent of a plantation for that year. By the contract he was to pay $3,000; one-half on the first of November, 1876, the balance on the first of January, 1877. She admitted the payment of $500, and it was proven, on the trial, that he had paid about half, at the time suit was brought. She asserted a lien upon the crop of cotton and corn; and filed, with her complaint, an affidavit, stating that he had removed a portion of the crop without her consent, and was about to remove the remainder without paying rent; that her claim was for rent, and unpaid; and that she had a lien. She filed a bond in the sum of $5,000, conditioned to be void if she should pay to defendant all damages that should be assessed against her, if the order for attachment were found to be wrongfully obtained; and if she should prove her demand and her lien in a trial at law, or should pay such damages as might be adjudged against her.

A writ of attachment issued, and was levied on some cotton and corn. The defendant, after three days, gave a bond, with sureties, conditioned to perform the judgment of the court; and was allowed to take the property.

It seems, although it is nowhere found in the transcript, that defendant filed an affidavit, contesting the truth of the grounds laid for an attachment, by the plaintiff in her affidavit. The parties treated the case as if this matter were in issue, and a jury was impanneled to try it, at the April

term, 1877. They found, by their verdict, that the attachment had been wrongfully sued out, and that defendant had sustained damages to the extent of $700; whereupon, it was ordered by the court that he recover of the plaintiff, as executrix, that sum, with costs. She moved for a new trial, for causes assigned, and to set the verdict aside. Upon this, the record shows the following order, of the date of thirtieth of April, 1877: "Come now the parties, and the point of law, arising on the motion for a new trial, being heard, and being supported by affidavits, is by the court granted, and thereupon, on motion, it is ordered that this cause be continued."

Afterwards, on the application of the defendant, and two of his sureties in the retaining bond, a change of venue was granted by the judge, in vacation, to Jefferson county. There, at the fall term, the death of the plaintiff was suggested, and McCain, as administrator *de bonis non*, was substituted; and divers motions were overruled, which had been made by the defendant, to quash the writ, return, and proceedings. Concerning these, it may be sufficient to say, in passing, that they were of a technical character, and that the proceedings under the writ seem to have been substantially correct, and in accordance with law. No error, with regard to these points, is urged in argument.

The court also overruled a motion of defendant to dismiss the suit, because there had been a trial and judgment, *and no order granting a new trial.*

The record shows no answer to the complaint. We find in the *bill of exceptions*, however, a copy of a paper said to have been put in as an answer, amounting to a denial of the debt. It is out of place there, and can not be noticed.

A jury was impanneled, however, and the parties went to trial, as if issues had been made up in due form, upon

the merits of the complaint, and the truth of the grounds for an attachment. They returned a verdict in favor of the plaintiff, finding that the attachment had been rightfully issued, and that he was entitled to recover on the contract a balance of $1,404. Judgment was rendered, accordingly for that amount, against defendant and the sureties on his bond.

He moved for a new trial, upon divers grounds. Those important to be noticed may be grouped as follows:

1. Because the verdict was contrary to the law and the evidence.

2. Error in giving and refusing instructions.

3. Because the court refused to dismiss the cause on change of venue, for the reason that the original judgment in the Lincoln circuit court had never been set aside.

4. Because of newly discovered evidence.

5. Because the court, on plaintiff's motion, put defendant under the rule, as a witness.

The motion was overruled, and defendant appealed.

This suit was brought under *secs. 4101-2-3 and 4, of Gantt's Digest*, prescribing the mode of enforcing the landlord's lien for rent. The specific remedy is given in two cases: First, when the tenant is about to remove the crop from the premises without paying the rent; and, second, when he has removed it without the consent of the landlord. The rent need not be due at the commencement of the suit, but the trial must be stayed until it becomes so. The plaintiff is required to make affidavit of one of the facts above stated, the amount that is or will be due for rent, and that he has a lien on the crop for such rent. He must also file a bond in double the amount of his claim, with sufficient surety, conditioned to "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." The general attachment law (*sec. 391*) provides for "a bond to the effect that the plaintiff shall pay to the defendant all damages which he may sustain by reason of the attachment, if the order is wrongfully obtained."

The plaintiff's affidavit and bond contained all that was essential, and more than was necessary to sustain the landlord's specific attachment. The defendant's bond was filed under *sec. 416*, by which the attachment was discharged, and he obtained restitution of the property. He was allowed, nevertheless, to put in issue the truth of the grounds of attachment, and had the benefit of it on trial. It is not easy to see the grounds of his complaint on this point. The court is, therefore, not required now to decide whether or not a defendant, after giving a discharging bond under *sec. 416*, may afterwards question the grounds upon which the attachment issued, and have damages for wrongful attachment assessed in the action. There was sufficient evidence to sustain the finding of the jury on both, or either, of the grounds alleged for the attachment. It is true that the judgment upon the first verdict was not formally set aside, and a new trial ordered. That should have been done in plain, direct terms. But parties should not lose their rights, nor business be delayed, by the inexpertness, or inattention, of the clerks in making entries, when it can be seen, without any doubt, what the court meant to do. The motion was to set aside the first verdict, and to have a new trial. This was ordered to be granted, and the cause continued. The formal entry should have followed, as a matter of course; and having the motion before it to correct by, the Jefferson court did right to give the effect intended to the order of the Lincoln court, and proceed with a new trial. It was consistent with the order granting the motion. To

have refused to proceed, would have been in contravention of it.

The court, for the plaintiff, instructed the jury, in effect, that if they believed defendant was indebted for rent, and that he had removed from the place any portion of the crop without Mrs. Kimbrough's consent, although other portions may have been removed with her consent; or although enough may have been left on the place to pay the rent, she had the right to attach; and they might find for the plaintiff, although the rent was not due when the attachment issued. For the defendant, it instructed, that the plaintiff must prove every material allegation in her affidavit, by a preponderance of evidence; and that if defendant had her permission generally to ship cotton to pay for supplies, he might ship in pursuance of that permission without being liable to attachment, unless at the time the attachment issued he was about to remove the crop from the place without paying the rent. Also, that they should find for defendant if they believed that, after the payment of the first installment of rent, no cotton was removed from the place, unless they should find further, that defendant was about to remove the crop without paying rent. Also, that the permission to move any part of the crop might be proved by parol, outside of the written instrument. They were also advised that they should not take it as a circumstance against defendant, if he shipped cotton away by night, or on Sunday, in order to meet a boat, if such was the custom of planters in his section. Also, on the question of damages, they were instructed that if they found the writ of attachment had been wrongfully sued out, they should assess against the plaintiff such actual damages as may be proven to their satisfaction; that the matter of damages and the propriety of the attachment were the only

matters for them to consider, except that if they found the attachment to have been just and on proper grounds, they might find for the plaintiff whatever might be due on the rent.

Passing over instructions refused for the plaintiff, the court refused to instruct for defendant as follows:

"4. If the jury believe from the evidence that the rent was payable in two installments of fifteen hundred dollars each, payable, respectively, the first of November, 1876, and the first of January, 1877; and that the first payment was promptly made without attachment, and there was sufficient corn and cotton left upon the premises to pay the second payment, and that defendant was not making any attempt to move the said crops, and that said second payment was not due at the time of the attachment; these are circumstances that may *well be considered* by the jury, as to whether the attachment in this case was without just grounds."

This was properly refused, not only because the matters stated would not have been sufficient to bar the right of attachment, but the instruction, if given, would have intimated to the jury the opinion of the court as to the weight of evidence. The actual removal of *any part* of the crop, even for honest purposes, and after the payment of the first installment, without the consent of plaintiff, would justify the attachment, although enough might have been left to satisfy her, and defendant did not intend to remove the crop in bulk. The statute does not require landlords to rely upon the good faith of tenants until the removals of the crop touch the quick, and render the security questionable. They must not remove *any*, without consent. A higher public policy is involved in encouraging landlords to let their lands to tenants who swell the

annual products, and thus add to the wealth of the state. This is best subserved, in the long run, by securing to owners the rents for which they contract, and prohibiting tenants from trifling with their security. This reacts, also, for the benefit of tenants generally, tending, by competition of landowners, to reduce the rates of rental.

The court, also, refused to instruct for defendant:

"9. Attachment is a remedy that is harsh in its nature, and when resorted to, upon any grounds stated in the affidavit upon which it is founded; and such affidavit is controverted by defendant's affidavit, the proof, to sustain the attachment, should convince the jury, over and against the testimony of the defendant, that the attachment was rightful and necessary, or the jury will find for defendant."

The court properly declined to denounce, to the jury, as *harsh*, a remedy given by the legislature, and prompted by sound views of public policy. The province of the jury is to find facts, and apply to them the law, as given by the court. The courts, themselves, in determining points of law, and considering the scope and intention of statutes, and what may be within their equities, and general policy, may look to their bearing and consequences, for the purpose, only, of aiding their judgment of legislative intent; but it is improper in them to express to juries their opinions of legislative action, whether harsh or beneficent. Such expressions, with average juries, are very apt to create an unfavorable bearing against the party claiming under a statute, and should be avoided, whether the subject-matter be landlords' liens, usury, or limitation. Juries have nothing to do with the harshness of laws. Besides, the instruction was erroneous. The defendant's affidavit, denying the truth of the matters alleged as grounds of attachment, did not have the effect of an old answer in

chancery. It simply made an issue, like a plea. The *onus* was on the plaintiff, as the jury were elsewhere advised; but no more weight was due to the testimony of the defendant, than to that of plaintiff, or any other witness. The jury were free to judge, from all the testimony, whether the case was made out.

At common law, the judge presiding might, in his discretion, upon the application of either party, direct the witnesses to be examined separately, and kept from hearing the testimony of each other. It is a very important power, which has been rarely abused, if ever. The discretion was vested in the judge, before parties were made competent to testify in their own cases. They may now do so; but if a party should assume the character of a witness, it is not unreasonable to require him to submit to the general rules, established for the more certain elimination of truths from witnesses generally. It would be dangerous to give him, *as a matter of right*, exceptional advantages, when he, of all others, if assailable at all by the temptation to concoct evidence, would have the greatest interest in doing so. I can not find that the courts have established any positive rule upon this subject since parties have been made competent to testify. Mr. Wharton, in his "Law of Evidence," cites *R. v. Newman, 3 C. & K., 260*, as his authority for saying that, "whoever is yet to be examined, though party or prosecutor, is subject to this rule." In *Clark v. Reese, 35 Cal.*, it was held, though not with regard to this matter of separation, that when the party became a witness in his own behalf he subjected himself to all the rules, regulating the examination and cross-examination of witnesses.

It has been held that the order of exclusion does not extend to an attorney in the cause, if his presence in court be

necessary. See cases cited: *Starkie on Ev., p. 199, 9th ed.* This rests on peculiar grounds. Attorneys are not only officers of the court, essential to the progress of the cause, but officers sworn to fidelity, and entitled to such confidence, whilst in good standing, as would preclude the idea of their lending themselves to such unworthy practices as would be implied by their exclusion. The rule of exception does not seem *positive* as to attorneys even. In England, where counsel manage causes on trial, attorneys are only excepted upon special application, and showing that their attendance was necessary in court to instruct counsel. (*Phil. on Ev., Vol. 2, p. 885, chap. x, sec. 1.*) On the other hand, *Mr. Greenleaf, in a note to sec. 432 of Vol. 1 of his work on Evidence*, cites *Selfe v. Isaacson, 1 F. & F., 194*, as authority for saying that a party has a right to remain in court for the purpose of instructing counsel. He adds, without any citations: "And in those states in which parties are made competent witnesses, *it would seem* that the order of exclusion should not include them; and it is the better practice, as a general rule in those states, so far as it is known to be established, when the witnesses in a case are ordered to withdraw, to except parties from the order."

This may be perhaps accepted as an excellent genera rule for the guidance of circuit judges, in the exercise of their discretion, without going to the length of saying that the right of a party to remain and hear the testimony of others, and then give his own, is a positive legal right. It may be fairly left to the discretion of the judge. There does not appear to have been any detriment to appellant in this case, from his exclusion during the examination of two of plaintiff's witnesses. He was then released from the rule; had ample opportunity to advise himself of their

testimony, and did not ask to have them recalled for cross-examination, nor state in his motion for a new trial any points upon which a cross-examination would be desirable. In truth, there is no pretense that his case suffered in any way, and we find no error in the action of the court in this matter.

The plaintiff, Mrs. Kimbrough, testified on the first trial in her own behalf. After her death, upon the second trial, in Jefferson county, a witness, P. D. Taylor, testified as to what she swore on the former trial. Defendant in his motion for a new trial, and as one of the grounds upon which it was asked, says: that, since the last trial, he has discovered that the witness, Taylor, was, at the time of the former trial, a witness in the same case; and was, with other witnesses, put under the rule and could not have heard Mrs. Kimbrough's testimony; that defendant did not know this fact on the last trial until the evidence was closed; nor did he know that Taylor was going to testify; that the witnesses, by whom he could show the facts upon which he relied, to-wit: that Taylor was placed under the rule, were out of the county. The affidavits of others, which he filed with the motion, show that Taylor was a witness at the former trial, and was, with others, placed under the rule, but fail to show affirmatively that Taylor did not actually hear the testimony of Mrs. Kimbrough. He does not allege that the testimony of Taylor, as to Mrs. Kimbrough's evidence, was false.

This was not a showing of any newly-discovered evidence as to the merits of the case, but, taken in its fullest force, it only showed that he might have impeached Taylor's credit if he had known in time of his absence from the court-room at the time Mrs. Kimbrough gave in her testimony. But it does not clearly appear from all the affidavits that

Taylor could not have heard the testimony, notwithstanding the rule. There was a counter-showing that Taylor was an officer of the court, and that it was the unvarying habit of the presiding judge not to require officers of the court to come under the rule for separation, when witnesses in pending trials. It was also shown that many persons were present at the second trial who were also at the first, and whom the defendant might have called. The court did not err in refusing a new trial on this account.

Upon the whole case, we find no material error.

Affirm the judgment.

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HOLLIDAY BROS. VS. COHEN.

1. ATTACHMENT: *Removing effects out of the state.*

If a debtor is removing his property out of the state, not leaving sufficient to pay all his debts, a creditor may attach, although sufficient be left to pay his debt; and testimony of other debts is admissible to prove the insufficiency of the property to pay all.

2. SAME: *Damages for.*

Damages for injury to credit and loss of prospective profits in business, are not recoverable in an action on the attachment bond, nor in the attachment suit. If recoverable at all, it must be in a separate action on the case.

3. WITNESS: *Evidence of bad character of, whether too remote.*

It is within the discretion of the circuit judge to admit or refuse evidence of the character of a witness for truth in a neighborhood in which he had previously lived, according as he may think it too remote, or fairly proper to assist the jury in judging of the witness' present veracity.

4. ATTACHMENT: *Act of November* 10, 1875, *construed, etc.*

For construction of the act of November 10, 1875, amending the attachment laws, and the proper practice under it, see opinion. (REP.)

APPEAL from *Chicot* Circuit Court.
Hon. T. F. SORRELLS, Circuit Judge.
Reynolds, for appellants.
Dodge & Johnson, Rose, contra.

EAKIN, J. Appellants sued Cohen upon a bill of exchange, drawn by him, in their favor, upon Richardson & May, of New Orleans, for $1,000, dated at Laconia, Arkansas, January 1, 1876, payable twenty days thereafter. Acceptance was refused, and the same was presented again for payment at maturity; which was refused, also—the said drawees answering, as the complaint says, "that they had no funds of defendant with which to pay the same." There is no more direct allegation that there were no funds; nor any allegation of notice to defendants. With the complaint, they filed an affidavit for an attachment, verifying the debt, and stating that defendant "is about to remove his property, or a material part thereof, out of this state, not leaving enough therein to satisfy the plaintiffs, or the claim of said defendant's creditors; and that, unless an attachment is issued, there is reason to believe that plaintiffs' claim will be lost, or greatly delayed." This affidavit was made by George Burns, as their agent. The ordinary bond was given by two sureties.

An attachment issued, and, on the thirteenth of April, 1876, was levied on a store house and goods of defendant, which were left in possession of defendant's clerk, untouched; with directions not to sell the same, but to proceed as usual with the other duties of his business. On the fifteenth it was levied on ten bales of cotton; and on the seventeenth, the store-house and goods were released. On the nineteenth, the ten bales of cotton were duly appraised, and the defendant gave a bond for the performance of the

judgment of the court, or to produce the cotton or its value.

On the thirteenth of July, 1876, after a motion to discharge the attachment had been overruled, the defendant filed an affidavit, denying the truth of the statement in plaintiffs' affidavit, to the effect that the defendant was about to remove his property, or a material part thereof, out of this state, not leaving enough therein to satisfy the plaintiffs, or the claims of said defendant's creditors;" and that, "unless an attachment was issued, there was reason to believe that plaintiffs' debt would be lost, or greatly delayed."

At the July term, 1877, a jury was impanneled to try this issue, which returned this verdict: "We, the jury, find for the defendant, and assess his damages at $4,000." Whereupon, judgment for that amount was rendered in favor of defendant, against the plaintiffs and their sureties, for the damages sustained by the defendant, by reason of the wrongfully suing out said attachment, and for costs, "and that he have execution for the same." A motion for a new trial was overruled, bill of exceptions taken, and appeal.

It appears, from the bill of exceptions, that the circuit judge acted, in receiving and excluding testimony, upon the view that it was not competent for the plaintiffs to show what debts the defendant owed others; and that he was removing his property so as not to leave sufficient to pay his creditors; but the judge held, and so instructed the jury, that, "in order to sustain the affidavit, the plaintiffs should prove that the defendant was about to remove his property, or a material part thereof, from the state, not leaving sufficient to satisfy plaintiffs' demand; otherwise, to find for the defendant, and assess his damages at whatever amount the proof shows he sustained." This was excepted to by plaintiffs, and was all the instruction given.

The affidavit was, substantially, in the terms of the sixth ground of attachment, set forth in the first clause of *sec. 388, Gantt's Digest.* We can see no meaning in the concluding expression of the sixth ground, to-wit: "or the claim of said defendant's creditors," unless the legislature meant to allow an attachment in favor of one creditor, whenever a debtor might be about to remove his property to such an extent as not to leave enough to satisfy all his creditors. Justice requires this. It would be but a tantalizing remedy if each creditor of many, should be obliged to stand by and see the common debtor spirit away his effects until he had reduced the remainder within the value of the largest debt. And it would be, then, very hard upon the minor creditors, if the largest could sue out his attachment, and claim a preference over the whole of the remaining effects, as soon as their value might be reduced within his debt, but not within that of the minor creditors. The circuit judge erred in excluding evidence of other debts, and in the instructions given the jury on this point.

The circuit judge, upon trial, admitted on defendant's part, evidence of his damage from loss of credit, and interference with his prospective business profits. This was error. In the assessment of damages upon an attachment bond, made in the action, there is no issue of malice or want of probable cause. It is simply the truth of the naked fact which is put in issue—not whether the plaintiff acted maliciously or wantonly, without probable cause to believe the fact. In such cases damages must be compensatory merely, and confined to the actual loss from deprivation of the property attached, or injury to it; or, in case of closing business, to the probable profits of the business during the time of its stoppage. Injury to credit

and loss of prospective profits thereby, is too remote and speculative. Damage from that cause can not be assessed in an action on the bond, or in the attachment suit. If recoverable at all, it must be in a separate action on the case. The damages were assessed on an erroneous principle, and are, moreover, clearly excessive.

The defendant, on the trial, was his own principal witness. The plaintiff offered, but was not allowed, to impeach his testimony, by proof of his character for truth and veracity in the neighborhood where he had been living until within a few months before the trial. The judge held, as a point of law, that the proof of his reputation should be confined to the neighborhood in which he lived when his testimony was given. It was in the discretion of the judge to admit or refuse such testimony according as he might think it too remote or fairly proper to assist the jury in judging of the present veracity of the witness. He should have exercised that discretion. It was held in *Snow v. Grace, 29 Ark., 131*, that such testimony was admissible. In a recent Alabama case (*Kelly v. State, 61 Ala., p. 19*), it was held that the character of a witness might be impeached by the testimony of one who had, three years before, lived in the same neighborhood with him, and knew his past and present character in that neighborhood, although he knew nothing of it in the neighborhood to which the witness sought to be impeached had removed, and where he then resided. In this case, the interval was comparatively very short, and a sound discretion if exercised would have permitted the impeaching testimony to go to the jury for their consideration.

For the errors indicated, the verdict of the jury should, in any view of this case, have been set aside, and the

judgment rendered thereon, arrested. It must now be reversed.

Before remanding the case, it is deemed expedient to indicate the proper practice in this and like cases. This involves a construction of our system of attachment laws, which do not seem sufficiently clear to avoid misapprehension by the courts and the profession.

Before the Civil Code, the action by attachment was *a suit* of a peculiar character and of statute creation. The writ was not merely an ancillary remedy, aiding a common-law suit, which might proceed *proprio vigore*, regardless of the attachment itself. The complaint was, indeed, like that of a common-law suit, but it was so combined with the affidavit and writ as to make altogether an action *sui generis*. There was no summons independently of the writ, which was so essential to the continued vitality of the action that it could not be separately abated for any defect. A plea in abatement of the writ of attachment went to the whole action. It was regarded as a whole thing—a new form of action. *Edmonson v. Carroll, 17 Ark.*, citing *Childress v. Fowler, 9 Ark., 159.*

Except that, in either of the two contingencies, it might by force of the statute, be converted into a common-law suit. If the defendant chose to give bond to appear and answer, and to pay any judgment that might be rendered against him; or if, *having first appeared and pleaded*, he should successfully except to the affidavit upon which the writ was issued, then the attachment would be released and the suit would proceed as other suits at law. The connection could be no otherwise dissolved, and without that the suit remained an entirety. The profession became used to designate it a "suit in attachment," or "an

attachment" simply, as they would say "replevin" or "detinue."

So the law stood until the act of March 7, 1867, amending the attachment laws, which furnished a new ground upon which the attachment might be dissolved. This was by a sworn plea on the part of the defendant, denying the truth of the grounds assigned for the writ in the plaintiff's affidavit. The effect of such a plea was to dissolve the attachment, and throw upon the plaintiff all the costs of the suit to that time, unless his affidavit should be supported by other sufficient evidence. He had the burden of proof. No mode nor time for the trial of this issue was specially directed by the statute, but the inference is strong that it was intended to be interlocutory. The judgment on it was simply to maintain the attachment, or dissolve it with costs *up to that time.*

Other amendments were made by the act. Before its passage, the bond of the plaintiff entitled him to the writ; and the counter-bond of defendant entitled him to its dissolution, and the restoration of the property. Neither, *in the action,* was entitled to any remedy against the other on the bond. The act provided that upon the failure of the plaintiff in his *suit,* in any "suit by attachment," either upon trial of issues made, *or otherwise,* the defendant might have a writ of inquiry to assess his damages on the bond, and judgment against the plaintiff and his sureties for the amount; and if, on the trial of *such suit,* judgment should be rendered against the defendant, it should go against the sureties in his bond also, to the extent of the appraised value of the property released. These provisions preceded that allowing the contest concerning the truth of the affidavit, and evidently refer to the final trial in the attachment suit. Although, on account of false or defective affidavits,

the attachment may have been dissolved, and the property restored, his bond remained good against the plaintiff, and damages might be assessed upon it in case of, but not before, his final failure in the suit.

The practice under this system, thus plainly indicated, would have been easy, just and equitable; but time was not allowed to establish it.

The provisions of the Civil Code of 1868 covered the whole ground of attachments; and, as has been held, superseded all former laws within its scope. This made the confusion incident to all such sweeping experiments. Useful timbers are apt to be omitted in the reconstruction, and to complete the system, subsequent legislatures must gather up, and work in again, these *disjecta membra*. The principal features of the new system were the same as those of the old, though not taken from them. The whole "Code of Civil Practice" was not devised with reference to our body of existing laws, or even the existing constitution; but taken from the judicature of a neighboring state, to which it had been adjusted, and thrown into ours, to be adjusted as the courts might find themselves able. This duty we recognize, and must endeavor to perform. The attachment was made to be merely ancillary to an action at law, and might be had either *at* or *after* its commencement. This was consistent with the abolition, in name, of all forms of action. The "suit in attachment" no longer retained its peculiar and exceptional form and characteristics, no more than any other class of actions. To obtain the writ of attachment, in any action, affidavits and bonds were required, as formerly, with slight modifications. The defendant was allowed to contest the truth of the affidavit, not by *plea*, as formerly, but by counter affidavit, and hearing by the court on *motion*, and upon affidavits of the parties, depositions,

and such oral proofs as the court might permit to be adduced. This is the usual mode of raising and determining all interlocutory questions. No difference was made in the mode of disposing of motions to dissolve on account of the *falsity* of the grounds sworn to, and those to dissolve for other reasons. The Code provided that if "*the court* should be of opinion that the grounds of the attachment are not sustained, the attachment should be discharged, subject, however, to reinstatement before final judgment.

A mode of reinstatement was attempted to be provided, *pendente lite,* through a judge of this court. This was one of the provisions of the adopted Code, which could not be made to fit into our constitutional system of courts; and it has been, necessarily, disregarded in practice. The provision remains historically useful in construing other portions of the system—indicating its intention to be, that the attachment should not be considered as finally disposed of, until the determination of the action. Evidently, the practice of summoning a jury to determine the truth of the facts alleged as grounds for attachment, was not contemplated. It was an interlocutory issue, not going to the merits of the action, but questioning the right to the ancillary remedy. The mode of trial prescribed was not the usual one for trying issues of fact raised by pleadings. The order of the court, upon the result, was simply to be in discharge of the attachment, or to maintain it; that is, to determine whether, pending the action, the property should be restored to the defendant, as wrongfully taken, and prematurely, or retained in court, under custody of law, to await judgment and execution. The decision, and order of the court, unless excepted to at the time, and reversed on appeal, became, between the parties *res judicata,* and might be used in a suit on the bond for damages. How-

ever that might be, the point now under consideration is, that the Code did not contemplate a trial by jury, on a motion to dissolve an attachment. (*Gantt's Digest, secs. 457, 458, 459.*) Doubtless, a judge may, if he chooses, of his own motion, refer to a jury any matter of fact whatever. It would not be error in him to so refer such an issue as the one in question. (*Ib., sec. 4642.*) But in view of the construction of subsequent acts, it is important to know what practice the legislature intended, in ordinary cases. The sections, above quoted, are parts of the Kentucky system, and were brought over, *verbatim* and *in situ*, with the body of her civil practice. (Compare *Myer's Code of Kentucky Practice, sections 289, 290, 291.*) Under them, it was held by the supreme court of that state that the motion to discharge an attachment should be tried by *the court*, and that a party was not entitled to a trial by a jury. (*Talbot v. Pierce, 14 B. Monroe.*) Whilst this court would not feel constrained, in all cases, to adopt a construction given by the supreme court of another state to the language of a state statute, which our legislature had adopted; yet it confirms us in our views to find them in accordance with the supreme court of the state from which the law in question was taken. The Code, in furnishing us a new system of attachment laws, omitted a provision to which our sense of justice had become accustomed. No judgment *in the action* could be rendered, on the bonds, against sureties of either plaintiff or defendant. The system needed readjustment, and hence the act of November 10, 1875. It is in one section, providing:

"That in all actions of attachment now pending, or hereafter instituted, in which the defendant shall recover judgment for the discharge of the attachment, the court or jury trying said attachment, shall assess the damages sustained

by the defendant, by reason of such attachment, and the court shall render judgment against the plaintiff and his sureties in the attachment bond for the amount of such damages, and cost of attachment. But if the plaintiff shall recover against defendant, and the attachment shall have been discharged upon the execution of a bond, as prescribed by *section 416, of Gantt's Digest*, then the court shall render judgment against said defendant and his sureties in said bond for the amount recovered, and the cost of said suit. But if the defendant shall have given bond for the retention of the property attached, as provided by *sec. 406, of Gantt's Digest*, and the attachment shall be sustained, the court, or jury, in addition to finding the amount of debt or damages due to the plaintiff, shall, on demand of the plaintiff, also assess the value of the property attached," etc.—proceeding to provide for judgment against the sureties in defendant's bond for the value of the property, or the whole debt, if less than the value.

The first clause of this section, standing alone, would be doubtful in meaning. It speaks of the "action of attachment," in the old sense, as if it remained a separate and distinct form of action. It speaks of "the court or jury trying said attachment," without designating *what* trial is meant—whether of the merits upon the pleadings, or of the truth of the grounds upon affidavits and motion. Inasmuch as it had become the habit to designate an action begun with an attachment, as an "action of attachment," or an "attachment," and inasmuch as there was no mode directed, by existing laws, for the trial of any other issue in the suit, than the issue in the action, made by the pleadings, the inference from this clause alone, might well be, that the act meant to empower the court or jury trying the *final* issue to fix the damages.

The doubt vanishes on continuing to read the section with the conjunction "but." The continuing part is thus made to refer to *the same* trial, on the contingency of the *plaintiff's recovery.* This could only happen on the final trial of the merits in the principal action. If a distinction had been intended between the trials at which defendant might have assessments of damages, and plaintiff assessments of values of retained property, the draughtsman of the act would have been certainly prompted to the use of more appropriate language to make it clear. It is plain that the legislature did not intend judgment for damages, and execution against the plaintiff and his sureties before the final disposition of the case.

The best practice founded upon all the acts, is, to try the truth of the facts put in issue by the counter affidavit of defendant, and the motion to dissolve, by the court, as an interlocutory motion. If found for defendant, the attachment should be dissolved, and the property released. Exceptions may be reserved, and the ruling on this point will be subject to revision on appeal from the final judgment. But until corrected it becomes *res judicata* between the parties, as establishing the fact that the attachment was wrongfully sued out. In case there should be a trial by jury, or the court, of the issues in the principal action, the damages on the respective bonds of plaintiff and defendant may then be assessed against them and their sureties.

If there should be no final trial and the main suit be otherwise disposed of, there is no direct and mandatory provision of any statute for the assessment of damages on the bond in the action. The act of 1867 made such a provision, by giving defendant the right to have a writ of inquiry, in case the plaintiff should fail in his action from

any cause. That act has, as we said, been superseded by the Code provisions.

There is, however, such an analogy between the acts of 1875 and 1867, that the impression is strong in the profession, and upon our minds, that the legislature meant to return to the policy of the latter act, which policy had been disturbed by the Code provisions, and to leave it with the court, through proper instrumentalities, to settle in one suit, the whole of the litigation arising not only out of the original cause of action, but also out of the bonds executed in its progress. We think it, therefore, within the equity and spirit of the act, as a matter of practice, that the defendant should have the right, when the plaintiff shall fail to bring his suit to final trial, or may fail otherwise, to have a jury summoned on his own behalf, to assess the damages which may have accrued to him from a wrongful attachment in the action, and which had been dissolved.

It is certainly unreasonable, and a bad practice, which may lead to great injustice, to have an assessment of damages, judgment and execution in favor of defendant, upon an interlocutory trial, when, in the end, the plaintiff may recover a larger sum on his debt, and find the defendant insolvent. One trial should settle all, and damages may be set off when fixed; and a final judgment rendered on one or the other side for a balance.

Let the judgment be reversed for the errors above indicated, and the case be remanded for further proceedings consistent with law and this opinion.

34 720
61 101
62 553
34 720
70 430
34 720
71 65
34 720
75 113
77 70
34 720
84 99

EDMONDS VS. THE STATE.

1. GRAND JURY: *List of, must be certified by jury commissioners.*

If the jury commissioners fail to certify the list of grand jurors and alternates selected by them, as the law requires, the circuit court may quash the list and require the sheriff to summon others.

2. INDICTMENT. MURDER: *Name of deceased and means of death unknown.*

An indictment is not bad on demurrer, or in arrest of judgment, because it states that the surname of the party killed is to the grand jurors unknown. But such allegation is material, and must be proved by the state on the trial; and also that the grand jury made due inquiry to ascertain the name.

And so the averment that the defendant committed the crime at a place specified, "in some way and manner, and by some means, instruments, and weapons to the jurors unknown," is sufficient, when the circumstances of the case will not admit of greater certainty in stating the means of death.

3. MOTION FOR CONTINUANCE: *Absence of counsel.*

It is within the sound discretion of the presiding judge to grant or refuse a continuance on the ground of the unavoidable absence of the leading counsel in a cause, and unless it is made to appear that such discretion was abused to the prejudice of the party making the application, its refusal will not be ground for reversal in the supreme court.

4. EVIDENCE: *Party contradicting his admissions in court.*

A defendant stated in his motion for continuance, that certain absent witnesses would testify, if present, to certain facts. The state, to avoid the continuance, admitted that the witnesses, if present, would testify as stated. Afterwards, the court, against the objections of the defendant, permitted the state to introduce the witnesses, and prove by them the reverse of what it had admitted they would testify. *Held,* That there was no error in this.

5. EVIDENCE: *Counts in an indictment, not.*

Counts in an indictment are mere pleadings, and can not be used as evidence on the trial.

6. SAME: *Declaration of deceased: Res gestæ.*

Where it was important to prove that the deceased had a peculiar tooth in the roof of her mouth, her declarations about it, when there could have been no *lis mota,* were admissible in evidence as *res gestæ.*

7. PRACTICE IN CIRCUIT COURT: *Reading law-book to jury.*

The reading a law-book to the jury in a criminal case by the defendant's counsel, is under the control and subject to the discretion of the circuit judge; and his refusal to allow it, will not be held error here, where there is nothing to show that the discretion was abused.

8. MOTION FOR NEW TRIAL: *General assignments of error.*

A general assignment in a motion for new trial, "that the court erred in admitting and excluding evidence," points to nothing, and is too indefinite.

9. CHARACTER OF PRISONER: *Presumption from.*

If the jury find, from the evidence, that the prisoner is of good character, they may take that fact into consideration in determining his guilt or innocence; but if they believe, from the evidence, that he is guilty, they must so find, notwithstanding his good character.

10. —*Corpus delicti.*

For the rules of law as to proof of the *corpus delicti*, see opinion, page 743, *et seq.* (REPORTER.)

11. EVIDENCE: *Inconsistent statements of accused.*

False, improbable, inconsistent, or contradictory statements of an accused in attempting to explain suspicious circumstances or appearances, are prejudicial to him.

APPEAL from *Franklin* Circuit Court.
Hon. W. D. JACOWAY, Circuit Judge.
Clark & Williams, for appellant.
Henderson, Attorney General, contra.

ENGLISH, C. J. Thomas Edmonds was indicted in the circuit court of Johnson county for murder. On his application, the venue was changed to the circuit court of Franklin county, where he was tried; found guilty of murder in the first degree; motions in arrest of judgment and for a new trial were made and overruled, and he took a bill of exceptions. He was sentenced to suffer the death penalty on the twenty-seventh of February, 1880, and prayed an

appeal, which was allowed by one of the judges of this court.

I. In the Franklin circuit court, the prisoner moved to quash the indictment, because the circuit court of Johnson county discharged the list of grand jurors selected by the jury commissioners, and ordered the sheriff to summon others, etc.

It appears from the transcript, that on the fourteenth of April, 1879, being the first day of the term of the circuit court of Johnson county at which the indictment was found, the court, on motion of the state's attorney, quashed the list of grand jurors and alternates selected by the jury commissioners, because they had failed to certify said lists as the law required, and thereupon the sheriff was ordered to summon sixteen good and lawful men, citizens and qualified electors of Johnson county, to serve as grand jurors, etc. The sheriff, accordingly, returned into court the requisite number of men, who were found qualified, and impanneled and sworn as a grand jury.

That the court had the power to make the order complained of, was decided by this court in *Straughan et al. v. State, 16 Ark., 43;* and there is nothing before us to show that the power was improperly or erroneously exercised in this case.

II. The prisoner demurred to the indictment, and its sufficiency was also questioned by the motion in arrest of judgment.

The indictment contained two counts:

The first count charged, in substance, that "the said Thomas Edmonds, on the fourteenth day of August, 1878, in the county of Johnson, etc., willfully, deliberately, feloniously, and of his malice aforethought, and with premeditation, did kill and murder one Julia Edmonds, then and

there being, in some way and manner, and by some means, instruments and weapons to the jurors unknown," etc.

The second count charged that "the said Thomas Edmonds, on the fourteenth day of August, 1878, in the county of Johnson, etc., willfully, deliberately, feloniously, of his own malice aforethought, and with premeditation, did kill and murder a certain woman, whose Christian name was Julia, but whose surname is to the jurors unknown, then and there being, in some way and manner, and by some means, instruments and weapons to the jurors, unknown, contrary," etc.

The first, second and third causes assigned for the demurrer were, in substance, that the indictment did not aver the manner or means of the alleged murder.

The fourth cause was, that it did not state such facts as constituted any crime known to the law.

And the fifth and sixth causes were, that if the indictment charged any crime, it charged two separate and distinct offenses.

The court sustained the fifth and sixth causes of demurrer, and required the attorney for the state to elect on which count of the indictment he would proceed, and he elected to dismiss the first count, and proceed on the second, and thereupon the court overruled the demurrer.

The trial and verdict were upon the second count of the indictment.

The count was not bad on demurrer, or in arrest of judgment, because it stated that the surname of the woman alleged to have been murdered was to the grand jury unknown.

If known, it should have been alleged; if not, it might be so stated, as it was, and this was matter in issue to be proved by the state on the trial. *Cameron v. State, 13 Ark., 717.*

And so it has been held that an averment, as in this case, that the defendant committed the crime at a place specified, "in some way and manner, and by some means, instruments and weapons to the jury unknown," is sufficient, when the circumstances of the case will not admit of greater certainty in stating the means of death. *3 Greenleaf Ev., note 4 to sec. 130; Commonwealth v. Webster, 5 Cush., 295; People v. Colt, 3 Hill (N. Y.), 432.*

No doubt the mode or instrument of death, if known to the grand jury, or if it can be ascertained by them, should be alleged in the indictment. *Thompson v. State, 26 Ark., 323; 29 ib., 168.*

But this rule must not be carried so far as to furnish a shield from punishment, where it is plain that a crime has been committed. *People v. Taylor, 3 Denio, 95.* It will be seen from the evidence in this case that if the means of death could not have been so alleged, the crime might have gone unpunished.

A person might be killed by violence on the bank of a river, and then thrown into the stream, and the body when afterward discovered might be so decayed and wasted as to leave no trace of the violence, and it might be impossible to tell whether the death was from drowning, or from the use of some weapon. Other examples may be easily imagined, though they may not frequently occur.

In *Howard v. State, ante, 433,* the question whether a count in an indictment, in which it was alleged that the means of death was unknown to the grand jurors, was valid, was waived, as not material in that case to be decided. Here the prisoner was convicted on a count making such allegation, and we hold it to be valid on demurrer, or motion in arrest of judgment.

III. The term of the Franklin circuit court, at which the

prisoner was tried, commenced on the third of November, 1879.

On the twenty-fifth of that month the prisoner filed a motion for a continuance of the case. The motion was based on the grounds: *First*, the absence, from sickness, of John W. Bush, Esq., who was represented to be the leading counsel of the prisoner; *second*, the absence of H. F. Barna, a witness for prisoner, by whom he expected to prove that he stopped at Barna's hotel, in Argenta, and had with him the woman, Julia Edmonds, and her child, after the date of her alleged murder, and after she and her child were missing at Pratt's Landing, on the Arkansas river, in Johnson county, where it was supposed they were murdered; *third*, the absence of James Williams, of Washington county, a witness for prisoner, by whom he expected to prove that, on the day after the supposed murder of Julia Edmonds, and after she and her child were missing from Pratt's Landing, prisoner conversed with said Williams at Clarksville, and had with him said Julia and her child, and with them took passage on an eastern bound train of the Little Rock and Fort Smith Railway for Argenta.

The motion was taken up on the third of December, when it was found that the two witnesses named in the motion as absent, were then present, which left nothing in the motion but the absence of John W. Bush, Esq., and the court overruled the motion, and prisoner excepted.

Thereupon the prisoner filed an amended motion for continuance, on two grounds: *First*, the absence of *Frank Marion*, *Amanda Marion*, and *Mrs. M. S. Cook*, material witnesses for prisoner. That he had learned on the day before, that *J. N. Cook*, a witness for the state, would testify that prisoner stopped at his house on the night after the

supposed and alleged murder of Julia Edmonds, and was alone, and did not have her or her child with him, and represented to said Cook that he was from Pope county, and was then going to Sebastian county. That he could prove by said Frank Marion, Amanda Marion, and Mrs. M. S. Cook, that they were at the house of J. N. Cook on the night that he would state that prisoner stopped there, and that they would testify that the stranger, or man who stopped at the house of J. N. Cook, was not the prisoner, but another and different man; *second*, the absence of John W. Bush and John K. Hendricks, Esqs., represented to be the principal and leading counsel for the prisoner.

The attorney for the state admitted that said Frank Marion, Amanda Marion, and Mrs. M. S. Cook, would, if present at the trial, testify as stated in the amended motion for continuance, and thereupon the court overruled the motion; and prisoner excepted.

The two motions for continuance are embraced in the general bill of exceptions, and it was made the sixth ground of the motion for a new trial, that the prisoner was forced to go to trial without his leading and senior counsel.

It appears that the prisoner was zealously and ably defended at the trial by J. P. Byers, Esq., who prepared the above motions for him, and who filed the motion to quash the indictment, and also interposed the demurrer thereto; and who was also counsel for the prisoner, before the change of venue, on application for bail, made before his Honor, the circuit judge, at chambers, in Dardanelle. Whether Messrs. Bush and Hendricks knew more of the case, or could have made a better defense for the prisoner than Mr. Byers did, we have before us no means of determining.

Cases may occur in which the unavoidable absence of leading counsel in a cause, might be ground for a continu-

ance, but such motions are addressed to the sound discretion of the presiding judge, and unless it is made to appear that such discretion was abused to the prejudice of the party making the application, the overruling of the motion will not be cause for reversal here. No such abuse of discretion is shown in this case.

It appears that John W. Bush, Esq., resided in Livingston county, Kentucky, and attended to taking depositions for the prisoner there. Where John K. Hendricks lived does not appear. *Hunter v. Gaines et al., 19 Ark., 92; Golden v. State, ib., 590; Stewart v. State, 13 Ark., 734; Stillwell, Ex'r, v. Badgett, 22 Ark., 166; Ware et al. v. Kelly, ib., 442.*

IV. In connection with the amended motion for continuance, the ninth ground of the motion for a new trial may be disposed of, and which is stated in the motion as follows: "Because the court improperly permitted Francis Marion, Amanda Marion and M. S. Cook to be sworn in behalf of the state, and testify that they were the parties mentioned in defendant's motion for a continuance, and that they identified the defendant as being the man who stopped at the house of J. N. Cook a day or two after the murder, when the state, by her attorney had admitted, when said motion for continuance was submitted to the court, that said witnesses would swear that they had never seen defendant, and when said motion for continuance was overruled by the court by reason of said admission by the prosecuting attorney."

John N. Cook, witness for the state, after testifying about a skull and some woman's clothing that he and Thomas Martin had found below and near Pratt's Landing, in November, 1878, on a sand-bar, stated to the best of his knowledge, the prisoner stayed all night at his house,

about the sixteenth of August, 1878. Prisoner said that he had knocked a man down in Polk county, and was looking for the sheriff after him, and told witness not to be alarmed if during the night he jumped up and ran out of the house—said his name was Edmond Cook; seemed to be very restless. From his remarks, he came from the southwest to the house of witness, which would be nearly in the direction of Pittsburg Landing. Said he was a fortune-teller, and proposed to pay his board by telling the fortunes of the family, and did so. The man who stayed at the house of witness had light hair, blue eyes, and rather a dark complexion. Said he was on his way to Mazzard prairie. Clarksville is about due north of Pratt's Landing, about four miles distant. Witness lived at that time about two and a half miles northeast of Pratt's Landing, about four miles a little south of east of Clarksville.

FRANK MARION, witness for the state, testified that he did not know that he had ever seen the prisoner. He was at the house of John N. Cook in August, 1878, when a fortune-teller stayed all night there, but was blind with sore eyes and could not see him, and would not now recognize him.

Mrs. AMANDA MARION, witness for the state, testified that she and her husband stayed all night at the house of her brother (John N. Cook), in August, 1878, when another man also stayed there. Prisoner favored the man that stayed there on that night. He said his name was Edmond Cook, and that he had knocked a man in the head down about Georgetown, and was on the look-out. Said his horse had died, and that he had concluded he could make more telling fortunes than he could otherwise. She would not say positively that the prisoner was the man,

but she would say that he looked like him. She was certain that the fortune-teller did not have blue eyes. If she had seen the prisoner on the street she could not have identified him.

Mrs. M. S. Cook, witness for the state, testified that she was the wife of John N. Cook, and that a man stayed at their house, in August, 1878, and, pointing to the prisoner, said "that looks like the man." He had on a loose sack coat; said he had knocked a man in the head with a rock, and was looking for the sheriff. She could not swear that prisoner was the man, but thought so. He appeared to be very restless the night he stayed at the house, and stepped to the door several times, etc.

The bill of exceptions states that the prisoner objected to *Frank Marion*, *Amanda Marion* and *M. S. Cook* being sworn as witnesses for the state, and moved to exclude their testimony on the ground that they were the witnesses mentioned in his amended motion for continuance, and that the prosecuting attorney had admitted that, if present, they would testify as stated in said motion; but the court permitted them to be sworn, and to testify on behalf of the state, etc. They were cross-examined by the prisoner.

It also appears that after the state had closed, the prisoner was permitted to read in evidence the amended motion for continuance, etc.

By section 4644 Gantt's Digest, to avoid an application for continuance on account of an absent witness, the opposite party had to consent that on the trial the facts proposed to be proved by the absent witness should be taken as true.

But by act of March 5, 1879 (*Acts of 1879, p. 26*), this section was amended, so that if, upon the filing of the

affidavit for postponement, "the adverse party will admit that on the trial the absent witness, if present, would testify to the statement contained in the application for continuance, then the trial shall not be postponed for that cause; *provided*, the opposite party may controvert the statement so set forth in said motion of continuance by evidence."

It so turned out that the three witnesses, on account of whose absence the prisoner made the amended application for continuance, were present at the trial, and we can see no good reason why the state might not call and examine them, as she did.

The prisoner might have called them if he had thought proper, and he did cross-examine them. How better could the state have controverted the statement set forth in the motion than by calling the very witnesses themselves?

V. The seventh ground of the motion for a new trial is that the court erred in permitting David Hinkle to prove that prisoner had made threats against his child, Ellen.

After the state had examined H. F. Barna, the first witness introduced, and who failed to prove that the prisoner was at his hotel in Argenta, in August, 1878, with the woman, Julia, and her child, and proved that their names were not registered there, though it was his custom to cause all guests to be registered, the state introduced DAVID HINKLE, whose testimony it may be well here to state in full, substantially, that the part objected to may be understood.

He testified in substance that he moved the prisoner from Washington county, starting on Sunday, about the tenth to the twelfth of August, 1878, to Pratt's Landing on the Arkansas river, in Johnson county. He had with

him a woman he called Julia, and claimed her as his wife. They also had with them a female child about four months old, which they claimed as their child. Witness, prisoner, the woman and child stayed all night at Fred Stout's, near the landing, on Tuesday night. Prisoner was on his way to Kentucky, and first employed witness to haul him to Ozark, but subsequently said he did not care a damn where witness left him, if it was in a canebrake, just so it was on the bank of the Arkansas river. They left Stout's about daylight next morning, and witness took him on to the river. When witness left them they were wending their way toward the river. He heard defendant say to the child, "Hush, or I'll be damned if I don't stamp your brains out, or throw you in the river," or something to that effect. [Which last statement defendant objected to, and moved the court to exclude it from the jury, and the motion was overruled.] Witness noticed nothing peculiar about the teeth of the woman, Julia. Defendant and the woman had a sachel, a basket, a camphor bottle and a tin cup. There was nothing peculiar about these articles. The woman had light hair, would weigh about 140 pounds, and lisped when talking. Defendant treated her kindly on the journey.

Here, some hair was shown witness, which was found near the skull above referred to, and witness thought it resembled her hair.

Witness was also shown a sachel, a bottle, clothing, lamp and cup, which were found at or near the landing, and he stated that he believed they were the same that defendant had with him on his journey from Washington county.

Witness was before the grand jury, at the April term, 1879, of the Johnson circuit court, and stated to the jury

that the woman went by the name of Julia Edmonds, because she was with the defendant, and he claimed her for his wife; but he further told them that he was informed that she was not his wife, and he did not know what her name was, and could not inform them. He told them that he had learned that defendant had a wife and family living in Livingston county, Kentucky, whom he had left when he moved away from there with the woman Julia, the deceased. He got his information from the county clerk of Livingston county, but did not tell the grand jury how he got his information. The clerk did not inform him what deceased's surname was, etc.

It may be here remarked that the woman, Julia, and her child were never seen by any witness produced at the trial after Hinkle left them, with the prisoner, near the river.

We think that the harsh, passionate and inhuman expressions of the prisoner to the child, in the presence of the mother, near the place and shortly before they disappeared, were calculated to throw some light upon the condition of his mind, and his feelings toward the mother as well as the child, at the time, and that they were properly admitted to the jury for what they were worth, under the rule laid down in *Austin v. State 14 Ark., 555.* See also *Doghead Glory v. State, 13 Ark., 239; Dunn v. State, 2 ib., 229; Liles v. State, 30 Ala., 24.*

VI. The eighth ground of the motion for a new trial is, that the court erred in excluding a part of the evidence of John M. Armstrong.

It appears from the bill of exceptions, that John M. Armstrong, witness for the state, testified, in substance, that he was foreman of the grand jury which found the indictment in this case; that the surname of the woman, defendant was

charged with having murdered, was to the grand jury unknown; his recollection was, that Hinkle and others were asked the question as to the name of the deceased, and stated that it was Julia, and the defendant claimed her as his wife, and that she was commonly called Julia Edmonds; that the grand jury could only ascertain that the deceased, Julia, was traveling with defendant, but were informed that she was not his lawful wife, and, after due inquiry, they were unable to ascertain her surname; nor could the grand jury ascertain from the witnesses the manner and means by which she came to her death; they used all means in their power to learn all the facts in regard to the murder, and were wholly unable to ascertain in what way or manner, or by what means, instruments or weapons, the deceased came to her death.

On cross-examination, the prisoner offered to prove by this witness that the grand jury embodied two counts in the indictment, and in the first count described the woman that defendant was charged with having murdered, as Julia Edmonds, but the court excluded such evidence.

It was proven on the trial, by other witnesses, that the real name of the woman was Julia *Alsbrook*, who grew up to young womanhood in the neighborhood of prisoner, in Livingston county, Ky., and that, about April, 1877, he abandoned his wife and family there, and eloped with Julia Alsbrook, and brought her to Washington county, in this state, where he cohabited with her as if his wife. It was sufficiently proven that the grand jury did not know her true surname, but they were informed that she was called Julia Edmonds; hence, she was so described in the first count of the indictment; and it was alleged in the second count, that her surname was to the jurors unknown.

It was not necessary for the foreman of the grand jury, or any other witness, to prove what the first count in the indictment alleged, it being before the court, and subject to inspection.

This disposes of the tenth ground of the motion for a new trial, which is similar to the eighth.

VII. The eleventh ground of the motion for a new trial is, that the court erred in refusing to permit defendant to read, in evidence to the jury, the first count of the indictment, as tending to show that the grand jury knew the surname of the woman charged to have been murdered by him.

The bill of exceptions shows that defendant offered to read in evidence the first count of the indictment, and the court excluded it.

The prisoner demurred to the indictment, on the ground that each count charged a separate and distinct offense, whereupon the court compelled the attorney for the state to elect between the counts, and he elected to abandon the first, and prosecute upon the second. At the time the demurrer was interposed, the prisoner had on file the depositions of a number of witnesses taken by him in Livingston county, Ky., who proved that the surname of the woman he was charged with murdering was *Alsbrook*. If the prosecuting attorney had elected to prosecute upon the first count, which alleged her surname to be Edmonds, the ingenious counsel for prisoner would perhaps have insisted upon his acquittal for variance between the allegation as to her surname and the evidence. Her surname was not Edmonds, for she was not the wife of the prisoner. *Regina v. Campbell, 1 Carrington & Kerwin, 82.*

Both counts in the indictment were mere pleadings, and neither of them could be used as evidence on the trial. *Starkie on Evidence, by Sharshwood, top p. 407, marginal p. 450.*

In *Regina v. Campbell, sup.*, the first count of the indictment charged the prisoner with having killed Catherine Maginniss; in the second count, the deceased was described as Catherine Campbell, and in the third count, "as a woman whose name to the jurors is unknown." There are other similar precedents, but in no case have we found any intimation that one count could be used as evidence to disprove an allegation of another as to the name of the person killed or injured.

It was perhaps in consequence of the difficulty in some cases of ascertaining, alleging and proving the names of persons injured, that the Code makers were induced to adopt the provision that: "Where an offense involves the commission or attempt to commit an injury to person or property, and is described in other respects with sufficient certainty to identify the act, an erroneous allegation as to the person injured, or attempted to be injured, is not material." *Gantt's Dig., sec. 1786.*

VIII. The twelfth ground of the motion for a new trial is, that the court erred in permitting the state to prove by one Vest, and others, that they heard the woman, defendant was charged with murdering, say, in her lifetime, that she had a peculiar tooth or tusk in the roof of her mouth.

J. D. VEST testified: That defendant worked for him in Washington county in 1878; that he had a woman with him, named Julia, who had a child while at his house, who was about four months old when he left; witness informed him that he had heard that he was not married to Julia, and he said that it was all a lie, but that they might give him considerable trouble about it; seemed to be excited about it; said next morning he was going back to Kentucky; Julia was heavy-set, light hair, blue eyes, and lisped at times; it was generally understood that she had a tooth

behind her front teeth, and this was the cause of her lisping; witness had heard her speak of it. [Objected to by defendant, and objection overruled by the court.]

MARY C. VEST testified: That she knew defendant, and a woman he had with him, named Julia, in 1878; that Julia had a tooth in her mouth a little back of her front teeth, in the upper jaw; witness saw the tooth but once; she was certain it was back of the front teeth, not quite touching them; the cavity in the skull shown witness looked like it might be the same; Julia said to witness that she had wanted the tooth taken out; witness thought the skull was hers from the places where the teeth used to be.

S. PERDUE testified: That he had known defendant since about April, 1877; he lived with witness about five months, and left his house in October, 1877; he had a woman he called Julia; she had a tooth on the right side of her mouth, behind the upper front teeth, and said it hurt her tongue, and made her lisp; she asked Edmonds to have the tooth taken out, and he said his money had given out; witness had seen her sit for an hour at a time and feel of her tooth, and complain; it did not touch her front teeth at all; there was a gum between it and her front teeth; could not say that the tooth in the skull shown him was further back than the one in her mouth; when witness learned that she was not defendant's wife, he did not like to have them about him; she was pregnant.

A number of other witnesses testified substantially the same as the above about the peculiar tooth in the roof of the woman's mouth, back of her upper front teeth, which seems to have been regarded as important in identifying the skull produced at the trial as being her skull.

It being material to prove that the woman, Julia, had such a peculiar tooth in the roof of her mouth as that de-

scribed by the witness, her declarations about it, made when there could have been no *lis mota*, were admissible as *res gestæ*. *Cornelius v. State, 12 Ark., 805; Yarbrough v. Arnold, 20 ib., 592.*

IX. The thirteenth ground of the motion for a new trial is, that the court erred in refusing to permit defendant's counsel to read, as part of his argument in the case, from a law-book, an instance of the conviction of an innocent man on circumstantial evidence.

From what law-book, or what part of it, the counsel proposed to read, does not appear.

The matter was under the control, and within the discretion, of the presiding judge, and we have nothing before us to show that he abused such discretion. *Winkler v. State, 32 Ark., 550.*

X. The fourteenth ground of the motion for a new trial, that the court erred in overruling the motion in arrest of judgment, must have been a slip of the pen of the counsel for the prisoner.

The fifteenth and sixteenth grounds are general assignments, that the court erred in admitting and in excluding evidence, pointing to nothing, and are too indefinite.

XI. The first and second grounds of the motion for a new trial question the sufficiency of the evidence to warrant the verdict.

We shall have more to say about the evidence in considering the instructions. It is enough to say here, that upon the whole, there appears no such want of evidence to sustain any material allegation of the indictment as to induce us to award a new trial on the facts. It belongs to that class of cases in which it is the peculiar province of the jury to make their verdict final upon the weight of the evidence,

and the fate of the prisoner must rest on their award. He must abide the judgment of his peers on the facts.

XII. The giving and the refusing of instructions were made the third, fourth and fifth grounds of the motion for a new trial.

It appears from the bill of exceptions that twenty-one instructions were moved for the state; nineteen for the prisoner, and the court gave six of its own motion, making in all forty-six.

Why it was thought necessary to offer so many instructions to get the law of the case fairly submitted to the jury, we are at a loss to conjecture. We shall not swell this opinion, and encumber the reports, by copying and commenting upon all of the instructions objected to by the prisoner, and given by the court, or offered by him, and refused by the court. We have examined all of the instructions with care, to see if the prisoner might probably have been prejudiced by the giving of any objected to by him, or the refusal of any moved in his behalf.

Such of the instructions as we deem it proper to notice, will be treated in connection with the subjects to which they relate.

XIII. As to the allegation in the second count of the indictment, that the surname of the woman, Julia, was to the grand jurors unknown—

The court distinctly and correctly charged the jury, in the eighteenth, nineteenth and twentieth instructions moved for the state, and objected to by prisoner, that this was a material allegation, and must be proved; and, also, that the grand jury made due inquiry to ascertain her surname, etc.

The prisoner, in the fifth and sixth instructions moved by him, and refused, asked the court to charge the jury, in

effect, that if they believed, from the evidence, that the grand jurors knew, or might have ascertained by a reasonable effort, the surname by which the woman, Julia, was commonly called or known, they must acquit the prisoner, though they might believe, from the evidence, that he killed and murdered the said Julia.

A number of the grand jurors testified that they did not know, and could not ascertain, what the surname of the woman Julia was; that some of the witnesses testified that she was called Julia *Edmonds*, because she lived with the prisoner, though they had been informed that he was not her husband; that he had a wife in Kentucky, and that they did not know what her surname was.

If it might have been alleged in the second count of the indictment, as it was in the first, that her surname was Edmonds, because she lived in adultery with the prisoner, it was not necessary so to allege, when the grand jurors were informed that such was not her true or lawful surname, and did not, in fact, know, and could not ascertain from the witnesses, what it was; though after the indictment was found, it was ascertained to be *Alsbrook*, and so proven by the prisoner's Kentucky witnesses.

XIV. As to the means of death:

In the twenty-first instruction given for the state, the court charged the jury that it must appear from the evidence that the grand jury did not know in what way or manner, or by what means, or instruments or weapons, the deceased was killed, and that they made due inquiry to ascertain these facts.

Other instructions left it to the jury to determine from the evidence whether the woman was in fact dead, and whether she was murdered by the prisoner.

The foreman and others of the grand jury testified that

they did not know, and could not ascertain, the means of her death.

The jury found, in effect, by their verdict, that she was dead, and that the prisoner murdered her, but if they, or the grand jury, knew the means of her death, they were wiser than we are after carefully reading all of the evidence.

XV. As to character of accused:

The court charged the jury, in instruction No. 26, given of its own motion, against the objection of the prisoner, that:

"If the jury find, from the evidence, that the defendant is a man of good character, they may take this fact into consideration in determining the question of his guilt or innocence; but if they believe, from all the evidence in the case, that the defendant is guilty, they must so find, notwithstanding his good character."

This instruction was given instead of the fifteenth asked for prisoner, in these words: "The court instructs the jury that if the prisoner be proved of good character as a man of peace, the law says that such good character may be sufficient to create or generate a reasonable doubt of his guilt, although no such doubt would have existed but for such good character."

The Kentucky witnesses, whose depositions were taken by the prisoner, were his neighbors, some of them his relations, and they had all been acquainted with him for many years. His counsel propounded to each of them two interrogatories relating to his character.

It will be sufficient to copy the two interrogatories, and the answers given to them by E. F. Leman, a minister of the gospel, the answers of the other witnesses being, in substance, the same, and none more favorable:

Int. (3). "Tell whether or not you are acquainted with

the general reputation of said Thomas Edmonds among his neighbors and acquaintances for truth, honesty and morals. If so, is said reputation good or bad?"

Ans. "I am, and his general reputation among his neighbors and acquaintances for truth, honesty and morals is good."

Int. (22). "Was said Edmonds a moral or an immoral man? Was he or not a member of any Christian denomination or church? If so, to what church did he belong?"

Ans. "I regarded him as a very moral man, and he came as near living above suspicion as any man. He was a member of the United Baptist church, and I think a deacon; prayed in public, and was regarded as a devout Christian."

The witnesses manifestly do not mean to say that he maintained this good moral and Christian character in that community later than down to the fifteenth of April, 1877, for they state, in answer to other questions, that he and *Julia Alsbrook* left about that time, and that he did not return to the neighborhood until the twenty-second of August, 1878, which was shortly after the time of the alleged murder. They also proved that he had been twice married. His first wife died after he had lived with her three or four years. He had been living with his second wife six or seven years, and had two living children, one by the first, and the other by the second wife, when he left. Julia Alsbrook, a playful, romping girl, who could read, but could not write, raised in the same neighborhood, and about seventeen years of age, had been living in his family about six months, when they left.

Other witnesses show that he brought her to this state, and cohabited with her down to the time that he brought her to Pratt's Landing, on the fourteenth of August, 1878, when she disappeared.

It was plain to the jury, from the evidence, that however good the general moral character may have appeared to be, down to the period above indicated, he had outraged public morals by abandoning his wife and children, and church, and eloping and living in adultery with this unfortunate young woman.

It is the better practice, in proving the character of an accused, with the view to raising a presumption of innocence from it, to direct the inquiry to some particular trait of character involved in the commission of the alleged offense. For example: If the charge of perjury, what is the character of the accused for truth; if larceny, for honesty; if rape, for chastity; if some deed of violence the opposite character. *Burrill on Cir. Ev., 525 to 530; Kee v. State, 28 Ark., 164.*

Here the inquiry extended to the general good character of the prisoner for morals, religion, etc., and it was proved to be very good down to within about sixteen months of the time of the alleged murder, when there was an unfortunate break in it. Some of the Arkansas witnesses testified that he was quiet and peaceful while living in Washington county. The court correctly charged the jury in the instruction copied above (No. 26), that if they found from the evidence that defendant was of good character, they might take this fact into consideration in determining the question of his guilt or innocence; but if they believed, from the evidence, that he was guilty, they must so find, notwithstanding his good character. *Kee v. State, 28 Ark., 164; Burrill on Cir. Ev., 530, 531.*

The instruction No. 15, copied above, asked for prisoner, and refused, to the effect, that the law says that good character may be sufficient to create a reasonable doubt of guilt, though no such doubt would exist but for such good

character, was properly refused, on the facts of this case. Instruction No. 26 was appropriate, and sufficient on the subject of character.

The rule, as practically laid down by the courts, says Mr. BURRILL, is, that character evidence is of no force or value except in doubtful cases. If the case hangs in even balance, character should make it preponderate in favor of the accused; but if the evidence of guilt be complete and convincing, testimony of previous character can not, and ought not to avail. This rule, however, is not to be construed to exclude the admission and due consideration of evidence of character, even in clear cases. *Ib.*, *531.*

The rule may be as strong as stated by the counsel for the prisoner, in the above proposition, in a case of larceny, where possession of the stolen goods, by the accused, is the only evidence of guilt, and he has no witness by whom he can prove how he obtained such possession—there, good character may well create a doubt of his guilt. *Ib.*, *531*, *note* (*b*).

XVI. CORPUS DELICTI, ETC.

The prisoner moved the following instruction, which the court refused:

"1. The jury are instructed that the state has wholly failed to make out or prove the *corpus delicti* of the charge in the indictment, and the jury are, therefore, instructed to acquit the defendant."

It would have to be a case very barren of proof to warrant the court in depriving the jury of their constitutional province to judge of the facts, and in instructing them that the state had wholly failed to prove any material matter, and that they must find a verdict of acquittal. See *sec. 23*, *Art. VII*, *Constitution.*

After quoting some appropriate passages from *Mr. Bur-*

rill's work on Circumstantial Evidence, relating to proof of the *corpus delicti*, supported by other authorities, we will briefly state some of the leading facts and circumstances in evidence, conducing to prove the body of the crime in this case, and the connection of the prisoner with it.

"In cases of alleged homicide, the proof of a *corpus delicti*, involves that of the following points, or general facts: *First*, the fact of death, particularly as shown by the discovery of the body, or its remains; *secondly*, the identification of such body, or remains, as those of the person charged to have been killed; and, *thirdly*, the criminal agency of another, as the cause of the death.

"1. The fact of the death. This is the basis of the *corpus delicti;* and the circumstance which furnishes the best proof of it, as well as the most effectual means of ascertaining its cause, is the finding and inspection of the dead body itself. (*Wills on Cir. Ev., 162*). Hence it is a general rule of evidence that a dead body must have been discovered and seen, so that its existence and identity can be testified to by eye-witnesses. It is considered unwarrantable and dangerous to *infer* the fact of the death of a person from the circumstance of his sudden and unaccountable disappearance, even when followed by long continued absence, and even although such circumstances may be connected with others, apparently casting suspicion upon a particular individual. Some early cases of mistaken convictions, founded on such inferences, sufficiently establish the sound policy of this rule (*Best on Pres., sec. 202, p. 272*), which, so far as its authority is concerned, rests upon the declaration of SIR MATHEW HALE, that he would never convict any person of murder or manslaughter, 'unless the fact was proved to be done, or at least the body found.' *2 Hale's P. C., 290.*

"But to require the discovery of the body, in all cases, would not only be unreasonable and absurd in itself, but would seriously interfere with the course of criminal justice. MR. BENTHAM, regarding the rule in this unqualified light, pronounced it to be in the highest degree prejudicial to justice. 'To secure to himself impunity,' he observes, 'a murderer would have no more to do but to consume or decompose the body by fire, by lime, or by any other of the well-known chemical menstrua, or sink it in an unfathomable part of the sea. In any of these cases, might the body be effectually got rid of.' (*Bentham, 3 Jud. Ev., 234*). And in the case of *The United States v. Gilbert et al.*, (*2 Sumner, 19, 27*), Mr. Justice STORY, in summing up the case at the trial, said of the same rule, or proposition, that 'it certainly can not be admitted as correct in point of common reason or of law, unless courts of justice are to establish a positive rule to screen persons from punishment, who may be guilty of the most flagitious crimes. In the cases of murders committed on the high seas, the body is rarely, if ever, found; and a more complete encouragement and protection for the worst offenses of this sort could not be invented than a rule of this strictness. It would amount to universal condonation of all murders committed on the high seas.'

"It follows, therefore, that, in cases where the discovery of the body, after the crime, is impossible, the fact of death may be proved by other means. Indeed, the rule, as stated by Lord HALE himself, is in the alternative—the fact must be proved to have been done, *or* the body found. The question then occurs, by which kind of evidence—direct or indirect—must the fact of death be established. The language of Lord HALE indicates the former. But, accordin to the rule, as it seems to be understood by the best mod-

ern writers, the fact of death, when the body can not be found, may be proved by circumstances. 'It may be *inferred*,' says Mr. Wills, 'from such strong and unequivocal circumstances of presumption as render it morally certain, and leave no ground for reasonable doubt.' (*Wills on Cir. Ev., 162; Best on Pres., sec. 202, p. 271.*) In illustration of this, the same author (Mr. Wills) cites the case of *Rex v. Hindmarsh* (*2 Leach C. C., 569*), where the prisoner, a seaman, was seen, one night, to take the captain in his arms, and throw him into the sea; after which he was never seen or heard of, but near the place on the deck where the captain was seen, was found a billet of wood, and the deck and part of the prisoner's dress were stained with blood. It was objected that the *corpus delicti* was not proved, as the captain might have been taken up by some of the neighboring vessels. But the court, while admitting the general rule on the subject, left it to the jury to say whether the deceased was not killed before his body was cast into the sea. The jury having found in the affirmative, the prisoner was convicted of murder, which conviction was, on a case reserved, held good by all the judges. (*Best on Pres., sec. 203.*)

"2. *Identification of the body, or its remains.*

Supposing a dead body, or its remains, to have been discovered, the next step in the proof of the *corpus delicti* is the identification of such body, or remains, as those of the person charged to have been slain. Where the body is found shortly after the commission of the crime, and the face has not been disfigured by violence, accident, or natural decay, it may be identified by direct and positive testimony of persons to whom the deceased was known. But where the features have been destroyed, the body may be identified by circumstances—as by the dress, articles found

on the person, and by natural marks upon the person. In Colt's case (*New York Oyer and Terminer, January, 1842*), where a considerable portion of the face had been beaten in by blows, and the progress of decay had otherwise rendered direct recognition impossible, the body was identified in this way. In *McCanrie's case* (*13 Smedes & Marshall, 472, 478,*) where the face of the deceased had been eaten away by hogs, identification was effected in a similar manner. In the case of *Rex v. Clewes* (*4 Carv & P., 221*), the body of a man was, after a lapse of twenty-three years, identified by his widow from some peculiarity about his teeth, and by a carpenter's rule and pair of shoes found with the remains, and identified, etc. In *Webster's case* (*sup.*), the body was dismembered, and an attempt made to destroy it. The head of the deceased had been placed in a furnace, and exposed to strong heat. But some blocks of mineral teeth resisted the action of the fire, and were identified by a dentist as part of a set of teeth which he made for the deceased, and which he wore at the time he disappeared. Some other portions of the body, not subjected to the fire, were found and identified by peculiar appearances. A case is mentioned by *Mr. Wills*, in which the remains of a female, consisting merely of the trunk of the body, from which the other parts had been cut, were identified by a curious train of circumstantial evidence, embracing several facts of conduct on the part of the prisoner. (*Wills on Cir. Ev., 165*)

"3. *Criminal agency as the cause of death.*" A dead body, or its remains, having been discovered and identified as that of the person charged to have been slain and the basis of a *corpus delicti* being thus fully established, the next step in the process, and the one which serves to complete the proof of that indispensable preliminary fact is,

to show that the death has been occasioned by the criminal act or agency of *another person*. This may always be done by circumstantial evidence, including that of the presumptive kind; and for this purpose a much wider range of inquiry is allowed than in regard to the fundamental fact of death, and all the circumstances of the case, including facts of conduct on the part of the accused, may be taken into consideration." *Burrill on Circumstantial Evidence, p. 678, 683; Liles v. State, 30 Ala., 24.*

Having thus shown what appear to be the well-established rules of law as to proof of the *corpus delicti*, we will now proceed to state the leading facts and circumstances which were in evidence in this case.

We have seen from the testimony of J. D. VEST, above copied, that when the prisoner was informed that it was known that he was not married to the woman, Julia, he seemed to be excited—said it was all a lie, but expressed apprehension that it might give him trouble, and said he would go back to Kentucky.

He first employed DAVID HINKLE to haul him, the woman, Julia, and the young child to Ozark, which is on the Arkansas river, and near the line of the Little Rock and Fort Smith railroad, but afterwards procured Hinkle to bring him lower down to Pratt's Landing; saying he did not care a damn where he was left, if it was in a canebrake, just so it was on the bank of the Arkansas river.

They staid at the house of FRED STOUT (as proved by Hinkle, Stout and others), on the Seth Howell farm about a mile southeast of Pratt's Landing, on Tuesday night of the thirteenth of August, 1878. Prisoner told Stout that he was on his way to Kentucky; had rather go by water than by rail, and was not in a hurry anyhow; asked Stout when a boat would come down, and he told him there

would be one down the next day; but none came down for several months.

Prisoner, with the woman and child, left Stout's house next morning (fourteenth August) about daylight, and Hinkle took them on near to the river and left them there. We have above seen that prisoner was in a passion when Hinkle left him. Why he left the house of Stout so early in the morning when no boat was in sight or hearing does not appear. He seems to have been in the neighborhood of Pratt's Landing for several days, though no witness saw the woman or child after Hinkle left them.

PETER HOWELL, who lived within about half a mile of Pratt's Landing, recognized the prisoner at the bar, and testified that he came to his house on Thursday, the fifteenth of August, 1878, to get something to eat for his wife and child, and when he started off he said that "women were a damned heap of trouble anyhow."

DORCAS HOWELL testified that he saw the prisoner once, but could not identify him at the trial. That he came to his house on Friday, in August, 1878, to get something to eat, and said women were a damned heap of trouble; and witness thought he was mad, though he said nothing else that led him to believe be was mad.

MARY HOWELL saw him when he had some cooking done (perhaps at Dorcas Howell's), and afterwards. It was after he was at Dorcas Howell's that she found the two bonnets, which will be noticed below.

If JOHN N. COOK, whose testimony we have above stated, was not mistaken (and he was rather corroborated than contradicted by other witnesses), prisoner was at his house on the night of the sixteenth of August, in the character of a fortune-teller.

THE TWO BONNETS. Mary Howell further testified that

after the prisoner was at Dorcas Howell's house, she found two bonnets, one a woman's and one a child's, and a lamp, at Pratt's Landing. The child's bonnet was solid gingham, the other was striped, red and purple checked. She had the bonnets at her house a long time, but did not know what became of them. This, she thought, was about September, 1878.

FELIX BONE testified that he was present when the two bonnets, lamp, a bottle and tin cup were found. They were found within four feet of the bank of the river, and at this point the water was near the bank, *and very deep*. He made particular search for the bonnets afterwards, and could not find them. The lamp, bottle and cup were produced in court, and there was some evidence conducing to prove that prisoner and the woman, Julia, brought them with them on their journey from Washington county to Pratt's Landing.

FRED STOUT also testified that he saw the two bonnets on the bank of the river where they were found, and they appeared to be the bonnets worn by the woman, Julia, and her child when they staid with him all night. He had noticed the child's bonnet particularly when it was on a table at his house.

If the bonnets of the mother and the child, and the lamp, found on the brink of the deep water, could have spoken, they might, perhaps, have disclosed a tale of horror.

THE SACHEL AND CLOTHING, ETC. We have above shown what Hinkle stated about the sachel.

E. CARTER testified that one evening in the latter part of August, 1878, he found an oil-cloth sachel in the field where he was at work, about a mile from Pratt's Landing. He found it in the corner of the fence, at the lane between

the Pratt and Collier farms. He took the sachel home, and Mrs. Collier, who had a key that fit it, opened it.

It may be here briefly stated that this sachel and contents were produced in court at the trial. Fred Stout identified the sachel as the one that the woman, Julia, had at his house. It contained a dress, shawl, braid, some brass jewelry, and other articles proved to have belonged to her, also some clothing of her child. The braid was of light color, and about the color of her hair.

THE SKULL, FRAGMENTS OF CLOTHING AND HAIR FOUND NEAR IT.

About the twenty-second of November, 1878, THE. MARTIN, who lived about a mile and a quarter from Pratt's Landing, found a skull of a human being about a quarter of a mile below the landing, also some ribs, and the bones of a hand or foot, a calico and cotton skirt, and some light-colored hair about eight or ten inches long. The skull was eight or ten steps from the edge of the water, the river being very low. The hair was hanging in a root. There was a tusk back of the upper front teeth. He left the skull there. The skull and hair were produced at the trial, and he believed them to be the same found by him. The hair was on a stump root. The clothes were very rotten. The calico had colored leaf or vine as figures. He thought the flowers were brown, but did not remember the color of the ground.

JOHN N. COOK testified that he and The. Martin found the skull and some woman's clothing near Pratt's Landing. He afterwards saw the same skull at Craft's, the same produced in court. The calico was a purple ground, and a flower or vine; could not tell the color of the vine or flower.

FRED. STOUT testified: That, having heard that The.

Martin had found a skull, he went to the river and found the skull, and a piece of calico that resembled the dress the woman Julia had on at the time she stayed with him; he recognized it from the figures on the calico; he went to the place three times, and, to the best of his knowledge, it was part of the dress which she had on; the hair produced and shown witness resembled hers; the dress was of a dark color, and the figures of a dark brown; he also saw, at the place where the skull was found, on a sand-bar, a white cotton skirt, the upper part with a draw-string; did not see this skirt the night the woman Julia stayed at his house; did not save any of the fragments of the dress.

W. R. Craft testified: That the skull produced in court was brought to his house by Mr. Price and Mr. Cochran, and afterwards taken away by Fred. Stout; he knew the skull to be the same that was at his house, by the tusk back of the upper front teeth; three or four days after the skull was brougnt to his house, he went to the place where it was found, and found there a rib about the shape and size of the rib of a human being; also saw some female clothing, which was part of a white skirt with a draw-string, and part of a calico dress, dark ground, with flower-like vine with leaves.

Whether the tusk which a number of the Arkansas witnesses testified the woman Julia had in the roof of her mouth, back of the upper front teeth, while living, was in the skull when it was found, does not distinctly appear, but it seems, when the skull was produced at the trial, the tusk was not in it, but there was a socket or cavity where the most of the witnesses represented the tusk to have been; the Kentucky witnesses had seen no such tusk in her mouth.

There was some evidence that she had, when living, a

small tooth in front of the upper teeth, which was indicated in the skull.

Two medical witnesses who examined the skull were of the opinion that it had been shocked by a blow, which caused the blood to coagulate in the outward tissues, seen under the microscope; one of them had seen heads before with teeth in the roofs of the mouth.

Other witnesses thought that the discoloration upon the skull was from exposure.

There was conflicting evidence about the teeth, etc.

We shall, further on, give the statements of the prisoner about what became of the woman Julia and her child.

We need only to say here, that there was some proof of the *corpus delicti*, and its weight and sufficiency were properly left to the jury, and that the court did not err in refusing the *first* instruction moved for the prisoner, and copied above.

The seventh, eighth, tenth and nineteenth instructions moved for appellant also relate to proof of the *corpus delicti*, and are noted in the margin refused, with reference to other instructions given, which the court seems to have regarded as sufficient on that subject.

The court, in the series of instructions given, after defining murder generally, express and implied malice, and how manifested, and the statute degrees of murder, distinctly charged the jury that they could not find the defendant guilty of murder in the first degree, unless they were satisfied, from all the evidence, beyond a reasonable doubt, which was properly defined, that he willfully, deliberately, maliciously, feloniously, and with premeditation, *killed* the woman Julia, etc.; and that to find him guilty of murder in the second degree, they must believe, from the evidence, that he willfully, feloniously, and with malice

aforethought (but without deliberation and premeditation), did *kill* the woman Julia, etc. And in the twenty-third instruction, given by the court of its own motion, the jury were charged: That if they believed, from the evidence, that the defendant was the last person ever seen with the deceased, and that she had never been seen since that time, and that the defendant had failed to account for or explain her absence, these were circumstances which tended to establish defendant's guilt; *but were not alone sufficient to warrant a conviction;* that it must also appear from the evidence that the *woman Julia was actually dead, and that she came to her death by the agency of the defendant.*

XVII. The first part of the instruction last above copied (No. 23) must, of course, be taken and interpreted in connection with the evidence showing the relation between the prisoner and the woman Julia. Had he been merely casually in company with her at Pratt's Landing, where she disappeared, he would have been under no obligation to account for her. But such was not the case. He could not plausibly interpose the plea of Cain—*he was her keeper.* He had induced her to abandon home, friends, and a life of virtue in Kentucky, and lead with him a life of shame in Arkansas. He took her to Pratt's Landing. She and her young child were in his charge, and dependent upon him. Her dress and the contents of her sachel show that she had but little worldly goods. It was but reasonable, under the circumstances, that he should be required to account for her. How he accounted for her we shall see further on.

XVIII. CIRCUMSTANTIAL EVIDENCE:

The court, after properly defining "a reasonable doubt," in instruction No. 12, given for the state (See *Benton v. State, 30 Ark., 334*), charged the jury (instruction No. 13) that: "In cases of circumstantial evidence, the law does

not demand absolute, mathematical certainty, but if all the circumstances established by the proof, taken together, convince the minds of the jurors, beyond a reasonable doubt, of the defendant's guilt, they will be justified in finding a verdict against him.

And in instruction No. 14, given for the state, that: "In determining the question of the guilt or innocence of the defendant, you will take into consideration all the facts and circumstances connected with the case, as shown by the evidence, giving to them all their due and natural weight, considered in the light of your observations of human actions and motives in human affairs."

These instructions are substantially such as were approved in *Benton v. State, sup.*

For the prisoner, the following instruction (No. 3) was moved, which the court refused: "The jury are instructed that circumstantial evidence should be acted upon with great caution, especially where the public anxiety for the detection of a great crime creates an unusual tendency to exaggerate facts, and draw rash inferences."

Hypothetical instructions should be based on facts in evidence, and not on imaginary, assumed, or conjectured facts. There is nothing in the transcript to show that there was any public excitement in Franklin county pressing for the conviction of the prisoner. He was not being tried by the masses, but before a court and jury, supposed to be removed from excitement, and under the most solemn obligations to afford him a fair and impartial trial, according to law and evidence. The rules and value of evidence, either direct or circumstantial, are fixed, and can not be made to bend and swerve with the outward passions of the multitude.

If his Honor, the presiding judge, had any reason to be-

lieve that the jury were under any pressure from without, it would have been his duty, as, doubtless, his pleasure, to caution them against it. The instruction, as framed, was properly refused.

In the fourth instruction moved for the prisoner, and refused, the court was asked to charge the jury, in substance and effect, that, to warrant the conviction of the prisoner on circumstantial evidence, it must be as strong and convincing as direct evidence.

Authors have speculated and differed about the relative value of direct and circumstantial evidence.

There is no difficulty in conceding, at the outset, says Mr. BURRILL (*Cir. Ev., p. 224*), that as a medium of judicial proof, direct evidence unquestionably ranks as the superior of the two species. And Mr. GREENLEAF classes direct evidence as primary, and circumstantial as secondary.

There may be cases resting on circumstantial evidence, where a large number of well-linked facts, pointing unquestionably to the guilt of the accused, are as convincing as the testimony of one or more eye-witnesses. But such cases have rarely occurred, in our experience.

If an unimpeached witness had sworn in this case that he saw the prisoner knock the woman, Julia, on the head, and throw her into the river, and pitch her child in after her, we should have felt more positively assured of his guilt than we do upon all the circumstances in evidence in this case. Yet, it is well settled that men may be convicted of crime on circumstantial evidence. Otherwise, the most atrocious murders, committed in darkness, or in secret places, witnessed by no human eye, might go unpunished.

XIX. STATEMENTS OF ACCUSED.

By instruction No. 17, given for the state, against the

objection of the prisoner, the court charged the jury that:

"If the jury find from the evidence that the defendant made any false statements as to the absence of the woman whom he is charged to have murdered, or what became of her, or any conflicting or unreasonable statements as to his whereabouts, about the time said woman was first missing, they may be considered by the jury as circumstances tending to establish his guilt."

And of its own motion, and against the objection of the prisoner, the court charged the jury (No. 25): "That when the statements of the defendant are introduced in evidence, all he said in the same conversation is evidence before the jury, as well what he said in his own favor as against him; but in determining the weight to be given to such statements, the jury should compare their consistency with all the other testimony in the case, and so form their opinion of the weight to be attached to them."

Instruction No 12, moved for the prisoner, and refused by the court, also related to statements made by him, and was, in substance and effect, the same as instruction No. 25, given by the court of its own motion.

Instructions Nos. 13 and 14, moved for the prisoner, relate to the weight to be attached to confessions made by a party accused of crime, which appear to have been refused by the court as abstract.

There is no evidence that the prisoner made any confession or admission of guilt.

False. improbable, inconsistent, or contradictory statements of an accused, in attempting to explain suspicious circumstances, or appearances, are prejudicial to him. *Burrill Circ. Ev., pp. 488, 489.*

THOMAS SIMS testified that prisoner stated that Hinkle

moved him from Washington county, and put him off at the depot in Clarksville; that he stopped at Argenta and staid there about two days, and while there went over to Little Rock; and the hotel keeper carried his wife and child to the train; and he went on to Poplar Bluff, and staid there two weeks; and that the woman and child he was accused of killing died there.

W. J. SMITH testified that prisoner stated to him that he staid in Argenta two weeks.

J. R. YOUNG testified that he went to Kentucky and brought prisoner back to this state on a requisition from our governor. That on the road to Mayfield depot, prisoner said his wife and child had died twenty-five or thirty miles from Poplar Bluff. That Capt. Bush had told him he was charged with murdering his wife. Prisoner said the child died about six hours before the woman; that they died on the railroad, and he buried them. That he stopped all night at Argenta and three days at Poplar Bluff. That Hinkle left him somewhere close to Stout's, where he staid all night, and on his return he took the train at Clarksville.

A. J. NICHOLS testified that prisoner told him that Hinkle brought him from Washington county, and set him down in Clarksville, and that he took the first down train, and he and his wife registered at the hotel in Argenta; that he could make the hotel-keeper (Barna) remember him, because he had assisted him in getting through the quarantine, and he could be identified at Clarksville. That when he left Clarksville the child was having chills. That the woman and child both died at Poplar Bluff, and he buried them there. Witness was certain that prisoner said that Hinkle put him off at the depot at Clarksville. Witness asked him if he did not get

off at Stout's, at the boat landing, and he said he did not. Witness went with him to Dardanelle, when he applied for bail, and talked with him a good deal; was in charge of the jail, etc.

T. F. HODNETT testified that he had had a great deal to do with prisoner, and often heard him say that Hinkle carried him to the river, and, not finding a boat, he went back to the railroad and on to Argenta, where he staid over night. That his wife and child died near Poplar Bluff, and he staid at that place several days—did not say how they died; said he staid at the river two or three days.

J. T. TRACY, of Livingston county, Kentucky, and brother-in-law of prisoner, testified that prisoner got back there twenty-second of August, 1878, and told him that Julia Alsbrook had a child in Arkansas, and that she and the child died on the Iron Mountain railroad, on their way to Kentucky, and were buried there.

Prisoner was arrested at the house (or in the field) of W. D. EDMONDS, his brother, to whom he made no statement as to what had become of Julia Alsbrook and her child.

W. W. LOYL, Kentucky witness and brother of prisoner's wife, testified that prisoner told him that Julia Alsbrook and her child had died, and that he buried them on the Iron Mountain railroad, the other side of Poplar Bluff.

The above statements of the prisoner to the several witnesses were voluntary, and made at different times and places.

They must have made an unfavorable impression upon the jury, and he had better been silent, as he had the right to be. *Perkins v. State, 60 Ala., 9.*

No doubt Hinkle took the prisoner to Pratt's Landing,

and he remained in that neighborhood for several days. If he took Julia Alsbrook and her child from the river to Clarksville, and on the train to Argenta, etc., the jury must have wondered why their bonnets, etc., were left on the bank of the river, and the sachel containing their clothing, etc., left in the corner of a fence.

The jury must also have thought it marvelous that he could have taken the woman and child from the river to Clarksville, thence on a public train to a hotel in Argenta, and thence on the Iron Mountain railway to or near Poplar Bluff; that they sickened, died, and were buried there, and yet no witness could be produced who ever saw them after Hinkle left them at Pratt's Landing. Did the prisoner, without assistance, nurse them in their sickness, and, without help, dig their graves and bury them in secret?

Several of his zealous Kentucky witnesses appear to have put themselves to the trouble to come to Clarksville, look at the skull found on the sand bar below Pratt's Landing, return home, and, in depositions, give their opinions that it was not Julia Alsbrook's skull.

Would it not have been as little trouble and travel for them, under the directions of the prisoner, to have found the grave where he buried her, exhumed her body and identified her true remains?

The prisoner left the vicinity of Pratt's Landing, perhaps, about the sixteenth or seventeenth, and was in Livingston county, Kentucky, on the twenty second of August —there was not much time for the sickness, death and burial of the woman and child on the trip.

All these matters, however, were for the consideration of the jury.

XX. Motive of the crime. Except in rare instances of brutal and blood-thirsty criminals, there is usually a motive for murder.

There was evidence that the prisoner was kind to the woman while they were in Washington county, and on the journey to Pratt's Landing, and this was a circumstance in his favor, as the court charged the jury.

There was also evidence that she was dissatisfied with her life in Arkansas, and wished to return to Kentucky.

The jury must have concluded that the motive of the crime was to get rid of her.

The jury and the presiding judge heard all the evidence, and part of it—that relating to the skull, etc., which was before them—they understood better than we do. Upon a careful examination of the whole case, we shall leave the unfortunate prisoner where the verdict of the jury and the judgment of the court below placed him. We have found in the record no material error of law that could probably have been of prejudice to the prisoner; and we could not award a new trial on the evidence without a departure from a long and well-established rule of this court, founded upon a just view of the respective provinces of court and jury under our judicial system.

We should have been better satisfied in affirming the judgment if the proof of the *corpus delicti* had been clearer and stronger.

We have a strong moral conviction that Julia Alsbrook and her child perished in the river at Pratt's Landing But for the contradictory statements of the prisoner, it might possibly have been conjectured that he abandoned them there, and that the fallen woman, through shame and despair, terminated her existence and that of her child by a baptism of death. There is nothing, however, in the

record to indicate that her temperament was of a character to lead her to such an act. She seems to have been of a cheerful disposition, and manifested no feeling that she had fallen, or was leading a life of shame.

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64 362

Cox vs. Donnelly et al.

1. Homestead Lands: *Contracts for sale of, before completion of entry.*
An agreement by a homestead enterer under the homestead act of congress, of May 20, 1862, for the sale and conveyance of part of the land, made before completion of the entry, is in violation of the act, and against public policy, and void.

2. Contracts Against Public Policy: *Relief in equity, when granted.*
Although, in general, courts of equity will not grant relief to persons who are parties to agreements or other transactions against public policy, there are cases where the public interest requires that they should, for the promotion of public policy, interpose; and in such cases the relief is granted to the public through the party.

APPEAL from *Hempstead* Circuit Court in Chancery.
Hon. J. K. Young, Circuit Judge.
Gallagher & Newton, Dan Jones, for appellant.
Williams & Battle, contra.

Harrison, J. This was a suit in equity, by Anson B. Cox, against Patrick Donnelly, William W. Strickland, Alice L. Levinson and Sarah Hirschfield, for the specific performance by said Donnelly of an agreement for a sale of certain lots in the town of Hope, and to set aside and cancel certain deeds from him to the other defendants.

Donnelly, on or about the fourth day of July, 1873, applied to the register of the land office at Camden, to enter,

as a homestead, the east half of the northwest quarter of section thirty-three, in township twelve, south, range twenty-four, west, but found that it had been already entered as a homestead by James Ferrick. Ferrick, at the instance of Donnelly, relinquished his claim, and his entry was canceled. After the relinquishment of Ferrick's claim, but before the cancellation of his entry at the general land office, Donnelly, who was residing on the land, left or deposited with the register an application to enter it; after doing which he laid off a part of the tract into town lots, as an addition to the town of Hope.

Before the lots were laid off, however, and about the month of August, 1873, he entered into a verbal agreement with the plaintiff and his partner, Joshua B. Davis, to sell them, as the complaint alleged, that parcel of the tract which, when the lots were laid off, constituted the larger part of lot 7, in block 29, a fraction of it belonging to another tract, and which, in speaking of, we shall call lot 7, for what an adjoining vacant lot would be worth when he should obtain a title to the land. Donnelly, in his answer, said that the agreement was that they should have the lot at an annual rent of $100, payable in monthly installments, until he obtained his title, and then have the privilege to purchase it at a fair price, or to remove their improvements, if the rent was paid up, as they might elect.

As proven or found by the court, however, the agreement was, that they should have the lot at a rent of $100 a year, and when he obtained the title to the land, they should have the right to purchase it by paying what an adjoining vacant lot would then be worth; or, if they preferred, to continue in the occupancy of it until the rent amounted to the value of the improvements they had put upon it.

Cox and Davis, under the agreement, entered into the possession of the lot, and built a store-house and made other improvements upon it; and in December or January following, they made a similar agreement in respect to lot 8 of the same block. The two agreements were stated in the complaint as one, and may be so treated. Davis subsequently sold and transferred his interest in the lots to Cox.

Ferrick's entry having been canceled, Donnelly, on the second day of February, 1874, made application again, and formally, to the register to enter the land as a homestead, and did so; and on the third day of August, 1874, he paid the government $2.50 an acre—the minimum price—for the land, and received the certificate, and afterwards, the patent.

Donnelly, in August, 1874, after receiving the certificate, sold lot 8 to Smith and Galloway, who paid him for it, and some time after, in that year, they sold the south half of it to the defendant Strickland, and the north half to the defendants Levinson and Hirschfield; and deeds of conveyance were executed by Donnelly to them, respectively.

Cox, after Donnelly had perfected his title, elected to purchase the lots. Donnelly refused to comply with his agreement in respect to lot 7, and he had, as just stated, before sold and conveyed lot 8.

Donnelly made his answer a counter-claim, and prayed a decree for the rents of the lots, none of which, except a small part of that of lot 7, he averred, had been paid; and for general relief.

The other defendants denied any knowledge of the plaintiff's claim to lot 8 previous to their respective purchases and payment of the purchase-money.

The court held and adjudged the agreement void, and

decreed that the possession of lot 7 should be surrendered and delivered up by the plaintiff to Donnelly; and having directed an account to be taken of the value of the improvements upon it, and also of the rents and profits, that Donnelly pay to the plaintiff the sum of $555, the excess of the former over the latter.

The plaintiff appealed.

The homestead act of congress of May 20, 1862, requires: That before any person shall be allowed to enter land as a homestead, he shall make oath before the register or receiver that the entry is made for the purpose of actual settlement and cultivation, and for his exclusive use and benefit, and not, either directly or indirectly, for the use or benefit of any other person; and he must, before a certificate will be given or patent issued, prove by two credible witnesses, that he has resided upon or cultivated the land for five years immediately succeeding his entry; and also make oath that no part of the land has been alienated. And although he may before the expiration of the five years, on making proof of settlement and cultivation as provided by the pre-emption laws, pay the minimum price, and obtain a patent, as was done in this case, his right to do so is derived from his application and affidavit previously filed.

The agreement was clearly in contravention of the act. *Warren v. Van Brunt, 19 Wall., 646; Seymour v. Sanders, 3 Dill., 437; Oaks v. Heaton, 44 Iowa, 116; Dawson v. Merrill, 2 Neb., 119; Clark v. Bailey, 5 Oregon, 343; The St. Peter Company v. Bunker, 5 Minn., 192.*

And it is a proposition admitting of no exception, that contracts in violation of law or against public policy are void, and courts will not lend their aid to enforce them.

It is urged that the court should have refused relief to

Donnelly also, and not have decreed him possession of the lot.

Although, in general, courts of equity will not interpose to grant relief to persons who are parties to agreements or other transactions against public policy, there are cases where the public interest requires that they should, for the promotion of public policy, interpose, and the relief in such cases is given to the public through the party. *1 Sto. Eq. Jur., sec. 298; 2 Kent's Com., 467; Hatch v. Hatch, 9 Vesey, 292; Lord St. John v. Lady St. John, 11 ib., 526; Jackman v. Mitchell, 13 ib., 581; Morris v. MacCullock, 2 Eden, 113; Law v. Law, 3 P. Williams, 391; Austin v. Winston, 1 Hen. & Mun., 33; Hale v. Sharpe, 4 Cold., 275.*

Public policy demands that the purpose or object of the law under which Donnelly entered the land should not be defeated, and that the plaintiff should not be allowed to hold what he had obtained possession of in violation and disregard of its provisions.

There is no error in the decree, and it is affirmed.

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But if the contract be incomplete, and not binding at the intestate's death, and be completed by his administrator, either of his own will or by order of the probate court, the claim will be against the administrator personally, and not against the estate. An administrator has no power to rent land for the benefit of an estate, nor the probate court the power to order it. Yarborough vs. Wood. 204

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12. SAME: PROBATE COURT: *Their duty to pay for personal services for estate.*
Claims for necessary or useful personal services rendered to an estate at the instance of an administrator, and not within his personal duties, may be presented to the probate court, not for allowance and classification, but for an order on the administrator to pay them as expenses of administration. It is the duty of the administrator to pay such claims, and if he does so he will be allowed a credit on settlement. Should he refuse, the probate court has power to compel him. (The case of *Turner vs. Tapscott*, 30 *Ark.*, 312 explained.) Id.

13. *Distribution of property. Jurisdiction.*
Claims for the distribution of personal property of an estate in administration must be made to the probate court; and when not needed for payment of debts, claims for the real property may be asserted by action at law. Equity ordinarily has no jurisdiction. Oliver vs. Vance, Jr., et al. 564

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Under the act of April 11, 1873, creating the county of Lee, the county of Phillips ascertained and reported to the county court of Lee county the amount of the latter's portion of the debt of Phillips county to be paid by Lee county, as provided by the act. Said county court, upon its own examination, allowed, by order on its record, a much smaller amount, and Phillips county appealed to the circuit court. There Lee county demurred to the "action, or complaint," as insufficient in law, etc., etc., and the circuit court sustained the demurrer, and dismissed the appeal. *Held:* That the proceedings were not in the nature of a suit to enforce an obligation resting on contract, but were in pursuance of legislative directions to adjust the fiscal arrangements between the old and new counties; that the action of Lee county court was subject to appeal, and by it the whole cause was transferred to the circuit court, to be tried *de novo*, and final judgment rendered, just as if brought there in the first instance. Phillips County vs. Lee County. 240

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It is in civil suits only, including suits at law, in chancery, and penal actions, that the clerk of the supreme court is authorized by the Civil Code of Practice, to grant appeals. DuVal vs. Hot Springs. 560

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APPROPRIATION OF PAYMENTS.

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In the absence of any agreement between the parties, or any actual appropriation of payments by either of them at the time, the law makes the appropriation. The rule for this, in case of successive charges, making a running account, and successive payments at different times, is to apply the payments to the charges in the order of their dates, extinguishing the oldest first. But this results from presumed intention of the parties. A different agreement may be shown by evidence. Price vs. Dowdy. 285

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The subjects and range, as well as the length, of the arguments of counsel, must necessarily be left to the sound discretion of the presiding judge; and, unless grossly abused to the prejudice of a party, it is not the subject of review in the supreme court. Ford vs. The State. 649

2. *Reading law-book to jury.*

The reading a law-book to the jury in a criminal case by the defendant's counsel, is under the control and subject to the discretion of the circuit judge; and his refusal to allow it, will not be held error here, where there is nothing to show that the discretion was abused. Edmonds vs. The State. 720

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In a suit in which no affidavit or bond for attachment was filed, nor order for attachment issued, the defendant filed the bond of a surety to perform such judgment as should be rendered in the case. Afterwards, judgment was rendered against both defendant and the surety, without notice to him, for the plaintiff's demand; and execution was issued, and the surety gave a stay bond; and afterwards appealed to the supreme court. *Held:* That the bond of the surety was unauthorized by law, and answered no purpose in the suit; that it gave the circuit court no jurisdiction as to him, and the judgment against him was *coram non judice*, and void; and that, there being no judgment against him, the execution and stay bond were also void. Williams vs. Skipwith. 529

4. *Forthcomng bond, when broken. Pleading on.*

The obligors in a delivery bond, executed under sec. 406 Gantt's Digest have a right to retain the property attached until the court orders a sale of it to satisfy the judgment against the defendant; and when such order is made, they may pay off the judgment, or *must*, by the terms of the bond, deliver the property or its value to the sheriff. Until such failure, there is no breach. And a complaint against the obligors on such bond, which fails to allege any order of court concerning the attached property, shows no cause of action. Adams et al. vs. Jacoway. 542

5. LANDLORD'S ATTACHMENT: *What removal of crop sufficient for.*
The actual removal by the tenant of any part of the crop, even for honest purposes, without consent of the landlord, will justify the attaching of the crop, although enough remains upon the premises to satisfy the rent, and the tenant does not intend to remove the crop in bulk. Randolph et al. vs. McCain, Ad. 696

6. *Removing effects out of the state.*
If a debtor is removing his property out of the state, not leaving sufficient to pay all his debts, a creditor may attach, although sufficient be left to pay his debt; and testimony of other debts is admissible to prove the insufficiency of the property to pay all. Holliday Bros. vs. Cohen. 707

7. *Act of November* 10, 1875, *construed, etc.*
For construction of the act of November 10, 1875, amending the attachment laws, and the proper practice under it, see opinion. (REP.) Id.

See DAMAGES, 4. JURISDICTION, 7.

BAIL BOND.

SURETIES ON BAIL BOND: *Bad indictment against principal, no defense.*
The sureties on a bail bond can not show, in answer to a *sci. fa.* on forfeiture, that the indictment against the principal was bad. Reeve et al. vs. The State. 610

BIGAMY.

See CRIMINAL LAW, 11. EVIDENCE, 10.

BOND.

See ATTACHMENT, 3, 4. BAIL BOND. COLLECTOR, 1, 2. MISTAKE, 1. SHERIFF, 1. TREASURER, COUNTY, 1.

BURDEN OF PROOF.

See CRIMINAL LAW, 9.

CANCELLATION

See DEED, 2.

CERTAINTY.

See DEED, 3, 4.

CERTIFICATE OF DEPOSIT.

See ASSIGNMENT.

CERTIORARI.

See PROCESS, 3.

CHANCERY JURISDICTION.

CONTRACTS AGAINST PUBLIC POLICY: *Relief in equity, when granted.*

Although, in general, courts of equity will not grant relief to persons who are parties to agreements or other transactions against public policy, there are cases where the public interest requires that they should, for the promotion of public policy, interpose; and in such cases the relief is granted to the public through the party. Cox vs. Donnelly et al. 762

See CORPORATION, 2. INJUNCTION, 1. JUDGMENT, 2. PROCESS, 3.

CIRCUIT COURT.

See JURISDICTION, 4, 6. SPECIAL JUDGE, 1.

CLERK, COUNTY.

See TAX SALE, 2.

COLLECTOR.

1. *His bond, measure of.*

The bond of a collector of taxes must be for double the aggregate amount of taxes on the tax-books, exclusive of the probable liquor and other licenses that may be issued by the county clerk. Hodgkin vs. Holland, Collector. 200

2. SAME: *Affidavit of sureties, requisites.*

The affidavit of the sureties on a collector's bond need not give a description of their property, but only its amount and value. That the affidavits of some of the sureties are not made until after the bond is approved by the county judge and filed in the clerk's office, is no reason that the circuit court should not approve it. Id.

See DEED, 3, 4.

COMMISSIONER'S DEED.

See JUDICIAL SALE, 1.

COMMISSIONER OF UNITED STATES.

See FALSE IMPRISONMENT, 1.

COMMON CARRIER.

1. RAILROAD COMPANY: *Liability for injury to passengers: Negligence, when presumed.*

To the liability of a railway company as a passenger carrier, two things are requisite—that the company be guilty of some negligence or omission, which mediately or immediately produced or enhanced the injury; and that the passenger should not be guilty of any want of ordinary care and prudence which contributed to the injury. *Prima facie*, when a passenger, being carried on a train, is injured without fault of his own, there is a legal presumption of negligence, which the carrier must remove by proof. If a car is thrown from the track and crushed, and there is a broken rail, the jury may infer negligence from these facts; and the *onus probandi* will be shifted to the carrier. George vs. Railroad Company. 613

2. SAME: *Bound to utmost diligence.*

Railway carriers of passengers are bound to the utmost diligence which human skill and foresight can effect; and if injury occurs by reason of the slightest omission in regard to the highest perfection of all the appliances of transportation, or the mode of management at the time the injury occurs, the carrier is responsible. Id.

See FERRYMAN.

CONSIDERATION.

See CONTRACT, 2. PLEADING, 2.

CONSTITUTIONAL LAW.

1. COUNTIES: *Area.*

An act of the legislature, reducing a county below 600 square miles is unconstitutional. Bittle vs. Stuart, Judge. 224

2. STATUTE: *Indivisible, void in part, void in whole.*
CLARK COUNTY: *Act abolishing, void.*

The act of the legislature, of April 3, 1879, distributing portions of the territory of Clark county to other counties, is an indivisible act, and can not take effect in part and not in whole. It is also void, because it can not be ascertained from its terms, with any reasonable certainty, what territory is assigned to Dallas county. Id.

3. SAME:

An act of the legislature, conflicting with the constitutional provision, that until a designated time, a certain county shall be a representative district with two representatives, and, with certain other counties, shall compose a senatorial district, is void. Id.

CONSTRUCTION.

See LANDLORD AND TENANT, 2. STATUTES, 5, 6.

CONTINUANCE.

1. MOTION FOR: *Must be in bill of exceptions.*

A motion for continuance, not contained in the bill of exceptions, is no part of the record in the supreme court. Evans & Shinn vs. Rudy. 383

2. SAME: *Absence of counsel.*

It is within the sound discretion of the presiding judge to grant or refuse a continuance on the ground of the unavoidable absence of the leading counsel in a cause, and unless it is made to appear that such discretion was abused, to the prejudice of the party making the application, its refusal will not be ground for reversal in the supreme court. Edmonds vs. The State. 720

CONTRACT.

1. *Extent of obligation.*

Parties to contracts are bound only so far as they intend to be bound. Rau vs. Little Rock. 303

2. *Consideration.*

If the purchaser of land at execution sale agree with the owner, to convey the land to his wife and children, upon certain conditions to be performed by the wife, and he thereupon refrain from redeeming the land from the execution sale, this is sufficient consideration to support the contract. Watkins vs. Turner. 663

See CHANCERY JURISDICTION. FRAUDS, STATUTE OF, 1. HOMESTEAD ENTRY. MUNICIPAL CORPORATION, 2, 3. POWERS. SHARE CROPPER, 1.

CONTRIBUTION.

See PRINCIPAL AND SURETY, 4.

CONVERSION.

See TROVER, 1, 2, 3, 4.

CORPORATION.

1. STOCKHOLDERS IN CORPORATION: *Their liability at common law.*

By the common law, stockholders of a corporation are not personally liable for its debts. They are liable to an action at law by the *corporation* for unpaid stock, but a *creditor* of the corporation can not, by the common law, sue them in a court of *law* for unpaid stock. His remedy is in chancery. Jones et al. vs. Jarman. 323

2. SAME: *Liability under constitution of* 1868.

The clause of sec. 48, Art. V, of the constitution of 1868, which provides that "in all cases each stockholder shall be liable, over and above the stock by him or her owned, and any amount unpaid thereon, to a further sum at least equal in amount to such stock," entered into and formed a part of the act of April 12, 1869 (*Secs.* 3333-3334, *Gantt's Dig.*), for the organization of private corporations, and parties becoming stockholders in a corporation under that act, during the operation of that constitution, assumed the liability imposed by the foregoing provision of it, and in the absence of any statutory remedy at law, the corporation creditor may enforce such liability in equity. Id.

COUNTY.

1. *Area.*

An act of the legislature reducing the area of a county below 600 square miles, is unconstitutional. Bittle vs. Stuart, Judge. 224

2. CLAIMS AGAINST COUNTIES: *Excessive allowances forbidden.*

The allowance of charges against a county above the cash value, in consequence of the depreciation of county scrip, is forbidden by statute, and contrary to public policy. Union County vs. Smith. 684

See APPEAL, 1. CONSTITUTIONAL LAW, 2, 3.

COUNTY COURT.

1. STATUTE CONSTRUED: *Appropriation of taxes by the county court.*

Sec. 7 of the act of March 18, 1879, limiting the appropriation of taxes by the county court to "90 per cent. of the taxes for that year," means of the taxes levied upon the assessments of property, and to be extended upon the tax-books; and does not prevent the court from also appropriating the revenue accruing to the county from fines, forfeitures and licenses. Allis vs. Jefferson County. 307

2. COUNTY COURT: *Power to make allowances and issue warrants beyond appropriations.*

Since the passage of the act of March 18, 1879, the county court is not prohibited from allowing claims against the county in excess of the appropriations. The law makes it the duty of the clerk to issue warrants on allowances when made. (ENGLISH, C. J., dissenting as to so much of the opinion as holds that the clerk may issue warrants upon allowances not covered by appropriations, or against exhausted appropriations.) Worthen, Clerk, etc., vs. Roots et al. 356

See COUNTY, 2. LIQUOR LICENSE, 3.

COURTS.

See PROCESS.

CRIMINAL LAW.

1. LARCENY: *Trees severed from soil, subject of.*

Trees previously severed from the soil are personal property, and the subject of larceny, and when furtively taken from the land or possession, actual or constructive, of another, it is larceny. State vs. Parker. 157

2. *Former acquittal.*

If, upon a former indictment, the defendant could not have been convicted of the offense described in the latter, then an acquittal upon the former is no bar to the latter. State vs. McMinn. 160

3. *Assault with intent to murder.*

To sustain an indictment for an assault with intent to murder, the evidence must be such as would warrant a conviction for murder if death had ensued from the assault. Lacefield vs. The State. 275

4. *Shooting one, with intent to kill another.*

When one, intending to kill A, shoots and wounds B, or if it be doubtful which he shoots at, he can not be convicted of an assault with intent to kill B. *Sec.* 1327 *Gantt's Digest*, has no application to assaults with intent to kill. It has relation to maiming or wounding; and prosecutions under it are for the maiming, or bodily injury done, and not for the assault or attempt. Id.

5. LARCENY: *Drunkenness, when a defense.*

If one, at the time of taking property, is so under the influence of intoxicating liquor that a felonious intent can not be formed in his mind, he is not guilty of larceny. Wood vs. The State. 341

6. *Intent, when implied.*

Every one is presumed to intend the natural consequences of his act; and though a specific intent may not exist in the mind, the law will imply an intent to produce the effect, when it is the natural and probable consequence of the act Howard vs. The State. 433

7. LARCENY: *Evidence—Possession of stolen property.*

Possession of property recently stolen, unexplained, is evidence of guilt to go to a jury for their consideration. In this sense, it is *prima facie* evidence; but not in the sense that it is such evidence as must compel the jury to convict unless it be rebutted. The presumption that the person in whose possession stolen property is found, is the thief, is not one of law, and a weak one of fact—is not at all conclusive, and, of itself, is not sufficient for a conviction. Boykin v. The State. 443

8. SABBATH-BREAKING: *Keeping open saloon on Sunday.*

Appellant was a nominal partner in a saloon, and he and another bar-tender attended by turns on Sundays to furnish liquor to customers entering at the back door, the front door being kept closed. Held guilty of the offense of Sabbath-breaking by keeping open a dram-shop on Sunday. Blahut vs. The State. 447

9. INTENT: *When presumed from the act.*

Where an act, in itself indifferent, becomes criminal if done with a particular intent, there the intent must be proved and found; but where the act is in itself unlawful, the proof of justification or excuse lies on the defendant; and on failure thereof, the law implies a criminal intent. Harris vs. The State. 469

10. DRUNKENNESS: *When evidence of, admissible.*

Where the question is whether words have been uttered with a deliberate purpose, or are merely low and idle expressions, the drunkenness of the person uttering them is proper to be considered. Id.

11. BIGAMY:

If A marries B, and afterward, while B is alive, marries C, and afterward, when B is dead, or divorced, marries D while C is living, this last marriage is not bigamous, the second being absolutely void. Halbrook vs. The State. 511

12. WEARING CONCEALED WEAPONS: "*Upon a journey.*" *Temporarily stopping.*

Whether a traveler was "upon a journey" in the spirit of the law against wearing concealed weapons, while stopping at a town on his way, is a question for the jury, upon all the circumstances before them. His intent governs, and the question of fact is, was he really prosecuting his

journey, only stopping for a temporary purpose; or had he stopped to stay awhile, mingling generally with the citizens, either for business or pleasure. Carr vs. The State. 448

13. SAME: *What necessary to constitute the offense.*

To constitute the offense of wearing concealed weapons, under sec. 1517 of Gantt's Digest, the implement must be carried about the person, to be always accessible for use in fight, and so hidden from general view as to put others off their guard. If a pistol be not loaded, or unfit for use, this rebuts the presumption that it was carried as a weapon. If it be worn concealed, the jury may presume that it was loaded and worn as a weapon. But this is a presumption of fact, and not of law, and may be rebutted by proof. Id.

14. EMBEZZLEMENT: *Officer failing to pay over.*

A failure by an officer to pay over money found due from him upon settlement, is, without a good or satisfactory reason, evidence in proof of a conversion; but where there has been no conversion or misapplication of the money or funds, a failure to pay over is not of itself sufficient to constitute the offense of embezzlement by an officer. State vs. Hunnicut. 562

15. LARCENY: *Conversion by servant of master's goods.*

The servant has a mere custody of the master's goods. His possession is that of the master. If he appropriates them to his own use, with intent to steal, it is larceny at common law. The trespass occurs when he changes his custody of his master's goods into an adverse possession in himself, with a felonious intent. Powell vs. The State. 693

16. CHARACTER OF PRISONER: *Presumption from.*

If the jury find from the evidence that the prisoner is of good character, they may take that fact into consideration in determining his guilt or innocence; but if they believe, from the evidence, that he is guilty, they must so find, notwithstanding his good character. Edmonds vs. The State. 720

17. *Inconsistent statements of accused.*

False, improbable, inconsistent or contradictory statements of an accused in attempting to explain suspicious circumstances or appearances, are prejudicial to him. Id.

18. *Pocre—Stud Pocre.*

Proof of the playing of "stud" pocre will sustain an indictment for playing pocre. The statute can not be evaded by slight variations in the name, or mode of playing the game, nor by paying money to a banker or stakeholder, and taking chips to bet with, nor by obtaining chips

from others to bet with, which would draw money. Flynn vs. The State. 441

See EVIDENCE, 6. FORMER ACQUITTAL. GAMING. INDICTMENT. SUPREME COURT, 3.

CRIMINAL PROCEDURE.

1. *Oath of jury: Entry of.*

It is not necessary to enter upon the record the *form* of oath administered to the jury. It is sufficient for the entry to show that they were duly sworn. The supreme court will presume, in the absence of a contrary showing, that they were sworn according to law. But if the form of oath administered is entered of record, and appears not to be in substance and legal effect the oath prescribed by law, it will be error. Anderson vs. State. 257

2. *Trial without plea of defendant, error.*

To proceed to trial without a plea from the defendant is error, for which judgment should be arrested. Lacefield vs. The State. 275

3. *Insufficient verdict.*

Upon the return into court of a verdict of "guilty as charged in the indictment," which charges murder in the first degree, the court should order the jury to retire and return a verdict in proper form; but if instead, a new trial is granted, such verdict is no bar to a trial and conviction of the defendant for murder in the first degree. Ford vs. The State. 649

4. GRAND JURY: *List of, must be certified by jury commissioners.*

If the jury commissioners fail to certify the list of grand jurors and alternates selected by them, as the law requires, the circuit court may quash the list and require the sheriff to summon others. Edmonds vs. The State. 720

See ARGUMENT OF COUNSEL. NEW TRIAL, 1.

DAMAGES.

1. REPLEVIN: *Measure of damages in.*

The ordinary measure of damages for the plaintiff in replevin, as to property which has no usable value except for consumption, in the absence of proof of special damage, is legal interest on the value of the property, in addition to the property itself or its value. But as to property having a usable value, by way of bailment for hire, like horses or tools, the measure is the value of the use during the detention. The loss of a job, by the taking and detention of one's tools, is too remote as an element of damages. Kelly vs. Altemus 184

2. *Measure of damages against ferryman.*

The measure of damages for property lost by the fault of a ferryman in its transportation, is the value of the property, together with compensation for the actual expenses and loss of time caused by the detention on account of the accident. Evans & Shinn vs. Rudy. 383

3. TROVER: *Measure of damages for chose in action, etc.*

The measure of damages in trover for a chose in action, as a bond, bill, note, or other security for payment of money is, *prima facie*, the amount due on the security; the defendant being at liberty to reduce that valuation by proof of payment, or the insolvency of the maker, or of any fact tending to invalidate the security. Ray vs. Light. 421

4. *Damages for wrongful attachment.*

Damages for injury to credit and loss of prospective profits in business by reason of a wrongful attachment are not recoverable in an action on the attachment bond, nor in the attachment suit. If recoverable at all, it must be in a separate action on the case. Halliday Bros. vs. Cohn. 707

DECREE.

1. *What is final.*

A final decree is the order of the court pronounced upon hearing and understanding all the points in issue, and determining all the rights of the parties to the suit, according to equity and good conscience. If a decree does not profess on its face to dispose of many of the important matters involved in the cause, and it is manifest that the cause was not in condition to be heard upon those matters, and the decree fails to show affirmative action of the court upon them, the presumption may be indulged that they were not under consideration at the hearing, or intended to be embraced in the decree. Shegogg vs. Perkins et al. 117

2. *Binds only parties. Reversed if necessary party not made.*

A decree is not binding upon one not a party to the suit. It is error in a court to render a decree without having before it a party necessary to make it final and effective. King et al. vs. Clay et al. 291

3. *Must be only for parties to suit.*

A court of equity can not render a decree in favor of persons not parties in the cause. Sisk vs. Almon et al. 391

4. IN REM: *When superseded by appeal without bond.*

A decree for the sale of land, against several defendants, is superseded by an appeal without bond, if any of the appellants are administrators, or executors, having an interest in the land. Fishback et al. vs. Weaver et al., Ad. 569

5. *By consent of unauthorized attorney, not void.*

Though an attorney appears for a party to a suit without his authority, and consents to a decree, it is only voidable for fraud, and can not be collaterally attacked. Denton vs. Roddy et al. 642

See EVIDENCE. FORECLOSURE, 1. JUDGMENT, 2. JUDICIAL SALE, 2. MORTGAGE, 1.

DEED.

1. *Mistake in, how corrected. Intervening purchaser.*

A mistake in a deed, in a description of land, may be corrected and the title perfected by a subsequent deed; and a purchaser of the land at a sale made after the last deed, under an execution against the grantor levied on it *between* the deeds, gets no title if he have notice at the time, of the mistake and correction. Williams et al. vs. McIlroy. 85

2. *Cancellation or surrender procured by fraud.*

The cancellation or surrender of a deed will not revest the title in the grantor. But where such cancellation has been made under circumstances which would render it a fraud on the part of the holder of the legal title to retain it, such circumstances, for instance, as would render a restoration to the *statu quo* impossible, a constructive trust will be adopted as a convenient machinery for the fulfillment of justice; saving, always, the rights of innocent parties. Taliaferro, Ex., vs. Rolton. 503

3. COLLECTOR'S DEED: *Uncertainty in description makes void.*

A collector's deed which recites that a quarter section of land was offered for sale, and that B purchased 35 acres of it, and then conveys to him said land, is void upon its face for uncertainty. Jacks vs. Chaffin et al. 534

4. SAME: *Recital of survey of part sold.*

If a collector's deed for land sold under chapter 128, Revised Statutes, be otherwise sufficient, a failure to recite in it the survey and return of the part sold, will not invalidate it; they may be shown *aliunde*. But, in the absence of any recital of a survey, or any evidence of it *aliunde*, the deed itself, describing nothing, is an absolute nullity. Id.

5. QUIT-CLAIM DEED: *What it conveys.*

A quit-claim deed conveys only such interest as the grantor then has. Kountz et al. vs. Davis. 590

DEMAND.

See TROVER, 2, 3.

DEMURRER.

See LIMITATION, STATUTES OF, 1. PLEADING, 4. PRACTICE, 2.

DESCENTS AND DISTRIBUTION.

1. DESCENTS AND DISTRIBUTION: *Rules in Kelley's case.*

The rules of descent educed from the statute, and then formulated, in the case of *Kelley's Heirs v. McGuire, et al.*, 15 *Ark.*, 555, have become rules of property, to be disturbed only by the legislature. By the first section of the statute, the personal property of which an intestate dying without wife, children or father, was possessed, or in which he had a vested interest in remainder after the death of another, goes, after payment of debts, to his mother as his sole distributee. Real property given by a paternal uncle is ancestral, as if it came from the father; and upon the death of the donee, intestate, it will descend to his nearest relations who are of the blood of the donor, to the exclusion of those who are not of his blood. The donee, or person last entitled to possession, and not the donor, remains the *propositus*, whose nearest relations of the donor's blood must be traced for heirs. Oliver vs. Vance, Jr., et al. 564

2. DESCENTS: *Dying intestate without issue.*

J and W, brothers, were joint owners, by purchase, of land. J died, leaving surviving him his father and mother and brothers and sisters. Afterwards, W died, leaving a child, and soon afterwards the child died, w thout issue, leaving its grandfather and grandmother and uncles and aunts on its father's side. *Held:* That upon the death of J, his interest in the land ascended to his father for life, remainder in fee to his brothers and sisters; and upon the death of the child, its interest in the land ascended to its grandfather and grandmother and uncles and aunts on the father's side in equal parts. Kountz et al. vs. Davis. 590

DEVISAVIT VEL NON.

See WILL, 1.

DIVORCE.

1. *Not granted on pleadings, etc.*

A divorce will not be granted on a demurrer to a bill, or upon a failure to answer, or upon admissions in an answer, or alone upon declarations or admissions of the defendant, proven by depositions or otherwise. Rie vs. Rie. 37

2. *Non-cohabitation sufficient for.*

Actual abandonment of matrimonial cohabitation, without reasonable cause, for the period of one year, intentional on the part of the wife, is cause for divorce, notwithstanding she makes occasional visits to the house of her husband to look after her children, and while there engages in domestic duties. Id.

3. *Not granted on evidence of parties. Conflict between.*

The uncorroborated evidence of the parties, though admissible for what it is worth, is not sufficient to authorize a divorce, notwithstanding they agree in their statements. Where there is a conflict in their testimony, that of the defendant is deemed of greater weight. Id.

4. *Pleading. Allegations must be specific.*

Where the causes alleged for divorce are not sufficiently specific, the court should, on motion of the defendant, compel the plaintiff to make them so. Id.

See MORTGAGE, 1.

DOWER.

See ADMINISTRATION, 2. SWAMP LANDS, 1.

DRUMMING.

See MUNICIPAL CORPORATION, 6.

EJECTMENT.

PRACTICE IN: *Record.*

The documentary evidences of title exhibited with pleadings, under the act of 1875, regulating the practice in actions of ejectment, and the exceptions thereto, become parts of the record; and no motion for new trial, or bill of exceptions, will be required to bring to the notice of the court any ruling upon exceptions. Jacks vs. Chaffin et al. 534

See LIMITATION, STATUTES OF, 5. MORTGAGE, 4.

EMBEZZLEMENT.

See CRIMINAL LAW, 14.

EQUITY.

See CHANCERY JURISDICTION.

EVIDENCE.

1. WITNESS: *Not impeached by proving indictment against.*

A witness can not be impeached, nor his testimony impaired, by proving that he had been indicted for larceny. Anderson vs. State. 257

2. PRACTICE IN CIRCUIT COURT: *Admitting testimony irregularly.*

It is within the discretion of the circuit court to allow a plaintiff to introduce further evidence in chief, in support of his action, after the defendant has closed his testimony. And, unless the discretion is abused, it is not error. Evans & Shinn vs. Rudy. 383

3. *Direct and circumstantial, distinguished.*

When the existence of any fact is attested by witnesses, as having come under the cognizance of their own senses, the evidence of the fact is said to be direct or positive; but when the existence of the principal fact is only inferred from one or more circumstances which have been established directly, the evidence is said to be circumstantial. Howard vs. The State. 433

4. ADMISSIONS: *Jury not bound to believe all a party said.*

The jury are not bound to give equal weight to all the statements of a defendant admitted in evidence. Id.

5. SAME: *Trustee's, not admissible against cestui que trust.*

The statements or admissions of a trustee, of a past transaction, can not be admitted against the interest of his *cestui que trust.* Ludlow, Ad., vs. Flournoy et al. 451

6. *Threats: Admissibility of.*

Where a threat is not communicated to the defendant before the killing, and there is no evidence by which it may appear that the defendant, in taking the life of the deceased, acted under a reasonable apprehension of danger to his own life, or fear of great bodily injury, and such threat, if it had been communicated to him, could afford him no justification or excuse for the killing of the deceased, it can not be admitted in evidence. Harris vs. The State. 469

7. *Prejudice of witness may be shown, but not the reason for it.*

A witness for the state may be shown to be prejudiced, or to have ill-feeling against the accused, but the facts and circumstances causing such prejudice or ill-feeling can not be stated in detail by the witness. Butler vs. The State. 480

8. *Contradiction of witness. Collateral matter. Test of.*

When a witness is cross-examined on a matter collateral to the issue, he can not, as to his answer, be subsequently contradicted by the party

putting the question. The test of whether a fact inquired of in cross-examination is collateral, is this: Would the cross-examiner be entitled to prove it as part of his case, tending to establish his plea. This limitation, however, only applies to answers on cross-examination. It does not affect answers to the examination in chief. Id.

9. ADMISSIONS: *State may prove, but not, defendant.*
The state may prove any voluntary admissions made by the defendant, but the defendant has no right to prove admissions made by himself to another person at a different time. Id.

10. *Evidence of marriage: Admissions—Cohabitation, etc.*
In prosecutions for bigamy, the deliberate admissions of a defendant that a woman was his wife, and evidence that he cohabited with, treated and held her out to the community as such, may go to the jury for what they are worth, as tending to prove an actual marriage. Halbrook vs. The State. 511

11. MARRIAGE: *Divorce decree, evidence of.*
The record of a decree of divorce, in a suit of which the defendant has had legal notice, is evidence of the marriage. Id.

12. *Medical expert, opinion, etc.*
A medical witness, after examination of a wound upon the head, inflicted by a blow with a club, may testify his opinion that the blow produced the death of the party by concussion of the brain, without opening the skull and examining the brain. Ebos vs. The State. 520

13. *Decree.*
The certified copy of a decree alone, is sufficient evidence that such a decree has been made. Denton et al. vs. Roddy. 642

14. CRIMINAL EVIDENCE: *Confessions.*
The confessions of a defendant should be cautiously received, but when deliberately and voluntarily made, they are among the most effectual proofs in the law. Ford vs. The State. 649

15. SAME: *Testimony of other crimes than the one alleged.*
When a man is charged with one crime, it is not competent to prove that he has committed others; but a witness of a conspiracy may state the whole plan or purpose of the conspirators to rob several parties, though it does not appear that they executed their plan except as to the one for the murder of whom the defendant is indicted. Id.

16. WITNESS; *Defendant in criminal case, incompetent.*
A defendant in a criminal case can not testify or make a statement to the jury contradictory of the evidence. Id.

17. WITNESSES: *Husband and wife. Magness v. Walker*, 26 *Ark.*, *overruled.*

Husband and wife can not testify for or against each other in civil cases. And the incidental benefit which the husband, though a formal party, may derive from the wife's success in a suit for property, can not be noticed as a legal or equitable interest to authorize his admission as a witness. The decision in *Magness v. Walker*, 26 *Ark.*, 470, that a husband or wife acting as agent for the other, may testify as to the matters of the agency, overruled. Watkins vs. Turner et al. 663

18. WITNESS: *Party as, put under rule.*

A party who becomes a witness in a suit may be put under rule as other witnesses. Randolph et al. vs. McCain, Ad. 696

19. SAME: *Evidence of bad character of, whether too remote.*

It is within the discretion of the circuit judge to admit or refuse evidence of the character of a witness for truth in a neighborhood in which he had previously lived, according as he may think it too remote, or fairly proper to assist the jury in judging of the witness' present veracity. Holliday Bros. vs. Cohen. 707

20. *Party contradicting his admissions in court.*

A defendant stated in his motion for continuance, that certain absent witnesses would testify, if present, to certain facts. The state, to avoid the continuance, admitted that the witnesses, if present, would testify as stated. Afterwards, the court, against the objections of the defendant, permitted the state to introduce the witnesses, and prove by them the reverse of what it had admitted they would testify. *Held*, that there was no error in this. Edmonds vs. The State. 720

21. *Counts in an indictment not evidence.*

Counts in an indictment are mere pleadings, and can not be used as evidence on the trial. Id.

22. *Declaration of deceased: Res gestæ.*

Where it was important to prove that the deceased had a peculiar tooth in the roof of her mouth, her declarations about it, when there could have been no *lis mota*, were admissible in evidence as *res gestæ*. Id.

23. *Corpus delicti.*

For the rule of law as to proof of the *corpus delicti*, see opinion, page 743, *et seq.* Id.

See CRIMINAL LAW, 7. DIVORCE, 1, 3. HOMESTEAD, 1. INDICTMENT, 14. MUNICIPAL CORPORATION, 2, 3.

EXCEPTIONS, BILL OF.

1. PRACTICE IN SUPREME COURT: *Bill of exceptions.*

When the bill of exceptions contains no reference to the motion for new trial, and no exception to the decision of the court overruling it, there is no question of law before the supreme court to decide, on the appeal. Sigment vs. The State. 420

2. *Bill of exceptions not allowed in time, no part of record.*

When it does not appear that a bill of exceptions, in a criminal case, was allowed by the judge within the time given, or even before the end of the succeeding term, beyond which it could not have been extended by the court, it will not be considered as any part of the record. Crowell vs. The State. 432

3. *Not necessary* where error appears upon the face of the judgment. Union County vs. Smith. 684

4. *Pleadings found in bill of exceptions not noticed.*

A copy, in a bill of exceptions, of a paper, said to be an answer in the case, is out of place there, and will not be noticed in the supreme court. Randolph et al. vs. McCain, Ad. 696

See CONTINUANCE, 1. EJECTMENT, 1.

EXECUTION.

1. INNOCENT PURCHASER: *One under his own execution is not.*

A purchaser under his own execution is not an innocent purchaser for value, without notice. Williams vs. McIlroy. 85

2. SALE OF LAND UNDER EXECUTION: *Sheriff not bound to sell in forty-acre tracts.*

Section 2681 *Gantt's Digest,* which provides that lands be sold under execution in forty-acre tracts, is directory, and at the option of the owner. In the absence of instructions, the sheriff will exercise his sound judgment in making the sale. Feild, Brown et al. vs. Dortch. 399

3. *Purchaser of safe is not, of contents.*

The purchaser of a safe at an execution sale, acquires no title to its contents. It is his duty to preserve them and restore them to the owner when called for. Ray vs. Light. 421

See DEED, 1.

EXECUTOR.

1. *Executor, authority of, relates to grant of administration.*

The authority of an executor relates to the grant of administration to him

by the probate court, and not to the mechanical issuance of the letters testamentary, as evidence of his authority. Ludlow, Ad., vs. Flournoy et al. 451

2. *To whom liable for waste.*

For waste, or loss, a former executor or administrator is liable to heirs, legatees and creditors, but not to an administrator *de bonis non.* Id.

3. *His powers—selling land. His receipt to purchaser sufficient discharge.*

An executor derives his powers from the will. If it authorizes him to sell lands, he may do so without the order of any court. And, in the absence of fraud, his receipt to the purchaser for the purchase money, is a sufficient discharge. Id.

4. FRAUD: *Purchaser concerting with executor.*

One who purchases land at less than its value, by concerting with the executor, may be held to pay its full value, and the land be held to a trust for the purpose. Id.

5. SAME: *Acquiescence—Limitation.*

Acquiescence for a considerable time is often an element against relief; and will prevent creditors from questioning sales by executors. Id.

See DECREE, 4.

EXEMPTION.

Only residents entitled to. How pleaded.

The right of exemption of property from sale under execution appertains only to residents of the state. The pleading asserting it must show such facts as bring the pleader within the expressions of the exemption law. It is not sufficient to allege that the goods are exempt. Donnelly vs. Wheeler. 111

EXONERATION

See PRINCIPAL AND SURETY, 4.

EXPERT.

See EVIDENCE, 12.

FALSE IMPRISONMENT.

COMMISSIONER OF UNITED STATES CIRCUIT COURT: *Power to fine.*

A commissioner of the circuit court of the United States has no power to fine a party as upon final trial, and if he does so and imprisons him until the fine be paid, he is guilty of false imprisonment. Vanderpool vs. State. 174

FERRYMAN.

1. *Liability of.*

When a ferryman receives property for transportation, and has the exclusive custody of it, he is held to the strict liability of a common carrier. But if the owner retains control of the property himself, and does not surrender the charge of it to the ferryman, such strict liability does not attach, and he is only responsible for actual negligence; and if the owner, by his own negligence, has contributed to the loss, which otherwise would not have happened, the ferryman is only liable when the direct cause of the loss is his omission, after becoming aware of the owner's negligence, to use a proper degree of care to avoid the consequences of such negligence. Evans & Shinn vs. Rudy. 383

2. *Ferriage.*

A ferryman can not charge, as a common carrier, for the contents of a wagon separately from the wagon itself. The fixing of the rates of ferriage by the county court is for the protection of the public against an abuse of the franchise. Kelly vs. Altemus. 184

See DAMAGES, 2.

FINE.

See FALSE IMPRISONMENT, 1.

FORBEARANCE.

See PRINCIPAL AND SURETY, 1, 2.

FORECLOSURE.

PRACTICE: *Selling land for cash, error. Plaintiff must not sell.*

It is error in foreclosure suits, to direct land to be sold for cash; and bad practice to appoint the plaintiff commissioner to sell. Worsham and wife vs. Freeman. 55

FORMA PAUPERIS.

See PRACTICE, 5.

FORMER ACQUITTAL.

Conviction of less offense, acquittal of higher.

Where a defendant is indicted for murder, and a verdict against him for a lower offense, the verdict is an acquittal of any higher offense, and he can not, in a new trial, be tried for the higher offense. Ross vs. The State. 376

FORMER JEOPARDY.

See CRIMINAL PROCEDURE, 3.

FORTHCOMING BOND.

See ATTACHMENT, 4.

FRAUD.

What it is, and how alleged.

Fraud is a term the law applies to certain facts as a conclusion from them, and is not itself a fact, and can not be charged in general terms. The facts and circumstances constituting it must be stated. Mock et al. vs. Pleasants. 63

See ADMINISTRATION, 4. DEED, 2. EXECUTOR, 4, 5. JUDGMENT, 2. PLEADING, 3.

FRAUDS, STATUTE OF.

Contracts to repair or rebuild.

Agreements to repair or rebuild are agreements for work, labor and material, and are not required to be in writing. Halbut et al. vs. Forrest City. 246

FRAUDULENT CONVEYANCE.

None but creditor can assail.

One who is not a creditor is not in condition to ask chancery to set aside an alleged fraudulent conveyance of a debtor. King et al. vs. Clay et al. 291

GAMING.

Cities can not license.

A city ordinance licensing the exhibiting of a gaming table or gambling device, within the limits of the city, and a license granted under it, are null and void, and afford no protection against an indictment for the offense. State vs. Lindsay. 372

GRAND JURY.

See CRIMINAL PROCEDURE, 4. PROCESS, 3.

GUARDIAN AD LITEM.

None for unknown infant heirs.

Where the number and names of infant heirs are unknown, it is not practicable to appoint guardians *ad litem* for them. Kountz et al. vs. Davis. 590

HOMESTEAD.

When asserted to avoid a mortgage, must be proved.

The allegations in the answer in a suit to foreclose a mortgage, of facts showing that the mortgaged premises were the homestead of the mortgagor at the time the mortgage was executed, are affirmative, and the *onus probandi* is upon the mortgagor. Worsham and wife vs. Freeman. 55

HOMESTEAD ENTRY.

HOMESTEAD LANDS: *Contracts for sale of, before completion of entry.*

An agreement by a homestead enterer, under the homestead act of congress, of May 20, 1862, for the sale and conveyance of part of the land, made before completion of the entry, is in violation of the act, and against public policy, and void. Cox vs. Donnelly et al. 762

HUSBAND AND WIFE.

See DIVORCE. EVIDENCE, 17. MARRIED WOMEN. VENDOR AND VENDEE, 2.

INDICTMENT.

1. LARCENY: *Indictment, description of property in.*

"Twenty-five cords of wood" sufficiently indicate personal property, and is a sufficient description of the subject of larceny. The common and ordinary acceptation of property is to govern in description; the certainty must be to a common intent, which is such as will enable the jury to say whether the chattle proven to be stolen is the same as that specified in the indictment, and will judicially show to the court that it could be the subject-matter of the offense charged. State vs. Parker. 158

2. *Variance.*

Upon an indictment for stealing a cow, one can not be convicted of stealing a bull. State vs. McMinn. 160

3. FOR MURDER: *Must show manner of killing.*
An indictment for murder that fails to show the manner of the killing, is fatally defective. Haney vs. The State. 263

4. *Indictments need not follow statutory form.*
The form of indictment given in the statute need not be strictly followed. It is sufficient if it contain the requisites specified in *section* 1796, *Gantt's Digest.* Lacefield vs. The State. 275

5. *Indictment for assault with intent to kill.*
Indictments for assault with intent to kill, need not state the means used by the assailant to effectuate his intent. Id.

6. *Venue.*
When the name of the county appears in the caption, and is referred to in the body of an indictment in laying the venue, it is sufficient. State vs. Hunn. 321

7. *Selling Liquor. Alcohol is not liquor.*
An indictment for selling liquor without paying the special tax prescribed by *secs.* 5052 or 5054 *Gantt's Digest,* must charge that the defendant was a liquor dealer, and must state the particular tax, whether state or county, that had not been paid. State vs. Martin. 340

8. *Indictment: Good and bad counts: Verdict.*
Where there are several counts in an indictment for the same offense, some good and some bad, and there is a verdict of guilty on the indictment, it will be referred to the good counts, and the bad will be no ground for arresting the judgment. Howard vs. The State. 433

9. *Indictment: Varying counts.*
It is no objection to an indictment that the different modes in, and means by, which an offense is alleged to have been committed, are stated in several and distinct counts. Id.

10. *For "felony."*
To accuse one of the crime of *felony* is a bad Code beginning to an indictment. *Felony* is the name of no particular crime, but designates a *class* of crimes. Butler vs. The State. 480

11. *The words "no considerable provocation appearing,"* are proper in an indictment for an aggravated assault, but are unnecessary and inappropriate in an indictment for an assault with intent to kill, and may be treated as surplusage. Id.

12. *May be joint against several.*
Several may be jointly indicted for offenses arising wholly out of the same joint act or omission. Volmer vs. The State. 487

13. *Using insulting language to a crowd: How charged.*

When an offensive denunciation is addressed to a company of men, and intended to apply to all of them, it may be charged as having been made to all, or any one or more of them. Hearn vs. The State. 550

14. MURDER: *Name of deceased and means of death unknown.*

An indictment is not bad on demurrer, or in arrest of judgment, because it states that the surname of the party killed is to the grand jurors unknown. But such allegation is material, and must be proved by the state on the trial; and also that the grand jury made due inquiry to ascertain the name. And so the averment that the defendant committed the crime at a place specified, "in some way and manner, and by some means, instruments and weapons to the jurors unknown," is sufficient, when the circumstances of the case will not admit of greater certainty in stating the means of death. Edmonds vs. The State. 720

INDORSEMENT.

See PROMISSORY NOTES, 1.

INFANCY.

INFANT: *When he may disaffirm deed.*

An infant has seven years, the period of limitation, in which, upon coming of age, to disaffirm his conveyance executed in infancy. Kountz et al. vs. Davis. 590

INJUNCTION.

1. *None against criminal proceedings.*

A court of equity will not exercise jurisdiction by way of injunction to stay proceedings in any criminal matters, or in any case not strictly of a civil nature. Portis vs. Fall et al. 375

2. *Chancery will not enjoin a criminal prosecution.* Medical and Surgical Institute vs. City of Hot Springs. 559

3. *Illegal municipal exactions enjoined.*

By section 13, Article XVI, of the constitution of 1874, chancery has power to inquire into the validity of municipal exactions, and to enjoin their collection when found invalid. But to enjoin a city from prosecutions for violations of its ordinances, is beyond its usual relief. Taylor, Cleveland & Co. vs. Pine Bluff. 603

See PROCESS, 2.

INNOCENT PURCHASER.

See EXECUTION, 1.

INSANITY.

INSANE PERSONS: *Contracts of, not void.*

Insane persons have no complete power of contract, but their contracts are not, in general, absolute nullities. George vs. Railway Co. 613

INSTRUCTIONS.

1. *Judge must charge in writing.*

It is the duty of the circuit judge, at the request of a party, to reduce his charge to writing. Anderson vs. The State. 257

2. *Error in, when waived.*

When error in giving or refusing instructions is not made ground for new trial, it is waived. Ray vs. Light. 421

3. *Abstract, refused.*

The court may well refuse instructions of abstract law, which are not applicable to the facts of the case. Harris vs. The State. 469

4. *There is no error in refusing an instruction* which is sufficiently embraced in other instructions given by the court. Ford vs. The State. 649

5. *Intimation of court's opinion of the evidence, improper.*

An instruction should not be given which intimates to the jury the opinion of the court as to the weight of the evidence. Randolph et al. vs. McCain, Ad. 696

6. *An instruction which denounces the landlord's attachment,* a remedy given by the legislature, as harsh, should not be given. Id.

See SUPREME COURT, 5.

INTEREST.

See TENDER, 1.

INTERPLEA.

See REPLEVIN, 4.

JEOPARDY.

See CRIMINAL LAW, 4.

JOINDER.

See INDICTMENT, 12.

JUDGE.

See OFFICERS, 1.

JUDGMENT.

1. *Amendment of without notice, error.*

Failure to give notice to the adverse party of an application to amend a judgment, is ground for reversing the order of amendment, on appeal or writ of error; but the order can not be held void in a collateral proceeding. King et al. vs. Clay et al. 291

2. *Entry procured by fraud, vacated in chancery. Fraud, how charged.*

Chancery will vacate an entry procured by fraud, but the allegations of fraud must be specific of the facts constituting it. General allegations are not sufficient. Id.

See ADMINISTRATION, 1.

JUDICIAL DISCRETION.

See EVIDENCE, 2.

JUDICIAL NOTICE.

JUDICIAL NOTICE: *United States surveys. County boundaries, etc.*

Courts take judicial notice of the United States system of land surveys; with the base lines, meridians, townships and ranges thereby established, and the relative positions of the sections in the townships; also of the division of the state into counties, and the boundaries of the counties as described in public acts; and also of the principal geographical features of the state, including the navigable rivers. Bittle vs. Stuart, Judge. 224

JUDICIAL SALE.

1. SALE BY COURT: *When complete.*

Until confirmed by the court, a sale made under its decree is not completed; and a deed from the commissioner to the purchaser confers upon him no right to the property, and may be assailed in a collateral proceeding. Wells et al. vs. Rice et al. 346

2. SALES PENDING APPEAL: *Title of purchaser.*

When a decree for the sale of property is reversed in the supreme court, all the rights acquired by parties to the suit as purchasers of the property under the decree, fall with the reversal of the decree and dismissal of the bill. They do not stand upon the same equities with strangers who purchase under an order, still valid, and pay valuable consideration. Fishback et al. vs. Weaver et al., Ad. 569

See EXECUTION, 2.

JURISDICTION.

1. ADMINISTRATION OF ESTATES: *Jurisdiction of courts in.*

The probate court has exclusive original jurisdiction in matters of estates of deceased persons, and chancery can not take cognizance of such, except upon some one or more of the ordinary grounds of equity jurisdiction. Mock et al. vs. Pleasants. 63

2. *What it is.*

The power to hear and determine a cause, is jurisdiction. Trammell vs. Town of Russellville. 105

3. *Jurisdiction of courts in.*

The probate court has the exclusive right to make settlements with administrators, which, when confirmed, can never be reinvestigated except in chancery upon a charge of fraud, supported by affidavit. Chancery will then take jurisdiction, not to supersede the probate court, or to withdraw the case from its jurisdiction, but to correct and prevent fraudulent abuse, and to hold the administrator liable for losses or injuries resulting from his mal-administration. It will determine the amount of the administrator's liability, and set aside fraudulent settlements made and confirmed by the probate court; and, when the matters in issue are determined, the administration must be remanded to the probate court to be proceeded with as directed by the decree in chancery. Shegogg vs. Perkins et al. 117

4. OF CIRCUIT COURTS: *How ascertained.*

The correct method of ascertaining the civil and criminal jurisdiction of the circuit courts, is to see what cases, or class of cases, are confided by the constitution exclusively to the jurisdiction of other tribunals; and the great residuum belongs exclusively, or concurrently, to the circuit courts. State vs. Devers. 188

5. *Concurrent.*

In cases of concurrent jurisdiction in different courts, the first exercising jurisdiction rightfully acquires control, to the exclusion of the other. Id.

6. CIRCUIT COURTS: *Can not be deprived of jurisdiction.*

It is not in the power of the legislature, under the provisions of the constitution, to deprive the circuit courts of all original jurisdiction of misdemeanors; and the act of the fifteenth of March, 1879, attempting it, is unconstitutional and void. Id.

7. *Consent can not give, but, etc.*

Consent can not give jurisdiction where none exists; yet, where the court has jurisdiction of the subject-matter (as of property attached), and certain conditions are made essential to its exercise, they may be waived. Orders made concerning the property within the general scope of the power of the court, and in furtherance of the design for which it was attached, may be made by consent; and consent may well be presumed where parties ought to object, and fail to do so. Feild, Brown et al. vs. Dortch. 399

8. JURISDICTION: *When acquired, continues, etc.*

When a court once rightfully acquires jurisdiction of a cause, it has the right to retain and decide it. Jurisdiction of the court depends upon the state of things at the time of the action brought; and, after vesting, it can not be ousted by subsequent events. Estes, Ad., etc., vs. Martin, Ad., etc. 410

See ADMINISTRATION, 13.

JUSTICE OF THE PEACE.

JUSTICE OF THE PEACE: *Practice before. Filing account, etc.*

In ordinary actions before justices of the peace, the plaintiff must indicate in the paper filed as his cause of action, the matter upon which his claim is founded; but he is not held to exhibit in any paper or written statement (unless he chooses to proceed by regular pleading), a complete cause of action, unaided by proof *aliunde*. The instruments filed are not pleadings. If a proper paper or statement be not filed, the suit may be dismissed on motion. If the paper filed is sufficient to indicate a cause of action, the plaintiff may supply full proof *aliunde*. Jacks et al. vs. Nelson & Hanks. 531

See PROCESS, 3.

LANDLORD AND TENANT.

1. *Cropper.*

One who raises a crop on the land of another, under a contract to raise the crop for a particular part of it, is a mere cropper, and not a tenant. Burgie vs. Davis. 179

2. *Contract to return in good order, etc.*

Whenever there is an agreement of the tenant to re-deliver the premises in any prescribed condition of good order, it is a question of the real intention and meaning of the parties, whether he meant to become bound to rebuild, in case of their casual destruction by fire during the term. In arriving at this meaning, the circumstances and probable intention of the parties will be considered. Halbut et al. vs. Forrest City. 246

See ATTACHMENT, 5. LIEN, 2. SHARE CROPPER, 1.

LARCENY.

See CRIMINAL LAW, 4, 5, 7, 15.

LEGAL PRESUMPTIONS.

See CRIMINAL PROCEDURE, 1. DECREE, 1.

LICENSE.

See GAMING, 1.

LIEN.

1. *Laborer's lien.*

One who raises a crop upon land of another, under a contract to raise the crop for a particular part of it, is a mere cropper, and not a tenant; and has a lien upon the crop for whatever is due him. And, as against him, a laborer under him has a lien upon the crop only to the extent of the cropper's claim against the land owner, and may enforce it against the land owner, who gets the crop. Burgie vs. Davis. 179

2. LANDLORD'S LIEN: *Not lost by sale of crop to purchaser with notice.*

A landlord's lien on cotton for rent is not affected by the sale of the cotton by the tenant to a purchaser with notice, nor by his furnishing to the tenant bagging and ties for, and paying freight on it to market; nor is the lien waived by the landlord's accepting, in part payment of the rent, part of the money paid by the purchaser for the cotton, although he knew, at the time of accepting it, that it was a part of that money; unless he was a party to the transaction between the tenant and purchaser, or consented to the sale. Volmer vs. Wharton. 691

See LIMITATION, STATUTE OF, 2. RECEIVER, 1. VENDOR AND VENDEE.

LIMITATION, STATUTE OF.

1. *Demurrer for, at law.*

The statute of limitations can not be availed of at law by demurrer to the complaint, but must be pleaded in bar; unless the complaint shows upon its face not only that sufficient time has elapsed to bar the action, but also the non-existence of any ground of avoidance. Hutchinson vs. Hutchinson. 164

2. *Lien of mortgagee or vendor, when barred.*

The bar of a debt due to a mortgagee, or to a vendor of land by title bond, does not necessarily preclude a proceeding *in rem* in a court of equity, to enforce the specific lien upon the land itself. Only adverse possession for the statutory period necessary to bar ejectment, can bar such a proceeding. Coldcleugh vs. Johnson, Ad., et al. 312

3. ADVERSE POSSESSION: *As against mortgagee, or owner by title bond.*

The possession of a mortgagor, or vendee by title bond, is not adverse, and the statute will not commence running to protect him, until there is an open and notorious denial on his part, of the mortgagee's or vendor's title. Id.

4. TITLE BY POSSESSION: *Statute limitations.*

Possession of land during the full period of limitation, under such circumstances as would make a valid defense, amounts to an investiture of title, which may be actively asserted in all respects, as effectively as if acquired by deed. The continuity of possession has reference to the time the statute is running, and is not necessary after the bar has attached. Jacks vs. Chaffin et al. 534

5. *Title by possession.*

A void patent may be used to give color of title and fix the limits of possession, and a continuous adverse possession under it, or without any color at all, when the limits of possession may be shown, for a period of over seven years, as against parties whose rights are not saved, will create a title which may be used to maintain ejectment. Logan et al. vs. Jelks. 547

6. ADVERSE POSSESSION: *Continuance of, presumed until, etc.*

Possession once established by material acts of visible, notorious ownership, must be presumed to continue until open, notorious and adverse possession be proven to be taken by another. Clements vs. Lampkin et al. 598

See INFANCY, 1.

LIQUOR LICENSE.

1. *Alcohol is neither ardent or vinous spirits, or liquor of any kind;* and its sale is not in any manner restricted or attempted to be regulated. State vs. Martin. 340

2. LIQUOR: *Sale of, near Judson University can not be licensed.*

The sale of liquors within two miles of Judson University, in White county, is regulated entirely by the act of the twenty-seventh of February, 1875, entitled "An act to prevent the sale of alcoholic spirits or vinous liquors within two miles of Judson University, White county," and the county court can not license one to sell within that distance of the university. DeBois vs. The State. 381

3. *Discretion of county court in granting.*

Under the act of May 30, 1874, regulating the licensing of dram-shops, the county court had the discretion to grant or refuse the license petitioned for, and its action was final. Whittington, *ex parte.* 394

See INDICTMENT, 7.

MARRIAGE.

See EVIDENCE, 11.

MARRIED WOMEN.

1. *May mortgage or sell her property for husband's debts.*

The rule that a wife can charge her separate estate only for its, or her personal benefit, does not prevent her from mortgaging or selling it absolutely for her husband's debts. She is for most purposes, in equity, a *femme sole,* as to her separate property, when not restricted by the deed of settlement, in terms or by implications equivalent to express provisions. Collins, Trustee, vs. Wassell. 17

2. *Need not acknowledge assignment of rents.*

She may assign or transfer rents and profits accruing to her under a deed of trust, without conforming to the requirements and formalities prescribed for the alienation of real property. Id.

3. *Mortgage by.*

Must be acknowledged and authenticated as prescribed by the statutes. Worsham and wife vs. Freeman. 55

4. VENDOR AND VENDEE: *Mutuality of contract; want of, when no defense.*

One who receives property from a married woman, under a contract of purchase, whether valid or invalid, and enters upon it and enjoys it for

years, will not be heard in a court of equity to plead that the contract is not binding upon her, or to refuse payment upon tender of a sufficient deed. The defense of want of mutuality has no place, except where the defendant has never received the benefit of the contract on his part, and never had the right to enforce it. Coldcleugh vs. Johnson, Ad., et al. 312

MANDAMUS.

Discretion not controlled by.

Where a court has discretion, it can not be controlled by mandamus. Whittington, *ex parte.* 394

See STATUTES, 4. SUPREME COURT, 1.

MANSLAUGHTER.

See SUPREME COURT, 3.

MASTER AND SERVANT.

See CRIMINAL LAW, 15.

MISDEMEANOR.

See APPEAL, 2, 3. JURISDICTION, 6.

MISTAKE.

Suit and bond in wrong name.

Where a suit is brought against one in a wrong name, and a bond is given to secure some action on his part, describing him by the same name, and there is no doubt of identity, the bond is for the action of *the person.* The insertion of the true name by the court in the subsequent proceedings, and the judgment against *the same individual* for whom the obligors became bound, although by a different name, is sufficient; and the change made, with or without notice to the obligors, can not affect their liability. But when the persons are *actually* distinct, a bond given for the conduct of one can not, by change of names in the proceedings, be made to stand good for the action of the other. The test is, *the person* had in view by the obligors in executing the bond. If judgment is rendered against the same person by a different name, the bond holds good. If it be a different person not contemplated in the bond, the obligation can not be transferred. Adams et al. vs. Jacoway. 542

See STATUTES, 3.

MORTGAGE.

1. DECREE: *Mortgagee not bound by, if not party to.*

A divorce decree in a suit between the mortgagor and his wife, subsequent to the execution of the mortgage, assigning the mortgaged premises to the wife as alimony, does not affect the rights, or remove the lien, of the mortgagee, who was not a party to the suit. Worsham and wife vs. Freeman. 55

2. *Execution of by wife must be acknowledged, etc.*

If the wife of the mortgagor has such interest in the premises as makes it necessary for her to join him in the execution of the mortgage, her execution must be acknowledged by her, and the acknowledgment authenticated, as prescribed by the statute. Id.

3. REPLEVIN: *For part of undivided crop.*

Washington rented land from Jones, agreeing to give one-fourth of the cotton produced on it, for rent. He afterward mortgaged to Love three bales of the cotton to be produced on the farm, to secure a debt payable the first of November following, with power to take possession and sell, upon default of payment. After this mortgage was executed and recorded, he made another mortgage, to Deutsch, upon the whole crop, to secure indebtedness to him; and Jones, being indebted to Deutsch, gave him power of attorney to collect the rent, and apply it to his indebtedness. Washington raised and gathered eleven bales. Deutsch got about eight bales, leaving in a pen on the premises about three bales. Love demanded this under his mortgage. Soon afterward, Deutsch, with Washington's assent, moved this cotton to a gin to be ginned. Love then brought replevin against Washington for "three bales of cotton, valued at $90," and the officer seized it at the gin. Deutsch interpleaded for the cotton, alleging that "he was the owner, and entitled to the immediate possession;" and was also, on his motion, made defendant. Washington made no defense. *Held:* 1. The contest for the cotton was between Love and Deutsch, and Love was entitled to the verdict on the interplea. 2. The eight bales, being more than sufficient to pay the rent, which was the first lien, Deutsch had no right of possession against Love, his *mortgage* being subsequent to Love's. 3. While the cotton was undivided on the premises, and the three liens upon it, Love could not maintain replevin for three bales, or as much as would make three bales, for he had no title to any particular part of the undivided crop. He should have sued in equity, making the three others parties. But after all but three bales had been taken away, he could, under the circumstances, maintain replevin for the remainder. Washington et al. vs. Love. 93

4. MORTGAGOR AND MORTGAGEE: *Ejectment.*

Upon failure to pay the mortgage debt at the time stipulated in the mortgage, the estate of the mortgagor becomes forfeited, and ejectment can not be maintained against the mortgagee in possession, or those holding under him, until payment of the debt. But payment satisfies an unexecuted decree of foreclosure, and revests the estate in the mortgagor, his heirs or assigns, and may be given in evidence to support the action. Wells et al. vs. Rice et al. 346

See HOMESTEAD, 1. LIMITATION, STATUTE OF, 2, 3. MARRIED WOMEN, 1. RECEIVER, 1. VENDOR AND VENDEE, 1.

MULTIFARIOUSNESS.

See PRACTICE, 9.

MUNICIPAL CORPORATION.

1. *Liability for injuries to individuals. Enforcing illegal ordinances.*

For acts done by them in their public capacity, and in discharge of their duties to the public, cities and towns incur no liability to persons who may be injured by them. Neither for the act of the council in passing an illegal ordinance, nor for that of the mayor in issuing a warrant of arrest for its violation, nor for that of the marshal in arresting the offender, under it, is a town liable to him. Trammell vs. Town of Russellville. 105

2. *Contracts of; how made and proved.*

Contracts of municipal corporations may be proved by their ordinances and records, or made by authorized agents without seal, and proved by parol; and the authority of agents may, in many cases, be implied from circumstances. No officer, or member of a corporation, can, without its authority, make contracts for it, or bind it by his declarations or admissions. Halbut et al. vs. Forrest City. 246

3. *Contracts for corporate purposes, void.*

A contract by a town for rent of a house solely for the use of the county as a court-house, is void; but when a town is authorized to rent a building for its own use, it will not vitiate the contract to allow it to be used for other purposes of a public nature. Id.

4. CITY ORDINANCES: *Restrospective in part, void pro tanto.*

A city ordinance retrospective in part, is inoperative and void to that extent only, if otherwise unobjectionable. Rau vs. Little Rock. 303

5. *Effect of act of the ninth of April*, 1869.

Section 9 of the act of April 9, 1869, for the incorporation, etc., of cities and towns (section 3202 Gantt's Digest), clearly indicates an intention of the legislative body to produce a strict conformity in the organization and government of all the cities and towns in the state, each after its class; but did not mean to take away any special powers theretofore granted them by special acts, and not affecting their organization or government. Babcock vs. The City of Helena. 499

6. *Power to punish drumming.*

A corporation may make it a penal offense for any person to drum customers to gaming houses and strumpet houses, and such other immoral and pernicious occupations, as it has power under its charter to suppress. But it has no power to make it a crime to solicit custom for hotels, competent practitioners of medicine, or other ordinary, lawful and useful occupations. Thomas vs. City of Hot Springs. 553

7. CITIES: *Power to provide for weighing produce, etc.*

By section 12 of the act of March 9, 1875, for the creation and government of municipal corporations, a city has the power to pass and enforce by proper penalties, an ordinance "to provide for the measuring or weighing of hay, wood, or any other article for sale," within its limits. But if such ordinance be unreasonable, or directed to the end of raising a revenue, chancery will declare it void. Taylor, Cleveland & Co. vs. City of Pine Bluff. 603

See INJUNCTION, 3. SALARY, 1.

MURDER.

See INDICTMENT, 3.

MUTUALITY.

See MARRIED WOMEN, 4.

NEGLIGENCE.

See COMMON CARRIER, 1, 2.

NEW TRIAL.

1. *New trial for improper conduct of jury.*

When evidence is adduced, and shows that a jury, in a criminal case, exposed to improper influences, were not in any way influenced, biased or prejudiced by the exposure, the verdict will not be disturbed; but unless it is proven that it failed of an effect, the verdict will be set aside. Wood vs. The State. 341

2. *When circuit court should grant.*

The circuit judge has the discretion to grant new trials in all cases, where he is satisfied that the ends of justice will be best subserved thereby; and should not hesitate to exercise it where he is dissatisfied with a verdict, as being the result of excitement, passion or prejudice, or any other influence save a calm consideration of the facts in evidence. Oliver vs. The State. 632

3. SAME: *For want of evidence to support verdict.*

The following rules seem to result from all the previous decisions of this court in relation to setting aside verdicts for insufficiency of evidence: 1. Where there has been a conflict of evidence, a new trial will not be granted by the supreme court, merely because the preponderance of evidence in the mind of the court may seem to be against the verdict. 2. But in all cases, even in those of conflict, the supreme court will direct a new trial, when, upon inspection of the evidence, the verdict is so clearly and palpably against the weight of it as to shock a sense of justice. 3. A new trial will be granted where there is no evidence at all to support the verdict, or where it fails in some material link. The jury will not be allowed to supply the missing link by inferences and presumptions from other facts, unless they be legitimate and fair presumptions, such as naturally follow. Id.

4. NEW TRIAL: *Surprise: Discretion of court.*

A motion for new trial on the ground of surprise is addressed to the sound discretion of the circuit court, whose judgment upon it will not be overruled by this court unless clearly wrong. Shepherd vs. The State. 659

5. *Motion for* not necessary where error appears upon the face of the judgment. Union County vs. Smith. 684

6. MOTION FOR NEW TRIAL: *General assignments of error.*

A general assignment in a motion for new trial, "that the court erred in admitting and excluding evidence," points to nothing, and is too indefinite. Edmonds vs. The State. 720

See EJECTMENT, 1. EXCEPTIONS, BILL OF, 1. INDICTMENT, 7. INSTRUCTIONS, 2.

NOTICE.

Possession.

Actual possession of land at the time of another's purchase is sufficient to put him on inquiry of the possessor's title. Sisk vs. Almon et al. 391

OFFICERS.

1. JUDGE: *Liability for judicial acts.*

One acting judicially in a matter within the scope of his jurisdiction, is not liable in an action for his conduct. Trammell vs. Town of Russellville. 105

2. *Officer protected by process.*

Process *fair on its face*, though not in all respects regular, will protect from liability the officer executing it. Id.

ORDINANCE.

See MUNICIPAL CORPORATION, 4. SALARY, 1.

PARENT AND CHILD.

See ACTION, RIGHT OF, 1.

PARTNERS.

Severally bound by the acts of the firm. Hubbard, Ad., vs. Pace et al. 80

PARTIES.

Heirs, administrator.

The administrator or executor is entitled to the real estate of the deceased for the payment of his debts; but in suits in which he claims the possession, when the title is in question, the heirs are necessary parties. Sisk vs. Almon et al. 391

See AMENDMENT, 4. DECREE, 2, 3. PRACTICE, 2. PRINCIPAL AND SURETY, 5. REVIVOR, 1. VENDOR AND VENDEE, 2.

PAYMENT.

See APPROPRIATION OF PAYMENTS, 1.

PENAL STATUTES.

See STATUTES, 5.

PLEADING.

1. *Statute of limitations;* how pleaded. Hutchinson vs. Hutchinson. 164

2. CONSIDERATION:

A plea alleging that the note sued on was given without consideration, is good. Catlin vs. Horne. 169

3. FRAUD:

A plea that the note sued on was obtained by false representations, without stating what the representations were, is bad. Id.

4. STATUTE: *Whether constitutionally passed, raised by demurrer.*

An answer denying that an act of the legislature under which the plaintiff claims was constitutionally passed, is but a demurrer; and the court will, at the suggestion of counsel or of its own motion, seek information to determine the question. Scott vs. Clark County. 283

5. *No reply to answer.*

A plaintiff is not entitled to reply to an answer which contains no set-off, or counter-claim. George vs. Railway Company. 613

See ATTACHMENT, 4. DIVORCE, 1, 4. EXEMPTION, 1. PRACTICE, 9, 10. REPLEVIN, 2.

POCRE.

See CRIMINAL LAW, 18.

POSSESSION.

See NOTICE, 1.

POWERS.

Construction and effect of.

A contract to convey land to a wife and such of her and her husband's children as she and he shall designate, constitutes them trustees of a power to designate the children to receive, with the wife, the conveyance; and a suit for the conveyance can not be maintained until the designation is made. If either parent die before it is made, all the children will take equally with the mother. Chancery will exercise the power on the principle of equality. Watkins vs. Turner et al. 663

PRACTICE.

1. IN SUPREME COURT: *When no appeal against a party.*

Where no appeal is taken from a decree in favor of one of several parties, the case made against him is not before the court. Mock et al. vs. Pleasants. 63

2. PARTIES, WANT OF: *Demurrer.*

A general demurrer does not reach the defect of want of proper parties. Chrisman vs. Jones. 73

3. IN SUPREME COURT: *No reversal where justice is done.*
Where substantial justice has been done in the circuit court, the supreme court will not reverse for a matter of form. Washington et al. vs. Love. 93

4. AMENDMENT: *New parties.*
Where a plaintiff shows in his complaint that he has no cause of action, the court can not amend it by making others plaintiffs who have. State use of Oliver vs. Rottaken et al. 144

5. PAUPERS: *Suits by, without attorney's certificate of cause of action.*
It is too late, after judgment, to object that a complaint in *forma pauperis* was not accompanied with the certificate of an attorney that in his opinion, the plaintiff had cause of action. It affects the cost alone, not the merits of the action, nor jurisdiction of the court. Railway Company vs. Yocum. 493

6. IN THE CIRCUIT COURT: *Findings of court, when reduced to writing.*
The findings of the court may be reduced to writing after judgment. Nathan et al. vs. Sloan. 524

7. SAME: *When findings not special.*
The conclusion of facts found, are in the nature of a special verdict; and, when the finding of facts is not special, or such as the law requires, the party desiring it may have them made so, by motion in the circuit court; and if he fails to make such motion, this court will not reverse. Id.

8. AMENDMENT: *To answer must be pertinent to defense.*
L and others sued T in chancery for specific performance of a contract to convey the southeast and southwest quarters of a section of land, making C, who was claiming the southwest quarter under color of title, a defendant; and praying to quiet their title to the southeast quarter as against him, and also for specific performance against T. C answered as to the southeast quarter, and afterwards asked and was refused permission to file an amendment alleging his acquisition of title *pendente lite* to the southwest quarter. *Held:* That the acquisition of title to the southwest quarter was no defense to the charges as to the southeast quarter, and the amendment was foreign to his defense, and was rightly refused. Clements vs. Lampkin et al. 598

9. CHANCERY: *Multifariousness, how corrected.*
Multifariousness is not ground for demurrer under the Code practice. It may be corrected by motion to strike out, or to make the bill more specific, or a court of chancery may compel the plaintiff to elect on which ground he will prosecute the suit. Id.

10. SAME: *Pleading a decree. Bill of exceptions.*

A decree relied on and referred to in pleading should be brought upon the record literally. It is loose practice to give the purport of it in a bill of exceptions. Id.

See ARGUMENT OF COUNSEL. CRIMINAL PROCEDURE, 1. EJECTMENT, 1. EVIDENCE, 2. FORECLOSURE, 1. GUARDIAN AD LITEM. INSTRUCTIONS, 1. MISTAKE, 1. SUPREME COURT, 1, 2, 3, 4.

PRE-EMPTION.

1. SWAMP LANDS: *Pre-emption claimant without right, can not question defendant's entry.*

Unless the plaintiff for pre-emption shows a superior right in himself to make the pre-emption, it does not concern him whether the patent to the defendant was rightfully issued or not. Miller vs. Gibbons, Ad., 212

2. SAME: *Pre-emption claimants. Contests between. Decisions of land agents, when conclusive.*

The decisions of the state land agents in contests for rights of entry, are conclusive upon the courts, save in cases of fraud or mistake. Id.

See SWAMP LANDS, 1.

PRINCIPAL AND SURETY.

1. SURETY: *When discharged by creditor's forbearance. Not, by failing to issue execution.*

An agreement upon a valid consideration by a creditor, without consent of the surety, not to sue the principal debtor for a stated time, discharges the surety. But the payment of part of a debt by the principal, at or after the time it becomes due, is not a sufficient consideration to support an agreement for forbearance; and such an agreement, founded upon such a consideration, though carried out by the creditor, will not discharge the surety. Nor will mere delay of the creditor to issue execution on a judgment against the principal, discharge the surety. Thompson et al. vs. Robinson, Sheriff, et al. 44

2. SAME: *Not discharged unless time of forbearance is fixed.*

An agreement for forbearance with the principal will not discharge the surety, unless the time of forbearance is fixed. Id.

3. SAME: *Notice to creditor to sue, how given; when he should attach.*

If, after the debt becomes due, the surety, either verbally or in writing, requests the creditor to sue the principal, who is then solvent, and the

creditor fail to do so, and the principal afterward become insolvent, the surety is thereby discharged. But before a surety can claim a discharge for the omission or failure of the creditor to *attach the property* of the principal, he must show in his bill for discharge that there were legal grounds for attaching. Id.

4. *Exoneration and contribution between.*

Where successive securities for a debt have been given in judicial proceedings, at the request of the debtor alone, to enable him to prolong the litigation, whilst all will be liable to the creditor, they will, as between themselves, be liable to exoneration in the inverse order of their undertakings. Those who contract last become sureties not only for the benefit of the creditor, but in exoneration of those who precede, and all will be liable to exonerate the original sureties for the debt, if there be any. Chrisman vs. Jones et al. 73

5. *Parties.*

It is not necessary, in a proceeding against a surety, previously liable, to make the principal a party, and allege his insolvency; but as against co-sureties, in a proceeding for contribution, the principal is a necessary party. Id.

6. SURETY: *Discharged by creditor's willful loss of collaterals.*

Lavender, as administrator, let to Pace a farm for 1870, and took his note for the rent, with Taylor as surety, stipulating in the note that he would "retain a lien upon the crop for the payment of the rent." He and Pace were then, and many years afterward, partners in a mercantile firm, and they received of the crop more than sufficient to pay the note, and sold it on the firm account. At the date of the note, Taylor was indebted to Pace in a large amount, which, several years afterward, he paid, without notice that the rent note was unpaid. In August, 1875, Lavender sued Taylor on the note. Taylor pleaded the foregoing facts as an equitable discharge, and the cause was transferred to the equity docket. *Held:* 1. That the retention of the lien in the note was not additional to the statutory landlord's lien, but a mere assurance to Taylor that the legal lien should be enforced for his protection, or at least was not waived, nor would be abandoned. 2. The mere passive conduct of Lavender, in allowing the cotton to be shipped, when, by ordinary diligence, he could have prevented it, was, in the face of the written obligation, "to *retain* a lien on the crop for the rent," a fraud upon the surety. Ordinarily, a creditor's mere neglect or forbearance to sue, or his failure to enforce collaterals, will not discharge the surety; but he must not release them, or do any act by which the surety's right of subrogation, upon payment of the debt, may be fruitless to him. 3. The

shipment and sale of the cotton by the *firm* was Lavender's *act*, and more than passive acquiesence or neglect. 4. That Lavender's acting as administrator did not affect the equities of his surety. Hubbard, as Administrator, vs. Pace et al. 80

7. SAME: *When subrogated to liens.*

A surety can not have subrogation to liens until he pays the entire debt. McConnell, Ad., vs. Beattie, Ad. 113

8. SUBROGATION: *Surety voluntarily paying bond.*

A surety who has paid money for a guardian, which the guardian owed upon his bond, and which the surety is bound to make good, is not obliged to wait for judgment or execution, but, by paying without them, undertakes the burden of showing that he was actually bound to pay. Showing that, he has the right to pay at once, and be subrogated to all the securities which the creditors or beneficiaries in the bond have, and to all securities put into the hands of his co-sureties, even though intended to indemnify the latter alone, except such as he has consented to be given to them to his exclusion. Fishback et al. vs. Weaver et al., Ad. 569

PROBATE COURT.

See ADMINISTRATION, 10. JURISDICTION, 1, 3.

PROBATE OF WILLS.

See ADMINISTRATION, 10. JURISDICTION, 1, 3. WILLS.

PROCESS.

1. COURTS. POWER OVER: *Injunction against supreme court judgments.*

Courts of law have the control and direction of their own process, free from interference of other courts of law of co-ordinate authority; and an inferior court of law can not interfere with the execution of the process of the supreme court. But whenever from fraud, accident, or mistake, etc., it becomes inequitable to proceed with the execution of the process of the supreme court, and it can not interfere without the exercise of original jurisdiction, it allows courts of chancery to interfere by injunction. Hinkle vs. Ball et al. 177

2. SAME: *Injunction against.*

Common law courts have jurisdiction and power over their writs, and over the officers who execute them, and may, on motion, recall and quash process illegally issued. This being a plain and complete remedy at law

to a party to an execution illegally issued, he can not apply to chancery for injunction against it. But one who is not a party to an execution illegally levied on his property, has not this remedy, and may apply to chancery to enjoin the sale. King et al. vs. Clay et al. 291

3. JUSTICES OF THE PEACE: *Their power over their process. Equity can not enjoin.*

A justice of the peace has control of an improper or improvident execution issued by him, and may recall and quash it. Or the circuit court may bring up the proceedings by *certiorari*, and grant relief. But equity can not enjoin it. It has no power to *correct* even the grossest errors of inferior courts. Scanland, Ad., et al. vs. Mixer. 354

4. SUMMONS: *Judgment by default, on good service and bad return of.*

Where a summons has been, *in fact*, duly served, the defendant must take notice of it, unless all defense be waived. He can not shelter himself under a defective *return*, from the consequences of his default, if the true facts be at any time brought properly upon the record, which may be done by amendment, even after an appeal. Railroad Company vs. Yocum. 493

5. SAME: *Irregular, amendable.*

A summons against several partners in the partnership name may be amended by the proper insertion of the names of the individual partners. Martin et al. vs. Goodwin & Co. 682

6. SAME: *Defective return of service, when waived.*

A defendant can not avail himself, in the supreme court, of a defective return of service of a summons against him, when he has appeared in the circuit court and made no objection to the return there. Id.

See OFFICERS, 2. TAXATION, 1.

PROMISSORY NOTES.

Indorsers, when joint makers.

Parties who indorse their names in blank upon an obligation to another, at the time it is executed by the maker, and for the same consideration, are joint makers with him, and not guarantors. Nathan et al. vs. Sloan. 524

QUIT CLAIM DEED.

See DEED, 5.

RAILROAD.

See COMMON CARRIER, 1, 2.

RECEIVER.

When appointed for mortgaged property.

When a mortgagor, or one who has created a lien upon land, enforceable in equity, is insolvent, and the land is insufficient to satisfy the decree when rendered, a receiver will be appointed to take charge of it, and secure the rents and profits during the litigation to enforce the lien. Price vs. Dowdy. 285

RECORD.

RECORD ENTRIES: *Imperfect, when sufficient.*

When an imperfect entry upon the record plainly shows without doubt, what the court intended to do, the effect intended should be given to it. Randolph et al. vs. McCain, Ad. 696

See TRANSCRIPT, 1.

REPLEVIN.

1. *Not avoided by transfer of possession.*

A party in possession of goods can not avoid replevin by wrongfully transferring the possession to another. Washington et al. vs. Love. 93

2. *Affidavit for, no part of complaint.*

The affidavit for replevin in the circuit court, is not a part of the complaint which the defendant is bound to answer. Donnelly vs. Wheeler. 111

3. *For bales of cotton, seed cotton not to be taken.*

An order of delivery directing the officer to replevy bales of cotton, gives him no authority to seize seed cotton. Chandler vs. Smith. 527

4. *Interpleader: Judgment against.*

On the trial of an interplea in an action of replevin, no verdict or judgment for either property or money (except for cost) can be rendered against the interpleader, where the property has never been delivered to him. Id.

See DAMAGES, 1. MORTGAGE, 3.

REPLY.

See PLEADING, 5.

RES GESTÆ.

See EVIDENCE, 22.

RES JUDICATA.

See DECREE, 1.

REVENUE.

See COLLECTOR.

REVIVOR.

Parties, where title to land involved.

Upon the death of a defendant in a suit in equity for land, his heirs must be made parties, before the question of title can be determined. If this is not done, the complaint should be dismissed without prejudice. McCauley & Co. vs. Six et al. 379

SABBATH BREAKING.

See CRIMINAL LAW, 8.

SALARY.

CITY OFFICER: *Accepting salary under one ordinance, can not claim under another.*

Where a salary, as fixed by an ordinance, and afterwards by a resolution of the city council, is paid monthly to an officer, and he, with full knowledge of the fact, accepts the same, without protest or objection, in full satisfaction and discharge of his demand, he can not afterward object that the ordinance and resolution were void, and demand a larger salary under a previous ordinance. Rau vs. Little Rock. 303

SENATORIAL AND REPRESENTATIVE DISTRICTS.

See CONSTITUTIONAL LAW, 3.

SHARE CROPPER.

1. *Title to crop.*

A contracted to raise a crop on B's land, in consideration that B would furnish tools, team and feed for the team, and give him one-half the crop raised; and out of A's half B was to retain sufficient to pay what A should owe him for supplies. The contract was never filed in the re-

corder's office. Afterwards A mortgaged the growing crop to C to secure a debt he owed him. A raised five bales of cotton. B sold three of them, and C, with A's consent, took the remaining two bales under his mortgage. A's indebtedness to B for supplies, exceeded the value of his half of the cotton. In replevin by B against C for the two bales, *held:* 1. That the crop was B's, and A had no interest in it to mortgage. 2. It is only when the laborer is tenant in common with his employer in the crop raised, that the employer is required by the statute to file a copy of the contract in the recorder's office to secure his lien for advances and supplies. Sentell vs. Moore. 687

2. *One who raises a crop* on the land of another, under a contract to raise the crop for a particular part of it, is a cropper, and not a tenant. Burgie vs. Davis. 179

SHERIFF.

Names of sureties in bond of.

It is not necessary that the names of the sureties appear in the body of a sheriff's bond. It is sufficient in any contract, if the intent of the party to be bound clearly appears. Hodgkin vs. Holland, Sheriff. 203

SPECIAL JUDGE.

Special adjourned courts.

If the regular judge is not present to take the bench at the commencement of an adjourned term of the court, if necessary, it would be his duty, or the clerk's, to certify to the bar his inability to hold the court They should then proceed to elect a special judge for general business, who would, perhaps, supersede a special judge elected at the regular term for special business. Where this is not done, the presumption arises from the record that the regular judge was present. A decree rendered at an adjourned term, by a special judge elected at the regular term, is a judicial act from which an appeal lies. Fishback et al. vs. Weaver et al., Ad. 569

SPECIFIC PERFORMANCE.

Discretion of chancellor.

Courts of equity have always reserved the right of exercising a sound discretion in suits for specific performance, and generally refuse relief where the case is not clear, or where the complainant is in the wrong, or there are considerable countervailing equities. In such cases equity refuses to interfere, and leaves the parties to their rights and remedies at law. Watkins vs. Turner et al. 663

STATE LANDS.

Coupons not receivable for.

Neither the "act to provide for the funding of the public debt of the state," passed April 6, 1869, nor the act of the fifth of March, 1875, fixing the price of state lands, etc., by any of their provisions, authorizes the commissioner of state lands to receive coupons of the funded bonds of the state in payment of lands sold by him. Crofton vs. The State. 271

STATUTES.

1. *Void in part, void in toto.* Bittle vs. Stuart, Judge. 224

2. *When void, uncertainty.* Id.

3. *Mistake in. When corrected by the court.*

Where it is obvious that the legislature did not intend to use a particular word written in a statute, and it is further apparent what word they *did* intend, the courts will correct the mistake by substituting the word intended for the one used. Haney vs. The State. 263

4. *Permissive words in, when imperative.*

Permissive words in statutes, in many cases, impose a duty on tribunals, which will be enforced by mandamus. But it is always in cases where the public interest, or vested private rights, are to be thereby protected or enforced. The power to give the citizen full, adequate and complete relief, or the power to promote the public interest in some prescribed mode, implies the duty to exercise it when the occasion arises. In all other cases, the words *may* or *it shall be lawful* imply discretion, and are used in contradistinction to *must* or *shall.* Whittington, *ex parte.* 394

5. *Repeal of penal act; effect of, on offenses before repeal.*

When a criminal or penal statute is repealed, offenses against it committed before the repeal, are, by our statute, still punishable as if it were still in force, unless otherwise specially provided in the repealing statute. Volmer vs. The State. 487

6. *Mandatory and directory distinguished.*

Those directions in a statute which are not of the essence of the thing to be done, but which are given with a view merely to the proper, orderly and prompt conduct of the business, and by a failure to obey which the rights of those interested will not be prejudiced, are not commonly to be regarded as mandatory; and if the act be performed, but not at the time, or in the precise mode indicated, it may still be sufficient if that which is done accomplishes the substantial purposes of the statute; unless negative words are employed in the statute which expressly, or by necessary implication, forbid the doing of the act at any other time, or in any other

manner, than as directed. Sec. 42 of the act entitled, "An act to maintain a system of free common schools in the state of Arkansas," approved December 7, 1875, is *as to the time* designated for the appointment of a county examiner, directory, and not mandatory. Neal vs. Burrows. 491

7. *Repeal of, by implication.*

Repeal of statutes by implication must be necessary, or, at least, arise from a clear and unmistakable intention. Babcock vs. Helena. 499

See APPEAL, 1. COUNTY COURT, 1. CONSTITUTIONAL LAW. EXECUTION, 2. STATE LANDS.

STAY BOND.

See ATTACHMENT, 3.

STOCKHOLDERS.

See CORPORATION, 1, 2.

SUBROGATION.

See PRINCIPAL AND SURETY, 7, 8.

SUPERSEDEAS.

See DECREE, 4.

SUPREME COURT.

1. *Mandamus.*

The supreme court can issue writs of mandamus in aid of its appellate and supervisory jurisdiction, and on proper application, may direct the sheriff as to the funds he should receive in satisfaction of its execution. Hinkle vs. Ball et al. 177

2. *Finding of chancellor not conclusive in.*

In all equity cases which are heard upon written documents, and which come as fully before the supreme court as before the chancellor, the supreme court will inquire into the correctness of his finding of the facts. Miller vs. Gibbons, Ad. 212

3. PRACTICE IN SUPREME COURT: *Punishment reduced.*

Where, in a prosecution for manslaughter, the court instructs the jury that if they find that the defendant killed the deceased, as charged in the indictment, they will fix his punishment at imprisonment in the peniten-

tiary for a term not less than two, nor more than seven, years; and the jury return a verdict for manslaughter, without saying whether *voluntary* or *involuntary*, and fix the punishment at two years' imprisonment; and it does not appear from the bill of exceptions that the jury were informed what punishment the statute prescribes for *in*voluntary manslaughter, and there is a doubt whether the jury were informed or knew that they might find the defendant gulity of manslaughter and fix his imprisonment at *one* year or less; and it also appears that the evidence would warrant a verdict for *in*voluntary manslaughter, the supreme court will not reverse the judgment where there was no objection to the instruction, nor motion for a new trial on account of it, but will give the defendant the benefit of the doubt, and reduce his imprisonment to one year. Brown vs. State. 232

4. *Verdict in criminal case erroneously set aside, etc.*

When there is a valid trial and verdict against a defendant in a criminal case, and the verdict is set aside for an erroneous reason, and there is no final judgment, the supreme court will not send a mandate to the court below to sentence the prisoner upon the verdict, where there were other causes assigned in the motion for new trial for which the court may have set aside the verdict. State vs. Ross. 376

5. *Instructions.*

The supreme court will not reverse for the refusal of the circuit court to give a proper instruction, if others, substantially the same, and equally favorable to the party, are given. Evans & Shinn vs. Rudy. 383

6. MOTION FOR NEW TRIAL AND BILL OF EXCEPTIONS: *None necessary where error apparent in judgment.*

Where error appears upon the face of a judgment, it can be reviewed in the supreme court without motion for new trial, or bill of exceptions, in the court below. Union County vs. Smith. 684

See EXCEPTIONS, BILL OF, 1. PROCESS, 1.

SURETY.

See ATTACHMENT, 3. BAIL BOND, 1. PRINCIPAL AND SURETY.

SURPRISE.

See NEW TRIAL, 4.

SURVEY.

See JUDICIAL NOTICE, 1.

SWAMP LANDS.

Widow's right in husband's improvements on.

A widow in possession of improvements of her husband on swamp lands, subject to pre-emption, may perfect his inchoate title, but, subject to her dower, she will be held in equity as trustee of the fee for the benefit of his estate. Miller vs. Gibbons, Ad. 212

See PRE-EMPTION, 1, 2.

TAXATION.

WRITS, ETC.: *Tax on, not unconstitutional.*

The tax of fifty cents imposed by statute upon each original writ and execution issued out of any court, and on each certificate of record of recorded instruments, is strictly a fee to the public, and not a tax within the clause of the constitution requiring all property to be valued *ad valorem*, and may be imposed without express authority of the constitution if not prohibited by it. Lee County vs. Abrahams. 166

See MUNICIPAL CORPORATION, 7.

TAX SALE.

1. *For territorial taxes.*

There was no law in existence in 1847, authorizing the sale of lands for territorial arrearages of taxes. Jacks vs. Chaffin et al. 534

2. *Purchase at, by county clerk, illegal. Owner, how far relieved in chancery.*

The county clerk being required by law to advertise delinquent lands for sale, to attend and make a record of the sales, and to issue certificates of purchase to the purchaser, and certificates of redemption to the owner when he redeems, and finally a deed to the purchaser if it is not redeemed, is forbidden by public policy from purchasing at such sales. But the owner seeking relief in chancery will be required to refund to him the legal taxes, penalty and costs charged against the land, and interest from the date of sale; and also all subsequent taxes paid by him, and interest thereon from the dates of payment. The purchaser will also be entitled to receive from the officer having the custody of it, any excess above the taxes, etc., which he may have paid for the land. Cole vs. Moore. 582

TENDER.

When it stops interest.

An unconditional tender, which is kept good, stops interest from the date of the tender. Cole vs. Moore. 582

See VENDOR AND VENDEE, 2.

TRANSCRIPT.

IN CRIMINAL CASE: *Must show impanneling of grand jury, etc.*

The entries showing the impanneling of the grand jury and their return of the indictment into court, are parts of the record in every criminal case brought to this court; and the omission of the circuit clerks to include them in the transcripts, after the publication of this opinion, will be treated as contempt. Ford vs. The State. 649

TREASURER—COUNTY.

Bond of.

The filing of a treasurer's bond for $65,000 is a sufficient compliance with an order for one of $60,000. Read, *in re*, etc. 239

TROVER.

1. *Conversion, what it is.*

A conversion, in the sense of the law of trover, consists either in the appropriation of the thing to the party's own use and beneficial enjoyment, or in its destruction, or in exercising dominion over it in exclusion or defiance of the plaintiff's rights, or in withholding the possession from the plaintiff, under a claim of title inconsistent with his. Ray vs. Light. 421

2. *Demand and refusal.*

Proof of demand and refusal, or non-compliance, is *prima facie* evidence of conversion. Id.

3. *Demand too large.*

When the demand is for several articles, only some of which the plaintiff is entitled to, a general refusal, without offering to deliver those he is entitled to, will be evidence of conversion of them. Id.

4. *Conversion, joint and several.*

In trover, as in other actions of tort, one or more of the defendants may be found guilty and the others acquitted. But the plaintiff can not recover against all, unless he proves a joint conversion by all. Id.

See DAMAGES, 3.

TRUST.

See DEED, 2. EXECUTOR, 4. MARRIED WOMEN, 2. SWAMP LANDS, 1.

TRUSTEE.

See EVIDENCE, 5.

USURY.

How to avoid, in equity.

He who comes into a court of equity for relief against a judgment, conveyance, or other security, upon the ground of usury, must have paid or offered to pay what is really and *bona fide* due from him, in accordance with the maxim that he who seeks equity must do equity. Anthony vs. Lawson. 628

VENDOR AND VENDEE.

1. VENDOR BY TITLE BOND: *Rights of assignee of purchase notes. Duty to surety on.*

A vendor of land by title bond stands in the position of a mortgagee for the purchase money, and his rights pass to the assignee of the purchase notes, who may proceed against the purchaser to foreclose the lien, or against him and his sureties on the note personally, or any of them separately, or may prosecute all these remedies at once, *pari passu*, until satisfaction. But he must take care that the lien is not lost to the surety by his act or negligence; but to *stay the enforcement* of the lien is no defense to an action against the surety. McConnell vs. Beattie, Ad. 113

2. SAME: *Enforcing lien of married woman's title bond. Parties. Pleading.*

Where husband and wife have executed bond for title to the purchaser of the wife's land, and transferred the purchase note, the assignee of the note should, in a suit instituted in 1872, to enforce the lien upon the land for the purchase money, have made the husband and wife parties, so that their legal title might be divested, and vested in the purchaser; or should have tendered a sufficient deed, executed by the husband and wife, or by her alone if the husband had died. Coldcleugh vs. Johnson, Ad., et al. 312

See LIMITATION, STATUTE OF, 2, 3. MARRIED WOMEN, 4.

VENUE.

See INDICTMENT, 6.

WAIVER.

See PROCESS, 6.

WARRANTS—COUNTY.

See COUNTY COURT, 2.

WEARING CONCEALED WEAPONS.

See CRIMINAL LAW, 12, 13.

WITNESS.

See EVIDENCE, 1.

WILL.

WILLS: *Probate of, on insufficient evidence.*

The granting of probate of a will on insufficient evidence, is only error, which may be corrected by an issue of *devisavit vel non*, on appeal in the circuit court; and the proceedings and orders of the probate court, can not be collaterally attacked; nor even directly in chancery, except for fraud, or perhaps on some other peculiar ground of chancery jurisdiction. Ludlow, Ad., vs. Flournoy et al. 451

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