26

REPORTS

OF

CASES AT LAW AND IN EQUITY

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF THE

STATE OF ARKANSAS,

CONTAINING THE CASES DECIDED AT THE MAY TERM, AND PART OF THOSE DECIDED AT THE NOVEMBER TERM, 1881.

By B. D. TURNER,
SUPREME COURT REPORTER.

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OF THE

SUPREME COURT OF THE STATE OF ARKANSAS,

DURING THE PERIOD COMPRISED IN THIS VOLUME.

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HON. WM. M. HARRISON, } .....ASSOCIATE JUSTICES.
HON. JOHN R. EAKIN, }

B. D. TURNER.....REPORTER.

C. B. MOORE.....ATTORNEY-GENERAL.

LUKE E. BARBER.....CLERK.

CHANCELLOR:

HON. DAVID W. CARROLL.

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

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CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF ARKANSAS,

AT THE

MAY TERM, 1881.

DYER v. ARNOLD, ET AL.

1. HUSBAND AND WIFE: *Right to property purchased with wife's funds.* 37 17 / 60 472
A homestead purchased by the husband with money given to the wife during the coverture, and coming to his possession, belongs to him; and so, also, does personal property so purchased, and cannot be screened from his debts by the scheduling of it as her separate property.

2. SAME. *Property rights of wife under Constitution of 1868.*
Under the Constitution of 1868 a wife could acquire and hold personal property, but it was not protected from her husband's debts until scheduled.

APPEAL from *White* Circuit Court in Chancery.
Hon. J. N. CYPERT, Circuit Judge.

Coody, for appellant:

The property was the wife's; never reduced into possession by the husband. 14 *Ark.*, 604; 16 *Ib.*, 154.

The wife, after the Act of 1875, and before appellee's judgment, scheduled the property which had been purchased by the husband with her means. 33 *Ark.*, 611; 23 *Texas*, 180; 2 *Bishop on Married Women, sec.* 101.

The laws of another State are presumed to be the same with our own. 14 *Ark.*, 603. But it would be the same under common law principles. 30 *Ark.*, 79; *Act 1875, Ad. Sess., p.* 172.

After scheduling the presumption is that the husband used the property as agent of the wife. (See Act.)

J. W. House, for appellee:

The property on marriage became fully vested in the husband. 8 *Ark.*, 310; 9 *Ib.*, 202; 15 *Ib.*, 180; 19 *Ib.*, 66; 25 *Ib.*, 223; 30 *Ib.*, 79.

The burden of proof, of showing different law in Tennessee, is in plaintiff. 15 *Ark.*, 180

She was estopped by her conduct in allowing the husband to manage and control the property.

English, C. J. On the fourth of August, 1877, John W. Arnold, a merchant of West Point, White county, obtained a judgment against J. H. Dyer, a farmer of that vicinity, before a Justice of the Peace of Red River township, in said county, for $335.53, debt, damages, etc. On the fourteenth of December, of the same year, an execution was issued upon the judgment to James L. Brewer, Constable of the township, and by him "levied on about five acres of cotton in the patch, and two hundred pounds in the pen; fifteen acres of corn in the field, and eight or ten bushels in the crib; one ton of millet; two mare mules;

wagon and harness; one buggy; sixteen head of cattle; seventy head of hogs; and all farming tools, household and kitchen furniture," as the property of defendant in the execution, and advertised them for sale.

It appears that Arnold, the plaintiff in the execution, was a dealer in general merchandise, and during the years 1874 and 1875 sold to Dyer, the defendant in the execution, dry goods, groceries and family supplies. Partial payments were made in money and cotton, and a note given by Dyer for balance, and the judgment was for principal and interest of the note.

On the seventeenth of December, 1877, Mrs. Judie E. Dyer, wife of J. H. Dyer, filed a bill on the Chancery side of the Circuit Court of White county against John W. Arnold, plaintiff in the execution, and James L. Brewer, the Constable, claiming the property levied on, and praying that the sale thereof be enjoined.

An interlocutory injunction was granted, and on the final hearing upon bill, answer and depositions, it was dissolved. The bill dismissed, Mrs. Dyer appealed, and obtained here an order for an ancillary injunction to stay the sale of the property until the cause could be heard and determined on her appeal.

Mrs. Dyer alleges in her bill that on the twenty-eighth of October, 1876, she owned, as separate property, and scheduled in the office of the Clerk of the Circuit Court of White county: "Two dark bay mules; one wagon; one set of harness; fourteen head of cattle; fifty head of hogs; four turning plows; five shovel plows; five cotton hoes; three feather beds; three mattresses; four bedsteads; one bureau; one clock; one sewing machine; one dining table; one cooking stove; one safe; six chairs; one trunk, and bed clothing," and exhibits a certified copy of her schedule.

She also alleges that all of the property levied on, ex-

cept the buggy, is her property, "and the same as scheduled by her, including the issues and proceeds arising therefrom, and produced with the same upon her account, and as her sole and separate property."

She further alleges that the crop of cotton and corn levied on was grown upon the homestead of herself and her husband in White county.

When or how she acquired the property scheduled by her, the bill does not allege, nor is anything more alleged than as above of the homestead.

The defense was that the crop was produced by the husband on land owned by him; that the scheduled property belonged to him when the schedule was filed; that he had contracted the debt in judgment, and others, on faith of the property, representing it to be his, and it was afterwards scheduled by the wife to shield it from and defraud his creditors.

AS TO THE HOMESTEAD CROP.

I. The cotton, corn and millet were not in the wife's schedule. She claims that the crop of cotton and corn were exempt, because grown upon the homestead of herself and husband, and produced with her means.

B. K. Rogers deposed that about the first of July, 1873, he sold to J. H. Dyer the southwest quarter of section 18, T. 6, N. R. 5, W. for $1000, and made to him a deed for the land; that Dyer did not represent to him that the money paid to him for the land was his wife's, but bought as any other individual; that he took possession of the land early in the year 1874, and had occupied it ever since.

Mrs. Dyer deposed that she was married to J. H. Dyer after she was of age, in Lauderdale county, Tennessee; he had nothing; after her marriage she received from her mother, who had been her guardian, about $1,400 left her by her grand-mother; she and her husband

continued to live with her mother, and he engaged in farming for over six years after their marriage, and she gave him money to spend when she wanted anything, and to loan out. He did not loan out all the money, but would loan out two, or three, or four hundred dollars at a time. They moved from Tennessee to Jackson county, in this State, (bringing $920 with them in money), in February, 1871, where he engaged in farming for two years before they moved to White county, and "made a right smart of money." They brought about $2000 to White county. Mr. Dyer brought $1800 of it to White county to buy land, and bought the place they lived on, (though he did not spend all of it for the land), and had the title of it made to himself, but talked of having it made to her.

It is manifest, from the evidence, that the homestead was the property of the husband, and not of the wife, or their joint property. There was no evidence to prove that the cotton and corn grown upon the homestead, gathered and ungathered, were the property of the wife. They were, no doubt, as the Court below found, the property of the husband. The Constable levied on about five acres of cotton and fifteen acres of corn in the field of the homestead. The levy was made on the fourteenth of December, and after the crops were matured.

Whether an ungathered crop is the subject of execution, or if it is, whether the owner of a homestead may claim an unsevered crop produced by him upon it as exempt from execution, the homestead being exempt, are questions not presented in this case. The husband, the owner of the homestead and the crop, is not claiming an exemption. It is the wife who filed the bill.

1 HUSBAND AND WIFE: Right to property bought with wife's funds.

II. The Court below found, from the evidence, but part of which is stated above, that the property levied on (that scheduled by the wife, as well as the cotton and corn pro-

duced on the homestead) was the property of the husband, and not of the wife; and notwithstanding the expressions of the wife, and her witnesses, in their depositions, that the property belonged to her, the facts stated by them, and other witnesses, warranted the Court in finding against her claims.

The court found that the money left the wife by her grand-mother, came to the possession of the husband after their marriage in Tennessee, and thereby become his; and if all the scheduled property was bought with that identical money, which is not probable from the evidence, it belonged to him when scheduled. Most of it was purchased after they moved to this State.

No statute of Tennessee barring the husband's common law right to the personal property and money of the wife on reducing them to possession was in evidence. See *Tatum* v. *Hines*, 15 *Ark.*, 180. Property afterwards purchased by him with the money, or its fruits, would also be his. *Ferguson et al*, v. *Moore and wife*, 19 *Ib.*, 379.

It is probable, from the evidence, that most of the scheduled property was purchased after Dyer and wife came to this State, and before the adoption of the present Constitution, (1st November, 1874), and when the Constitution of 1868 was in force.

2. SAME: 1. Property rights of wife under Constitution of 1868 Schedule necessary.

Under Section 6, Article 12, of the Constitution of 1868, Mrs. Dyer could acquire and hold personal property, but it was not protected against the debts of her husband until scheduled. *Humphries* v. *Harrison*, 30 *Ark.*, 79; *Berlin* v. *Cantrell*, 33 *Ib.*, 611.

If the property in question was purchased with her money, and for her, as she insists, she should have scheduled it before her husband contracted debts on faith of it, and it was afterwards too late. *Berlin* v. *Cantrell*, *Supra*; *Howell* v.

Howell, Ad., 19 *Ark.*, 344; *Beeman and wife* v. *Cowser et al*, 22 *Ib*, 432.

We have not overlooked the fact that this was a bill to enjoin the sale of ordinary personal property under execution, but there was no objection to the bill on that ground in the Court below, and the cause was heard on the merits, and the bill dismissed. We need not, therefore, consider the question of jurisdiction. See *Sanders* v. *Sanders et al*, 20 *Ark.*, 610, *modifying Lovette and wife* v. *Longmire*, 14 *Ib.*, 339.

Affirmed.

SAPPINGTON ET AL v. L. R., M. R. & T. R. R. Co.

1. RAILROAD COMPANY: *Liability upon agreements for building road bed.*
An agreement of a railroad company in consideration of the right of way through one's lands, to so build its road bed as to protect the lands from overflow, imposes upon it, as an artificial person, a personal obligation, for a breach of which it, or a company afterwards consolidated with it, would be liable to an action at law for damages.

2. RAILROADS: *Liability of purchasers of, for their obligations.*
A purchaser of the road bed, property and franchises of a railroad company is not liable for its obligations, which are not liens upon the property.

APPEAL from *Chicot* Circuit Court,
Hon. T. F. SORRELLS, Circuit Judge.

STATEMENT.

On the twenty-second of May, 1877, Sappington and Frazier filed in the Circuit Court of Chicot county their complaint at law, alleging, in substance, that they were the

owners of certain lands in said county described in the complaint; that about the year 1870 the Little Rock, Pine Bluff and New Orleans Railway Company, organized under the general incorporation act of Arkansas, received from the State $480,000 in levee bonds, under the provision of section 4053 of Gantt's Digest, upon their claim that said road bed extending through the counties of Desha and Chicot, answered the purposes of a levee for the protection of the lands subject to overflow in said counties, including said lands of the plaintiffs, through which said road bed was built. That on the ——— day of ———, 1871, said company constructed their road bed through the plaintiffs' lands, and have since used it for the purposes of a railroad, under an agreement with the plaintiffs to make said road bed a full and adequate levee to protect their said lands from overflow from the Mississippi river, in consideration that the plaintiffs would grant them the right of way through said lands for said road; and that the plaintiffs have fully performed and abided by said agreement. That afterward said company consolidated with the Mississippi, Ouachita and Red River Railroad Company, a corporation under the laws of Arkansas; the new company adopting the name of the Texas, Mississippi and Northwestern Railroad Company. That the said consolidated company was, in December, 1875, purchased by the defendant—the Little Rock, Mississippi River and Texas Railway Company—who thereby acquired all the rights, powers and privileges, franchises, pains and penalties of its said predecessors. That the plaintiffs, relying on the promises of said Little Rock, Pine Bluff and New Orleans Railroad Company, at the time they received said aid from the State, expended large sums of money in clearing, fencing, improving and preparing their said lands for cultivation; but said company wholly failed to perform their said contract when receiving said aid, as

well as their said contract with the plaintiffs when obtaining the right of way through their said lands, and had made their road bed much below the level of the Mississippi river at high water, and against the remonstrance and protest of the plaintiffs.

That the defendant had neglected and refused to keep the levee in repair when it had the means of doing so, and had, against the plaintiffs' protest, and their notice to desist therefrom, caused a part of the levee built before as well as since the organization of said company, of adequate height, to be cut down and reduced, for the temporary convenience of said road; thus depriving plaintiffs' lands of the protection they had before said road was built. That by the failure of the defendant, and its predecessors, to comply with said contract, the plaintiffs have been deprived of the use of their lands, their fences washed away, and their crops, raised at great expense, destroyed by overflow, and their horses, mules and cattle drowned by the overflows, to their damage $16,700, an itemized account of which was filed with and made part of the complaint.

The defendant demurred to the complaint; the demurrer was sustained, and judgment rendered against the plaintiffs, dismissing the complaint and for cost, and they appealed.

Mark Valentine, for appellant:

Joinder of separate causes of action permissible. *Gantt's Digest*, *sec.* 4550. If not, demurrer not proper practice.

The contract of the company not *ultra vires*. *Gantt's Digest*, *sec.* 4943.

Defendant company at least liable for its own negligence.

L. A. Pindall, for appellee:

Upon first point of demurrer cited, *Gantt's Digest*, *sec.* 5563; on the second, third and fourth, *Smithee* v. *Garth*,

33 *Ark.*, 17; upon the fifth, *Field on Corporations, secs.* 248 and 257; *Pearce* v. *Madison and R. Co.*, 21 *How.*, 441; upon the sixth, *Angell & Ames on Corp.*, *secs.* 770, *note b.* 772–3; *St. of Md.*, v. *Bk. of Md.*, 6 *Gill & Johnson*, 205, 230; *Brinkerhoff* v. *Brown*, 7 *John.*, *Ch.* 224–5; 6 *Ind.*, *N. C.*

The defendant not liable on the contracts of the old—being purchaser of its property under mortgage sale.

1. RAILROAD COMPANY: Liability upon its agre'me'ts to build road bed.

EAKIN, J. This Court held, in *Smithee, Comm'r*, v. *Garth*, 33 *Ark.*, 17, that there was no law authorizing the issue of "Arkansas State Levee Bonds." Hence they were void, and their acceptance by the company imposed upon it no duty for the neglect of which it could be held amenable to the State or any individual.

The agreement by the Little Rock, Pine Bluff and New Orleans Railroad Company, in consideration of a right of way over plaintiffs' land, to so build their road bed as to make it efficient as a levee to protect the lands, was connected with, and in furtherance of, the legitimate object of the company, and imposed upon it, as an artificial person, a personal obligation, for a breach of which it would have been liable to an action at law for damages. But, as set forth, the construction of the levee was not a condition of the grant of right of way, either precedent or subsequent. The right of way became the property of the company, and upon consolidation, passed to the Texas, Mississippi and Northwestern Railroad. Upon the consolidated road the obligation became also binding; and still is, if it be alive; not as "pains or penalties," under Section 4969 of Gantt's Digest, but upon general principles of law and equity. These words refer to *forfeitures* and *pecuniary punishments* alone, when applied to corporations. The sense of

pains is obvious. The word is not technical. For "*penalties*" see *Bouvier's Dic*, *in verbum*.

2. RAILROADS: Liability of purchasers of, for their obligations.

How the defendant corporation came into possession and control of the right of way is not definitely stated. It appears to be a purchaser. As such it would not, as a matter of law, by virtue of its purchase of the property and franchises of the said consolidated company, become bound to fulfill its personal obligations as distinct from those which were liens upon the property. If the purchasing company knew of any equities against the other in favor of third persons, and bought subject to him, it might make a different case, and perhaps afford ground for some appropriate relief in Chancery. But the obligation is not transferred *ipso facto* on the purchase. Otherwise no sale could ever be made of a railroad, from fear of coming into a *damnoso hæreditas*.

The same reasoning applies to the acts of the defendant in altering the road bed. In the absence of any allegations of notice at the time of purchase that the road bed was intended for a levee, and built as such in consideration of the right of way, they would not be answerable for any acts done on this part of the road bed, which it might have done if the right of way had been bought or condemned in the usual way.

Affirm the judgment.

37	27
78	197
82	467

VERSER V. FORD ET AL.

1. HABEAS CORPUS: *For custody of infant child, by what principles governed.*

In deciding contests upon writs of *Habeas Corpus* for the custody of infant children, the principles adopted in the Chancery Court must govern. No rigid rules to govern the practice have or can be formulated. Subject to a few general rules, to be taken as a

guide, the Chancellor must exercise his judgment upon the peculiar circumstances of the case, and act as humanity, respect for the parental affection and regard for the infant's best interest may prompt. All three should be considered. Neither should be conclusive.

2. PARENT AND CHILD: *Custody of child; preference to whom given.*

As against strangers, the father, however poor and humble, if of good moral character and able to support the child in his own style of life, cannot be deprived of the privilege by any one whatever, however brilliant the advantage he may offer. It is not enough to consider the interest of the child alone. And as between father and mother, or other near relation of the child, where sympathies of the tenderest nature may be confidently relied on, the father is generally to be preferred.

APPEAL from *Lonoke* Circuit Court.

Hon. J. W. MARTIN, Circuit Judge.

STATEMENT.

Petition for *habeas corpus* filed by Verser against Ford and his wife, to obtain from them the custody of his infant child.

The opinion sufficiently states the case.

Clark & Williams, for appellant:

In support of the father's right to the custody of the child, cited *Reeves' Domestic Relations*, *p.* 290 *et seq;* 2 *Kent's Com.*, *p.* 193 (*Mar.*); 5 *Bacon's Abridgement*, *Infancy and Age*, "*M*," *p.* 169 *Gantt's Digest*, *sec.* 3035; *Wright* v. *Johnson*, 5 *Ark.*, 687. None of the exceptions to the rule touch this case.

The Court is bound to issue the writ and change the custody. *McPherson on Infancy*, 152; *Rex* v. *Deloval*, 3 *Burrows*, 1434.

R. A. Howard, and *R. C. Newton*, for appellees:

The father's right not positive and unqualified. *Gantt's*

Digest, *sec.* 3035; *Kent's Com.*, 194; *Hurd on Habeas Corpus*, *pp.* 456–7; and authorities cited. Also, *Ib.*, *pp.* 540 *et seq;* 21 *N. J. Eq.*, 384; 11 *Bush.* (*Ky.*) 403; 41 *Ind.*, 92; 47 *How.* (*Tr.*) (*N. Y.*) 408; 37 *Ind.*, 164.

That there had been a permanent transfer is *resjudicata*. *Hurd on Hab. Corp.*, *p.* 463. Such was Verser's understanding. He had the right to transfer the custody. *Ib.*, *p.* 537 *et seq; Commonwealth* v. *Dougherty*, 1 *Pa. Leg. Gaz.*, *Rep.* 63.

Judgment should have been simply one of dismissal, with costs. *Gantt's Digest*, *secs.* 3108 and 3126; 25 *Wend.*, 64; *Hurd on Habeas Corp.*, 450, 456.

1. HABEAS CORPUS: For custody of infant child, by what principles governed.

EAKIN, J. This is a contest for the custody and nurture of an infant girl of tender age, whose mother died at her birth, and who, from the first two or three days of her existence, has been cared for and kept by the grand-parents. The father now demands the child again, having since married, and being in circumstances to provide and care for it.

In deciding such cases upon writs of *habeas corpus*, the principles adopted in the Chancery Court must govern. The proceedings are special. No rigid rules to regulate the practice have or can be formulated. Only a few general principles can be taken as guides, subject to which the Chancellor must exercise his judgment upon the peculiar circumstances of the case, and act as humanity, respect for the parental affection, and regard for the infant's best interests may prompt. All three should be considered; neither ought to be conclusive.

2. PARENT AND CHILD: Custody of child, to whom preference given.

It is one of the cardinal principles of nature and of law that, as against strangers, the father, however poor and humble, if able to support the child in his own style of life, and of good moral character, cannot, without the most shocking injustice, be deprived of the privilege by any one

whatever, however brilliant the advantage he may offer. It is not enough to consider the interests of the child alone.

As between the father, too, and the mother, or any other near relation of the infant, where sympathies on either side of the tenderest nature may be relied on with confidence, the father is generally to be preferred. In the great majority of cases, his greater ability and knowledge of the world renders him the fittest protector, although that is not the test. The preference is conceded to the ties of duty and affection, and attends the primary obligation of the father to maintain, educate and promote the happiness of the child, according to his own best judgment and the means within his power. Any system of jurisprudence which would enable the Courts, in their discretion and with a view solely to the child's best interests, to take from him that right and interfere with those duties, would be intolerably tyranical, as well as Utopian.

Nevertheless, keeping these leading principles always in view, there are exceptional cases, depending on their own circumstances, in which the sovereign power of the State as *parens patriæ*, acting through the Chancellor, has interfered so far as may be necessary to afford the child reasonable protection. It is impossible to define them, further than to say that they should be of such urgency as to overcome all considerations based upon the natural affections and moral obligations of the father; and it may be added that this delicate discretion will be more freely exercised in behalf of one whose ties of affection are next to those of the father himself, upon whom the accompanying moral obligations would devolve in case of the father's death.

In this case the motherless infant, two days old, was taken by the maternal grand-mother, with the father's assent, and tenderly guarded through all the perils of infancy. There has been all of a mother's care, and scarce-

ly less than a mother's affection. The child is yet scarcely three years of age, delicate in health; she is in a safe asylum, surrounded by those who may be trusted to guard her anxiously against pernicious influences, and to do their best to instill into her mind such principles as will promote her future usefulness and happiness. They, too, plead the full strength of natural affections.

The infant needs female care and guidance of that patient, ever-watchful nature which is better insured by the natural affection of a grand-mother than by the inexperienced efforts of a father, or the sense of duty of the second wife. There is no reason to doubt that the step-mother would do all that duty might demand of her in that relation, but all disinterested persons would involuntarily feel that there would be some risk to the infant in the change of her surroundings.

The father has shown himself to be a moral man, with the means of discharging his parental obligations. Certainly, under the circumstances, if he had been in possession of the child, no Chancellor could have found warrant in equity for taking her away to be placed under the grand-mother's care. But it cannot be ignored that the case does not present that attitude.

The child was placed where she is by the father's assent, and has so remained. By his assent ties have been woven between the grand-mother and grand-daughter, which he is under strong obligation to respect, and which he ought not wantonly and suddenly to tear asunder. He has shown no urgent necessity for present action, and his appeal to the Circuit Court for aid was not such as to enlist in most hearts any very strong sympathy.

The order of the Court does not preclude him hereafter, as the child becomes more advanced in years, from applying to obtain the custody of her person, or directing her

education. He may see her at all reasonable times; and at the cost of some deference to and forbearance with his child's grand-father, which it would not compromise his self-respect to render, he may avoid all unpleasant rencountres. If not, the Courts are always open to him for a renewed application to be allowed to take the child away.

The Circuit Judge made the order with the parties personally before him, and may have had some means of judging not apparent to us. He seems to have made a temporary arrangement, which commends itself to us as naturally just, and in which, we think, the father, for a while at least, should acquiesce, until the course of time produces new circumstances.

Affirm the order.

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WARNER v. CAPPS.

1. PLEADING: *Demurrer to complaint in part good.*

When one of several paragraphs of a complaint is good, a general demurrer to the whole complaint is bad

2. SAME: *Common law forms not abolished by the Code.*

The Code has made no change in the substantial allegations necessary to constitute a cause of action, and an appropriate common law form of pleading may still be used, if in the use of it the material facts constituting the cause of action be specifically stated.

3. TRESPASS: *Not cured by return of property.*

The return of property is no defense to an action of trespass for taking it.

4. SAME: *Pleading; Plaintiff must allege title; Evidence.*

In an action for taking goods the plaintiff must allege in his complaint, property in the goods; and proof upon the issue, that he has a special property in them, as mortgagee, bailee or officer, &c., will sustain the allegation. So, also, mere peaceable possession will support the action as against one who disturbs the possession without right.

APPEAL from *Dorsey* Circuit Court,
Hon. T. F. SORRELLS, Circuit Judge.

R. L. Elliott, for appellant:

In support of the complaint cited *Ball et als*, v. *Fulton Co.*, 31 *Ark.*, 380; *Chitty on Pl.*, 2d *vol.*, 859; 7 *N. Y.*, 478; 31 *Ark.*, 301.

Demurrer not proper mode of objection, if the complaint is uncertain and indefinite. *McElroy* v. *Adams*, *p.* 315; 26 *Barbour*, (*N. Y.*) 9; *C. P. Ch.*, 8 *sec.*, *p.* 155.

If either count be good, demurrer should be overruled. *Turner* v. *Tapscott*, 29 *Ark.*, 312; *Bruce* v. *Benedict*, 31 *Ib.*, 301.

Pleadings to be construed liberally. *Bushy et al* v. *Reynolds et al*, 31 *Ark.*, 657.

ENGLISH, C. J. This action was brought in the Circuit Court of Dorsey county by James Warner against William E. Capps. There were three paragraphs in the complaint, the first alleging, in substance:

"That on or about the sixteenth day of December, 1877, said defendant, with force and arms, etc., took into his possession four bales of cotton, of the value of two hundred dollars, lawful money, etc., then lying and being in the county, etc., aforesaid, and at the gin house, and from and out of the possession of said plaintiff, unlawfully and without right, and did then and there detain said cotton for a long space of time, to-wit: for the space of six days, to the great damage and inconvenience of said plaintiff." etc.

The second paragraph alleged, in substance:

"That defendant, on the day and in the county, etc., mentioned in paragraph first, unlawfully and without right, and with force and arms, and against the protestation of said plaintiff, siezed, took and detained certain goods and

chattels, to-wit: four bales of cotton, the property of said plaintiff, of great value, to-wit: two hundred dollars, etc., and then and there held said cotton, and kept and detained the same so then held for a long space of time, to-wit: for the space of —— days then next following, whereby the said plaintiff for and during all that time lost and was deprived of the use and benefit of said cotton, and thereby the same then and there became and was greatly damaged, lessened in value, and other wrongs then and there did, to the great damage of said plaintiff."

Third paragraph:

"Plaintiff further says that during the time of said taking and detention as aforesaid, his teams were stopped in consequence thereof; and that he was led to believe by the wrongful acts of said defendant as aforesaid, that he was clothed with legal authority to sieze and take said cotton, and in consequence thereof said plaintiff was induced to employ the services of an attorney, to regain possession of said cotton, and then, and not until then, was he able to regain possession of said cotton, all of which greatly damaged him to the amount of $150." Wherefore he prays judgment, etc.

Defendant entered a general demurrer to the whole complaint, which was sustained by the Court, and plaintiff resting, final judgment was rendered for defendant, and plaintiff appealed.

1. PLEADING: Demurrer to complaint good in part bad.

I. The demurrer being to the whole complaint, if either of the paragraphs stated sufficient facts to show a good cause of action, it should have been overruled. *Bruce et al* v. *Benedict*, 31 *Ark.*, 301; *Lane* v. *Levillian*, 4 *Ark.*, 272.

2. SAME: Common law forms not abolished by the Code.

II. The Code has made no change in the substantial allegations necessary to constitute a cause of action, and resort may still be had to the common law forms of plead-

ing, where the form adopted is appropriate, and in the use of it the material facts constituting the cause of action are specifically stated. *Ball et al* v. *Fulton county*, 31 *Ark.*, 378.

III. The third paragraph of the complaint alleges no cause of action, but is a vague attempt to claim consequential, and not direct damages, for the taking and detention of the cotton complained of in the first and second paragraphs.

IV. The second paragraph showed a good cause of action. Trespass *de bonis asportatis* lies for unlawfully taking and carrying away the plaintiff's goods and chattels, and where the goods have been returned or reclaimed, the action will still lie for the damage done, if it be even nominal. *Green's Prac. and Plead.*, *sec.* 708.

3. TRESPASS: Not cured by return of property.

In the second paragraph it was alleged that the plaintiff was the owner of the four bales of cotton; that the defendant unlawfully, and with force and arms, seized, took and detained the cotton from him, for a long space of time, to-wit: —— days, whereby, etc. All the necessary and material facts to constitute a cause of action were specifically stated in this paragraph, the blank as to the time the cotton was detained being matter of form.

V. The first paragraph does not allege that plaintiff had any title, general or special, in the cotton.

4. ——: Plaintiff must allege title.

In trespass for taking goods, says Mr. Selwyn, the declaration must state that the goods were the plaintiff's goods; "hence," if the words "the plaintiff," or "his," be omitted, the declaration will be bad; but this omission may be cured by pleading over. 2 *Selwyn*, *Nise Prius*, 1333.

A declaration in trespass which does not allege that the plaintiff has property in the thing taken, is bad on demurrer. *Hite* v. *Long*, 6 *Randolph*, 457; 6 *Bac. Abr.*, 600, *tit.*, *Trespass*, *II*; *Neale* v. *Clantice*, 7 *Har. & John.*, 379.

Such is the common law rule, and it applies just the same to the Code pleadings. When in pleading, under any system, any right or authority is set up over either real or personal property, some title to such property must be alleged. *Green's Prac. and Plead., sec.* 435.

Proof of title.

On issue to the declaration or complaint, however, in trespass to personal property, plaintiff may maintain the action by proving that he is the general owner, or has a special property in the goods, as mortgagee, bailee, officer, etc. So a mere possession, by which is meant one who has a peaceable possession of goods, but who shows in himself no other right, may maintain trespass. This mere possession is sufficient, as against one who disturbs it without right in himself, and who, therefore, occupies the position of an intermedler in that in which he has no interest. *Cooley on Torts., p.* 437.

There is an awkward averment in the first paragraph that the cotton was taken from the possession of the plaintiff. But, as above shown, the better pleading is to allege property in the plaintiff, general or special, for it is not a universal rule that one in the actual possession of goods has a right of action for trespass to them. For example: where goods are entrusted by the owner to a mere servant, and there is a trespass upon them, the right of action is in the master. *Cooley on Torts.*, 436.

Whether there be other exceptions we need not inquire in this case; the second paragraph of the complaint was clearly good, and the Court erred in sustaining the demurrer to the whole complaint; and for this error the judgment must be reversed, and the cause remanded for further proceedings.

KEARNEY, ASSIGNEE, v. MOOSE ET AL, RECEIVER.

1. PRACTICE IN SUPREME COURT: *Bill of Exceptions signed in Vacation.* When a motion for new trial is not acted on by a special judge trying the case, and a bill of exceptions is afterwards signed by him in vacation with a statement that he would have overruled the motion if he had not been called away, the case stands as if no motion for new trial had been filed and no bill of exceptions taken, and presents no question for the decision of this court.

APPEAL from *Conway* Circuit Court.
Hon. C. B. MOORE, Special Judge.

Clark & Williams, for appellant:

Mortgagee not entitled to back rents or profits on foreclosure. *Jones, on Mort., secs.* 670, 671; 3 *Ind., ch.* 186; 91, *U. S.* (1 *Otto.*) 603; 5 *Bish.*, 237.

The jurisdiction of the Chancery Court was ample; no attachment necessary. Besides it was not in this case authorized by the acts under which it was brought, (acts of 1861, p. 101, *Gantt's Digest.*) Fletcher & Hotze had not the landlord's lien; it belonged to the estate; Gill no party to the transfer of the claim. Hence the giving and refusing of the instructions were erroneous.

Argued upon the facts that there was no ground for attachment, even if allowable on grounds.

Besides, Gill was a partner with Mrs. Carroll, and not strictly a tenant. The jurisdiction was in equity alone.

Jno. Fletcher, for appellee:

The affidavit was sufficient, or if not, amendable. 4 *Met.*, (*Ky.*) 342; 17 *B. Mon.*, 324; 2 *Bush.*, 191; 7 *G.*, 383; 13 *How. Pr.*, 348; 65 *N. C.*, 645; 33 *Ark.*, 406; *Gantt's Digest, secs.* 394, 4616, 4619, in support of the complaint, and of the right of receivers to sue under the

decree cited, *Gantt's Digest*, *sec.* 4813. The tenant must attorn to receiver; 2 *Jones on Mort.*, *sec.* 1536; 3 *Sandf.* (*N. Y.*) *ch.* 69; 1 *Hilliard on Mort.*, 199; (*chap.* 19, *sec.* 28, *et seq.*); 1 *Met.*, 494; 13 *G.*, 352; 8 *Paige* (*N. Y.*) 565.

There was no timely action on the motion for a new trial, and upon the bill of exceptions, to make them a part of the record, and none of the matters are properly here for decision.

English, C. J. This action was brought by James M. Moose and Carroll Armstrong, as receivers in chancery, against John W. Gill for rent, and an attachment sued out under the landlord's lien act. Cotton and corn were attached and bonded by defendant.

Defendant filed a motion to quash the attachment, for informality of the affidavit, &c. Plaintiffs filed an amended affidavit, which defendant moved to strike out, but the motion was not acted on by the Court.

Defendant filed an answer to the complaint, traversing its allegations, &c.

Pending the suit Gill was adjudged a bankrupt, and Wm. Kearney, his assignee, was substituted as defendant.

The cause was finally submitted to a special Judge, sitting as a jury, on the complaint and answer, and finding, and judgment for plaintiffs.

Defendant filed a motion for a new trial, but the Court finally adjourned without any decison upon it.

Afterwards, in vacation, defendant procured the special Judge to sign a bill of exceptions, setting out the evidence introduced on the trial, the declaration of law made by the Court, and the motion for a new trial, in which the special Judge stated that he would have overruled the motion for a

new trial had it been submitted in term when he was present, but he was called away and the motion was not overruled.

After the bill of exceptions was obtained it was filed with the Clerk of the Court below, and the Clerk of this Court granted defendant an appeal.

There is no question properly presented for the decision of this Court on this appeal.

The case stands as if no motion for a new trial had been made, and no bill of exceptions taken. *Young, Trustee &c., v. King et al.*, 33 *Ark.*, 745.

The points argued by counsel for appellant arise upon facts stated in a bill of exceptions irregularly taken, and might be considered and decided if the motion for a new trial had been overruled, and bill of exceptions properly taken. Leaving the bill of exceptions out of view, there appears upon the face of the record proper, no ground for reversal.

Affirmed.

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FRY v. STREET.

1. PARTIES: *Bankrupt.*

Bankrupts are neither necessary nor proper parties in suits concerning their effects which have passed to their assignee.

2. PLEADING: *Misjoinder of parties.*

A misjoinder of defendants is not cause for a demurrer, but may be corrected by motion to strike out the party improperly joined.

3. CHANCERY PRACTICE: *Selling property for cash; Construction of decree.*

A decree ordering real property to be sold, without saying on credit, means a sale for cash, and is therefore erroneous.

APPEAL from *Chicot* Circuit Court in Chancery.
Hon. T. F. SORRELLS, Circuit Judge.

STATEMENT.

On the eleventh of June, 1879, W. B. Street filed in the Circuit Court of Chicot county his complaint in equity against Reuben M. Fry, John M. Woodward and wife, Mary, and Cyrus W. Edmonds, assignee, alleging, in substance, that about the tenth day of May, 1873, he sold to the defendant, John M. Woodward, certain lots in Lake Village, describing them, and executed to him a deed for them, reserving a lien for the deferred payments, which were evidenced by two notes, each for the sum of $1000, payable respectively the first day of April, 1874, and 1875, and bearing ten per cent. interest from the fifteenth day of April, 1873, until paid. That afterwards, about the twenty-fourth day of June, 1873, the defendant, Fry, purchased the property from Woodward, and in such purchase assumed and agreed to pay punctually, at maturity, the two notes, as part of the consideration of his purchase; acknowledging and agreeing at the time of said purchase, that said notes were a lien upon the property; and that said Fry was then in possession of the property. That afterwards Fry paid $500 on the notes, but the balance was unpaid; that before the maturity of the notes the plaintiff deposited them with Martin & Hillsman, in Memphis, Tennessee, as security for supplies. When the notes matured he took them up and paid to Martin & Hillsman his bill for supplies, except a small amount, which he agreed to pay out of the proceeds of the notes when collected. Afterwards Martin & Hillsman became bankrupts, and the defendant, Edmonds, was their assignee in bankruptcy, but he had no interest in said notes, except as before stated. He does not know the amount of the balance due Martin & Hillsman, and asks that Edmonds, as such assignee, be made party defendant, and that he answer the complaint; and he prays that the

lien reserved in the deed to Woodward be enforced; that the equity of redemption be forever barred and foreclosed; that the property be sold to pay the notes, and for other proper relief.

The notes and deeds, as described in the complaint, are exhibited. The deed from Woodward and wife to Fry mentions the assumption and agreement of Fry to pay the notes to Street as part of the consideration for their conveyance; and also contains an express covenant of Fry to pay them at maturity, and is executed also by Fry.

Edmonds answered, admitting the facts stated in the complaint, and joining in the prayer for relief, and asking that the balance of the debt to Martin & Hillsman be paid out of the proceeds of the notes when collected.

Fry demurred to the complaint: 1st. Because Martin & Hillsman were not made party plaintiffs; 2nd. Because Edmonds was made party defendant; and 3rd. That the complaint did not state facts sufficient to constitute a cause of action. Woodward and wife made no answer. The demurrer was overruled, and Fry electing to stand upon it, a decree was rendered as prayed, ordering the property to be sold by a commissioner appointed by the Court, and directing the balance due from Street to Martin & Hillsman be paid to Edmonds, their assignee, out of the proceeds of the sale. Fry appealed.

D. H. Reynolds, for appellant:

It does not appear when the attorney *ad litem* was appointed. The decree was premature, as being rendered before Woodward and wife were brought in, so that their equities with Fry might be adjusted. See Sec. 4725 *Gantt's Digest*. No warning order was made on the complaint. *Ib.*, *sec.* 4527.

The decree was premature under Sec. 4664 (*Ib.*), as the

pleadings could not have been completed ninety days before beginning of term.

No terms of credit were fixed by the decree for the sale. *Ib.*, *sec.* 4708; *Welch* v. *Hicks*, 27 *Ark.*, 292.

Dodge & Johnson, for appellee:

Misjoinder of parties no ground for demurrer... *Oliphint* v. *Mansfield*, 36 *Ark.*, 191.

Martin & Hillsman being bankrupts, were not proper parties. *Rev. Stat. U. S.*, *secs.* 5044 *and* 5047; *Bump on Bankruptcy*, (10 *Ed.*) *p.* 143; also *p.* 542, *et sey.*

HARRISON, J. Whatever interest in the notes remained in Martin & Hillsman after they delivered them back to Street, if any, upon their bankruptcy passed to and vested in their assignee, Edmonds. *Rev. Stat. U. S.*, *secs.* 5044, 5047; *Geisreiter et al* v. *Sevier*, 33 *Ark.*, 522; *Pearce* v. *Foreman*, 29 *Ark.*, 563.

They were, therefore, neither necessary nor proper parties.

A misjoinder of defendants is not a ground of demurrer, and if Edmonds was not a proper party, his name might have been stricken out of the complaint upon motion. *Oliphint* v. *Mansfield & Co. et al*, 36 *Ark.*, 191.

As to the equity of the complaint, there can be no question; and the ground of the demurrer, that the complaint did not state facts sufficient to constitute a cause of action, has not been insisted upon here.

A lien for the payment of the notes was reserved in the deed from the plaintiff to Woodward, and the appellant, in part consideration of his purchase of the lots from Woodward, agreed and undertook to pay them, and it was so expressly stipulated in Woodward's deed to him.

That part of the debt, when collected, was by the decree

directed to be paid over to Edmonds, no way concerned the appellant.

But though the plaintiff's right to a foreclosure of the lien is clear, it was an error in the Court below, in its decree, to direct a sale of the property for cash, as it virtually did, by not directing the sale to be on credit, and fixing the credit to be given.

The Statute says that sales of real property by order of Court, shall be on a credit of not less than three nor more than six months, or in installments equivalent to not more than four months' credit on the whole. *Sec.* 4708 *Gantt's Digest; Worsham and wife* v. *Freeman*, 34 *Ark.*, 35; *Williams et al* v. *Ewing & Fanning*, 31 *Ark.*, 292; *Welch* v. *Hicks*, 27 *Ark.*, 292.

For this error the decree must be reversed and the cause remanded to the Court below, with directions to render a decree for a foreclosure of the lien, and for a sale of the property on a credit, as required by the Statute.

MEYER v. BLOOM.

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1. LANDLORD'S LIEN: *Superior to mortgagee's.*

A Landlord's lien upon the tenant's crop for rent is superior to that of a mortgagee.

2. SAME: *Right of assignee of rent note to crop.*

The assignment of a rent note does not carry the landlord's lien; but if the tenant deliver the crop to pay the note to one holding it as collateral security for a debt due from the landlord, his title and possession will be upheld against the claim of the tenant's mortgagee of the crop.

APPEAL from *Jefferson* Circuit Court.
Hon. X. J. PINDALL, Circuit Judge.

STATEMENT.

On the fourteenth of November, 1878, Meyer, as trustee for the creditors of Tomlinson, brought replevin against Bloom for four bales of cotton, before a Justice of the Peace of Jefferson county. Finding and judgment for Bloom, and appeal by Meyer to the Circuit Court.

Upon the trial in the Circuit Court, before the Court, sitting as a jury, Meyer read in evidence: 1st. A deed of assignment executed to him by Tomlinson, on the sixth day of April, 1878, conveying to him all his lands, goods and choses in action, for the payment of his debts enumerated in the assignment. 2nd. A mortgage executed by I. J. Higgins to Tomlinson, on the first day of April, 1878, mortgaging to Tomlinson seven bales of cotton, to be raised during the year on the McCrary plantation, in Jefferson county, seven miles below Pine Bluff, to secure the payment of a note for three hundred and twenty-nine dollars, which he owed to Tomlinson, and further indebtedness to accrue for supplies during the year; and 3rd. A mortgage executed by Higgins to himself (Meyer) as trustee for Tomlinson, on the eighteenth day of May, 1878, upon his entire crop of cotton, to be raised on forty acres of the McCrary place, to secure the payment of a debt then due the trustee, and other indebtedness to accrue for supplies during the year.

It was then admitted that neither of the mortgages had ever been satisfied, and that the cotton in controversy was a part of the crop mentioned in the two mortgages, and was in the possession of Bloom at the commencement of the suit, and that the mortgagor, Higgins, had rented the land on which it was grown, from Leon Levy, for the year 1878, for the sum of three hundred and sixty dollars, for which he executed to Levy, on the twelfth day of February, 1878,

his note, payable the first day of November, 1878, and that Levy, on the twenty-sixth of February, 1878, assigned the note as collateral security to J. Berlen, for a debt of three hundred and sixty dollars he owed Berlen; and that Berlen had, for value, transferred all his right, title, interest and claim in the note to M. Hanf & Co., and that the note had never been paid; and that Meyer knew at the time the mortgages were executed that the land was rented from Levy, and that at the time the suit was instituted the rent had not been paid.

M. Hanf, witness for Bloom, testified that Hanf & Co. held the rent note by virtue of the transfers before mentioned; that the cotton in controversy was delivered by Higgins to their agent to pay the note, and the agent had put it in the possession of Bloom. Finding and judgment for Bloom, and appeal by Meyer to this Court.

White & McCain, for appellants:

Appellee is concluded by the principle of the case of *Robert et als* v. *Jacks*, 31 *Ark.*, 597. Assignments of mere liens, independent of legal title, or *jus in re*, not tolerated at law. A lien by contract stands on no higher grounds than one arising by law. *Shepherd* v. *Thomas*, 26 *Ark.*, 617; *Jones* v. *Doss*, 27 (*Ib.*) 518; *Rankin* v. *Campell*, 28 *Ib.*

There can be no contract for lien on a crop not planted, 31 *Ark.*, 602, save by mortgage.

Mortgage after default gives legal title. 7 *Ark.*, 311; 18 *Ark.*, 166, 575; 30 *Ark.*, 520.

Landlord has no right to the crop; only a right to enforce his lien on it. *Upham* v. *Dodd*, 24 *Ark.*, 545; see 29 *Ark.*, 575.

There was no consideration for the assumed promise of plaintiff's to pay the rent out of the cotton. Forbearance to sue or attach is no consideration where the *right* does

not exist. *Story on Con.*, *sec.* 436, and cases cited. Besides, the promise is within the Statute of Frauds. 31 *Ark.*, 613; 13 *B. Mon.*, 356; 20 *Wendell*, 201; *Thrope on Verbal Agreements*, 647; 37 *Vt.*, 391.

Martin & Taylor, for appellee:

This case not analagous to *Roberts* v. *Jacks*, 31 *Ark.*; being an assignment as collateral security. See *Chamblee* v. *McKenzie*, 31 *Ark.*, 155.

On delivery of the cotton, of less value than the rent, to be credited on it, the right of possession and title to the property passed.

A mortgage of the crop is subject to the landlord's lien; and cannot be enforced against it. *Smith, Ex'r*, v. *Meyer & Bro*, 25 *Ark.*, 609; *Ib.*, 417; *Gantt's Digest, sec.* 4098; *Tomlinson* v. *Greenfield*, 31 *Ark.*, 559.

The cotton was, in reality, turned over to the landlord's agent for rent. The note was held by the assignee as collateral. *Crawley* v. *Riggs*, 24 *Ark*, 563; see also *Watson* v. *Johnson*, 33 *Ark.*, 737.

There was a right to attach the cotton for the rent, which was a sufficient consideration. *Curtis* v. *Brown*, 5 *Cushing*, 491–2; *Houlditch* v. *Milne*, 3 *Espinasse*, 86; *Williams* v. *Leper*, *Burrows*, 1886; and such promise is not within the Statute of Frauds. *Brown on St. of Fr.*, *secs.* 204, 206; 37 *Vermont*, 391. A doubtful right to sue will make forbearance a consideration. *Story on Contracts*, *sec.* 440.

The Statute does not avoid parol contracts. It only prevents them being set up by oral evidence when sought to be enforced. Does not apply to executed contrats. *Brown, Stat. of Fr.*, *secs.* 115, 116; 46 *Vermont*, 215.

There was an exception of the rent in the mortgage.

Every person having a lien has a right to waive it. *Maxwell on Statutes*, 378; *Sedwick on Stat. and Const. Law*,

109. The lien of the landlord never passed from him; or, if it did, re-attached with the return of the note. 10 *Humphries*, 371; 10 *Ala.*, 441; 18 *Ala.*, 371; *Bernays* v. *Field*, 29 *Ark.*, 218. The case is like a vendor's lien.

HARRISON, J. The lien of the landlord was superior to the mortgage, and it was in no way affected by it. *Sevier* v. *Shaw, Barbour & Co.*, 25 *Ark.*, 417; *Tomlinson* v. *Greenfield*, 31 *Ark.*, 357; *Watson* v. *Johnson et al*, 33 *Ark.*, 737; *Buck* v. *Lee et al*, 36 *Ark.*, 525.

Being entitled to have the cotton, raised on the demised premises, applied in payment of his rent, he had the right to receive payment in it. *Watson* v. *Johnson et al, supra; Buck* v. *Lee et al, supra.*

And, though the assignment of the note did not in law carry with it the lien, it still subsisted, and as the note was held by M. Hanf & Co. only as collateral security, the delivery of the cotton to them, in payment of it, was virtually a delivery and payment to Levy, the same in effect as if Levy still held the note and the delivery and payment had been directly to him, and he had then turned the cotton over to them in discharge of his debt to them.

The judgment is affirmed.

SHIELDS v. SMITH.

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1. AGENT: *His declaration, when admissible.*

The declarations of an agent, made in the course of his agency, and in relation thereto, are admissible against his principal.

2. ESTOPPEL: *By statement as to facts,*

If one by his statements as to matters of fact, or as to his intended abandonment of existing rights, designedly induces another to

change his condition in reliance upon them, he will afterwards be estopped to deny the truth of his statements or to enforce his rights against his declared intention to abandon them.

APPEAL from *Pulaski* Chancery Court.
Hon. JOHN R. EAKIN, Chancellor.

U. M. Rose, for appellant:

The decree in the former suit (to which Smith was a party) settled the matter as between the parties and their privies. *Freeman on Judgments, secs.* 248–49 and 330.

The Chancellor improperly assumed that Fagan might be presumed, from his agency, to have the power to release the lien of the Hannibal Company.

Fagan had no power to act as agent for both companies, where their interests are not identical, or might be in conflict. *Story on Agency, sec.* 210; 17 *Barb.*, 132; 14 *N. Y.*, 85.

The burden of proof to prove the agents' power to do the act was on the party claiming under it. 17 *Ark.*, 173: 23 *Id.*, 413; *Id.*, 32; 5 *Trenton*, 337; 29 *Ark.*, 543; 24 *Ohio St.*, 67. Admissions of an agent to bind a principal are only admissible after an agency has been proved *aliunde.* 29 *Ark.*, 512; 2 *Wharton's Ev., sec.* 1183.

The novation of the debt was not made, unless the Arkansas Insurance Company had assented to bind itself to the Hannibal Company. 2 *Chitty on Cont.*, 1380 *N.* 9.

Complainant claiming under the Arkansas Insurance Company has no equity, without showing that said company, or himself, has paid the debt assumed (if that be so). 23 *Ark.*, 704; 2 *Wheat*, 336; 6 *Peters*, 402; 17 *Howard*, 343; 7 *Wall.*, 416; 13 *Ark.*, 632; 32 *Ib.*, 533; 18 *Ib.*, 369.

One who has assumed payment of a mortgage cannot contest its validity. 1 *Jones on Mort., sec.* 744; 44 *Ill*, 501; 15 *Iowa*, 407; 11 *Howard*, 521.

Complainant cannot succeed without showing or proving a written release as alleged; nor unless he has shown that he is in possession of the lands, or that the same are unoccupied.

Wassell & Moore, for appellee:

The mortgage given was a fraud upon Edward Fulton, and therefore should not be sustained.

It fully appears that there had been a compromise of all the matters involved in this case, including the settlement of this $1500 note and mortgage.

On question of dismissal of former bill see *Story's Eq. Pl.*, *sec.* 793; 7 *Johnson's Chancery Reports*, *p.* 1, and cases cited.

A power of attorney, for sale only, does not authorize a mortgage. 4 *Kansas*, 42; 3 *Hill*, 361; 1 *Hammond* (*Ohio*) 232; 5 *Vesey*, *Jr.*, 211; 1 *Kansas*, 281; 4 *Kent's Com.*, *pp.* 331, 160. Generally as to agents' powers, see *Story on Agency*, *secs.* 59, 62, 66, 67, 69, 72, 76, 81, 83, 101, etc.; 8 *Ark.*, 227.

One dealing with an agent is chargeable with notice of his powers. 3 *Hill*, 262, 279.

CARUTH. S. J. Smith filed his complaint in the Pulaski Chancery Court, in which he alleged that on the thirtieth April, 1873, he lent to the Arkansas Insurance Company $3115, for which he took a note, secured by mortgage on the lot in controversy. The Insurance Company took title by purchase from Edward Fulton and wife, Wm. H. Fulton and wife, and John Wassel and wife. The title came through Wassel, the other two deeds having been taken merely to satisfy all doubts. Wassel got his title from Wm. H. Fulton and Lavinia C., his wife, Mrs. Fulton having been the owner of the land. On the fifteenth Novem-

ber, 1865, Mrs. Fulton had executed a mortgage on the lot to Edward Fulton.

It is charged this was done under misrepresentations of her husband, and that it was never properly acknowledged by her.

On the twenty-sixth August, 1869, a bill was filed in the name of Edward Fulton, to foreclose that mortgage, under which a decree of foreclosure was rendered, and on May second, 1870, the lot was sold, and bought in the name of Edward Fulton, though without his knowledge.

In this suit, it is further alleged, there was no valid service on Mrs. Fulton. After this W. H. Fulton, who held a power of attorney from Edward Fulton, his brother, fraudulently, and in violation of his authority, made three notes, secured by deeds of trust on the lots as follows:

First note—to White & Dillon, July eighteenth, 1870; afterwards assigned to the Arkansas Insurance Company, the deed of trust being made to M. W. Benjamin.

Second note—to Merchants' National Bank; deed of trust to John W. Smith, trustee, January thirtieth, 1871.

Third note—for $1500, April twentieth, 1870, to the State Insurance Company, of Hannibal, Missouri, James F. Fagan, trustee.

These notes were for individual debts of W. H. Fulton.

Benjamin, as trustee, having advertised the lot for sale, Mrs. Fulton filed her complaint against her husband, Benjamin, Smith, Fagan, as trustees, and Edward Fulton, to enjoin the execution of the trusts, and a preliminary injunction was issued. In that complaint she alleged, substantially, that she executed the mortgage to Edward Fulton by reason of deceit and misrepresentation on the part of her husband; that it had never been legally acknowledged by her; that she had never been served with process in the foreclosure suit; and, in fact, never heard of it until

she saw her property advertised by Benjamin for sale, under his deed of trust.

Smith further alleged that the injunction suit of Mrs. Fulton was finally settled and compromised as follows:

The suit was to be dismissed; the deed of trust to the Merchants' National Bank was to be paid; the Arkansas Insurance Company was to assume the debt due to the State Insurance Company, and the deed of trust to the latter company was to be cancelled.

This agreement was made by all parties in interest, James F. Fagan, its agent, acting for the State Insurance Company. Inasmuch as Fulton was largely indebted to the Arkansas Insurance Company, it was also agreed that a clear title to the lot in controversy, and other valuable property, was to be made to that company.

The suit was then dismissed, the order showing that the suit had been compromised and settled between the various parties.

That order was entered March second, 1872. Nevertheless, Fagan, as trustee for the State Insurance Company, had advertised the lot for sale, under the deed of trust, at the instance of Shields, who had become the owner of the note. Both companies had become insolvent. Prayer for injunction, and that the deed of trust to Fagan be cancelled. Shields filed his answer and cross-bill, denying the alleged agreement to release the State Insurance Company's deed of trust, and the authority of Fagan to make any such contract so as to bind the company.

The cross-bill alleged that Fagan had removed from Pulaski county, and prayed for the appointment of another trustee.

To this answer certain interrogatories to be propounded to Smith were attached, all of which he answered on final hearing.

The Chancellor made the injunction perpetual, and decreed a cancellation as prayed.

To reverse that judgment this appeal is prosecuted.

1. AGENT: His declarations, when admissible.

The evidence discloses the facts that James F. Fagan was the general agent of the State Insurance Company, at Little Rock, and as such he made the loan, which was secured by the deed of trust. and in which he was named as trustee. The fact of the general agency of Fagan is not denied by Shields; but it is insisted that as such general agent he had no authority to make the settlement set out in the complaint. We are not called upon, however, to pass upon this question. The law is well settled that where the agency is otherwise established, as is the case here, the declarations of the agent, made in the course of his agency, and in relation thereto, are admissible as against his principal. Now, in this case, Fagan was not only the general agent of the company, but was its direct representative in the particular transaction, out of which the alleged settlement arose. He was entrusted with certain of the company's funds, for the purpose of loaning them out. He did so loan them out, and to secure that loan took a deed of trust, having himself named as trustee. Now, these facts being established, *ali-made*, we see no reason why his declarations, touching the agreement of the company to make the proposed settlement, are not competent. He did so declare to Wassel, and this declaration tends to show the agreement of his principal.

He does not prove his agency by such declaration; that appears otherwise. But in view of the facts that his relation of agent still existed, he being the person representing the interest of the foreign insurance company, in and about the deed of trust, we are of the opinion that his declarations, under such circumstances, were competent to show the agreement of the company to the proposed settlement.

Mrs. Fulton was raising the question of the validity of

her acknowledgment of the mortgage to Edward Fulton, also of the decree of foreclosure. If she succeeded in those issues, then the deed of trust of the State Insurance Company would have been worthless. It is not at all singular that the Hannibal Company would accept the promise of payment by the Arkansas Insurance Company, then a solvent corporation, in lieu thereof; nor is it difficult to comprehend why the latter company would so assume it.

Wm. H. Fulton was indebted to it in a large sum of money. He and his wife owned this lot and other valuable property. If it could get a clear title, it could well afford to pay the $1,500 to the Missouri corporation. The whole matter seems simple enough, and the proof establishes the contract.

It is, however, urged that Smith had no equity in his bill, inasmuch as it was in the nature of a bill to remove a cloud upon the title, and he was simply mortgagee.

2. ESTOPPEL. By statement as to facts, &c.

We do not so consider it. Smith was a party to that agreement as one of the defendants to Mrs. Fulton's suit. By that agreement, the deed of trust on this lot given to the State Insurance Company, was to be cancelled. Acting upon it, and believing it to have been done, he subsequently loaned a large sum of money on that security. The attempt to force this trust thereafter, by Fagan, was a direct fraud upon Smith's rights, an undertaking on his part to do that from which he was clearly estopped. In the case of *Union Mutual Insurance Co.* v. *Money*, 96 *U. S.*, the supreme court of the United States held as follows:

"The doctrine of estoppel is applied with respect to representations of a party to prevent their operating as a fraud upon one who has been led to rely upon them. They would have that effect if a party, who, by his statements as to matters of fact, or to his intended abandonment of existing rights, had designedly induced another to change

his conduct or alter his condition in reliance upon them, could be permitted to deny the truth of his statement, or enforce his rights against his declared intention of abandonment."

There was a clear equity in this complaint, and the Chancellor properly made the injunction perpetual and decreed the cancellation of the deed of trust.

Let it be affirmed.

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Perry v. The State.

1. Indictment: *For larceny of heifer yearling; Marks.*
It is not necessary to allege in an indictment for the larceny of a heifer yearling that it was marked or branded. If it was over one year old, running in the range, and not marked or branded, the defendant should prove the facts in defense.

2. Criminal Practice: *Trial without plea, error.*
If the record shows no plea to the indictment, made by the defendant or entered by the Court, the trial is without issue, and a judgment of conviction will be reversed.

APPEAL from *Yell* Circuit Court.
Hon. W. D. Jacoway, Circuit Judge.

C. B. Moore, Attorney-General, for appellee:

It was not necessary for the State to prove that the yearling was under twelve months old, or that it was marked or branded. That, under Sec. 1382 of Gantt's Digest, was matter to be shown in defense. The proof sustains the verdict.

English, C. J. Appellant, Jeff. Perry, was indicted in the Circuit Court of Yell county, Dardanelle District, for

stealing "one heifer yearling, of the value of five dollars, the property of one Ras DeNeal."

He was convicted, and sentenced to the penitentiary for one year; motion for a new trial and arrest of judgment overruled; bill of exceptions, and appeal.

I. The commencement of the indictment is in Code form, and the larceny is alleged in the usual common law form. The particular objection taken to the indictment in the motion in arrest of judgement is, that it does not allege that the heifer was marked or branded. This was not necessary, being matter of defense, as decided in *Mathews* v. *State*, 24 *Ark.*, 484.

1. INDICTMENT: For larceny of yearling. Marks.

II. The Court refused the 6th instruction moved for appellant, which follows:

"That the yearling mentioned in the indictment is not the subject of larceny, unless the same is designated by the owner thereof, by some mark or brand; and unless the jury find that the said yearling was marked or branded, they will acquit the defendant."

"Owners of cattle, hogs or sheep, which run at large in the range or woods, shall designate such animals, if over twelve months old, by brands or ear marks; otherwise, if taken or converted to the use of any other person, such person shall not be deemed guilty of a larceny, but the owner may have his action for the value of such unmarked or unbranded animal." *Gantt's Digest*, *sec.* 1382.

The evidence on the part of the State conduced to prove that in March, 1880, a constable levied on ten head of cattle, the property of Ras DeNeal, and among them the heifer in controversy, and left them in charge of another person until the day of sale. That on the day of sale the heifer was missing, and in the meantime appellant had sold her. The witnesses for the State call her a heifer yearling,

but there was no proof on either side that she was over twelve months old, or that she was not marked or branded.

As matter of defense, appellant should have proven that the heifer was running at large in the range or woods; was over twelve months old, and not marked or branded, when he took and converted her to his own use. He made no such proof, but attempted to prove that the wife of Ras DeNeal, with his consent, had given the heifer to him when a calf; which, from other evidence, it seems the jury did not believe to be the truth.

The sixth instruction asked by appellant was, therefore, properly refused as abstract.

III. The instructions given for the State, with those given for appellant, fairly submitted to the jury, upon all the evidence, the question whether he was guilty or innocent of the larceny of the heifer as charged. He objected to but one instruction, the fifth, given for the State, which follows:

"If the defendant knew that the yearling mentioned in the indictment had been taken charge of by an officer, as the property of Ras DeNeal, and failed to appear and make known his claim to the yearling, but without any knowledge of the person having the same in legal custody, sold the heifer, and when afterwards questioned as to the property, failed to make known the facts of his having sold it, and remained silent, or pretended to know nothing of the whereabouts of the property, these are circumstances which may be considered by the jury as tending to establish the guilt of the defendant."

There was evidence conducing to prove the facts stated hypothetically in this instruction, and they tended, if the jury believed them to be true, to establish the guilt of the appellant. There is, therefore, no valid objection to the instruction.

IV. The trial entry shows that when the case was called, the parties announced themselves ready for trial, and that "defendant waived arraignment, and the drawing of a jury being waived, the following jurors, to-wit: James Patillo, etc., etc., were selected, and duly sworn to try the cause, and, after hearing the evidence, instructions of the Court, and the argument of counsel, retired, etc., to consider of their verdict," etc.

2. CRIMINAL PRACTICE: Trial without plea, error.

The record fails to show that defendant pleaded to the indictment, or that any plea was entered for him, and the trial was, therefore, without an issue. This is a fatal defect in the record, and ground of reversal, as held in *Lacefield* v. *State*, 34 *Ark.*, 275.

The judgment, for this error, must be reversed, and the cause remanded for a new trial, after appellant has pleaded to the indictment, or the plea of "not guilty" has been entered for him, if he stands mute.

V. When the appeal was allowed, by one of the Judges of this Court, the transcript failed to contain the entry showing the organization of the grand jury at the term at which the indictment was found, and which is part of the record in every criminal case brought here by appeal or writ of error, and the omission had to be cured by *certiorari*.

For this fault of the Clerk below, he will be allowed no costs for his return upon the *certiorari*.

DEAN v. THE STATE.

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1 MALICIOUS MISCHIEF: *Indictment for killing a mule; Inclosure.*

An indictment for killing a mule need not allege that it was killed in an enclosure having an insufficient fence. If killed while trespassing in the defendant's inclosure, having a lawful fence, he can prove it in defense.

2. PRACTICE IN SUPREME COURT: *Bill of exceptions.*

Where the bill of exceptions does not state that it contains all the evidence introduced, or facts proved on the trial, the presumption is in favor of the correctness of the judgment.

APPEAL from *Conway* Circuit Court.
Hon. JOHN FLETCHER, Special Judge.

The defendant was convicted in the Conway Circuit Court of malicious mischief in killing a mule. Motions for new trial, and in arrest of judgment, were overruled, and he appealed to this Court.

The opinion states the case.

C. B. Moore, Attorney-General, for appellee:

It was matter of defense, if the fence was not five feet high. It is not necessary to allege that it was.

Cited in support of the judgment, Sections 1380 and 1381 *Gantt's Digest; Acts of* 1879, *p.* 85, approved March 17, 1879.

ENGLISH, C. J. I. There is nothing in the motion in arrest of judgment.

The indictment was for malicious mischief, and charged, in substance, that Moses Dean, on the first day of May, 1880, in the county of Conway, etc., one mule, of the value of one hundred and fifty dollars, of the property, goods and chattels of one Hampton Hines, did unlawfully, wilfully and maliciously kill, contrary to the statute, etc., etc.

All the material facts to constitute an offense, under the statute (Acts of 1879, p. 85) are alleged in the indictment.

1. MALICIOUS MISCHIEF: Indictment for killing a mule:

The particular objection taken to the indictment in the motion in arrest of judgment, is that it "does not allege that the grounds in which the mule is charged to have been

killed were not inclosed with a lawful fence, as indicated in the *proviso* of the act under which the indictment was drawn."

It is not alleged that the mule was killed in any particular grounds, nor was such an allegation necessary.

When the animal is killed when trespassing in the inclosure of defendant, and he has a lawful fence, that may be shown in defense, under the *proviso* of the statute. Inclosure.

II. Appellant was found guilty by the jury, a fine of $50 assessed against him as punishment, and the value of the mule fixed at $100.

He made no objections to the instructions given on the part of the state, and the Court gave all asked by him.

The grounds of the motion for a new trial were that the verdict was against the evidence, the law and the instructions of the Court; and that the value fixed upon the mule was greater than warranted by the proof.

The evidence introduced by the State conduced to prove that defendant shot and killed a mule belonging to Hampton Hines, in May, 1880; that they had had a previous difficulty, and were not friendly.

It appears that the mule was shot in the yard of defendant, jumped the fence, and went part of the way home, but fell and died on the road. The yard and field of the defendant were inclosed by the same rail fence, there being no division fence.

The mule was perhaps shot in the night, and early next morning was found by Hines and others dying, and by its tracks and blood traced back to defendant's house. Hines attempted to measure the height of defendant's fence, when he picked up a rail, and told him if he measured his fence without legal authority he would kill him. He did measure it, however, where the mule had jumped over it out of

the yard, and found it only there feet high, and it was not more than four feet high all around.

Another witness testified that he, with others, had rode around the fence, and it appeared to be not more than four feet high in the highest places. Witnesses for the defense testified that the fence was five feet high.

So the evidence was conflicting as to the value of the mule. Hines swore it was worth $127.50, and a witness for the defense testified that it was not worth over $50 or $60.

The value of the mule, the height of the fence, and whether defendant killed the mule, and if so, maliciously, were all questions of facts for the jury, and it was their peculiar province to judge of the weight of the evidence.

2. BILL OF EXCEPTIONS: When judgment presumed correct.

It is not stated in the bill of exceptions that it was proved that the mule was killed by defendant in the county of Conway, but the bill of exceptions does not purport to set out all the evidence introduced on the trial. The principal contest seems to have been about the height of the inclosure in which the mule was shot, and the value of the animal, and the testimony of the witnesses is not stated in the bill of exceptions in detail, as given by them, nor does it purport to state all the facts proved by the several witnesses, nor that the evidence set out was all that was introduced upon the trial.

Where it does not appear from the bill of exceptions that it sets out all the evidence introduced, or facts proved on the trial, the presumption is in favor of the judgment.

Affirmed.

BARBOUR v. THE STATE.

1. CRIMINAL PRACTICE: *Swearing jury.*

Where the record fails to show that the trial jury in a felony case were sworn in that case, a judgment of conviction will be reversed.

ERROR to *Desha* Circuit Court.
Hon. J. M. PINNELL, Special Judge.

L. A. Pindall, for appellant:

Objected that he was indicted by the initial "F." Barbour alone, his name of Flournoy Barbour being well known.

Also, that the Court below permitted the State to prove that defendant had left the State.

Also, to admission of proof of his confessions, in that they were drawn from him by direct questions, while under arrest, without due warning that it would be used against him.

Also, to exclusion of evidence of threats made by deceased against defendant. They were admissible to show the condition of feeling on the part of deceased, from which the jury might be assisted in inferring the facts connected with the transaction. *Pitman* v. *State*, 22 *Ark.*, 354, 357; *Palmore* v. *State*, 29 *Ib.*, 249; *Stewart* v. *State*, 19 *Ohio*, 302, 306.

Defendant should have been allowed to prove that he had been told of the threats, to show that he had heard them.

Instructions given and refused, were argued without citations of authority.

C. B. Moore, Attorney-General:

It is too late here, after pleading to the indictment, to make the first objection to the use of the initial. There

was neither a wrong name, nor error in the name, nor was it wrong to allow the State to show that defendant fled the State, after being admitted to bail.

The confessions were freely made and competent. *Austin* v. *State*, 14 *Ark.*, 556; *Meyer* v. *State*, 19 *Ark.*, 156.

Uncommunicated threats were properly excluded. Defendant's declarations that he had been told of the threats were heresay evidence.

The burden, after proof of killing, devolved on defendand to show mitigating circumstances. *Gantt's Digest, sec.* 1252.

The instructions and verdict, on the whole, were right.

English, C. J. Flournoy Barbour, the plaintiff in error, loosely indicted as *F.* Barbour, was arraigned, pleaded not guilty, tried by a jury, found guilty of murder in the second degree, as charged, and his punishment fixed at imprisonment in the penitentiary for eighteen years. A new trial was refused him, but the Court, of its own motion, reduced the time of imprisonment to nine years, and sentenced him for that period.

Passing over the points made and argued by his counsel here, in which there is nothing novel, there is a fault appearing of record, which we cannot overlook in a case involving liberty, and which is fatal to the judgment.

At the September term, 1880, of the Circuit Court of Desha county, the following record entry appears to have been made in this case:

"On this day comes the State, etc., and comes the defendant in custody, etc., and by his counsel, and being arraigned, entered his plea of not guilty to the charge in the indictment herein, and both parties announcing themselves ready for trial, it is ordered that a jury come; whereupon come J. T. Truvalt," etc. [eleven others being named],

"twelve good and lawful jurors, of the body of Desha county, who were selected from the regular panel, in accordance with law, to try this cause, and the jury, after receiving the admonition of the Court, are allowed to separate until to-morrow morning at 9 o'clock."

On the next day the following entry appears:

"On this day comes the State, etc., and comes the defendant in custody, etc., etc., and also comes the jury heretofore empannelled, and all being present, this cause proceeds; and after hearing the evidence adduced, arguments of counsel, and having received the instructions of the Court as to the law, the jury retired to consider their verdict," etc.

There is nothing in either of these entries, or any other entry appearing in the transcript, to show that the jurors were sworn.

The oath administered to the panel of twenty-four petit jurors, selected for a term of the Court, binds them in all civil cases tried by jury taken from such panel during the term. *Gantt's Digest, sec.* 3696–7. But in a felony case, like this, though the trial jurors be taken from the term panel, they must be specially sworn, as required by Sec. 1921 of the Digest. See also, Sec. 1898.

The record should show that the jurors were sworn. See *Anderson* v. *State*, 34 *Ark.*, 257, and cases cited.

Reversed and remanded for a new trial.

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THATCHER ET AL V. FRANKLIN.

1. ASSIGNMENT: *When title vests in assignee.*

In the absence of fraud the title to goods conveyed by a deed of assignment for the benefit of creditors, vests in the assignee, upon the execution and delivery of the deed; but he must file the bond and schedule provided by the statute before he can have possession of them.

2. SAME: *Registration of.*

Registration of a deed of assignment for the benefit of creditors, it being an absolute conveyance, without any defeasance, is not necessary to vest the title in the assignee, as against the assignor and execution creditors, who refuse to accept the benefits of the deed.

3. REPLEVIN: *Requisites of. When Assignee may have.*

Title, general or special, and a right to the immediate possession of the goods are both necessary to maintain replevin for them, and until the schedule is filed and bond given, as required by the Statute, the assignee in a deed of assignment for benefit of creditors has no right of possession, and cannot maintain the action.

APPEAL from *Jefferson* Circuit Court in Chancery. Hon. X. J. PINDALL, Circuit Judge.

W. S. McCain, and N. T. White, for appellants:

The filing of the bond required of the assignee by Sec. 385 of Gantt's Digest, is a condition precedent to the operation of the assignment, and without which it was a nulity. 3 *McLean*, 177; 10 *Kansas*, 47; 39 *N. Y.*, 369; 3 *Hum.* (*N. Y.*) 594.

The act did not violate any provisions of the Constitution of 1874.

ENGLISH, C. J. On the ninth of June, 1877, A. Nathan & Co., a firm of merchants of Pine Bluff, who were unable

to pay their debts, executed a general deed of assignment, by which they conveyed to Samuel Franklin, as trustee, their stock of goods, wares, merchandise, choses in action, etc., for the benefit of all their creditors.

Franklin took possession of the goods embraced in the deed, kept them in the house where A. Nathan & Co. had been doing business, and for a month or more was disposing of them for the benefit of creditors, but business becoming dull, he boxed up the remainder of the goods and stored them in a warehouse.

It appears that all of the creditors accepted the provisions of the deed of assignment, except W. W. Thatcher and Numsen & Sons, who brought suits before a Justice of the Peace against A. Nathan & Co., obtained judgments, sued out executions thereon, placed them in the hands of Anthony Johnson, constable, who levied upon the goods in the warehouse, took possession, and advertised them for sale.

On the eighteenth of August, 1877, Franklin, who had not filed a schedule of the goods, and executed bond as trustee, as required by the statute regulating assignments, brought this action of replevin in the Circuit Court of Jefferson county against Johnson for the goods levied on, and obtained possession of them by means of the writ.

After Johnson had answered the complaint, on his motion the execution creditors were made co-defendants, and adopted his answer. Under the instructions of the Court, the plaintiff, on the evidence, obtained a verdict, and judgment that he retain the goods, etc. A new trial was refused the defendants, and they took a bill of exceptions, and appealed.

I. In the absence of fraud, on the execution and delivery of the deed of assignment to the trustee, the title to the goods vested in him; and so far the Court correctly charged the jury.

1. ASSIGNMENT: When title vests in assignee.

2. SAME: Registration of.

II. The deed was an absolute conveyance, and not a mortgage or ordinary trust deed, with a defeasance, and the title to the goods vested in the trustee, not only as against the assignors, but also as against the execution creditors without registration, and the Court so rightly charged the jury.

3. REPLEVIN: When Assignee may have.

III. But though the deed vested the legal title to the goods in the trustee, yet by the express language of the statute regulating assignments, (*Gantt's Digest*, *secs.* 385, 387) before he was entitled to take possession, sell or in any way manage to control the property assigned, he was obliged to file the schedule, and execute the bond required by the act. *Clayton* v. *Johnson*, 36 *Ark.*, 406.

——: Requisites of.

To maintain replevin for goods, the plaintiff must not only have title, general or special, in them, but must be entitled to immediate possession thereof. *Gantt's Digest*, *sec.* 5035; *Beebe* v. *DeBaun*, 8 *Ark.*, 510; *Wallace* v. *Brown*, 17 *Ib.*, 450.

This case differs from the case of *Clayton* v. *Johnson*, *sup.* In that case the trustee filed the schedule, and executed bond before he brought replevin, as provided by the statute. In this case it appears that the trustee paid no attention to the statute.

——: Filing schedule, &c., prerequisite to.

The Court below erred in refusing to charge the jury as moved by appellants, in effect, that plaintiff having failed to file the schedule, and give bond as required by the statute, could not maintain replevin for the goods.

Reversed, and remanded for a new trial.

CASEY v. THE STATE.

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1. CRIMINAL PRACTICE: *Discretion of Court in rejecting juror.*

It is the province of the Circuit Court, in the exercise of a sound discretion, to determine the qualification of a juror challenged for bias, and this Court will not say that the discretion is abused by admitting a juror who says, upon examination, that he has formed an opinion of the guilt or innocence of the accused, upon rumor, that will require evidence to remove, but that he has no bias or prejudice against him, and can try the case impartially and without prejudice to his rights.

2. WITNESS: *Accomplice.*

An accomplice who is not indicted, or is separately indicted, is a competent witness, though convicted, if he has not been sentenced.

3. SAME: *Evidence; Advice of counsel.*

A witness cannot be compelled to disclose in his testimony the advice or communications of his counsel.

4. EVIDENCE: *Declarations of accomplice.*

The declarations of an alleged accomplice, in the absence of the defendant, are not admissible against him until other evidence than that of the principal is produced, implicating the declarant in the offense.

5. WITNESS: *Wife of co-defendant incompetent.*

In this State the wife of one who is jointly indicted with the defendant on trial, is not a competent witness for him.

6. EVIDENCE: *Declarations of accomplice.*

The declarations of an accomplice are admissible against, but not for, his accomplice on trial.

7. WITNESS: *Contradiction in immaterial matter.*

The contradiction of a witness in an immaterial matter—that is, one not tending to connect the prisoner with the crime—is material as affecting the credit of the witness with the jury.

8. INSTRUCTIONS: *Repeating.*

There is no error in refusing to repeat for one party instructions already substantially given for the other.

9. PRACTICE: *Retiring jury during argument of instructions.*

Requiring the jury to retire during the argument of instructions is a matter of practice within the discretion of the Court, and is not objectionable.

APPEAL from *Franklin* Circuit Court.
Hon. W D. JACOWAY, Circuit Judge.

STATEMENT.

On the seventeenth day of February, 1880, James P. Holland and William Casey were indicted in the Circuit Court of the Dardanelle District, in Yell county, as accessories to Charles G. Helphrey, in the murder of Burgess James. The indictment is as follows:

"The grand jury of Yell county, in and for the Dardanelle District, in the name and by the authority of the State of Arkansas, accuse James P. Holland and William Casey of the crime of murder in the first degree; committed as follows, viz: That on the twenty-second day of September, 1879, in the county of Yell, in the Dardanelle District, in the State of Arkansas, one Charles G. Helphrey unlawfully, willfully, feloniously, deliberately, of his malice aforethought, and with premeditation, did kill and murder one Burgess James, then and there living, by then and there shooting him, the said Burgess James, with a certain pistol, which he, the said Charles G. Helphrey, then and there held; the same being loaded with gunpowder and leaden bullets; and by then and there striking him, the said Burgess James, with the pistol aforesaid, so held by the said Charles G. Helphrey as aforesaid, with feloneous intent, him, the said Burgess James, then and there to kill and murder, against the peace and dignity of the State of Arkansas.

"And the grand jury aforesaid in the name and by the authority aforesaid, upon their oaths, do further present that the said James P. Holland and William Casey, before the said felony and murder was committed as aforesaid, to-wit: on the twenty-first day of September, 1879, in the district, county, and State aforesaid, did unlawfully, feloniously, deliberately, of their malice aforethought, and with premeditation, incite, move, procure, counsel, aid, hire and command the said Charles G. Helphrey to do and commit

the felony and murder, in manner and form aforesaid, against the peace and dignity of the State of Arkansas."

The defendants obtained a change of venue to the Circuit Court of Franklin county, and there filed a demurrer for uncertainty and insufficiency of the indictment. The demurrer was overruled, and they severed, and Casey was tried and convicted of murder in the first degree.

In empanelling the jury, James Huggins, offered as a juror, upon examination, stated that he was not acquainted with the parties, but had frequently heard, on several occasions, at the Circuit Court in Yell county, what purported to be the particulars of the case. He did not know whether it was the witnesses in the case or not that told him of them, but what he heard made such an impression on his mind as to the guilt or innocence of the defendant as would require evidence to remove it. He further stated that the opinion he had formed was such that he could go into the jury box and decide the case as impartially as if he had heard nothing about it, and without prejudice to the substantial rights of the defendant; that he had no prejudice or bias for or against him. The defendant challenged him for cause. It was overruled and he excepted.

Three others, offered as jurors, stated upon examination, that they had formed opinions, from rumor, of the guilt of the defendant, which would require evidence to remove; but that they could go into the jury box and try the case as impartially as if they had heard nothing, and without prejudice to the defendant's rights; and they had no bias or prejudice for or against him. A challenge to them for cause was likewise overruled, and the defendant excepted. The bill of exceptions does not show whether these four were put upon the jury or not.

Upon the trial the principal, Charles G. Helphrey, was offered as a witness by the State. The defendant objected

to his testifying, on the ground that he was jointly indicted with the defendant, and was a party defendant on the record; but the Court overruled the objection, and the defendant excepted. The witness then testified, in substance, as follows:

"I am 20 years of age; came from Missouri to Conway county, and thence to Yell county, in September, 1879; I know the defendant and James P. Holland. On Wednesday before the killing of James, I visited Casey and Holland, at Holland's gin, in Carden bottom, in Yell county; stayed there with them awhile and returned to Hudspeth's to pick cotton, with whom I engaged to pick cotton as I went up to Carden bottom from Conway county. Before leaving them I promised to return Saturday. They were going to Dardanelle Friday. On Saturday evening I returned to see Casey and Holland, at Holland's gin, Joe Koker going with me. About sundown Joe Koker returned to Hudspeth's, promising to return the next morning, and we were all to spend Sunday together. Casey and myself went to Holland's house, and afterwards, about dark, we and Holland went to the gin, and Holland brought out a bottle of whisky, and we sat down on a log, and Holland said that he and Casey had a good thing that they had been at work at for six months; that one Burgess James had about fifteen hundred dollars, mostly in gold, that he carried about him all the time, and the way to get it was to kill him and take it from him. Casey said yes, that was so. The conversation became general, and I can only state the substance of it. They asked me if I would go in with them and help them get it. I told them I did not like to go into anything of that kind, that I could not get out of. They then said that I need not be afraid to go into it; that they would get me out of it. Holland said he had two beds in his house; he would move one of them into the kitchen, and Casey would come there

and sleep on the bed in the kitchen; and that I could go out and kill James and come back and sleep with Casey, and they would both swear that I had stayed there all night. We then broke up, and Casey and I went to George Guest's and stayed all night. We all three met next morning (Sunday) at the gin, to make further arrangements for me to go and kill Burgess James, and get his money. They again assured me that they would get me out of it if I would kill him. I had no pistol, and Casey got his (a Smith & Wesson, calibre No. 32) and gave it to me, and Holland gave me some money. The pistol was dark-colored, varnished handle, and Casey said it once belonged to Rube Cole, the Sheriff.

"We then spoke about Koker intending to come there the next morning, and Casey said he would give him a scare and make him leave. They told me I would find James at Phillips' gin, or at the widow woman's house there. We then separated, and I went up the river. I went to the widow woman's house, and found that James had gone out home. I then went in the direction of his house, and met him a little before sundown and returned to the bottom with him. It was dark before we got into the bottom. On the way we stopped several times to rest. I told James that my name was Virgil James; that I was a cousin of his from Mississippi, and he recognized me as his cousin. Casey and Holland had told me to do this, giving me the names of James' relations in Mississippi. The last rest we made I had made up my mind to kill him, but didn't wish to do it without telling him of it. I pulled out the pistol and told him I was going to kill him with it. He jumped up and run towards me, and then turned from me, and when he had got about ten steps from me I fired the first shot, then the second, third, fourth and fifth, he running all the time. I then run up on him and knocked him down

with the pistol, and as he was trying to get up I struck him several blows on the head with the pistol. He was hallooing, and I choked him to stop him, until he was dead; and then took his money, amounting to one hundred and thirty-odd dollars, from his pants pocket. I then left immediately, and went to Holland's house. It was about ten or eleven o'clock Sunday night when I killed James, and about three o'clock Monday morning when I reached Holland's house. I went into the kitchen where Casey was sleeping and woke him up and told him what I had done, and he got up and went out with me. Holland also got up and came out where we were. I told him also about my killing James and getting his money. They said it was all right; that they would stick to me, and die by me but what I should come out all right. Holland brought out a bottle of whisky, which he said he got at Atkin's Station on Sunday on purpose for us, of which we all drank. Holland then went into the house and got me something to eat. I told them where I had left James' body, as near as I could describe the place, and they said if they thought they could find it they would go and throw it in the river so it could not be found. We then struck a match and tried to count the money I got from James, but the match went out before we got through. We then went to the gin, and Casey and I stayed there until daylight, when Holland came out and said it would not do for us to stay there and let anybody see us. We then counted the money, and Casey put a $20 gold piece in his pocket. I kept the balance, because we did not have time to divide it. They then advised me to go out into a thicket, some four or five hundred yards in Holland's field, and Casey went with me and showed me the thicket, and then left me and went back. He and Holland were to come out where I was as soon after daylight as they could get off, and after sun-up Casey came out alone, and

told me there were so many around that they couldn't both come out together with safety, but they would come out at twelve o'clock and bring me some dinner and a change of clothing and a pistol, and we were then to divide the money. He then went back. After he left I went out under a walnut tree in the field and went to sleep, and slept until after twelve o'clock. When I waked up I saw Casey running from the thicket in the direction of George Guest's house. I also saw several men riding down the road toward the gin house. This gave me a scare, and I left the country immediately, and went to Missouri. I was arrested in Missouri.

"On my return, in custody of Messrs. Cole, Young and Quinn, deputy sheriffs, I voluntarily confessed to them my guilt in killing James, and implicated Casey and Holland. I also made confession to the prosecuting attorney, whom we met on our return, between Dover and Russellville, of my guilt of the murder of James, implicating Casey and Holland. The prosecuting attorney did not offer me any inducement or reward to make the confession, but stated that he, as prosecuting attorney, could not promise me anything, and that my statement or confession would probably be used against me. Neither Holland or Casey were present when these confessions were made."

"The killing of James occurred in Dardanelle District, in Yell county. The defendant's counsel objected to the witness' statements to the guards and prosecuting attorney going to the jury, but the objection was overruled, and he excepted."

The counsel then proposed to ask the witness the following question:

1. "Did not your attorneys tell you at Dardanelle, at the examining trial of Casey and Holland, that it would be to your interest to testify against Casey and Holland?" but the Court refused to allow this and other similar questions,

as to the advice of his counsel, to be asked, and defendant excepted.

The defendant then asked the witness as follows:

"Did not the deputy sheriffs who brought you back from Missouri tell you that they knew you were guilty, and you had better confess?"

2. "Have you not been informed that when a person turns State's witness, it is the policy of the Court to mitigate his punishment?"

The Court permitted the questions to be asked, but upon its own motion instructed the witness that in answering he was not bound to answer as to any information received from his counsel. To which instruction of the Court the defendant excepted.

George B. Guest, for the State, testified as follows:

"I reside on what is known as the Holland farm, in Carden bottom, in Yell county. I have known the defendant since March, 1879, when I employed him as a laborer on my place. The first time I ever saw the witness, Helphrey, was on Saturday evening, the twentieth or twenty-first of September, 1879, about sundown. He was sitting on a log in front of Holland's gin. He soon after came to my house with Ben Tennison, one of my laborers, and they went into the laborers' room. Soon after supper the defendant, Casey, came in and recognized Helphrey at once. After a few minutes' general conversation Helphrey and Casey left together, about dark, going towards Jim Holland's house, which is about 100 yards from my house. I soon after went to bed. After about an hour, or hour and a half, they returned and went to bed in the laborers' room. The next morning I saw them come out of the room and go over to Holland's before sun-up, and return to my house in about thirty minutes. After breakfast they returned to Holland's. I never saw Helphrey again until since his ar-

rest. I saw Casey that day no more until about sundown, at the widow Tacket's.

"Casey's pistol was a fine Smith & Wesson six-shooter. I saw it in his coat pocket, where it was hanging up at the gin, on the Wednesday after the killing; saw nothing out of repair about it. I took it out of his pocket only far enough to recognize it by the handle. It was the only pistol I ever knew him to have. On Sunday night Casey did not sleep at my house. It was understood a few days before then that he was to board at Jim Holland's; but on the Monday night after, he did stay at my house. He had engaged to work for Holland at the gin, and was to board at Holland's. Only a narrow road separates my house from the gin, and I know that Casey fired the engine at the gin on Tuesday and Wednesday after the killing. Jim Holland was married to Matilda Tacket. He called her 'Tilda.' Casey was engaged to her sister—a stout, fat girl, called 'Lou.'"

Samuel Scruggs, for the State, testified as follows:

"I have known Casey since last March. I first saw Helphrey on the Wednesday afternoon before the killing of James. He came to where I was picking cotton for Mr. Collins, on the Holland farm, in Yell county; Casey was with him. They stayed about half an hour, and then went to Mr. Guest's. I next saw Helphrey on the Saturday evening before the killing of James, at Mr. Guest's. He said he came up to see Casey. I saw Casey the same evening, and remarked to him 'that he was not picking much cotton now;' and he replied, in a laughing way, that he was making more money than any of us; was making five dollars to our one; didn't say how he was making it. I knew his only business was picking cotton, and other farm labor. About half an hour afterwards he said he was getting up a

$500 horse race. I don't know that the making of five times what we made had reference to the horse race."

Joe Koker, for the State:

"My age is 18 years; live in Carden bottom, Yell county, Arkansas. I know Helphrey; came to Carden bottom with him from Greasy Valley in Conway county, and stopped and went to work at Hudspeth's. On the Saturday evening before the killing of James, Helphrey and I went up to Holland's gin to see Casey; when we got there, Casey and Holland were absent, killing a beef; Helphrey said he wanted to see Casey, and would stay all night. I started back home, Helphrey telling me to come back Sunday morning, and we would have some fun up and down the river. Sunday morning George Mills and myself were going up to Holland's gin and met Casey, who told me that Helphrey told him to tell me to meet him in Greasy Valley as soon as I could get there; and Casey further told me that they were after Helphrey with a writ from Conway county, and he had left the night before. He took me aside from George Mills to deliver this message to me. I left for Greasy Valley immediately, and went to John Robinson's, where Casey said Helphrey would meet me; but Helphrey never came there, and I returned to Carden bottom Monday. When Helphrey and I went to Holland's gin Saturday evening, he did not have a pistol—at least, I saw none, and if he had one, it was small and concealed in his pocket. When Helphrey was in Greasy Valley, he most always carried a pistol—a large Remington pistol. He also had a small pistol—Colt's revolver. He carried these pistols because he was most always in a fuss. He afterwards sold the Colt's revolver. Helphrey and myself occupied the same room at Hudspeth's for three nights before we went to Holland's gin, and I never saw him have any pistol there. He had no baggage there."

Robert Thomas, for the State:

"I saw Helphrey for the first time on the Sunday that James was killed; he was on the road near William Phillips', and got there about ten o'clock A. M., and stayed about two hours. He had a Smith & Wesson pistol wrapped up in his coat, which he was carrying in his hand; I read the name on the barrel; the barrel was about five and a half inches long—a six-shooter, and like the pistol in court. He inquired for Burgess James—said he was his cousin, and he had heard he was in jail for playing cards, and he was going to try to get him out."

The State then proved by the attending physician of Burgess James that he was shot in three different parts of the body, and had nine cuts about the head, from a hard substance, that had corners and edge, and that he died from the effects of the wounds. The shots were from a pistol or gun carrying a small ball.

George Mills, for State:

"On the Sunday on which Burgess James was killed, about 9 o'clock A. M., I was coming up the river road in Carden bottom, in company with John Lewis and Joe Koker. We met the defendant, Casey, who stopped, and after a short conversation, took Joe Koker aside, and after an interview between them of some five or ten minutes, Koker turned and went back in the direction of Hudspeth's. Lewis and myself went on towards Holland's gin, until we got to Malone's; we stopped there, and soon after Casey came on and stopped there too; soon after he came up, Lewis and myself went on to Holland's gin, leaving Casey at Malone's."

Elbert Embry, for the State:

"I live at Atkins, in Pope county, about five miles from the Holland farm. On the Saturday before the Sunday on which Burgess James was killed, the defendant and James

P. Holland came to my drug store and bought three quarts of whisky. Holland was in the habit of buying whisky from me, generally every week."

The State then proved by George Cole, the deputy sheriff and jailer at Dardanelle, that while the defendant, Casey, was in jail, he, Cole, took his letters from the postoffice and delivered them to him, always opening and examining their contents before delivering them. That in December, 1879, he got a letter out of the office addressed to the defendant at Cabin Creek postoffice, and forwarded to Dardanelle from that office. It was postmarked "Carden Bottom, Ark." The witness produced the letter, and he and other witnesses proved that the body, address and signature were in the hand-writing of James P. Holland. It was mailed at Carden Bottom, July eighteenth, 1879, and received at Dardanelle December twenty-third, 1879.

The Court, against the objections of the defendant, allowed the letter to be read to the jury, as follows:

"CARDEN BOTTOM, ARK., July 18, 1879.

"W. A. CASEY:

"*Dear Friend*—I seat myself to write you a few lines, to let you know bisness. Bill he is still on the river, but is going to his place Sunday to stay. You keep cool. I will write to you Monday or Tuesday, and tell you all about it. Bill, this leaves all well but me. I have got the tooth ache the worst kind. Every thing is all wright, the old lady has moved to the Gee house. I am here by myself and Tilda. You kneed not be afraid to come any time you get ready. So I will close as the mail is coming.

"Yours truly,

"J. P. HOLLAND."

"P. S.—I am going up to-morrow or next day. You believe me all is quiet. I told all you was gone to Joplin, Mo. W. A."

"Bill your girl is fat and wants to see you. When you read this burn it up and answer it. Be shure and do both. When I write for you to come you must come a hoping.

"Bravely as ever,

"JAMES P. H———D."

W. P. Phillips testified that Burgess James worked for him two months in 1879, on his farm on the river, and left there to go upon his own farm to stay, in July, 1879.

The defendant proved by a number of witnesses residing in Missouri, that they well knew Charles G. Helphrey in Missouri, before he came to Arkansas, about 1878. He lived in their neighborhood many years, and his general character for truth and immorality in the neighborhood was bad, and they would not believe him on oath. He was raised there, and was, at the time of their testifying, about twenty years old.

The defendant then offered to prove by the wife of James P. Holland that on the Sunday night on which Burgess James was killed, her husband, James P. Holland, was very sick, and she sat up with him all night, and knew that he did not go out of the house during the night, and that Charles Helphrey did not come to her house during the night; and that said Holland did not go to the gin house the next morning, as testified by Helphrey. He was sick several days, and she called in a physician for him Monday morning. That Casey had come to her house to board, in pursuance of an arrangement made for him to work for her husband in firing his gin, and a bed had been provided for him in a side room on Thursday or Friday before the killing of James, and he was boarding there, according to the agreement. But the Court excluded the witness, and the defendant excepted.

The defendant then offered to prove by J. G. Melton that on the Sunday on which the murder was committed he

met J. P. Holland and Dr. Shockley coming, as he supposed, from Atkins, and asked them for a drink of whisky, and they both told him they had none; that they started from Atkins with two quarts, one of which they had lost by getting the bottle broken, and the other they had drank up. But the Court refused the testimony, and he excepted.

The testimony of other witnesses was introduced by the defendant, for the purpose of contradicting certain statements of Helphrey.

The Court gave to the jury, for the State, twenty-nine instructions; to the 22d and 23d of which the defendant objected and excepted. They are as follows:

22d. The want of corroboration in testimony not material, or contradiction, when immaterial, is of no consequence in determining the guilt or innocence of the defendant.

23d. While it is necessary that the State should prove that Burgess James was murdered by Charles G. Helphrey, it is also necessary that she should prove circumstances outside of the testimony of said Helphrey, tending to connect the defendant with the commission of said offense; and said circumstances, if so proven, are a sufficient corroboration of Helphrey's testimony, if they, in connection with his testimony, satisfy your minds beyond a reasonable doubt of the defendant's guilt.

The defendant asked for nine instructions; all of which the Court refused, and he excepted.

The Court, against the objections of the defendant, permitted the jury to retire during the argument of the instructions, and he excepted.

The jury found the defendant guilty of murder in the first degree. The defendant filed a motion in arrest of judgment, and for new trial, upon the grounds of his ex-

ception, taken during the progress of the cause, and because the verdict was contrary to law and the instructions of the Court, and was not supported by the evidence; which being overruled, he excepted and filed his bill of exceptions, and obtained an appeal from one of the judges of this Court.

Harrison & Byers, for appellants:

The indictment demurrable. If good, it is joint against Holland, Casey and Helphrey; and the last is not a competent witness against his co-defendants.

The Court erred in refusing to sustain challenges of the jurors, Carter and Huggins, for cause, thus compelling defendant to exhaust peremptory challenges. *Texas Court of Appeals* 7, *p.* 519.

Also in refusing to allow witness, Helphrey, to tell if he had been advised by his attorney to testify. The attorney alone is privileged.

Holland's letter, without proof of conspiracy, was not evidence against Casey. Besides, its contents may as well have an innocent meaning as the contrary It was really the ground of the verdict.

The witness, Mrs. Holland, was competent to testify, upon severance, in favor of Casey. *Stanton's Ky. Digest*, *p.* 448, *sec.* 90; *Wharton's Crim. Law*, *top p.* 769, 767–8; *Greenleaf on Ev.*, *sec.* 335. See *N.* 2, *p.* 397, *Note* 5.

The witness, Hall, should have told what he had heard.

The evidence of Melton was competent as part of the *res gestæ*, disproving Helphrey's statement.

Casey is not connected with the killing by anything outside of Helphrey's testimony.

The 22d instruction tended to mislead the jury. The 23d, good as far as it goes, but there was no proof of criminal connection; acts, innocent in themselves, cannot fix guilt, unless connected with the case. 1 *Green's Crim. Law Re-*

ports, 749; 32 *Annual Reports*, 599; 7 *Texas Ct. of Ap.*, 445. Confessions of accomplice not sufficient. 12 *Am. Decisions*, *p.* 340.

The instructions asked for defendant should have been given. *Am. Reports* 32, *p.* 174; *State* v. *Lyon*, 81 *N. C.*, *p.* 600; *Roscoe's Crim. Ev.*, 159–160; 2 *Russ. on Crimes*, 958–59–60; *Bish. Crim. Prac.*, *sec.* 1076, *and note* 1; *secs.* 1073–74–78–79.

C. B. Moore, Attorney-General, for appellee:

Helphrey was not jointly indicted, but separately. His connection with the crime is only descriptive.

The jurors, Collins and Steinberg, were properly held competent.

The instructions were proper.

The letter admitted, although written sometime before the killing, tended to connect Casey and Holland in the crime, and was competent for what it was worth.

Mrs. Holland's testimony rightfully excluded. *Collier* v. *State*, 20 *Ark.*, 36.

There was no error in the exclusion of the testimony of Hall and Melton.

Defendant's instructions were properly refused.

HARRISON, J. The motion in arrest of judgment was properly overruled.

The guilt of Helphrey is averred, and the facts and the circumstances of the murder are stated in the indictment with the same directness and certainty required to charge him with the commission of it, if he alone had been concerned in the perpetration of it; and it charges with like directness and certainty, the appellant and Holland with having, before the commission of the crime, feloniously and with malice aforethought incited, procured, aided, counseled, hired and commanded him to do and commit it, and nothing more

was or could be necessary to charge them as accessories. 2 *Bish. Crim. Proced., Secs.* 7–11.

It was the province of the Court to determine in the exercise of a sound discretion, whether there existed such a state of mind on the part of the persons called as jurors in the case and challenged by the appellant for actual bias, that they could not, if chosen, give him a fair and impartial trial, and disqualified them as jurors, and unless there had been an abuse of its discretion, which we cannot say there was, we have no authority to overrule its decision. *Gantt's Digest Sec.* 1910; *Benton* v. *The State* 30 *Ark.* 328; *Wright* v. *The State, MS. Opinion.*

1. Discretion of court in rejecting juror. (See answer of jurors, p. 69)

Helphrey was a competent witness for the State. It is a well settled rule of the common law that an accomplice who is not indicted, or is separately indicted, and though he has been convicted, if sentence has not been passed upon him, is a competent witness. 1 *Bish. Crim. Pro., Secs.* 1166, 1167; 1 *Whar. Crim. Law*, 783; 1 *Green Ev. Sec.*, 379. And it is expressly provided by section 2479, Gantt's Digest, "that in all cases where two or more persons are jointly or otherwise concerned in the commission of any crime or misdemeanor, either of such persons may be sworn as a witness in relation to such crime or misdemeanor, but the testimony given by such witness shall in no instance be used against him in any criminal prosecution for the same offense." *The State* v. *Quarles* 13, *Ark.* 307; *Cossart* v. *The State* 14, *Ark.*, 539; *Pleasant* v. *The State* 15, *Ark.* 649.

2. WITNESS: Accomplice.

And we can see no reason why he should not have been permitted to state when testifying, that he had previously made a confession of the crime to the Prosecuting Attorney, in which he had told him of the appellant's, and Holland's complicity in it.

The advice given him by his counsel he could not be compelled to disclose. It was within the privilege of confiden-

3. ——: Evidence. Advice of counsel.

tial communications. *Bobo* v. *Bryson*, 21 *Ark.* 387; *Bigler* v. *Reyher*, 43; *Ind.* 112; *Hemenway* v. *Smith et al*, 28 *Verm.*, 701; 1 *Green Ev.*, *Sec.* 240 *a*.

Mr. Wharton says: "The question whether a client can be compelled to disclose his confidential communications to his legal adviser draws peculiar interest from the Statutes enabling parties to be called as witnesses by their opponents," and very justly remarks: "It is obvious the guard against the disclosure of such communications by counsel would be a mockery, if the client could be compelled to disclose that as to which counsel's lips are sealed. It would be absurd to protect, by solemn sanctions, professional communications when the lawyer is examined, and to leave them unprotected at the examination of the client." 1 *Whart. on Ev.*, *Sec.* 583.

And he was very properly told by the Court that he was not required to disclose any information he had received from his counsel.

4. EVIDENCE: Declaration of accomplice.

The letter written to Casey as the evidence conduced to prove, by Holland, was admissible against him only as the declaration or act of an accomplice, upon the principle that where several are engaged together in the commission of an unlawful act, the declaration or act of one in reference to or in pursuance of the common object is in contemplation of law, the declaration or act of all of them. But before it was introduced, other evidence than that of Helphrey implicating Holland, should have been produced.

The testimony of Helphrey was not sufficient for that purpose. "A conviction can not be had," the statute says, "upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the commission of the offense, and the corroboration is not sufficient if it merely shows that the offense was

committed and the circumstances thereof." *Section* 1932 *Gantt's Digest.*

Without evidence, therefore, connecting Holland with the murder, corroborative of that of Helphrey, the letter, however irrefragable in itself as evidence of his complicity, was of no higher grade than *hearsay*. And, as there was no such proof made, either before or after its introduction, it was not competent evidence.

5. WITNESS: Wife of co-defendent in. competent.

Though there is much conflict in the authorities, it is settled in this State by the decision in *Collier* v. *The State*, 20 *Ark.*, 36, that the wife of one indicted with the defendant on trial, is not a competent witness for the latter; which decision we adhere to.

6. EVIDENCE: Declarations of accomplice.

Though the declarations of Holland, if he had been proved to have been connected with the crime, might have been used against him, they were not competent evidence for the appellant. The evidence of the witness Melton, offered by the appellant, as to what Holland may have told him, on the day of the murder, about having no whisky, was, therefore, properly excluded.

7. WITNESS: Contradiction in immaterial matter, material.

The first of the instructions objected to by the appellant, the twenty-second in the series of those given at the instance of the State, so far as it related to the contradiction of the testimony of Helphrey, was not correct, if there had been evidence on which to base it; for if Helphrey was contradicted by any other witness, though in an immaterial matter, that is, as we understand the meaning of the instruction, in a matter not tending to connect the defendant with the killing, such contradiction might have tended to weaken his testimony, and to impair his credit with the jury; but as there was, in fact, no contradiction of it in any particular, the appellant was not in any way prejudiced by the instruction.

To the other, the twenty-third, we are unable to see any

objection, and none has been insisted upon or suggested here.

8. INSTRUCTIONS: Repeating

The *first*, *second*, *third* and *sixth* asked by the defendant were substantially the same as the *twenty-third* of those already given for the State; the *fourth* the same as the *twenty-sixth;* the *fifth* was contained in the *fourteenth*, *fifteenth*, *seventeenth* and *eighteenth;* and the *eighth* in the *fourteenth;* and as they would have tended to unnecessary prolixity in the charge, and could have served no good purpose, they were properly refused.

The jury were told by the Court, in the twenty-first instruction given, that they could not convict the defendant upon the testimony of Helphrey, unless it was corroborated by other evidence tending to connect the defendant with the commission of the murder, and that the corroboration was not sufficient if it merely showed that it was committed, and the circumstance of it, the Court so in effect telling them that the law impeached him, and they must have known from the atrocity of the crime he had committed that he was not a creditable witness. It could not go further and tell them that some particular motive or inducement might have influenced his testimony, and as to which there was no evidence; and if the law be as stated in the seventh instruction asked by the defendant, but as to which we do not deem it necessary or proper to express an opinion, it was properly rejected.

9. PRACTICE. Retiring jury during argument of instructions.

Requiring the jury to withdraw from the court-room whilst the instructions were being argued and settled was a matter of practice, only within the discretion and control of the Court. We cannot see or imagine any impropriety in it, or how the appellant could have been thereby prejudiced.

As the judgment must, for the error above indicated, be reversed, and the case remanded for a new trial, we do not deem it proper to make any remark upon the evidence,

further than to say that there was, in our opinion, competent and legal evidence corroboratory of Helphrey's, conducing to connect the appellant with the commission of the crime.

Reversed, and remanded for a new trial.

FURBUSH v. LEE COUNTY.

1. PRINCIPAL AND DEPUTY: *Deputy's right to control conduct of principal: Payment; Estoppel.*

Mervin, as deputy of Furbush, collector of revenue of Lee county, delivered to Hewitt interest bearing State scrip, which he had collected as revenue, to be paid to the County Treasurer on Furbush's indebtedness to the county. Hewitt delivered the scrip to the Treasurer, and took his receipt to Furbush for the principal, the Treasurer refusing to allow the interest. Furbush, upon receiving the receipt, repudiated the transaction, and returned the receipt to the Treasurer, and demanded the scrip, and the Treasurer returned it to him. Afterwards, Furbush having defaulted and absconded, Mervin petitioned the County Court, in his own name for the protection of Furbush's sureties, to credit the scrip on Furbush's account, on the ground that the delivery to the Treasurer was a payment. From the evidence, the scrip had not been entered on the Treasurer's books, nor placed with the county funds, and the receipt was not regarded by the Treasurer as a final matter, but merely as a memorandum showing how much Furbush had paid. *Held:* That the deputy could not thus control the conduct of his principal; that he had no right to petition for the sureties; that Furbush had the right to repudiate the transaction, and reclaim the scrip, and that the transaction was no payment; and treating the proceeding, which was docketed on appeal in the Circuit Court, and conducted in the name of *Furbush* v. *Lee County*, as the suit of Furbush, he was estopped to claim it as a payment.

APPEAL from *Lee* Circuit Court.
Hon. J. N. CYPERT, Circuit Judge.

STATEMENT.

In October, 1879, T. C. Mervin, as deputy collector, and in behalf of the sureties of Furbush, Collector of Revenue of Lee county, filed a petition in the County Court of that county, praying the court to give Furbush credit for the sum of six hundred and seventy-five dollars in his account for county revenue collected, upon the ground that that sum had been paid over by him to the County Treasurer on said account, and the Treasurer's receipt taken for it, and afterward the Treasurer had returned the money to Furbush and taken up the receipt; but the court denied the petition and the petitioner appealed to the Circuit Court. In the Circuit Court the cause was docketed as *W. W. Furbush v. Lee County*, and was submitted to the court sitting as a jury.

The evidence as set out in ths bill of exceptions shows that about the first of January, 1879, Mervin, as deputy collector under Furbush, Collector of Revenue for Lee county, received six hundred and seventy-five dollars in interest bearing State scrip for county taxes for the year 1877, and having no confidence in Furbush's honesty, delivered it to J. M. Hewitt to pay to the County Treasurer on Furbush's indebtedness to the county for taxes collected for that year. Hewitt paid the scrip to the Treasurer and took his receipt for so much paid by Furbush on his account to the county. On the same day he informed Furbush of the payment and delivered to him the receipt, telling him, also, that the Treasurer refused to allow any interest on the scrip since the first of July, 1878, on the ground that the money was then due to the county, and he would not allow the interest since that date. Furbush said he would not be robbed in that way and took the receipt to the Treasurer and demanded the scrip. The Treasurer took the receipt

and returned to Furbush the package of scrip. He testified that he did not regard the transaction with Hewitt as a complete and final transaction of the business with the collector, nor the execution of the receipt as a final matter. It was merely a memorandum showing how much was paid him. The payment had not been entered on his books at the time Furbush called for the scrip, nor had the scrip been distributed with the county funds or placed in the vault.

The court found for the county and rendered judgment against Furbush for cost; and after motion for new trial was overruled, the petitioner filed his bill of exceptions and appealed to this court.

U. M. Rose, for appellant:

An agent may employ an agent for mere ministerial purposes; 1 *Hill*, 501; 51 *N. Y.*, 117; *Wharton on Agency*, *sec.* 33, 645; 10 *Pick.*, 482.

The payment not sufficient. *Sec.* 1031 *Gantt's Digest.* Sheriff not bound to pay over at the same time, all monies collected.

The repayment to Furbush unauthorized. *Gantt's Digest*, *sec.* 601

EAKIN, J. It appears that when these proceedings began in the County Court in October, 1879, Mervin who had been deputy collector under Furbush, was then himself the clerk and Furbush had left the county. It does not appear whether any settlement had been made between the collector and clerk in 1878 on account of taxes for 1877, or what balance had been found against the collector. It is to be inferred, however, that there was no controversy save as to the particular item to which the motion was directed. The County Court had jurisdiction of the subject matter, and for the purposes of this decision, it may be taken that its action on the motion was final as to the settlement.

The securities of Furbush can not be regarded as parties to the proceedings. They might have been admitted to appear in person or by attorney, but Mervin, as deputy collector, had no more right to represent them than any other individual would have had. It is a fundamental principle of modern pleading that the remedies must be sought in the names of the real parties in interest if they are competent to act *sui juris*. The motion and the appeal are really in the name of Furbush and must be so considered. The deputy had no interest whatever. In this view Furbush is estopped by his contract from claiming that the package of scrip was actually paid into the treasury. He reclaimed it because he was unwilling that it should go into the Treasurer's hands upon such a receipt as that given by the Treasurer to Hewitt. This he had the right to do, remaining liable, however, for the amount actually due. If he acted in bad faith his securities are none the less responsible; they answer for his fidelity, and he has control of the funds collected until they are finally paid over to the person authorized to receive them.

The courts can not recognize the right of a deputy to control the conduct of his principal, or to act as agent of his principal's sureties, to keep funds out of his principal's hands, and administer them himself. Persons who become sureties with the suspicions which such a course implies, must abide the risks. The practice has been common and results from political causes with which we have nothing to do. Whilst we may sympathise with a people whose circumstances make it necessary, we cannot give it legal sanction.

The case would not be different if the motion had been made in the proper names of the sureties. The court rightly found that the payment into the treasury was never really consummated. The deputy might well have employed an agent or messenger, or obtained the serivces of a friend

to transmit the money to the Treasurer and take a receipt. He could not authorize the messenger however, to take any other than a true receipt for the whole amount paid in, principal and interest. Such a receipt should have been given, as receipts are but memoranda and evidences of facts. If the collector had been on his part liable for interest, it should have been shown by a charge *per contra*. A mere stranger acting for a deputy had no right to determine this question, and the collector might repudiate his action and leave matters *in statu quo*.

Affirm the judgment.

FORD V. BURKS ET AL.

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1. ACKNOWLEDGMENT OF DEEDS: *The word "purposes" necessary in.*
   An acknowledgment of a mortgage which does not show that the mortgage was exe uted for the *"purposes"* therein expressed, is insufficent to admit it to reco d; and the mortgage is no lien upon the property, as against a s ibs qu nt purchaser, even with notice.
2. MORTGAGE: *Not released by taking other security.*
   A subsequent written agreement by the mortgagor and new sureties, to pay the mortgage debt by a future fixed day, in consideration that the mortgagee will forbear suit on the debt until that day, is no release of the mortga e; and an unsatisfied judgment on such agreement is no bar o a suit to foreclose the mortgage.
3. SECURITIES: *Cumulative and collateral.*
   Cumu'ative and collateral securities may be all pursued simultaneously, but the party can have but one satisfacii n.

APPEAL from *Drew* Circuit Court in Chancery.
Hon. T. F. SORRELLS, Circuit Judge.

STATEMENT.

In February, 1878, Ford filed in the Circuit Court of

Drew county, his complaint in equity against Henry C. Burks, showing that in March, 1873, Burks executed to him a mortgage upon sundry tracts of land in Drew county (describing them) to secure the payment of a note executed to him for $740, due March first, 1874. That afterward for a valuable consideration he released a part of the tracts from the mortgage, and the defendant had conveyed to him his equity of redemption in another part of them and there still remained another part subject to the mortgage, (particularly describing these several parts) That the note was wholly unpaid. Prayer for judgment against the defendant for the debt, and for foreclosure of the mortgage upon the lands. The note and mortgage, with the certificate of acknowledgement, were exhibited with the complaint.

Burks for defense, answered that on the third day of January, 1876, Maximillian M. Snider and Charles M. Burks assumed and undertook with himself in writing to pay to the plaintiff the said promissory note by the first day of January, 1878, in consideration that the plaintiff would forbear to sue on said note until that date. That on the twenty-fifth day of January, 1878, the plaintiff brought suit on said undertaking against him and said Charles M. Burks and the heirs of said Snider, in the Drew Circuit Court, and recovered judgment against them at the February term, 1878; and that the foundation of said suit and judgment was the seven hundred and forty dollars specified in said note, and was no other or different consideration, and that said judgment was still in full force and effect and not appealed from. A transcript of the record in that case is filed as an exhibit with the answer.

On the seventeenth day of February, 1879, William T. Wells and James T. Jackson, claiming an interest in the lands, asked and were allowed to file their answer to the plaintiff's complaint, in which they set forth, that on the

sixteenth day of February, 1878, and before the commencement of this suit, the defendant, Henry C. Burks, had conveyed to them in payment of fees he owed them for legal services, and of money advanced to him, certain tracts (describing them) of the lands specified in the plaintiff's mortgage, and that said mortgage had not been properly acknowledged and recorded according to law, and that they were innocent purchasers without notice, and for a valuable consideration. They pray that the plaintiff's mortgage as to their lands be cancelled and their title be quieted. Their deed is exhibited with their answer.

Upon the hearing, the court found that the acknowledgment of Burks to the plaintiff's mortgage was insufficient and dismissed the complaint for want of equity. The plaintiff appealed.

The character of the acknowledgment is shown in the opinion.

McCain, for appellant:

In case of mortgages the "consideration" is really the same with the "purpose." *Jones on mortgages*, *Sec.* 611; *Bouvier's Dic.* "*consideration;*" *Blackstone's Com.*, *vol* 2. A substantial compliance with the statute is all that is required. *Jacoway* v. *Galt*, 28 *Ark.*, 190, 26 *Ark.*, 128, 32 *Ark.*, 453.

EAKIN, J. This cause was decided in the court below upon the ground that the mortgage had not been acknowledged for registration in accordance with the statute, and therefore gave no lien upon the lands subsequently purchased by Jackson and Wells.

The first question presented, regards the sufficiency of the certificate of acknowledgment. The words "*and purposes*," commonly used after the word "*consideration*" and as required by the statute, are omitted.

1. ACKNOWLEDGMENT OF DEEDS: The word "purposes," necessary in.

The question resolves itself into this: Have the words any distinctive significance, or does the use of one or either, substantially imply all that is contained in the other?

The legislature has seen fit to prescribe the use of both, from which we must infer that some substantial evidence was supposed to exist, and we think this is implied also in the ordinary significance of the words, as used in connection with legal instruments. In ordinary parlance the considerations which prompt an action, may not be easily distinguished from the purposes sought to be effected. But with regard to legal instruments and in the connection in which it is used in the statute, the word "*consideration*" has a more limited and technical meaning, distinct from motives or purposes. It means something of value in the eye of the law; something in the way of price or compensation, which may be of value to the obligor or of detriment to the obligee. Whereas "purposes" evidently means the *effect* which the instrument is intended to have upon the rights of the contracting parties and the status of the subject matter.

To illustrate in case of a mortgage. The loan is the *consideration*; but the *purpose* of the mortgage is to create a certain and definite security for the repayment, either by bill in equity or sale under a power. The words have a distinctive meaning and are each substantial. The legislature having required the use of both, the Court did not err in holding the certificate to be insufficient.

The law may seem very technical and vigorous, yet it is the duty of the Court to give it effect until repealed or modified.

Mortgage not properly acknowledged, no lien.

It has been well settled in this State by repeated decisions that a mortgage not duly recorded creates no lien against subsequent purchasers, even with notice. This ruling has been on the language of the statute, and has now become a

rule of property which cannot be safely disturbed, save by the prospective operation of a statute.

2. MORTGAGE: Not released by new securities.

There was no error therefore, in holding that the lien of the mortgage did not attach to the lands subsequently purchased by Jackson and Wells. As to them, the bill was properly dismissed; but this does not dispose of the whole case. It remains to consider whether there be any remaining equities against the mortgagor. The original mortgage was not released by the subsequent guaranty given by the joint note of Burks and Snyder; they merely assume to pay it in consideration of further forbearance. The security was cumulative and the foreclosure of their guaranty by previous bill in chancery, without a sale and payment, did not amount to such satisfaction as would preclude a suit upon the original mortgage. Cumulative and collateral securities may be all pursued together, although the party can have but one satisfaction. Upon platting the lands and comparing them with the several deeds exhibited and the descriptions in the pleadings, several mistakes are obvious. Taking the description however as probably intended, the lands are not all exhausted by the release of the mortgagee, or the conveyance of the equity of redemption, or the deed to Wells and Jackson. There remains, especially, the N. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of Sec. 36, and the N. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of Sec. 35, which seem yet subject to the mortgage. They are most probably of little value, and may therefore have been overlooked or released by consent. We cannot tell however, how that may be, and as these lands are still subject to the mortgage, it was error to dismiss the suit for want of equity. For this reason let the decree be reversed, save as to Wells and Jackson, and the cause remanded for further proceedings consistent with this opinion.

3. SECURITIES: Cumulative and collateral, all pursuable.

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THE STATE v. KEITH.

1. LIQUOR: *Selling without license.*

A licensed dealer may sell his own or any other's liquor without offense; and if the owner has license, his agent may sell; but if neither the seller, owner or person interested in the sale has license, all may be guilty.

APPEAL from *Logan* Circuit Court.
Hon. J. H. ROGERS, Circuit Judge.

STATEMENT.

Indictment for selling liquor without license.
The opinion states the case.

C. B. Moore, Attorney-General, for appellant:

The indictment was under section 5 of the Act of 1879, and follows the language of the statute.

ENGLISH, C. J. The indictment charged that J. A. Keith, on the fifteenth day of July, 1880, in Logan county, unlawfully did sell to one Charles Sharp, one pint of ardent liquor, without the owner or owners thereof having previously procured a license from the County Court of said county, authorizing such sale, against the peace, &c.

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

All the allegations of the indictment may be true, and yet appellee guilty of no offense. It is not alleged that he sold the liquor without license, and if he had license, no matter whether the owner of the liquor had or not. Any licensed dealer may sell his own or the liquor of others without offense.

So, if the owner has license, one acting as his agent, or in his employ, may sell without violation of law.

But if the seller has no license, and the owner, or a person interested in the sale none, all may be liable. *Acts of 8th March*, 1879, *Sec.* 5. *Cloud* v. *State*, 36 *Ark.* 151.

Affirmed.

On this opinion the following cases are affirmed:

No. 56, *State* v. *Nelson*, appeal from *Logan*.

No. 57, *State* v. *Barton*, appeal from *Logan*.

No. 58, *State* v. *Perkins*, appeal from *Logan*.

PARKS V. THE STATE.

1. CRIMINAL PRACTICE: *Appeals from Justices of the Peace in forma pauperis*

Appeals from Justices of the Peace may be prosecuted in *forma pauperis* in civil, but not in criminal cases.

ERROR to *Yell* Circuit Court.

Hon. W. D. JACOWAY, Circuit Judge.

C. B. Moore, Att'y Gen'l., for defendant in error.

The offense was a misdemeanor within the jurisdiction of the justice. *Gantt's Dig. Sec.* 1298; *State* v. *Devers*, 34 *Ark.*, 188. The statutes make no provision for defending as paupers, and expressly requires, in all criminal appeals to the Circuit Court, a bond for costs. *Sec.* 2104 of *Gantt's Dig.*; also *Sec.* 2105 requires the certificate of appeal to be served on the justice. For want of these the appeal was properly dismissed.

ENGLISH, C. J. Robert Parks and Nathan Taylor, plaintiffs in error, were charged, tried and convicted before a justice of the peace of Yell county, Danville District, for an assault upon Annie Spears, with a deadly weapon, fined $1000 each, and costs, and ordered into custody, &c.

Without giving any bond, they caused a transcript to be filed in the Circuit Court as if upon appeal.

The State moved to dismiss the appeal because not taken in accordance with law; plaintiffs in error filed a petition under sections 926–31, *Gantt's Digest*, to be allowed to prosecute their appeal without bond as paupers. The court refused the prayer of the petition and dismissed the appeal.

Plaintiffs in error could not appeal from the judgment of the justice of the peace without a covenant, by good security, for costs; and a further covenant to pay the judgment if they desired to stay execution. *Gantt's Dig.*, *Sec.* 2104, &c.

Persons may be permitted to prosecute civil suits as paupers under the sections of the Digest above referred to, but they have no application to prosecutions of appeals in criminal cases.

Affirmed.

JOHNSON V. THE STATE.

1. LIQUOR: *Selling with and without License.*

One having license to sell liquor may sell another's liquor who has no license, but one having no license can not sell the liquor of another who has, except as his agent or employee, and under his license; and if neither has license, both the seller and owner or party interested in the sale, are indictable.

APPEAL from *Franklin* Circuit Court.
HON. W. D. JACOWAY, Circuit Judge.

C. B. Moore, Attorney General, for appellee:

Indictment was under *sec.* 5 *of Act of March* 8, 1879.

In support of the judgment the State relied on the principles of *Foster* v. *State*, (*Miss.*) as applied to the evidence.

HON. E. H. ENGLISH, C. J. Appellant, George Johnson, was convicted on the following indictment, and motion in arrest of judgment overruled:

Charge: That George Johnson, on the twenty-fifth day of December, 1879, in the county of Franklin, &c., unlawfully did sell to one R. P. Williams, one pint of a certain preparation of ardent liquors commonly called "Granger Tonic," when the owner thereof had not previously thereto procured license from the County Court of said county authorizing the same, &c.

This indictment is like that in the *State* v. *Keith*, *ante* 96, which was held bad. It was not alleged that appellant had no license; and if he had he was guilty of no offense, though the owner of the tonic sold had none; and if the owner of the tonic had license and appellant none, he was guilty of a violation of the statute, unless he sold as the agent or employee of the owner, and under his license.

It is sufficient to charge that the seller has no license, and unless he has, or sells for some one who is licensed he may be convicted.

So if liquor be sold without license, the statute subjects not only the seller but the owner or person interested in the sale to indictment. *Act of Eighth March*, 1879, *sec.* 5.

Reversed and remanded with instruction to arrest the judgment.

HUNT v. CURRY.

1. APPEAL: *On overruling motion for new trial in Chancery.*
Where a party excepts to the overruling of his motion for a new trial in a Chancery case, and prays and obtains an appeal, it will be construed to be an appeal from the decree of the Court and not alone from the overruling of the unnecessary motion for new trial.

2. TAX SALE: *Purchaser's, remedy for taxes paid upon an invalid sale.*
If a tax sale prove invalid for any informality in the proceedings of any officer having any duty to perform in relation thereto, the purchaser has a personal right and remedy against the owner, and a lien upon the land as against him or his assignee for the taxes, penalty, cost and interest thereon, from the time of payment, and for all subsequent taxes paid by him: but he can have no personal decree against the assignee, for taxes accrued on the lands before the assignment; and in a suit against the assignee to enforce such lien, he may have the former owner made defendant for personal decree against him. The failure of the purchaser to pay the excess of his bid over the aggregate amount of taxes, penalty and cost due on the land before receiving the certificate of purchase, will not toll his relief for the amount paid.

3. SAME: *Taxes paid before sale, no remedy against owner or the land.*
Where land is sold for taxes which have been paid, the purchaser is without remedy against the owner or the land, to recover them.

4. SAME: *Object of the Statute for tax sales.*
It is the policy of the Statute to protect purchasers paying the taxes upon lands of defaulting owners.

5. CHANCERY SALE: *For enforcement of lien.*
A sale in Chancery to enforce a lien on land must be on credit, as provided by section 4708, Gantt's Digest.

APPEAL from *Ashley* Circuit Court in Chancery.
Hon. T. F. SORRELLS, Circuit Judge.

J. W. Van Gilder, for appellant:

Relied upon the fact, that the complaint does not state, nor the evidence prove any *informality* on the part of the

Sheriff to invalidate the sale, but that the plaintiff lost the land by failing to pay the whole of his bid, including the surplus.

The suit was founded on section 178, of Rev. Acts of 1871, (*see pamph. Acts, p.* 184.)

The complaint fails to show who was the proprietor of the lands, when sold in 1872; a subsequent purchaser would not be liable in this action.

No informality on the part of the Sheriff is set out in the complaint. The pretended informality was on the part of the Clerk in giving certificate of purchase before payment of the whole. There was fault on the part of the *purchaser*, as well as the officer.

S. P. Hughes, for appellee:

There was no proper appeal in this case. A motion for a new trial was not good practice, and the appeal should have been from the principal judgment, and not from the order overruling the motion. The case should be dismissed, citing *Sykes* v. *Laferry*, 26 *Ark.*, 414.

The object of section 178 (*p.* 184), Acts of 71, was, in all cases, to throw the burden of the taxes on the real proprietor, and to prevent purchasers at tax sales, who paid taxes, from losing their money. This is natural equity.

It was *informality* on the part of the tax collector, not to have demanded and taken the whole amount of the bid, and paid it over as required by law.

The proprietor of land cannot suffer by having to repay taxes on his land paid by another.

English, C. J. This suit was commenced on the Chancery side of the Circuit Court, of Ashley county, the eighteenth day of December, 1877, by Robert S. Curry, against Susan M. Hunt.

The bill was brought under the provisions of section 178, of the revenue act of March twenty-fifth, 1871 (*Acts of* 1871, *p.* 187), which was re-enacted as section 181 of the revenue act of twenty-eighth of Arpil, 1873 (*Gantt's Dig. sec.* 5214), to enforce a lien on lands for taxes paid by complainant.

The bill alleges in substance, that at a tax sale, made by the collector of Ashley county, in May, 1872, complainant purchased four tracts of land, which are described and the amount of taxes, penalty and costs charged on each tract, and the sum bid for it, are stated; the aggregate of the former being $296, and of the latter $779.

That complainant paid the collector the aggregate amount of the taxes, penalties and costs ($296.47), and obtained from the clerk a certificate of purchase, who, after the expiration of the time allowed by law for redemption, executed to him a tax deed for the lands.

That one Williamson Hunt was at that time in possession of the lands, claiming to be the owner thereof, and complainant instituted suit therefor in the Ashley Circuit Court, the tenth of February, 1875, for the purpose of possessing himself of the lands, and on the final trial thereof, in August, 1876, the tax sale was held invalid on account of some informality in the proceedings of the collector who made the sale, and judgment was rendered against him.

That as complainant was informed and alleged, the informality consisted in the fact that the collector had permitted him to receive the certificate of purchase before he had paid to the collector the surplus, to be deposited in the County Treasury, as directed by the Statute.

That Susan M. Hunt, who is made defendant, is the proprietor of the lands.

There was a claim for taxes paid subsequent to the tax sale, but no decree for them.

The bill prayed a decree for the $296.47, the aggregate amount of taxes, penalties and costs, paid by complainant, with interest thereon; that the sum charged on each tract and paid by him, be declared a specific lien thereon, and that the tracts be severally condemned and sold for the satisfaction of the decree.

The answer of the defendant is brief.

She admits the sale as alleged, and that the sale, at a trial at law, was held invalid, but denies that it was on account of some informality in the proceedings of the collector, and demurs to the bill, because:—

First. It does not state facts sufficient to constitute a cause of action; and,

Second. That it does not state, or show what the informality in the proceedings of the collector was.

On the hearing the demurrer was overruled, and decree as prayed by the bill.

Defendant filed a motion for a new trial (which was not necessary in a Chancery case) which motion, a record entry states, the Court overruled; to which ruling the defendant at the time excepted, "and prays an appeal to the Supreme Court, which prayer is by the Court granted."

1. APPEAL On overruling motion for new trial in Chancery.

I. Upon this entry the counsel for appellee submits that the prayer and grant of appeal were from the decision of the Court overruling the motion for a new trial, and not from the decree in the cause, and that therefore the appeal should be dismissed. Doubtless the prayer and grant of appeal were intended to apply to the decree, and to construe the entry so as to restrict them to the decision of the Court overruling the unnecessary motion for a new trial, would be to overlook substance and grasp at a shadow.

II. The bill purports to exhibit a transcript of the judgment in the ejectment suit, and the decree entry states that

the cause was heard upon bill, answer, exhibits and depositions; but in the transcript before us there are no exhibits.

Appellee read the depositions of witnesses, who stated that they were jurors in the ejectment suit, and in response to leading questions, several of them deposed that as they remembered it, the tax sale was held invalid, because appellee received the certificate of purchase before he paid the surplus bid by him for the lands. There appears, however, to have been no motion to suppress these depositions, and no question is made upon the evidence here.

2. TAX SALE: Purchaser's remedy for taxes paid upon invalid sale.

III. It is submitted for appellant that the bill was insufficient, and the demurrer thereto should have been sustained on the grounds:—

First. That the bill fails to state who was the proprietor of the lands at the time of the tax sale in 1872. That it alleges that at the time the tax deed was issued, Williamson Hunt was in possession of the lands, claiming to be the owner thereof; and that at the time of the institution of this suit, appellant, Susan M. Hunt, was the proprietor of the lands. And it is submitted that, under the Statute, the lands would only be bound in the hands of the proprietor at the time of the sale, and he only could be sued. That a subsequent purchaser would not be liable in this kind of action.

The Statute provides that:—

"Upon the sale of any land, or town or city lot, or part thereof, for taxes then due, if such sale should prove invalid on account of any informality in the proceedings of any officer having any duty to perform in relation thereto, the purchaser shall be entitled to receive from the proprietor of such land or lot the amount of taxes, interest, penalty and costs of advertising, with interest thereon from the payment thereof, and the amount of taxes paid thereon by the purchaser subsequent to such sale, and *such land or lot shall*

be bound for the payment thereof; and, in the event the purchaser having bid and paid a greater amount than the taxes, penalty and costs of advertising, the county clerk shall draw a warrant on the treasurer for the amount of such excess as may have been paid thereon, in favor of the purchaser or his assignee."

PROPRIETOR: Who is. Is liable to purchaser

By the word "*proprietor*," as used in this aet, is clearly meant the defaulting owner, or person under legal obligation to pay taxes on the land or lot, and on account of whose failure to pay them the sale occurs. As against such proprietor the Statute gives the purchaser a personal right, and of course a personal remedy.

Appellant is not alleged to have been the proprietor of the lands at the time of the tax sale, or to have been under any obligation to pay the taxes, etc., for which they were sold. But the bill did not seek to charge her personally, and the decree was *in rem* against the land. She was alleged to be proprietor of the lands at the time of the institution of the suit, which was not denied by her answer, but admitted by her demurrer, and she was properly made defendant, as the bill sought to charge the lands. When or how she became proprietor of the lands, was not stated in her answer.

But the Statute goes further. It provides that the land or lot shall be bound for the amount of the taxes, etc., charged thereon at the time of the sale, and subsequent taxes, paid by the purchaser. In other words, it gives the purchaser a lien upon the land or lot for the amounts so paid by him; and which he can enforce in Chancery. It would be a narrow view of the Statute, and not warranted by its language, so to construe it as to confine the lien to the time the land or lot remains in the hands of him who was its proprietor at the time of the tax sale, and to hold

that the lien may be defeated by a change of owners, which may often happen.

If one might be an innocent purchaser in such case, appellant interposed no such defense.

Appellant might have asked, for her own protection, that the former owner, who should have paid the taxes, and for whose default the lands were sold, and was, therefore, personally liable for them, be made defendant, but this was not done, nor did she demur to the bill for defect of parties. *Gantt's Dig.*, *sec.* 4564–5.

Failure of purchaser to pay excess, no prejudice.

IV. It is further submitted that the demurrer should have been sustained to the bill, because it does not allege any informality in the proceedings of the collector, within the meaning of the Statute. That the alleged informality was matter with which the collector had nothing to do. That if the clerk gave appellee a certificate of purchase without the payment of his bid, it was a fraud on the owner, and that appellee was the principal party to the fraud. That it was his duty to pay his bids, and if he failed to do so, it was his own fault, and not the collector's. That his failure to pay the surplus, could not possibly be an informality on the part of the collector. Such is the argument of the counsel for appellant.

It is not true that if appellee failed to pay the whole of his bids on the several tracts of land before the certificate of purchase was issued by the clerk, the collector was not at fault. It was the legal duty of the collector to require appellee to pay the whole amount bid for each tract before the clerk issued the certificate of purchase, and to deposit the excess or surplus of the bids, over and above taxes, penalties and costs, in the county treasury, to the credit of the owner of the lands.

If, when the lands were struck off to appellee, he failed

to pay his bids, it was the duty of the collector to re-sell the lands.

It seems, however, that appellee paid to the collector the aggregate amount of taxes, penalties and costs charged upon the four tracts of land purchased by him, and that the collector indulged him for the surplus, which was probably paid after the issuance of the certificate of purchase, and before the execution of the tax deed, for the bill does not aver that it was never paid, but that the collector permitted appellee to receive the certificate of purchase before he had paid the surplus.

True, appellee was in fault as well as the collector; but he suffered for his fault by having the tax sale declared invalid in the ejectment suit; whether rightfully or not, is a question not before us in this case.

Appellee certainly does not allege that he was guilty of any fraud in the matter; none was averred in the answer, and the demurrer to the bill merely admits the truth of its allegations.

3. TAX SALE: If taxes paid before sale, purchaser without remedy.

If it had been shown that the proprietor of the lands had paid the taxes, or that they were not subject to taxation, appellee would have had no personal claim upon him, or lien upon the lands, for the taxes, penalties and costs paid by him.

But the owner was a defaulter, and appellee has the merit of having paid them on his bids, and though he was to blame, as well as the collector, for obtaining the certificate of purchase before he paid the surplus, yet he was punished for that by loss of his tax deed, and it would seem hard to inflict a further punishment upon him by declaring that he has no remedy under the Statute to reclaim the amount of taxes, penalties and costs paid by him upon the lands.

4. SAME: Statute favors purchasers.

The policy of the State is to favor those who pay taxes upon lands for defaulting owners.

The language of the Statute is: "If such sale should prove invalid, on account of any *informality* in the proceedings of any officer having any duty to perform in relation thereto."

"Informality," What is.

All the steps in the process, from the assessment to the execution of the tax deed, are related to the sale, and any substantial omission of legal duty, misconduct, or irregularity of any officer connected with the process, for which the sale should be held invalid, may be deemed an "*informality*" within the meaning of the act. We are not disposed to take the word in a strict literal sense, and thereby limit the obvious purpose of the Statute.

V. There is an error, however, in the decree, for which it must be reversed.

5. CHANCERY SALE: To enforce lien must be on credit.

The suit was to enforce a lien upon lands, and the decree should have directed the commissioner to sell them on credit, as required by the Statute (*Gantt's Dig.*, *sec.* 4708), if not redeemed by the day named, instead of for cash, as it in effect did.

Reversed, and remanded for further proceedings.

CRAMPTON V. THE STATE.

1. LIQUOR: *Selling to minor under mistake of his age.*

A party's belief, however honestly entertained, that a minor to whom he sells liquor without the consent of his parent or guardian is of full age, will not justify or excuse him, but will mitigate his punishment.

2. EVIDENCE: *Exclusion of, when no prejudice.*

A party is not prejudiced by the exclusion of evidence in mitigation of punishment where the jury assesses the lowest punishment prescribed by the law.

3. INSTRUCTION: *Repeating.*

It is no error to refuse to repeat for a defendant similar instructions to those already given for the plaintiff.

APPEAL from *Johnson* Circuit Court.
Hon. W. D. JACOWAY, Circuit Judge.

STATEMENT.

J. D. Crampton was indicted, tried, convicted and fined fifty dollars in the Johnson Circuit Court for selling liquor to a minor without the written consent of his father or guardian.

Upon the trial, after proof of the offense by the State, the defendant offered to prove by sundry witnesses that the minor, who was about twenty years of age at the time the liquor was sold to him, was then and had been for a year or more, his own man, acting and transacting business for himself, and was generally regarded throughout the county as of full age; but the court refused to admit the testimony; and for this refusal, and also its refusal to instruct the jury upon his application, in substance, that if they believed from the evidence that the minor, at the time of the offense, had the appearance of a man of twenty-one years of age, and was regarded as of full age in the community, and that the defendant sold him the whiskey under the honest belief that he was of full age, they would acquit him, he filed his motion for a new trial; which being overrulled, he filed his bill of exceptions and appealed.

C. B. Moore, Attorney-General, for appellee:

Good faith will not protect the defendant. He sold the whiskey at his own peril. *See Redmond* v. *State* 36 *Ark.*

HARRISON, J. The defendant in selling the whiskey acted

at his peril, and a belief that the minor was of age, however honestly entertained, was no justification or excuse for him. *Redmond* v. *The State*, 36 *Ark.* 58.

Though the evidence offered by him to show that he believed the minor was of age, was admissible in mitigation of the punishment, he was not injured or prejudiced by its exclusion from the jury, as they assessed the lowest fine.

The court, having at the instance of the State correctly instructed the jury, very properly refused to give them similar instructions asked for by the defendant.

Affirmed.

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HOWELL v. HOGINS, COL'R.

1. CONFEDERATE STATES: *Validity of their acts.*

The acts of the several seceding States, and of their different departments of government relating to their own internal government affairs, and not impairing the authority of the general government, were valid and obligatory.

2. PLEADING: *Contradicting terms of written instrument.*

An answer alleging that a county warrant, payable in "dollars," was to be paid in confederate money, is bad,

3. COUNTY SCRIP: *Cancellation and re-issue of.*

Where there is less than three months between the making of an order by the County Court for calling in county scrip for re-issue, and the date fixed by the order for presenting the scrip, an order of the County Court barring that not presented will be void.

4. SAME. *Statute limitations.*

The County Treasurer is bound to pay off county scrip when presented, and the County Collector to receive it for county taxes, no matter how long it may have been issued

5. SAME. *Tender of for taxes.*

A tender of a county warrant for taxes for a larger sum than the taxes amount to is good; the tax payer may over pay if he chooses to.

APPEAL from *Pope* Circuit Court.
Hon. W. D. JACOWAY, Circuit Judge.

STATEMENT.

In March, 1879, Howell filed in the Pope Circuit Court his petition against Hogins, the collector of revenue of the county, alleging that he, the petitioner, was indebted to the county in the sum of fifteen dollars and five cents for taxes levied upon his property to pay the county indebtedness existing at the time of the adoption of the constitution of 1874, as appeared upon the tax books, which were in the hands of the defendant for the collection of the taxes charged upon them. That to pay said tax he had tendered and offered to pay to said collector a county warrant for the sum of one hundred and twenty-five dollars duly issued by the Clerk of the County Court on the thirteenth day of of August, 1873, and had also tendered in payment of all other State and county taxes charged against him, the full amounts in currency and proper State and county scrips; but that said collector refused to accept said county warrant in payment of said tax for which it was offered. Prayer, that he be compelled by mandamus to accept the warrant in payment of said tax.

To this petition the defendant appeared and answered:

1st. That at the time said warrant was issued, the State of Arkansas was in rebellion against the government of the United States and had no legally organized government or courts. That there was no lawful County Court in Pope county authorized to allow any claim against the county, or to issue any county warrants, and that the clerk who issued it was only a pretended clerk and had no authority in law to issue it.

2nd. That the county was not bound by any warrant issued prior to the ninth day of March, 1874, because the county board of supervisors of the county did, on the third Monday in July, 1873, in pursuance of law, make and cause to be duly published, an order requiring all scrip and county warrants previously issued by the county clerk, to be filed with the clerk of said board on or before the first Monday in October, 1873. That at the meeting of said board on the first Monday in November, 1873, further time was given to present outstanding scrip for re-issue until the first Monday in January, 1874, and it was ordered that all warrants and scrip not then presented should be forever barred, and the collector was forbidden to receive the same for taxes or any other demand then or ever afterwards to become due against the county. That on March ninth, 1874, said court again extended the time for presenting outstanding scrip or warrants against the county, until the first Monday in July, 1874, and again ordered that all county scrip and warrants not then presented should be forever barred and held null and void. That all said orders and calls were duly and fully advertised as required by law, and that the pretended warrant tendered by the petitioner in payment of said tax, was never presented in pursuance of said orders, and the same is now null and void.

3d. He pleads the Statute of limitation of ten years, and

4th. That the services for which the warrant was issued were based upon confederate money, and the warrant was issued to be paid in confederate money, and was therefore illegal and void.

The petitioner demurred to the answer.

The court overruled the demurrer, and holding that it reverted to the petition, which was considered insufficient, dismissed the petition and the petitioner appealed.

H. C. Howell, appellant, *Pro se.*

In support of acts of the court during the war cited *Berry* v. *Bellows*, 30 *Ark.*, 204; *Hawkins* v. *Filkins*, 24 *Ark.*, 288.

The orders calling in the scrip were not applicable to this warrant, and were also null for want of due notice. *Gantt's Dig.*, *sec.* 615; *Allen* v. *Blankstown*, 33 *Ark.*, 740.

Statute of limitation does not apply for or against the State unless it is embraced by express words; 10 *Ark.*, 67; *1st Black. Com.*, 247; 18 *John.* (*N. Y.*) 228; *4th Am. Repts.*, 430; 11 *Ark.*, 148; and this policy includes counties, 24 *Am. Repts.*, 219. Besides the Statute applies to suits and not provisions for receiving the scrip.

The warrant not based on a confederate money consideration.

1. CONFEDERATE STATES: Validity of their acts.

HARRISON, J. That the acts of the several States which attempted to secede from the Federal Union, and their different departments of government during the war, relating to their respective affairs and internal government, and not impairing or tending to impair the authority of the national government, were valid and obligatory, is too well and authoritatively settled now to be called in question. *Hawkins* v. *Filkins*, 24 *Ark.*, 286; *Hendry* v. *Cline*, 29 *Ark.*, 414; *Berry* v. *Bellows*, 30 *Ark.*, 198; *State*, *use*, *&c.* v. *Brown*, *Ib.*, 761; *Texas* v. *White*, 7 *Wall*, 700; *City of Richmond* v. *Smith*, 15 *Wall*, 429; *Horn* v. *Lockhart*, 17 *Wall*, 570.

2. PLEADING: Contradicting terms of written instrument.

The warrant tendered, which was in the usual form, and that prescribed by the statute, was payable in *dollars*, without designating any kind of money, and the objection that it was payable in confederate money, was therefore not tenable, as held in *Roane* v. *Green & Wilson*, 24 *Ark.*, 210, and *Daniel* v. *Askew*, 36 *Ark.* 487.

Warrants issued on or prior to the twenty-fourth of July, 1863, were not called in or required to be presented for reissuance by the order of July, 1873, but the call was in terms restricted to those of a subsequent date; consequently that in controversy was not barred because not presented within the time limited.

3. COUNTY SCRIP: [Cancellation and reissue of.

The time given by the order for the presentation of those called in, was less than three months, when the statute requires the time in which the warrants should be presented fixed in the order, to be at least three months from the date of it. *Section* 614 *Gantt's Digest*. The order was therefore invalid. *Fry, Collector* v. *Reynolds*, 33 *Ark.*, 450.

And if the orders subsequently made, extending the time for presentation, may be regarded as new calls, and as to all warrants previously issued, as from their language possibly might have been intended, though such orders can not be made oftener than once in every three years, they also, for the same reason, were invalid, and the warrant held by the appellant was barred by none of the calls.

4. SAME: Statute of limitation.

There is no time fixed by law in which county warrants must be presented to the Treasurer for payment, or paid to the Collector for taxes, or be barred; but if never barred by a call for reissuance, they must be paid by the Treasurer if he have funds on hand, or received by the Collector for taxes when presented or offered, no matter how long they may have been outstanding. *Daniel* v. *Askew*, 36 *Ark.* 487.

5. SAME: Tender of for taxes.

The warrant called for a much larger sum than the amount of the tax for which it was offered in payment, but the appellant was entitled to pay the tax with it and remit, as it appears he proposed to do, the excess.

The writ of mandamus should have been granted.

The judgment of the court below is reversed and the cause remanded.

King & Clopton, v. Blount.

1. Landlord's Lien: *Statute of Limitations.*

An action to enforce the landlord's equitable lien against one acquiring the tenant's crop, with knowledge of the lien, will be barred after six months from the maturity of the rent.

APPEAL from *Phillips* Circuit Court in Chancery.
Hon. J. N. Cypert, Circuit Judge.

STATEMENT.

This was an action at law by Blount against King & Clopton, to recover the proceeds of three bales of cotton, which the complainant alleged they had received from one Mackey, his tenant, in December, 1877, and sold and appropriated to Mackey's indebtedness to them, with knowledge of his landlord's lien upon it for rent for that year. The complaint was filed the thirty-first of May, 1878, and alleged that the rent was due the first day of November, 1877. A demurrer to the complaint was overruled, and by order of the Court, of its own motion, the cause was transferred to the equity docket, and Mackey made a defendant. The defendants all answered, and depositions were taken and filed; but as the case has been decided here solely upon the statute of limitations, a further statement of the pleadings and facts is unnecessary.

Upon the hearing the decree was for Blount, and King & Clopton appealed.

Tappan & Horner, for appellants:

The rights of the landlord depend on sections of Gantt's Digest, from 4098 to 4104. He must enforce his lien on the crop in the manner prescribed.

He has no title to the crop. *Upham* v. *Dodd*, 24 *Ark.*, 545; *Sevier* v. *Shaw & Barbour*, 25 *Ib.*, 417; *Smith* v. *Meyer*, 25 *Ib.*, 609.

The law gives no right to follow the proceeds—only the substance of the crop. See, under like statutes, cases in Tennessee: 8 *Humph.*, 561; 1 *Meigs*, 398; 6 *Yer.*, 267 and 252; 7 *Ib.*, 494; approved in *Upham* v. *Dodd* (*supra*).

Apperson v. *Moore*, 30 *Ark.*, 56, is in favor of a mortgagee, and not applicable. See also, *Roberts* v. *Jacks*, 31 *Ark.*, 600, as to nature of landlord's lien.

John C. Palmer, for appellees:

Rested on the law and facts disclosed by the record.

HARRISON, J. The lien of the landlord continues but for six months after the rent becomes due. *Sec.* 4098 *Gantt's Digest.*

And where there has been a conversion of the crop, or a portion of it, by one with knowledge of the lien, and it attaches in equity to the proceeds in his hands, its continuance is only for the same period, for equity follows the law. *Valentine* v. *Hamlett, Ad'r.*, *MS. Opinion.*

The suit not having been commenced within six months after the rent became due, and the lien having expired, no equity or cause of action was shown in the complaint.

The decree of the Court below is, therefore, reversed, and the complaint dismissed for the want of equity.

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YOUNGER ET AL V. THE STATE.

1. PRACTICE IN CIRCUIT COURT: *Judgment on bad indictment.*

No judgment should be rendered against a defendant found guilty on a bad indictment, though no motion in arrest be made.

APPEAL from *Franklin* Circuit Court.
Hon. W. D. JACOWAY, Circuit Judge.

W. W. Mansfield, for appellant:
Cited: *Johnson* v. *State*, 36 *Ark.* 242; *Keith* v. *State*, *ante* 96.

ENGLISH, C. J. The indictment in this case is like that in *State* v. *Keith*, *ante* 96, and in *Johnson* v. *State*, 36 *Ark.* 242.

No motion in arrest of judgment was filed, but the indictment being bad in substance, no judgment should have been rendered thereon against appellants.

Reversed and remanded, with instructions to the Court below to arrest the judgment.

FRY, COLLECTOR, v. CHICOT COUNTY.

1. PRACTICE IN SUPREME COURT:
This Court will not refer for the facts of a case to the record in another case. The facts must be shown by the bill of exceptions.

2. COUNTIES: *Attorney's fees.*
A county collector has no claim upon his county for fees paid by him to an attorney for resisting objections to his bond.

APPEAL from *Chicot* Circuit Court,
Hon. T. F. SORRELLS, Circuit Judge.

Mark Valentine, for appellant:
On principle it is plain that the county should re-imburse

appellant the reasonable charges of defending the mandamus suit.

A *fortiori*, when the collector has filed a *good* bond, and the objections made to it, if successful, would delay the collection of taxes. Even if the objections are sustained, the county pays the attorney's fees of the objector—and not the collector. (*Acts of* 1874–5, *p.* 193, *sec.* 4). Citing also, as applicable, *Gantt's Digest*, *sec.* 5288.

The course pursued to obtain the credit was proper. *Gantt's Digest*, *sec.* 5268. He is only required to pay balance on settlement.

English, C. J. It seems that at the April term, 1878, of the County Court of Chicot county, there was found to be due to the county, from R. M. Fry, as collector, $1390.

On a subsequent day of the same term, he applied to the Court to allow him a credit for $510.50, paid by him out of the county revenue, as follows:

To Dan W. Jones, Esq'r., for legal services in defending against objections made to his bond as collector, in the Chicot Circuit Court, at its January term, 1878	$200 00
To Mark Valentine, Esq'r , for services in the same matter	200 00
To costs paid in mandamus suit	10 50
To Mark Valentine, for legal services in defending in the suit of D. H. Reynolds against said Fry as collector, mandamus from the Chicot Circuit Court	100 00
	$510 50

The County Court refused to allow the credit claimed, and Fry appealed to the Circuit Court, where the case was

tried anew, on the following agreed facts, as set out in a bill of exceptions:—

"Fry was appointed, in January, 1877, collector of taxes for Chicot county. At the July term, 1877, of the Chicot Circuit Court, a suit by mandamus was brought against him by D. H. Reynolds; and Mark Valentine, Esq., defended said suit for said collector in said court, and afterwards in the Supreme Court; and the collector paid him $100.00 for his services therein, and that the compensation was reasonable. That at the January term, 1878, of the Circuit Court of Chicot county, J. E. Joslyn filed objections to the approval of the bond of said collector by said court; and Dan. W. Jones and Mark Valentine, Esq'rs., as attorneys for said Fry, defended against said objections, and he paid each of them $200.00 for his services, and the compensation was reasonable. That said objections were overruled, and the bond of Fry approved by the court. That he paid the clerk of the court $10.50 costs in the mandamus suit."

Upon these facts the court refused to allow the credit for the $510.50, as claimed by Fry, and overruled a motion for a new trial, and Fry appealed. No declarations of law were asked, and none were made by the court.

I. The bill of exceptions fails to show that the county had any interest in the mandamus suit, or was under any obligations to pay appellant's counsel's fee, or costs in the case.

We have been referred by appellant's counsel here to *Fry* v. *Reynolds*, 33 *Ark.*, 451, for the facts in the mandamus case. We may look at that case for law, but not for the facts of the case now before us. They should have been shown by the bill of exceptions.

II. The Statute makes no provisions for the county to pay the collector's attorney's fees where objections are made to his bond. When the court finds that the objec-

tions to the bond are made through malice, or without probable cause, the costs, and an attorney's fee, not exceeding $50, may be taxed against the objectors. If the bond be held insufficient, the objectors are entitled to an attorney's fee to be taxed against the county not exceeding $50. *Act of 1st March, 1875, sec.* 5; *Act of 1875, p.* 192.

Appellant did not bring his case within the Statute.

It was unfortunate that appellant was put to expense about his bond, which turned out to be good, but there is no Statute under which he is entitled to indemnity from the county, on the facts stated in the bill of exceptions.

Affirmed.

JORDAN V. HENDERSON.

1. JUSTICE OF THE PEACE: *Jurisdiction questioned by tenant's denial of landlord's title.*

A Justice of the Peace should not dismiss an action for rent, for want of jurisdiction, merely upon the defendant's answer denying the plaintiff's title to the land. The answer is not to be taken as true. The facts should be investigated, and if the relations of landlord and tenant exist, the ownership of the land is not material.

APPEAL from *Franklin* Circuit Court.
Hon. W. D. JACOWAY, Circuit Judge.

J. V. Bourland and *U. M. Rose*, for appellants.

The title was not involved, only the fact of tenancy.

When the title is brought into question by answer, a suit should not be dismissed without inquiry as to whether it is properly and *bona fide* so controverted.

ENGLISH. C. J. This suit was commenced November third, 1879, by Jas. P. Jordan, against S. M. Henderson, before a Justice of the Peace of Franklin county. The debt claimed was $75 for rent. The affidavit filed with the Justice states in substance: That the claim is just, and for rent of a certain tract of land owned by plaintiff, and cultivated by defendant for the present year. That plaintiff has a landlord's lien on the crop of cotton grown on the land for rent due thereon, and ought, as he believes, to recover thereon the sum of $75, and that defendant is about to remove all his crop, and has removed a portion of it, from the premises, without paying the rent due thereon.

An attachment was issued under the landlord's lien act, and levied on the cotton.

Defendant answered, denying all the allegations of the affidavit, except that he was about to remove the crop from the premises, and had removed a portion of it, as stated. He denied that he was the tenant of plaintiff, and that plaintiff was the owner of the land, and alleged that the land belonged to one D. D. Marvin; that he entered under him, and that he was entitled to the rent.

On this answer, defendant moved to dismiss the suit on the ground that the Justice had no jurisdiction to try the cause, because the question of title to land was involved. The motion was sustained, and the suit dismissed without trial or inquiry into the facts by the Justice, and the plaintiff appealed to the Circuit Court.

In the Circuit Court, defendant demurred to the complaint on the grounds:

First. That it did not state facts sufficient to constitute a cause of action; and,

Second. That the record in the case showed that the Court had no jurisdiction of the subject matter of the action.

The Court sustained the demurrer, and dismissed the case for want of jurisdiction, and plaintiff appealed.

There was nothing in the record of the case to show that title to the land was involved, or that the Court had no jurisdiction to try the case on the appeal, except the answer of defendant, and neither the Justice of the Peace, nor the Circuit Court should have taken that as true and dismissed the suit, without a trial to ascertain the facts.

If the relation of landlord and tenant existed between appellant and appellee, the ownership of the land was of no consequence, and not the subject of inquiry in the suit. See *Nolan* v. *Royston*.

Under such a practice, a landlord might not be able to recover rent in any court. The debt sued for was only $75, and appellee defeated the suit by simply alleging in his answer that the title to land was involved. If sued in the Circuit Court he might have the case dismissed by alleging that the title to the land was not involved, that he was tenant of appellant, and the debt, within the exclusive jurisdiction of a Justice of the Peace.

Reversed and remanded for trial.

Drees v. The State.

1. Criminal Law: *Breaking partition fence. Trespass.*

It is not a misdemeanor for one to break a partition fence between his lot and another's, and the common property of both. Nor is it a trespass for him to knock off the plank added to it by the other; but destruction of such fence would be a trespass.

APPEAL from *Pulaski* Circuit Court.
Hon. J. W. Martin, Circuit Judge.

STATEMENT.

Drees was convicted and fined ten dollars in a Justice's Court, in Little Rock, for malicious mischief in breaking an enclosure, and appealed to the Circuit Court, where, by consent, the cause was submitted to the court sitting as a jury, and he was again found guilty and his punishment fixed at a fine of twenty dollars and imprisonment in the county jail for twenty days, if the fine and cost were not immediately paid.

The facts appearing from the evidence were, that there was a partition fence between the lots of the defendant and one Demarsh, the prosecutor, in the city of Little Rock, over which the defendant's children were in the habit of climbing and entering upon the premises of Demarsh. To prevent this Demarsh first had some strips nailed upon the upper rail of the fence, and extending above the fence. These the defendant knocked off. Demarsh then got plank eight feet long and nailed them up where the stips had been, making the fence two feet higher than before, and the defendant with a hand axe broke them off. The fence was the common property of both.

C. B. Moore, Attorney-General, for appellee:

Contended that the conviction was proper under the Act of 1875, (January 21st) and the proof.

HARRISON, J. This was a prosecution under the act of January 21st, 1875 to protect enclosures from trespasses.

The act declares "That if any person shall ride, range or hunt within the enclosed grounds of another, without the consent of the owner previously obtained, or shall pull down or break the fence, or leave open the gate of the farm, plantation or other enclosed grounds of another, the party so offending shall be guilty of a misdemeanor, and upon convic-

tion thereof, before a Justice of Peace or other court having jurisdiction of such offense, shall be fined in any sum not less than ten dollars nor more than one hundred dollars, and in default of the payment of such fine, shall be imprisoned in the county jail not less than ten nor more than thirty days."

The evidence showed that the fence the defendant was charged with breaking, was the partition fence between the lots of himself and Demarsh, the prosecuting witness, and the common property of them both.

Having the same right in the fence, and equal power and control over it with Demarsh, he did not commit a trespass in knocking off the planks Demarsh had added to it; 2 *Hill, on Torts*, 277; *Cooley on Torts*, 327; *Freem, on Coten. and Part, secs.* 298, 299; *Cubitt* v. *Patin*, 8 *Barn. & Cress*, 257; *Bennett* v. *Bullock*, 35 *Penn. St.*, 364.

Had he, however, pulled down and destroyed the fence, such destruction of the common property would have been a trespass, but we are not called upon to say whether he would have been liable to an indictment or prosecution therefor.

As the fence was the common property of the defendant and Demarsh, the finding of the court that it was broken by the defendant without the consent of the owner was not sustained by the evidence.

The judgment is reversed and the cause is remanded with instructions to grant the defendant a new trial.

JACKMAN v. BECK, ET AL.

1. MORTGAGE: *Of undivided half interest in land.*
A mortgage of an undivided moiety in land will not be transferred and limited to the whole of a particular part of it allotted to the mortgagor in severalty by a subsequent partition between the co-tenants to which the mortgagee was not a party, nor assented.

2. CHANCERY SALES: *Foreclosing mortgage on land to be on credit.*
A decree for the sale of land in satisfaction of a mortgage should direct a sale on credit, as provided by the Statute, and not for cash.

APPEAL from *Chicot* Circuit Court in Chancery.
Hon. T. F. SORRELLS, Circuit Judge.

STATEMENT.

On the twenty-fifth of February, 1875, Jackman executed to Beck his note for the sum of $3500, payable the first day of October following; and to secure its payment, executed to him, on the same day, a mortgage upon his undivided half interest in a number of tracts of land in Chicot county, which belonged to him, and one Charles Carleton, as tenants in common.

After the maturity of the note, Beck filed in the Chicot Circuit Court, his complaint in equity against Jackman, alleging the execution of the note and mortgage, and the non-payment of the note, and praying for judgment for the debt, and for a sale of Jackman's undivided interest in the land for its satisfaction, and a foreclosure of his equity of redemption. Jackman answered, admitting indebtedness to Beck, but contesting the amount, and alleging that since the execution of the mortgage, he and Carleton had partitioned the lands between them, and prayed that the amount of his indebtedness be ascertained and fixed as a lien upon

the part of the lands allotted to him in the partition, and that they be sold for the satisfaction of the amount that should be found due to the plaintiff. Carleton was made a defendant, and filed an answer denying the partition and asserting a lien upon Jackman's interest in the lands for the taxes paid for him.

Upon the hearing, the Circuit Court found that Jackman was indebted to Beck in the sum of $3489, and that the partition between Jackman and Carleton being subsequent to the execution of the mortgage, did not affect Beck's interest in the undivided half interest in the whole, and decreed that the plaintiff recover from Jackman the amount found due him ($3489), and if the same should not be paid by a fixed day, said undivided moiety of the whole of the lands be sold for one half cash, and the balance on credit of eight months for the satisfaction of the judgment. Jackman appealed.

D. H. Reynolds, for appellant.

Cited *Jones on mortgages*, *p.* 706, to show that the mortgage lien, upon an undivided half of lands, follows the portion of the mortgagor upon subsequent partition, made by consent of the mortgagee. The pleadings in this cause do not show whether the mortgagee desires it or not. Generally, to show that the lien follows the share of mortgagor on partition. *Jackson* v. *Pierce*, 10 *J. R.*, 414; *Quaw* v. *Lamereaux*, 36 *Wis.* 626; *Hall* v. *Morris et al*, 13 *Bush.* (*Ky.*)

Valentine, for appellee:

Urged the same point, and desired the decree to be corrected, as asked by appellant.

Harrison, J. It is insisted by the appellant that upon the partition of the land, the mortgage attached to the

whole of the portion set off to him in severalty, and that set off to Carleton was entirely released. This no doubt would have been the effect of the partition if the mortgagee had been a party to it, or had ratified it. *Jones on Mortgages, sec.* 706; *Colton* v. *Smith*, 11 *Pick.*, 311; *Bradley* v. *Fulton*, 23 *Pick.*, 1.

But there was no proof of a ratification by the mortgagee, and of his assent to a change in his security, and the decree as to the foreclosure was, therefore, correct; but the sale should have been on a credit, as required by the Statute, and for no part cash. And for this error the decree must be reversed.

The cause will be remanded to the Court below, with instructions, should the mortgagee consent thereto, as it has been suggested here by his counsel he will, to decree a foreclosure as to the whole of the portion of the lands set off to Jackman, and not as to any part of that to Carleton; if not, as to the undivided half of the whole, and a sale of the same as provided by the Statute.

Barney v. Cain.

1. Landlord and Tenant: *Re-letting to tenant after judgment in unlawful detainer satisfies the judgment.*

A re-letting of the premises to a tenant after recovering a judgment for possession against him, is a satisfaction of the judgment, and an execution on the judgment after the new lease will be enjoined.

APPEAL from *Garland* Circuit Court.
Hon. J. M. Smith, Circuit Judge.

STATEMENT.

On the thirtieth June, 1879, Annie C. Barney presented to the County Judge of Garland county, the Circuit Judge being absent from the county, her complaint in equity, alleging, in substance, that on the twenty-fifth day of April, 1878, she leased from the defendant, Louis D. Cain, a certain house and lot in Hot Springs (describing them), for the term of one year next following, at a monthly rent of $65, to be paid in advance, on the twenty-fifth day of each month. That she entered into possession and paid the rents promptly until September or October, when she was notified by Reynolds & Conger that Cain, in renting to her, had acted as their agent, and that she must pay the rents to them, and not to him. She then stopped paying until Reynolds & Conger and Cain should settle between them who was entitled to receive the rents; and thereupon Cain brought his action of unlawful detainer against her in the Circuit Court of Garland county, and on the seventh day of December, 1878, recovered judgment against her for possession and for $216 damages and cost. From this judgment she prayed an appeal, which was never perfected. That very soon thereafter Cain proposed to rent the premises to her at $50 per month, if she would recognize him, then and afterwards, as her landlord, and would not rent from Reynolds & Conger. She replied that her goods had been greatly damaged by the leakage of the house, far in excess of the $216 damages he had recovered against her, in fact to the amount of $400. He replied that he had reduced the rent $15 per month, and would offset his judgment for damages against her damages from leakage, and call it even. She accepted this proposition, and then and afterward recognized him as her landlord, and paid the rent regularly and promptly every month. By a subsequent agreement, made on the twenty-fifth of April, 1879, the

term was extended to a year from that date, and she continued as his tenant, and paid the rents up to the month of July, 1879. On the fifteenth day of June, she sub-let the premises to one Francis Cora, for a saloon and restaurant. Thereupon Cain refused to receive further rent from her, though tendered to him, and on the tenth day of July, 1878, had caused a writ of possession to be issued on said satisfied judgment, and delivered to the defendant, Nichols, sheriff of the county, to be executed, and was threatening also to issue executions to collect the damages recovered in said judgment. She claims that the judgment was satisfied by the contract of re-renting the premises as alleged, and prays that the defendant be enjoined from executing it.

A restraining order was granted by the County Judge, and served upon the defendants. At the return term of the Circuit Court Cain answered, denying some, and admitting and avoiding other material allegations in the complaint. He admits the receipt of rents, as alleged, subsequent to the judgment in the action of unlawful detainer, but says they were received for the rents previously due; and he had refrained from executing that judgment under the belief that the appeal from it had been perfected, and the judgment superseded, and that he could not execute it until affirmed by the Supreme Court. The answer is very long, but a further statement of it is unnecessary to a proper understanding of the questions decided by the court. At the following August term, the injunction was dissolved and the complaint dismissed by the Circuit Court, and the plaintiff appealed.

The evidence conduced to establish the facts stated in the complaint.

G. W. Murphy, for appellant:

The occupancy by appellant, and the receiving of rent,

under the new agreement, created a new tenancy, and satisfied the judgment at law. *Hall* v. *Meyers*, 43 *Md.*, 446; *Fry* v. *Patridge*, 73 *Ill.*, 51; *Usher* v. *Moss*, 50 *Miss.*, 208; *Schuyler* v. *Smith*, 51 *N. Y.*, 309; *Grant* v. *White*, 42 *Mo.*, 285; *Sullivan* v. *Enders*, 3 *Dana*, 66; *Jackson* v. *Salmon*, 4 *Wend.*, 327; *Walters* v. *Young*, 11 *R. I.*, 409; *Gun* v. *Sinclair*, 52 *Mo.*, 327; *People* v. *Gostee*, 64 *Barb.*, 477; *Collins* v. *Hasbrook*, 56 *N. Y.*, 157; *Taylor's Land. and Tenant*, 497–8–9; *Gaitside* v. *Outlay*, 58 *Ill.*, 210. The last three citations are especially relied on.

The injunction should not have been dissolved. *Specie* v. *Hoop*, 51 *Ind.*, 365; *Mosser* v. *Pequest M. Co.*, 26 *N. J. Eq.*, 200; *Young* v. *Grundy, etc.*, 2 *Curtis' U. S. S. C.*, 317; *Pullan* v. *Cin. R. R. Co.*, 4 *Bis.*, 35. And it was the proper remedy. *Singer S. M. Co.* v. *Union B. & Co.*, 1 *Holmes*, 253; *High on Inj.*, *secs.* 187, 899, 900, 901, 902, 97, 86, 106; *Story Eq. Ju.*, *secs.* 876, 877, 721, 728, 729, 759, 760, 767, 718; *Chambers* v. *King, etc.*, 16 *Kan.*, 270; *Robinson* v. *Reed*, 50 *Ala.*, 69; *Simmons* v. *Martin*, 53 *Ga.*, 620.

J. M. Harrell, for appellee:

The receipt of monthly rent did not create a new tenancy, nor satisfy the judgment, because appellee was entitled to the rent in any event. *Curd* v. *Farrar*, 47 *Iowa*, ——.

Where a defendant, by *his own act*, procures the re-lease of property, and comes again in possession, the judgment is not satisfied. *Biscoe* v. *Sandefur*, 14 *Ark.*, 568. Appellant prevented execution, and there was no satisfaction.

A *partial* satisfaction is not a good bar. *Whiting* v. *Beebe*, 12 *Ark.*, 421. There was no legal satisfaction. *Freeman on Judgments*, *secs.* 463, 480.

To sustain injunction, payment must distinctly appear. *Hilliard on Inj.*, 238, *sec.* 131. The remedy being ade-

quate at law, injuction would not lie. *Ib.*, 240, *sec.* 135; *Gantt's Digest, secs.* 2619, 2621; *Anthony* v. *Shannon*, 8 *Ark.*, 52; *Rose's Dig.*, *p.* 325.

Appellant's term ceased after her default, and she was liable under *sec.* 4019 *Gantt's Dig.*, and entitled to no relief. *Ib.*, 4020.

1. LANDLORD AND TENANT: Re-letting to tenant after judgment against him for possession, satisfies judgment.

HARRISON, J. The evidence leaves no doubt upon the mind that the appellee, after he obtained his judgment against the appellant for the possession of the house and lot, rented it to her again and received rent from her for it, not only during the remainder of the time for which it had been originally rented, but for several months thereafter.

By the new agreement she again admitted his title, and held the house and lot as his tenant, and he obtained the possession, which he had recovered in his action, and the judgment therefor was satisfied and extinguished.

It can make no difference that the appellee supposed, as he very probably did, that the judgment was superseded, and he could not sue out a writ of possession until the appeal was determined, or whether it was superseded or not; for the appellant was at liberty, notwithstanding the appeal, and a supersedeas, if there had been one, at any time to surrender, as she virtually did do, the possession to him.

To obtain possession, upon her refusal to surrender it, after the expiration of the new lease, the appellee's remedy was by a new action.

According to the weight of evidence, as we think, it was a condition of the contract for the new letting, that the damages recovered and costs should be set off against her claim of damages to her goods by the leaking of the house; and in agreeing to their settlement in this way, he was influenced by his solicitude that the property should not, by her leaving it, get into the possession of Reynolds & Con-

ger, and which, by the new letting, he was endeavoring to prevent, and these also, were thereby satisfied and discharged.

The court below erred in refusing to decree a perpetual injunction against the whole judgment, and in dismissing the appellant's complaint, and its decree is reversed, and such a decree as should have been rendered there will be entered here.

SIMPSON v. ROBINSON.

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1. "IMPROVEMENT:" *Meaning of, under our land system.*

An "improvement," under our land system, does not mean a general enhancement of the value of the land by the occupant's operations. All works directed to the erection of houses for families, or which are substantial steps towards bringing lands into cultivation, have, in their results, the specific character of improvements. The true test is, are they real and made *bona fide* in accordance with the policy of the law, or are they only colorable and made for the purposes of fraud or speculation? As to their value, if they have any at all, the amount is immaterial.

2. DONATION LANDS: *Section 3905, Gantt's Digest, construed.*

The State Land Commissioner could not, under section 3905, Gantt's Digest, sell to the owner of an improvement, the land donated to another, until the three months allowed to the donee to pay for the improvement, and the thirty days for filing with the Commissioner the owner's receipt for the payment, had both expired.

3. LIEN: *Of State for purchase money of school land, superior to the lien for subsequent taxes.*

The lien of the State, for the purchase money for school lands, is prior and superior to her lien for taxes for general revenue, and is not merged in the legal title acquired by the State in the forfeiture of the land for taxes; and a sale in Chancery, by the State, to enforce the school lien, made after the forfeiture for taxes, passed the whole title to the purchaser, free from the lien for taxes, and a subsequent donation of the land was void.

APPEAL from *Lonoke* Circuit Court in Chancery, Hon. J.W. MARTIN, Circuit Judge.

The opinion states the case.

Hallum & England, for appellant:

The theory of Robinson's title is, that the land was forfeited to the State, because of Simpson's failure to pay for the alleged improvement; *Litchfield* v. *Steel*, 21 *Ark.*, 437. But the title acquired by a second donee is only *prima facie* evidence, and may be impeached for error or fraud. *Surginer* v. *Paddock*, 31 *Ark.*, 528.

As to what is an "improvement," see the emphatic language of this Court in *McIvors* v. *Williams*, 24 *Ark.*, 33, and *White* v. *Green*, 24 *Ark.*, 38. In each of these cases the Court took into consideration the "preponderance of proof." See also *Paty* v. *Harrel*, 24 *Ark.*, 40. "It does not belong to plaintiff to object to the smallness of defendant's improvement, when his own does not *largely partake of the qualities of a substantial improvement.*" *Schaer* v. *Gliston*, 24 *Ark.*, 137. Such improvements must be in their nature *permanently beneficial*. *Parsons on Contracts, vol.* 3, *sec.* 22 (6th *Ed.*), and particularly *Worthington* v. *Young*, 8 *Ohio*, 401; *Matthews* v. *Davis*, 6 *Humph.* (*Tenn.*), 324. They must be of a *permanent* character. 2 *Kent. Com., side p.* 335–6–7, and cases cited; must *augment the property in value*; *Ib.*, 337; be "valuable and lasting;" *West* v. *Williams*, 15 *Ark.*, 682; and "permanent and useful;" *McDonald* v. *Fowler*, 12 *Ark.*, 218.

Robinson's affidavit was false in two respects:

First. As to the value and extent of the improvement.

Second. As to the S. W. S. W. $\frac{1}{4}$. This was a *fraud*, and fraud avoids *ab initio*. *Strayhorn* v. *Giles*, 22 *Ark.*, 517; *Cooper* v. *Merritt*, 30 *Ark.*, 686; *Kerr on fraud, etc.*,

41, 152, *and cases cited. Farmers' Bank* v. *Groves*, 12 *How.* 51; *Kinney* v. *Keernan*, 2 *Lane*, 492; *Voorhies* v. *East*, 2 *Hill*, 288; *Jankins* v. *Simpson*, 2 *Shep.*, 364; *Foy* v. *Oliver*, 20 *Vermont*, 118; *Jennings* v. *Gage*, 13 *Ill.*, 610; *Mason* v. *Boyd*, 1 *Denio*, 74; *Clarkson* v. *Mitchell*, 3. *E. D. Smith*, 269; *Jewett* v. *Petit*, 4 *Mich.*, 508; *Kimball* v. *Cunningham*, 14 *Mass.*, 504; *Stephens* v. *Hyde*, 32 *Barb*; *McGuire* v. *Callahan*, 19, *Ind.*, 128.

Was the deed good as a whole? If bad in part, it was bad *in toto*. "The transactions cannot be rescinded, as to a part, and left in force, as to the rest. See cases just cited, *supra*. *Kerr on Fraud*, 53 to 142.

The term "improvement" had a well known and settled meaning, a technical signification, long before the passage of the act, January eleventh, 1851, and the Legislature employed it in its well settled meaning. Viewed in this light, Robinson had no improvement.

Clark & Williams, for appellee:

A deadening is an "improvement," involving expense and labor, and if the improvement was worth *anything*, the deed to Robinson was good.

This Court will not disturb a decree, upon a mere question of facts, where there is nothing but a question of preponderance of testimony. It will not be disturbed, unless palpably wrong. *Branch* v. *Mitchell*, 24 *Ark.*, 432.

Section 3905, Gantt's Digest, has been too often sustained ed to be now questioned. *Lacefield* v. *Steel*, 21 *Ark.*, 437; *Surginer* v. *Paddock*, 31 *Ark.*, 529.

ON THE CROSS APPEAL.

Robinson's title depended on his improvements, and not upon his original title. The land was a compact and contiguous body, and his rights were as broad as the forfeiture for taxes.

OPINION

EAKIN, J. This is a bill and cross-bill between claimants of the same land under conflicting deeds from the State, each seeking to have his own title quieted, and that of the other, cancelled.

The controversy involves two distinct tracts; one, embracing the north half of the southwest quarter, and the northwest quarter of the southeast quarter of the section, consisting of three forties lying side by side, was forfeited to the State for the taxes of 1870. The other, consisting of a single forty, to-wit: the southwest quarter of the southwest quarter, lying contiguous to one of the forty acre tracts in the first, was forfeited for the taxes of 1871. All were originally school lands, lying in section 16 of Township, 2 North, Range 9 West. There is nothing to show that they had previous to their respective forfeitures, been owned or claimed together.

The first named tract, after its forfeiture, had been sold under a decree of the Pulaski Chancery Court, against the former owner, in favor of the State for the purchase money.

The complainant, Robinson, claimed under the purchaser, an equitable title by parol contract, and part performance. He claims also, to have made valuable improvements before the seventeenth day of December, 1877, with a view to building and cultivation. At that date defendant, Simpson, applied to, and obtained from, the State Land Commissioner a donation of both said tracts, making in all, one hundred and sixty acres, of which one hundred and twenty acres were in the same quarter section and forty in the one adjoining.

Afterwards, complainant Robinson, on the eighteenth day of February, 1878, and after the expiration of three months from the date of the donation to Simpson, made an

affidavit that at the time of said donation, he was himself the owner of an improvement upon said lands, describing both tracts; that said improvements were worth one hundred dollars, and that neither Simpson nor any one for him had paid or tendered him the double value of said improvements, or any other sum. Upon filing this affidavit with the Land Commissioner, he was allowed to purchase all of said lands for arrearages of taxes, in accordance with the Act of January 11, 1851, and the Commissioner executed to him a deed accordingly.

The Chancellor, upon the hearing, found that the improvements were real, substantial, and such as it was the policy of the law to protect, but that they had not been made by Robinson with any reference to the southwest quarter of the southwest quarter of the section, and could not be made to cover more land than complainant then claimed, or intended to claim, when the improvements were made, and limited the extent of his relief to the lands he had purchased, and was improving for his own use. Whereupon a decree was rendered in effect quieting the title of complainant Robinson to the north half of the southwest quarter, and the northwest quarter of the southeast quarter; and that of defendant Simpson, to the southwest one-fourth of the southwest one-fourth of the section. The costs were divided.

The depositions conduce to show that Robinson, after his parol purchase of the lands in 1877, entered in good faith upon the three forty-acre tracts, without any knowledge at the time, that they had been previously forfeited to the State for non-payment of taxes. He considered and used the land as his own, selling from it wood and cross-ties. He deadened five or six acres of wood land in the manner usual in bringing lands into cultivation; and had removed the shrubs, and cleared off a portion of that which had been deadened. He had made rails, and house logs had been

prepared for fencing and building, but never put up. Afterwards, and for at least a year before the donation to Simpson, there was a cessation in the work of improvement. The cleared land had grown up with sprouts, and the greater part, almost all indeed, of the rails and house-logs had been hauled off and used upon another place by Robinson, or with his consent. Although the deadening was of *some* value, it could not have been worth near the amount claimed, to any one who might wish to resume and complete the improvement. It is tolerably plain, also, that the deterioration of the land from the cross-ties and other timber hauled away, more than counterbalanced the enhancement of value arising from the work.

The defendant (appellant) contends that under this state of the testimony there was really no improvement which, under the policy of the law, he was bound to notice or pay for, and that the subsequent purchase by Robinson, or an *ex-parte* application, without notice, was fraudulent.

1. IMPROVEMENT: Meaning of, under our land system.

An "improvement" under our land system does not mean a general enhancement of the value of the tract from the occupant's operations. It has a more limited meaning, which has in view the population of our forests, and the increase of agricultural products. All works which are directed to the creation of homes for famlies, or which are substantial steps towards bringing lands into cultivation, have in their results the special character of "improvements," and under the land laws of the United States, and of the several States, are encouraged. Sometimes their minimum extent is defined as requisite to convey rights. In other cases not. But the test which runs through all the cases, is always this: Are they real and made *bona, fide* in accordance with the policy of the law, or are they only colorable and made for the purpose of fraud or speculation?

A review of all the testimony leaves but little doubt that

Robinson's deadening, clearing, etc., was made in good faith. There is no evidence to show that he then doubted his title, or knew of the previous forfeitures, or was fortifying against a donation not actually made to another, until more than a year after he had ceased his improvements and taken away his rails and house logs.

He would not have been apt thus voluntarily to diminish the value of any improvements made with colorable motives. There is every indication that he had it in view to open the land and build a house. The deadening was a necessary step, and so far an improvement.

After the removal of the rails and house logs it was certainly of no great value, but if there was any value at all, of a real and substantial nature, the amount was not important, nor could it be cancelled by deterioration of other parts of the land, not interferring with the immediate purposes of the improvement. Whether the value was much or little, it was the duty of Simpson to take cognizance of it, upon examination of his gift, ascertain the value, and tender a double amount to Robinson. The finding of the Chancellor, that the improvement had a substantial value, at the time of the donation, seems to be sustained by the preponderance of the testimony. It would not be disturbed if the balance were even, and we therefore find no error in that.

There is nothing in our past legislation which better illustrates the extreme tenderness of the State towards owners of bona fide improvements, and jealousy in guarding them, than this act of January 11, 1851, taken in connection with the provisions for donations. It has been repealed since the transactions involved in this case took place; but was for eighteen years the settled policy of the State. It was felt at an early period, that the true prosperity of the State and the growth of her taxable resources depended upon the multiplicity of actual settlers, whilst the greatest impedi-

ment, in the way of such results, was to be apprehended from the accumulation of large quantities of her rich but unreclaimed forests, in the hands of capitalists, to be held for speculation. In accordance with this policy the courts have been more liberal, perhaps, than those of any other State, in sustaining tax titles, against mere technical objections, when taxes have been actually due and neglected without reasonable cause.

As early as 1840, for the double purpose of encouraging actual settlers and protecting those showing an intention to become so, laws were passed for donations in limited quantities, to heads of families, of lands which had been forfeited for taxes, and fruitlessly offered for sale by the Auditor. They were made on certain conditions of improvement, to be made in a time adapted to the ability of the poorest immigrant. But these donations, even upon such conditions, were considered mere matters of grace. They were not called upon to advance arrearages of taxes, or pay any thing whatever. But it was sternly exacted of them, that, in their selections of forfeited lands, they should respect the claims of the unwary, or the unfortunate, whose *improvements* had been forfeited, so far, at least, as to pay them the double value of their improvements. Originally this was not, however, made a condition of the donation. The improver was driven to the courts to recover. Experience soon showed, what might indeed have been obvious at first, that this afforded but little protection to a class of men too poor for litigation. Besides, no time was fixed for the payment; hence the act of January 11th, 1851. It recited the inadequacy of the existing law and provides (as adopted in *Gantt's Digest, section 3905*), that:

"It shall be the duty of every person who has obtained a donation of a tract of improved land, within *three months* from the date of the deed, to pay to the owner of such im-

provement double the value thereof; and to take from such person his receipt for the amount of money so paid; which receipt shall, within *thirty days* thereafter, be filed with the Auditor; and should any such improvement not be paid for by the donee, and his receipt, showing such payment, shall not be filed with the Auditor, within the time prescribed, such donee shall forfeit all right to the land; and the owner of such improvements, upon filing with the Auditor his affidavit, stating that he owned an improvement on the land at the time it was donated, and that the donee has not paid nor tendered to him double the value of such improvement, if the time allowed for making such payment, *and* for filing the receipt as evidence thereof, shall have elapsed, shall be allowed to purchase said land, including his improvement, by paying all arrearages of taxes which may be charged thereon, in the same manner as if the land had never been donated; and the Auditor shall execute to such purchaser a deed for the same, which shall have the same validity, force and effect, and be evidence of title, as other deeds executed by the Auditor for lands sold for taxes."

This act was sustained and construed in *Lacefield* v. *Stell*, 21 *Ark.*, 437, which, like this, was a case of contest between a donee (who was a minor) and the unpaid owner of an improvement; who, upon his affidavit, was subsequently allowed to purchase from the State, under the act. It was not necessary to decide in that case, as it is not in this, whether or not one having an improvement on the land at the time of forfeiture ceased to become the owner, and thereby lost the benefit of the act. It seems that such a construction would contravene the policy of the act, but the question does not arise. The improvements in this case were made after the forfeiture. That case settles the question, that no demand of payment by the improver was required, nor notice to the donee of the subsequent applica-

tion to purchase. The same points were expressly ruled in *Surginer, Adm'r.*, v. *Paddock*, 31 *Ark.*, 529, in which case it may be remarked, *en passant*, that the question did arise, and was much pressed, as to the *time* of the improvements. The court failed to see that it was material whether the improvements were made before or after the forfeiture; holding that although technically the improvements passed to the State with the land, yet she might, and intended as a matter of grace, to treat the former owner as against her donee, as still the owner. In which view, as remarked by JUSTICE WALKER: "If it is the pleasure of the Legislature to give the land to a person, on condition that the donee shall, within a prescribed time, pay or tender to such owner of an improvement double the value thereof, and the donee accepts the gift on such conditions, what right has he to complain? None, we think."

So far as the decree of the Chancellor asserts the right of Robinson to purchase of the State the lands upon which his improvements were made, without demand of the double value from the donee, or notice of his application, and *at the proper time*, to receive a deed from the Commissioner (to whom that power is now transferred), the views of the Chancellor were well sustained, upon authority. We think, too, upon principle, and a fair construction of the act, that his right to purchase was limited to the lands which he claimed when the improvements were made. He made the improvements to enhance the value of property which he held by metes and bounds, under a parol contract, and which were efficient to give him equitable title, as part performance. The adjoining forty was not in his contemplation, and the improvements cannot well be considered as extending to it. Upon all the points made and argued in the court below, or here, the views of the Chancellor are sound.

We cannot, however, overlook some other points presented by the record, which ought not to be passed *sub silentio*, as they so enter into the case that to do so would lead to error.

2. DONATION LANDS: Sec. 3905, Gantt's Digest, construed.

The purchase by complainant for arrearages of taxes, by virtue of his unpaid improvements, was clearly and palpably premature. The forfeiture of the donee could not occur under the act, where the improvements were not actually paid for, until the expiration of three months, *and* the thirty days allowed to file the receipt with the Auditor. This time had been allowed to expire in the cases of *Lacefield* v. *Stell* and *Surginer, Ad.*, v. *Paddock* (*supra*), so that the construction of the Statute did not arise. In this case the owner of the improvement was allowed to purchase at the expiration of three months and two days. It was a matter of power, and the Commissioner could not make the deed sooner. It is no answer to say that as the payment had not been made within the three months, it would have been a vain thing to give thirty days for the filing of a paper, the very existence of which had become impossible. There is no reasoning against Statutes conferring powers, on certain conditions where there would be no powers nor equities independent of the Statute. *Ita lex scripta est*, is then imperative and inflexible. The conditions must exist; besides, the law is reasonable. If the purchase, on one hand, is to be allowed on the mere affidavit of the applicant, as to the *fact* that no payment had been made, it is but just on the other that the *fact* should be further rendered probable by the failure of the donee to file the receipt within the time required. There should be no action until the full time expires. The deed of complainant from the Commissioner was wholly void, and offered no basis for any relief.

But there is a prayer for general relief, and we are brought to consider whether there was anything else in the

case, which might properly be shown, under the pleadings, to entitle complainant to the relief granted, or any other.

It is shown the lands were 16th Section lands. By act of July 25, 1868, the proceeds of the sale of all those lands had been taken under the control of the State, and transferred to the Common School Fund. They were the property of the State, and held for Common School purposes. The State had a lien upon all those lands which had been or might thereafter be sold for the payment of the purchase money.

The pleadings and the Commissioner's deed exhibited, show that the tract of land first mentioned, composed of the three contiguous forties, being school lands, had been sold under a decree of foreclosure in the Pulaski Chancery Court, in favor of the State, for the purchase money, rendered on the thirteenth day of June, 1873, against one J. Scott Gray; and had been purchased at the Commissioner's sale, on the twenty-seventh day of July of that year, by A. J. Ligate, for $138, to whom the Commissioner executed a deed, and that the sale had been duly reported to the court and approved. It further appears, from the pleadings and evidence, that Ligate bargained and sold said lands to one Thomas Staggs, who, on his part, in 1874, bargained and sold the same by parol contract to complainant; and that complainant, on his part, entered upon the lands in pursuance of said contract, and made the improvements under which he claimed. It was only by taking cognizance of the facts, and of complainant's equitable claim and its extent, that the Chancellor could find grounds for limiting the relief to these three forties, and refusing to extend it to all the lands embraced in his subsequent purchase from the State for arrearages of taxes. It is interesting to trace the rights and equities of the several parties, as they were affected by

these facts, and the forfeiture of the lands for taxes in 1871.

By act of January 10, 1851 (*Gantt's Dig.*, *sec.* 3984), "No tax title shall be valid or binding against the equitable or legal interest of this State, in any real estate whatever; but such tax titles are and shall be void, so far as the same shall conflict with the interest of the State, and shall be treated and considered as null and void in all courts."

Denuded of tautology, this means that tax titles are good, except in so far as they conflict with the vested interests of the State.

3. LIEN: Of State for purchase of school land, superior to lien for taxes.

No taxes accrued upon these lands in question, until after their sale for the benefit of the school fund. The lien of the State for the purchase money was prior and superior to her lien for taxes going to her general revenue. Upon forfeiture for these taxes, the whole title vested in the State, but her lien for the school fund was not thereby merged in her legal title. The doctrine of merger never applies where there are any equities which would be thereby defeated. She claimed the forfeiture for general purposes, but the lien for the school fund was a trust in her hands, she held in accordance with these equities; that is, the lands were hers for general revenue purposes—subject, in her hands, to the satisfaction of the debt due the school fund.

If, in this state of things, she had made a donation, the donee would have taken just what she got by the forfeiture; that is, the lands subject to the school fund debt, which the donee might have redeemed. If afterwards she had foreclosed without making the donee a party, it might be a question whether this right of redemption would be taken away; a question not indeed without difficulties. But the foreclosure in this case does not raise the question. At the time the decree was made, and the lands sold, under order of the Chancery Court, there were no outstanding interests

to be preserved—no interests not owned and constructed by the State herself, which was in court, making the foreclosure. The legal result would be that the sale under the first lien would pass the whole title, legal and equitable. The trust would be fulfilled, and that is all to which a court of equity would feel constrained to look. If her lien for arrearages of taxes be thereby lost, it is a matter disconnected with the trust, and results from imperfect legislation on a complicated subject.

It is not necessary to consider whether or not the State might, by a bill properly framed, have foreclosed for the whole that was due, applying the proceeds first to the school fund, and the surplus to the general revenue, nor whether her failure to do so indicated an intention still to retain the power to redeem from the purchaser for general revenue purposes. There was no necessity for such a proceeding. She was entitled to the whole surplus, much or little, by virtue of the forfeiture, which was absolute. In either case the full and complete title would pass to the vendee of the court.

The equitable right to this title had become vested in the complainant, Robinson, and he was entitled to the decree, which he, in fact, obtained.

Upon the whole case, let it be affirmed.

HOLT V. MOORE.

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1. MARRIED WOMEN: *Acknowledgment to deed, as evidence.*

A married woman's acknowledgment to a deed properly certified, is *prima-facie*, but not conclusive evidence against her, either that the acknowledgment was made as certified, or that the facts acknowledged were true, except as to a vendee for valuable consideration, ignorant of the falsity of the facts, and not participant in the fraud. As to him, she is estopped to deny an acknowledgment actually made.

2. STATUTE OF FRAUDS: *Parol promise to reconvey.*

A parol promise to reconvey, when the sale is absolute, comes within the Statute of frauds.

3. SAME: *Parol evidence, when admissible.*

Parol evidence is admissible between the parties to show that a deed absolute upon its face is only a mortgage, where there remains a subsisting debt to the vendee to support it. But where no such debt remains, where the consideration has passed, or the obligation to pay it been incurred, and there is no obligation of the vendor to repurchase, parol evidence is inadmissible to support such option. Nevertheless the use of a parol promise to reconvey in overreaching a weak or ignorant mind, might become an element of fraud to be considered in connection with other circumstances.

4. FRAUD: *In obtaining deed, onus probandi.*

Allegations of fraud in procuring a deed must be clearly proved. The *onus* is upon the party making them.

APPEAL from *Pulaski* Chancery Court,
Hon. D. W. CARROLL, Chancellor.

George L. Basham, for appellant:

I. The deed was obtained by fraud and undue influence of the husband of appellant and, void. 10 *Minn.*, 427, 448; 2 *Wal.*, 524; 5 *Ill.*, 521; 6 *Minn.*, 25; 24 *Iowa*, 509; 18 *Md.*, 305; 1 *Smith* (*Penn.*), 309; *Bish. on Married Women*, 2 *vol.*, *sec.* 419, *et seq.*

The price paid was inadequate, and shows fraud or unfair dealing. *Story's Eq.*, *vol.* 1, *secs.* 244–250.

The conversations and statements of Holt, appellant's husband, were incompetent and should have been excluded. *Greenleaf Ev.*, *vol.* 1, *secs.* 185 *and* 341 *and note*; 8 *Jones L.* (*N. C.*), 375; 13 *Iowa*, 89; 11 *Serg. & R.*, 325; 3 *Peck.*, 63; 5 *Conn.*, 93; 9 *Heisk.* (*Tenn.*), 606; 13 *Ark.*, 295; 21 *Ark.* 77.

II. The deed would not have been executed, except for the threats of appellant's husband and Moore's promise to reconvey. There has been such a part performance on part

of appellant that it was a fraud upon her by Moore not to reconvey. *Brown on frauds*, *sec.* 441, 442, 445 (*a*), 1 *Ark.*, 417; 22 *Ark.*, 487.

J. M. Moore, for appellee:

I. The alleged agreement to reconvey is within the Statute of frauds. *Campbell* v. *Campbell*, 2 *Jones Eq.*, *N. C.*, 364; *Patteson* v. *Horn*, 1 *Grant*, *Pa.*, *cases* 301; *Ballard* v. *Bond*, 32 *Vt.*, 355; *Graves* v. *Graves*, 45 *N. H.*, 323; *Townsend* v. *Townsend*, 6 *Metc.*, *Mass.*, 321.

II. Our Statute prescribes the manner of execution and acknowledgment of conveyances by married women, and in the absence of clear proof of fraud on the part of grantee or that the certificate is false, it is conclusive; and even if the charges against Holt were true, appellee would not be affected, unless a party to the fraud or coercion, or had notice. 7 *Lansing*, *N. Y.*, 6; 19 *Iowa*, 465; 13 *Iowa*, 445; 11 *Ohio st.*, 203; 2 *Head* (*Tenn.*), 259.

III. Holt had a life estate (beside the interest purchased of O'Cain) in the land, having living issue by appellant, subject to alienation without the wife's concurrence or joinder in the deed, and she can not, in any event, set aside the conveyance of her husband's estate to appellee. 21 *Ark.*, 592; 20 *Id.*, 508.

IV. The gist of appellant's case is, that the appellee worked upon the fears of Holt and induced him to force his wife to convey, and any testimony that tends to show the influence wrought upon him is admissible. His conduct and statements at and during the time of the transaction, were part of the *res gestæ*. 1 *Green. Ev.*, *sec.* 108; 2 *Hill*, *N. Y.*, 257 (*b*); *Cornelius* v. *The State*, 12 *Ark.*, 804.

EAKIN, J. Mary E. Holt, a married woman, applied by

bill in Chancery Court, to cancel a deed of land, which, with her husband, she had executed, in accordance with the statutory form, to the appellee, Moore. The certificate of her acknowledgment, before a Justice of the Peace, is full and sufficient.

She alleges that the conveyance was procured by the fraud of Moore, in operating upon the fears of her husband, to induce him to leave the country to avoid a criminal prosecution; and by the coercion and undue influence of her husband, to induce her to consent, of which defendant was cognizant. She also alleges that defendant, as a part of the inducement by which her consent to the acknowledgment was obtained, promised to reconvey the land, should they ever return to the country and desire it; and that upon request he had refused to reconvey upon the same terms or even for additional considerations.

Upon issues made to the allegations, and upon proof, the cause was heard by the Chancellor, who denied the relief, holding that the fraud did not sufficiently appear, and that the promise to reconvey, even if made, came within the Statute of Frauds and could not be enforced.

1. MARRIED WOMEN: Acknowledgment to her deed as evidence.

It is certainly true that the acknowledgment of a married woman to her deed duly certified, although prima facie evidence, is not conclusive against her, either as to the fact that the acknowledgment was made as certified, or that the facts which she acknowledged were themselves true, unless it be against a vendee for valuable consideration, who was himself ignorant of the falsity of the facts, and had not participated in the fraud. As to him, she must be held estopped where the acknowledgment was actually made, or there would be no safety in conveyances. A false certificate of acknowledgment, where none was made, would present a different question. (See cases commented upon in 1 *Bish. on mar. women*, *sec.* 591.)

A parol promise to reconvey, where the sale is absolute, comes within the Statute of Frauds. The agreement must be in writing. Parol evidence may be introduced to show that a deed, absolute on its face, is indeed only, as between the parties, a mortgage when a subsisting debt remains to support it. But where there is no remaining debt due to the vendee, where the consideration has passed, or the obligation to pay it has been incurred and there is no obligation of the vendor to repurchase, we know of no case where it has held that this option may be retained by parol agreement, any more than a right to make an original purchase at a future time. The equity doctrine for showing by parol that a deed was in fact a mortgage has never been extended so far, and indeed could not be without opening the flood gates of perjury in a country where property so often and unexpectedly increases in value with startling rapidity Nevertheless, the use of such a promise in overreaching a weak or ignorant mind might become an element of fraud to be considered in connection with other circumstances.

2. STATUTE OF FRAUDS: Parol promise to re-convey

The evidence in this case is voluminous, much of it conflicting, much incompetent and more irrelevant. Various portions were objected to before hearing and motions were made to strike out and suppress. The Chancellor suppressing one deposition and, for the rest, announcing that he excluded from consideration all those portions of the others which he deemed irrelevant or incompetent, reached the conclusion stated above.

The fraud, which is the single question, must be clearly shown. The *onus* is on the complainant. The depositions and exhibits have been carefully reviewed, and it is sufficient to say that, upon the whole case, we do not consider that the allegations of the bill were sufficiently sustained by preponderance of proof to entitle complainant to the relief sought.

3. FRAUD: In obtaining deed. *Onus probandi.*

Affirm the decree.

RALEIGH v. GRIFFITH.

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1. ASSIGNMENTS: *Statute of, constitutional. Sales must be public.*
The Statute of assignments (*Gantt's Digest, chap. 10*) is constitutional. (*Clayton* v. *Johnson*, 36 *Ark.*,) and a deed which authorizes the assignee to sell at private sale is in violation of the Statute and void.

APPEAL from *Pulaski* Circuit Court.
HON. J. W. MARTIN, Circuit Judge.

J. M. Moore, for appellant:

The only material point in this case is as to the validity and effect of *ch.* 10, *Gantt's Digest.*

I. The act imposes duties on the County Court that it cannot perform under the Constitution. *Art.* 7, *Sec.* 28, *Con. of Ark.*

The act is indivisible, and being void in part, is void *in toto*. *Bittle* v. *Stuart*, 34 *Ark.*

II. The provision requiring sales to be public is merely directory. Where it is to the interest of all parties that the sale be private, it is competent to so direct. *Feild* v. *Dortch*, 34 *Ark.*, 339; *Neil* v. *Burrows*, *Id.*, 494.

J. Erb, for appellee:

The assignment is void on its face, because it does not comply strictly with *ch.* 10, *Gantt's Digest.* See manuscript opinion of CALDWELL, J., in *Bartlett, Reed & Co.* v. *Teat et al, decided Oct. Term*, 1879, *U. S. Ct. Ct., East Dist., Ark.*; *also* 3 *N. Y., Rep.*, 215, 220; 27 *Ib.*, 311; 1 *Wis., Rep.*, 286, 313–14; 1 *Sand. Chan'y.*, 4; *Gardner* v. *Com. Nat. Bk., S. C., Ill., May* 18, 1880 (*The Reporter, Vol. X*, 300); *Nisbit* v. *Digby*, 13 *Ill.*, 301; *Hardin* v. *Osborne*, 60 *Ill.*, 101; *McIntire* v. *Benson*, 20 *Ill.*, 500; *Sackett* v.

Mansfield, 26, *Ill.*, 21.; *Curtis* v. *Leavitt*, 15 *N. Y.*, 10; *Brigham* v. *Tillinghast*, 13 *N. Y.* 214; *Dunham* v. *Waterman*, 17 *N. Y.* 9; *Jessup* v. *Hulse*, 21 *N. Y.*, 168; *McCleery* v. *Allen*, 7 *Neb.*, 21. These decisions are based on the Common Law doctrine and are therefore of greater weight and value.

The assignment authorizes a sale on a credit and at retail; either of these provisions vitiates the instrument. *Hardman* v. *Bowan*, 39 *N. Y.* 196; *Julian* v. *Rathbone*, *Ib.*, 369; *Brieton* v. *Lorenz*, 45 *Ib.*, 51; *Syracuse R. R.* v. *Collins*, 57 *Ib.*, 641; *Brennen* v. *Wilson*, 71 *Ib.*, 502; *Burrill on Assignments, section* 224 *and cases cited.* Being void *in part* because contrary to the provisions of a Statute, it is void *in toto.* 4 *Paige* 23; 11 *Wend.*, 187; 2 *Mich.*, 460; 1 *Ind.*, 411; 26 *Vt.*, 472.

The act is constitutional. *Sec.* 34 *of Art.* 7., *Con. Ark.*, does not limit the powers of Probate Courts to the duties therein set forth. It merely prescribes that they shall have exclusive jurisdiction of certain subjects therein specified, but does not say that they shall perform no other duties. The duties required are only *ministerial.* *State* v. *Collins*, 19 *Ark.*, 587; *State* v. *Chase*, 5 *Har. & J.* (*Md.*), 257. *In re Gill.* 5 *Wis.*, 686.

English, C. J. On the twenty-third of May, 1878, Jarrett & Co., merchants of Little Rock, who were unable to pay their debts, made a general deed of assignment of all their stock of merchandise, choses in action, and other property, to Patrick Raleigh, as trustee, for the benefit of all their creditors. Raleigh gave bond and took possession of the goods.

Two days after the execution of the deed, Musor Bros., and Mesker Bros., creditors of Jarrett & Co., who, it seems, had recovered judgments against them before a Justice of the Peace, sued out executions upon the judgments, which

were placed in the hands of Joseph Griffith, a constable, and he levied them on part of the goods embraced in the deed of assignment, and took possession of them.

Raleigh brought replevin for the goods against Griffith in the Pulaski Circuit Court, the issues made by the pleadings were tried before the Court, and after hearing the evidence, the Court declared as law, that the deed of assignment was fraudulent on its face by reason of the authority given therein to the plaintiff, as trustee, to sell the goods contrary to the express provisions of the Statute, etc., and rendered judgment that the goods replevied be restored to Griffith, or on failure, that he recover their value as found. A new trial was refused and the plaintiff took a bill of exceptions and appealed.

The counsel for appellant has submitted but two propositions:

First. That the assignment act imposes duties on the Probate Court that it cannot perform under the constitution, that the act is indivisible, and being void in part is void in toto.

Second. That the provision of the act, requiring sales to be public, is merely directory, and that where it is plainly to the interest of all parties that the sale be private, the deed may so direct.

1. ASSIGNMENT: Statute of, constitutional.

It was ruled in *Clayton* v. *Johnson*, 36 *Ark.*, 406, that the act was not unconstitutional.

The second proposition presents a question not heretofore decided by this Court.

Sale must be public.

The third section of the act provides that: "Said assignee shall be required to sell all the property assigned to him for the payment of debts at public auction within one hundred and twenty days after the execution of the bond required by this act, and shall give at least thirty days notice of the time and place of such sale," etc. *Gantt's Digest, Sec.* 387.

The deed of assignment, after conveying the property to the assignee, provides, "that the party of the second part (the assignee) shall take possession of all and singular the property and effects hereby assigned, and sell and dispose of the same, either, at public or private sale to such person or persons for such prices and on such terms and conditions, and either for cash or upon credit, as in his judgment may appear best and most for the interest of the parties concerned, and convert the same into money," etc.

It also provides that the assignee "shall first pay and disburse all the just, reasonable and usual expenses, costs, charges and commissions of making, executing and carrying into full effect this assignment and the objects thereof; in doing which he is hereby authorized to employ one or more agent or agents, attorney or attorneys, who shall be paid out of the proceeds of sale a reasonable compensation for their services," etc.

He was also authorized to keep the property insured and to pay the rent of the premises, then occupied by the assignors, until the property and effects, embraced in the trust, should be disposed of, etc.

There was evidence that after the assignment, the goods were marked and the business carried on as before; the sales were continued at retail in the ordinary course of business.

In providing for the sale of the property, the Statute is disregarded in the deed of assignment. The assignee was authorized to sell at private or public sale, and for cash or credit. Under such provisions, it was in the power and discretion of the assignee to prolong the execution and closing of the trust for an indefinite period. The Legislature deemed it expedient, as matter of public policy, to require assignees in general deeds of assignments for the benefit of creditors, to sell all property assigned to them for the payment of

debts, at public auction, within one hundred and twenty days after the execution of the bond, etc., on thirty days notice of the time and place of sale. The power of the Legislature, to make such regulation, has never been judicially questioned.

The Supreme Courts of a number of the States have held, in the absence of any Statute regulating the mode of sale, that a provision in a deed of assignment, authorizing an assignee to sell by retail or on credit, rendered the deed fraudulent and void as to creditors, under the general Statute of fraud, as tending to hinder and delay them in the collection of their claims. See the cases as collected and reviewed in *Burrill on Assignments, third Edition, Sec.* 218 *to* 225.

There are also contrary decisions in other States, but we deem it needless to undertake to ascertain and decide how the weight of authority is. The Statute prescribes a mode of sale in this State, and dissenting creditors are not bound by a deed, made in direct contravention of a plain provision of the Statute.

In *Clayton* v. *Johnson, Sup.*, it was said that inasmuch as the Statute required the assignee to sell the property at public auction, and within a fixed time, it was not therefore in the power of an insolvent debtor, by assignment, to tie up his property in the hands of an assignee for an indefinite period, with the view of coercing any reluctant creditors to accept a provision which they might dislike.

Affirmed.

MAYS v. ROGERS, AD.

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1. ADMINISTRATION: *Illegal allowance of claim.*

Illegality in the allowance of a claim in the Probate Court cannot be set up in a collateral proceeding.

2. STATUTE LIMITATIONS: *None against Probate Court allowances; Revivor of.*

There is no Statute bar against the enforcement of Probate Court allowances; and there is no necessity or occasion for reviving them.

3. ADMINISTRATION: *Application to sell lands for payment of debts must be in reasonable time.*

The charge upon the real estate of a decedent, for the payment of his debts, is not perpetual. Application to sell lands must be made in a reasonable time, to be determined by the Court under the circumstances of the case. A delay for ten years after the grant of administration, without showing any hinderance or proper cause for it, is unreasonable, and discharges the lien upon the real estate

4. SAME: *Ordering more land sold than prayed for, error.*

It is error for the Probate Court to order more land to be sold for payment of debts than is prayed for in the petition.

APPEAL from *White* Circuit Court.
Hon. J. N. CYPERT, Circuit Judge.

STATEMENT.

On the sixteenth of January, 1879, T. J. Rogers, as administrator, *d. b. n.*, of the estate of Thomas G. Mays, deceased, filed in the Probate Court of White county his petition, alleging that the personal assets of the estate were entirely exhausted, leaving the following debts unpaid, to-wit:

Account of T. J. Rogers.....	$ 60 45
Interest at 6 per cent., from April 30, 1860.....	
Judgment of T. J. Rogers.....	242 90
Interest at 10 per cent., from April 30, 1860.....	
Account of B. M. Jones	14 75
Interest at 6 per cent., from April 30, 1865.....	
Amount due administrator upon last settlement..	43 75

That he had before obtained an order of said court for the sale of certain lands of the deceased in said county (describing them), for the payment of said debts, and had several times offered them for sale, but had not been able to sell them at any price. That the deceased owned certain described town lots, in the town of Searcy, which had been allotted to his widow as dower; and he prayed for an order to sell the reversionary interest in said lots for the payment of said debts.

On the same day Annie Mays, the daughter and only heir of the deceased, appeared and filed her answer and objections to such order, setting up that her father died on the sixth day of February, 1860; that on the eleventh day of February, 1860, W. A. Old was appointed and qualified as administrator of his estate; that divers claims were probated against said estate, all of which had been paid except the claims set forth in said petition. That the petitioner was appointed as administrator, *de bonis non*, on the eleventh day of February, 1867, in place of Old, who had died, and should long before have obtained an order to sell, and sold the lands of the estate for the payment of the debts when they were valuable; but he had delayed until real property had become of little or no value. That the claim of $14.75 due to Jones was barred by the Statute of non-claim, when it was classed in the Probate Court. That all the claims set forth in the petition were Probate Court judgments—more than ten years old—had never been revived, and were barred by the Statute of Limitations. That no order or decree of any court had been made within ten years for the sale of said lands for the payment of said claims. That there was no legal and unsatisfied debt against the estate, except said sum of $43.75, due said administrator upon his last settlement, and that she was willing and offered to pay. The answer closed with a prayer that the petition be denied

and the petitioner be required to make final settlement of the estate, and turn over the property to her.

The administrator demurred to this answer; the demurrer was overruled, and he appealed to the Circuit Court, where the demurrer was sustained, and the order of sale prayed for was granted. The defendant appealed.

B. D. Turner, for appellant:

I. Jones' claim, not having been exhibited within two years, was barred.

II. An administrator must file annual accounts current, and make final settlement within three years from date of letters. *Secs.* 121, 198 *Gantt's Dig.* Appellee did neither. His letters should have been revoked. *Sec.* 141 *Ib.; North Prob. Prac., sec.* 544.

III. The allowance and classification of a claim is in effect a judgment. *Gantt's Dig., sec.* 113; *Biscoe* v. *Butts*, 5 *Ark.*, 305; *Dooly* v. *Watkins*, 26 *Ark.*, 705; *Wilson* v. *Harris*, 13 *Ark.*, 589; and ten years having elapsed, the claims are barred. *Gantt's Dig., secs.* 2609, 4128; *Brearly* v. *Norris*, 23 *Ark.*, 169. After ten years the presumption of payment would arise. *Wilson* v. *Harris*, 13 *Ark.*, 562.

Claimants should have revived by *sci. fa.* within ten years; not having done so, they are barred. *Brearly* v. *Norris*, 23 *Ark.*, 169, 172.

IV. The lien of a creditor is not perpetual, but is lost by gross laches, or unreasonable delay. *North Prob. Prac., sec.* 445; *Vansyckle* v. *Richardson*, 13 *Ill.*, 171; *Allen, ex parte*, 15 *Mass.*, 59.

In this State, as in Illinois, there is no Statute declaring how long such liens may continue, but the application of an administrator to sell lands to pay debts must be a timely

one. *North Prob. Prac.*, *sec.* 445, *p.* 212; *McCoy* v. *Morrow*, 18 *Ill.*, 519; *Rover on Jud. Sales*, *sec.* 254; *Moore* v. *White*, 6 *John. Ch'y.*, 376; *Richards* v. *Williams*, 7 *Wheat.*, 59, 115; *Smith* v. *Dalton*, 4 *Shep.*, 308; *Langworthy* v. *Baker*, 23 *Ill.*, 448.

Orders of sales and sales thereon, after an unreasonable length of time, are void. *Rover on Jud. Sales*, *sec.* 256, *p.* 100; *Ib.*, *sec.* 254, *p.* 49; *Langworthy* v. *Baker*. *sup.*; *Moore* v. *White*, *sup.*; *Jackson* v. *Robinson*, 4 *Wend.*, 436, 442.

V. No description was given of the lands in the notice. *Sec.* 176 *Gantt's Dig.*; *North Prob. Prac.*, *sec.* 468, *p.* 224; *Rover on Jud. Sales*, *sec.* 28 *p.* 16; McCoy v. Morrow, 18 *Ill.*, 509.

W. R. Coody, for appellee:

The allowance of a claim against an estate is not a judgment. *Ware* v. *Pennington*, 15 *Ark.*, 226; *Gantt's Dig.*, 113. Such allowance cannot be made the grounds of *an action*, and *Sec.* 4128 *Gantt's Dig.* has no application. Having the *force and effect* of a judgment, by *Sec.* 113 *Gantt's Dig.* already, no greater force could be given by another action or judgment.

A proceeding to sell real estate by an administrator to pay debts is *no action*, nor an independent proceeding. It is *simply a continuance of the same proceedings*—a part of the same administration begun when the letters were granted, and must continue until wound up. *Hence, there is no room for any limitation*, and like a *sci. fa.* to revive, no limitation can be set up again it. *Brown, Robb & Co.* v. *Byrd*, 10 *Ark.*, 534; *Bettison* v. *Byrd*, 11 *Ark.*, 480; *Evans* v. *White*, 12 *Ark.*, 133; 23 *Ark.*, 322 and 174.

HARRISON, J. The Statute of non-claim was suspended during the war. *Williamson et al* v. *McCrary, ad.*, 33 *Ark.*, 470. The claim of Jones was, therefore, presented in due time; yet if it had not been, the allowance of it could not be called in question in a collateral proceeding. *Carter, ad.*, v. *Engles*, 35 *Ark.*, 205; *Montgomery and wife* v. *Johnson*, 31 *Ark.*, 74, and cases there cited.

Under our system of administration there can be no necessity or occasion for the revival of allowances. *Gantt's Dig.*, *secs.* 142–147; *Rose* v. *Thompson*, 36 *Ark.*, 254.

And as payment of claims can be enforced only as directed by the Statute, and after the court has found, upon a settlement of the administrator, that there is money in his hands for the payment of them, and has ordered their payment in full, or *pro rata*, as it shall suffice, the allowances cannot be barred by the Statute of Limitations. *Gantt's Dig.*, *secs.* 142–147.

The lands and tenements of which an intestate has died, siezed, are, by the Statutes, made assets in the hands of his administrator for the payment of his debts, and in case of a deficiency of the personal estate, may, under an order of the court, be sold for that purpose. But this charge upon the real estate is not a perpetual one, which may be enforced by the administrator after any lapse of time. The heirs should not be forever deterred from making improvements on the property, or prevented from selling it, by the possibility that it may be sold for the debts of the estate.

The power of the administrator must be exercised in a reasonable time, and will be lost by gross laches, or unreasonable delay. *Rorer on Jud. Sales*, *secs.* 254–257; *Vansyckle* v. *Richardson*, 13 *Ill.*, 171; *McCoy* v. *Morrow*, 18 *Ill.*, 519; *Heirs of Langworthy* v. *Baker*, 23 *Ill.*, 484; *Smith* v. *Dalton*, 16 *Maine*, 308; *Moyers* v. *White*, 6 *John.*

Ch., 360; *Ricard* v. *Williams*, 7 *Wheat.*, 59; *Ex parte Allen*, 15; *Mass.*, 58; *Wellman* v. *Lawrence*, *Ib.*, 326.

What is such reasonable time must be determined by the court, in its sound discretion, under the circumstances of the case. *Mooers* v. *White*, *supra*.

This proceeding, to subject the lots to the payment of the debts of the estate, was not begun until eighteen years after the first grant of administration, and twelve after the appointment of the petitioner as administrator, *de bonis non*, and no attempt had been made by him for ten years to enforce the lien against any part of the real estate. It does not appear that any cause existed for this failure sooner to proceed against the real estate, and we are of the opinion that a delay for such a length of time as ten years, when there was no hinderance or proper cause therefor, was unreasonable, and that the lien on the real estate was thereby lost.

Another objection to the order is apparent upon its face. It included the tracts of land as well as the town lots, when the petition only prayed for the sale of the latter.

The judgment of the court below is reversed, and the cause remanded to it, with instructions to allow the petitioner to amend his petition, if so advised, and for further proceedings.

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63 392

BOZEMAN v. SHAW.

1. PLEADING AND PRACTICE: *Arrest of judgment.*
   If a matter in controversy has been adjudicated in a former suit, this is ground for defense, but not for arrest of judgment.

2. PRACTICE: *Verdict in conformity to appellant's instructions must stand.*
   A party cannot complain of a verdict which conforms to an instruction asked by himself, though the instruction be wrong.

3. MALICIOUS PROSECUTION: *Malice, Proof of; when presumed.*

To maintain an action for maliciously attaching the plaintiff's goods, it is not necessary to prove that the defendant, in suing out the attachment, acted dishonestly, or with actual malice. If there was no probable cause to believe that the facts alleged in the affidavit for the attachment were true, the jury may presume malice.

APPEAL from *Clark* Circuit Court.
Hon. A. B. WILLIAMS, Special Judge.

The opinion states the case.

H. H. Coleman, for appellant:

I. The Act of 1875, adjourned session, requires the "court or jury to assess the damages sustained," etc. This language embraces *damages of every kind*, and appellee exhausted his remedy by his first judgment.

II. The law requires *malice*, and the evidence shows that appellant was moved by *stern necessity*, and did not attach until every other avenue of justice was closed against him. *Drake on Attachment*, *sec.* 742; and then only under advice of counsel. *Ib.*, *sec.* 743.

III. But the essential ground is, that appellant commenced his attachment without probable cause. *Ib.*, *sec.* 732. The evidence rebuts this.

S. R. Allen, for appellee:

All exceptions which do not appear in the motion for a new trial are waived. *Hopkins* v. *Commonwealth*, 3 *Bush.*, 480; *Stater* v. *Sherman*, 5 *Bush.*, 211; *L. C. & L. R. R. Co.* v. *Mahoney's Adm'r.*, 7 *Bush.*, 238; *Gibbs* v. *Dixon*, 33 *Ark.*, 107.

This court will not reverse, unless the verdict of the jury

is so repugnant as to shock the sense of justice. The first jury found, *as that alone was submitted to them*, that the attachment was wrongfully obtained, and only assessed the *actual damages;* in this case they found that the attachment was *maliciously* sued out, and awarded exemplary or punitive damages. No error of law is complained of, and the evidence certainly sustains the verdict.

A party cannot complain of a verdict given in accordance with instructions asked by himself. We need cite no authorities—it is too well settled.

The motion to arrest is unknown to our civil Code. A judgment may be arrested only in criminal cases. By any system of practice, it was only to reach a case where, from the record, it appears that plaintiff was not entitled to judgment. *Bouvier Law Dict.*, 1 *Vol.*, 146.

EAKIN, J. The appellee, Shaw, had been sued by Bozeman in an attachment suit. The attachment was not sustained, and, upon its dissolution, a verdict and judgment, under the Statute, had been rendered against Bozeman for wrongfully suing it out.

Shaw afterwards brought this action against Bozeman for suing out the attachment maliciously, and without probable cause, seeking exemplary or punitive damages.

Malice and want of probable cause were denied by the answer, which also set up the former judgment for damages in the action of attachment. Upon these issues the jury rendered a verdict for $500 against defendant, Bozeman, who appeals.

There was a motion for a new trial, in which the only grounds assigned were, that the verdict was contrary to the law and the evidence. Also, a motion in arrest of judgment, on the ground that the matter of damages arising

from the transactions had been adjudicated in the former suit. Both motions were overruled.

1. ARREST OF JUDGMENT—*res judicata*, no ground for.

The motion in arrest, for the reason assigned, was not proper. It was matter of defense, if good, under any circumstances, and had, indeed, been put in issue by the pleadings. The court, upon defendant's own motion, had instructed the jury that if they found that the plaintiff, in another action, had recovered the actual damages sustained by him upon the dissolution of the attachment, they should, in making up their verdict in this case, exclude all actual damages from their consideration; and to find for the defendant, unless they found plaintiff entitled to vindictive or punitive damages.

2. VERDICT: In conformity to appellant's instructions must stand.

This was ground selected by defendant for himself, and upon which he was allowed to stand before the jury, at his own request. It is not necessary to determine whether the law was correctly given. There was certainly no ground, afterwards, for motion in arrest of judgment.

3. MALICIOUS PROSECUTION: Malice, proof of, when presumed.

It remains to consider whether the verdict was against the evidence, which is the only substantial point made by the appeal. The evidence tends to show that plaintiff was in a lucrative mercantile business; that defendant had a claim, or thought he had, against him for the correction of an account of their past dealings; that he was unable to get a settlement; that plaintiff was selling off his stock, and disposing of property; and that defendant, Bozeman, despairing of other remedy, and advised by his counsel, adopted that of attachment. He made oath that plaintiff was disposing of his property for the purpose of cheating, hindering and delaying his creditors. At least, this seems to be admitted by the pleadings. The affidavit is not copied into the transcript, although the writ of attachment is.

There is no reason to believe that Bozeman acted dishonestly, or with actual malice. But on the other hand,

there was no positive evidence of the facts upon which the affidavit and attachment were grounded. The jury found there was no probable cause to believe they existed, and upon that were justified in presuming malice.

The business of plaintiff seems to have been broken up, and his credit injured by the attachment. The jury had evidence before them to justify a verdict for exemplary damages, and the amount does not seem excessive.

Affirm the judgment.

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57 467

LITTLE ROCK AND FT. SMITH R. R. CO. v. PERRY.

1. PLEADING AND PRACTICE: *Equitable relief in actions at law.*
Relief of a purely equitable nature cannot be given in an action properly begun and prosecuted at law.

2. SAME: *Transfer of cause from law to equity docket.*
When a complaint at law discloses a purely equitable cause of action, it may be transferred on motion of either party, or of the court's own motion, to the equity docket; but the failure of the court to make the transfer, when neither party asks it, will not be error for reversal. The rule is the same where a purely legal action is brought in equity.

3. SAME: *When legal relief administered in equity—no equity at law.*
When a complaint in equity contains any equitable element to which the jurisdiction of a Court of Chancery may attach, the court may, in the same cause, administer all proper legal relief essential to complete justice at once to all parties before it; but actions at law, purely legal upon their face, must be decided on legal principles alone.

4. RAILROAD COMPANIES: *When bound by contracts of other parties.*
Whenever a third party enters into a contract with the promoters of a railroad, which is intended to enure to the benefit of the company, and it takes the benefit of the contract, it will be bound to perform it.

5. CORPORATION: *When bound for services rendered before its existence*
In order to recover against a corporation in an action at law for services rendered before its being, the plaintiff must prove either an expre s prom-

ise of the new company, or that the contract was made with persons then engaged in its promotion and taking preliminary steps thereto, and was made on behalf of the new company in the expectation of the plaintiff, and with the assurance of the projectors, that it would become a corporate debt; and that the company afterward entered upon and enjoyed the benefit of the contract and by no other title than that derived through it.

6. EVIDENCE: *Competency of, when and by whom determined.*

It is the Province of the court to determine, when evidence is offered, whether it tends to prove the issue. After it has gone to the jury, unless wholly irrelevant, it is for the jury to determine how far it, with other circumstances, conduces to prove the issue.

7. PRACTICE: *Directing jury what verdict to find.*

If there is any evidence whatever, however slight, pertinent to the issue, the court should not take it from the jury and direct their verdict, even if it is satisfied that it would grant a new trial if a verdict should be found upon it.

8. STATUTE OF FRAUDS: *Promise of a corporation to pay debt contracted before its organization.*

A verbal promise of a corporation to pay a party's claim, contracted with other parties prior to the incorporation, is void by the statute of frauds, as an undertaking to pay the debt of a third person.

9. CORPORATION: *Not bound by contracts of individual members.*

A corporation is bound only by its own contracts, and not by those of the individual members in their private capacity.

10. VERDICT: *Preponderance of testimony.*

The jury can find for the party holding the affirmative of the issue, only when there is a preponderance of testimony in his favor. The degree of preponderance is immaterial, but there must be some, of which they are the judges.

11. EVIDENCE. *Bill of particulars when not filed as exhibit.*

When a suit is upon an aggregate account filed as an exhibit, it is no surprise to the defendant to introduce and prove the bill of items composing the aggregate, though not filed as an exhibit.

12. PRACTICE IN SUPREME COURT: *Judgment upon two counts erroneous as to one.*

A judgment *in solido*, upon two counts, will be reversed *in toto*, if erroneous as to one.

APPEAL from *Pope* Circuit Court.
Hon. R. C. BULLOCK, Special Judge.

STATEMENT.

This suit was commenced in the Pope Circuit Court, by Perry, against the Little Rock and Fort Smith Railway Company, in May, 1877. The plaintiff's case is best stated by copying the following amended complaint, filed on the 26th September, 1879.

"The plaintiff, J. H. Perry, states that the defendant, the Little Rock and Fort Smith Railway, is indebted to and owes him the just sum of $8,053.77, after all just credits, for work and labor done, materials furnished, supplies advanced, and money laid out and expended by him, on mutual running account with said defendant, from January, 1873, till October 26, 1875, in and about the building and constructing the railroad of said defendant, to wit: the Little Rock and Fort Smith Railroad, from a point on said road known as Perry's Station, to Clarksville, Ark. The items thereof will more fully appear from an account herewith filed, marked Exhibit 'A,' amounting in the aggregate to the sum of $9,823.77, and that he has received $1,770, and no more; but that, after giving all just credits, there remains due and unpaid him thereon the just sum of $8,053.77, with interest thereon from twenty-sixth day of October, 1876, at the rate of six per cent. per annum. The plaintiff further states that, by the provisions and conditions of the land grant by the United States to the Little Rock and Fort Smith Railroad Company, unless at least eighty miles of said railroad from the point of beginning, had been constructed and completed by the thirteenth day of May, 1873, the right of said Little Rock and Fort Smith Railroad Company to all those lands or sections of land granted to said Little Rock and Fort Smith Railroad Company, in and by the act of Congress of the United States, approved February 9, 1853, entitled an act granting the right of way and making a

grant of lands to the State of Arkansas, for the use of the Little Rock and Fort Smith Railroad Company, to aid in constructing a railroad from Little Rock to Fort Smith, and by the act of Congress of the United States, approved July 28, 1866, entitled an act to relieve and extend the provisions of the aforesaid act, and for other purposes, would have been forfeited, and the title to the unsold lands included in said grant, to the United States. That, on the first day of January, 1873, said railroad was constructed to what is known as Perry's Station, a distance of sixty miles from the beginning point of said railroad, and on the said first day of January, 1873, the said Little Rock and Fort Smith Railroad Company, being insolvent and unable to complete the construction of said road within time to save their said lands granted to them as aforesaid, the bondholders of said railroad company, to whom the said railroad company had mortgaged their said lands, together with the right of way, privileges and franchises, for the sum of five million dollars, to aid said company in the construction of said railroad from Little Rock to Fort Smith, in view of future organization, and to save, unimpaired, their rights to said lands, under said mortgage, and to prevent a reverter thereof to the United States, took charge of said railroad for the purpose of constructing the same the required number of miles to save and prevent a reverter of the aforesaid lands mortgaged to them to secure the payment of the railroad bonds aforesaid; and between the first of January, 1873, and the thirteenth day of May, same year, said bondholders did, by their mutual and joint efforts, construct said railroad from said Perry's Station to Clarksville, Ark., being a distance of about forty miles, and that the work and labor done, supplies advanced, materials furnished and money laid out and expended by the plaintiff, was, by contract with said bondholders, and at their special instance and request, done in and about the

construction of said railroad from Perry's Station to Clarksville, aforesaid. That, afterwards, the said bondholders proceeded against the said Little Rock and Fort Smith Railroad Company and foreclosed their mortgage, as aforesaid; and on the nineteenth day of December, 1874, said bondholders bought, at public auction, the right of way, lands, rolling stock, privileges and corporate franchises of the Little Rock and Fort Smith Railroad Company, and thereby succeeded to all the property, privileges and franchises of said railroad company, and became a duly organized corporation, under the laws of the State, by the name of the Little Rock and Fort Smith Railway, for the purposes of constructing and carrying on the business of railroading from Little Rock to Fort Smith, and have and still continue to operate said road since the nineteenth day of December, 1874. The plaintiff further avers that the bondholders, formerly of the Little Rock and Fort Smith Railroad Company, are the identical and same persons, who became and are now the corporation that compose the defendant, Little Rock and Fort Smith Railway, and who completed the construction of the said railroad from Perry's Station to Clarksville, as aforesaid; and further states that the said corporators of the defendant were, all of them, large stockholders in the Little Rock and Fort Smith Railroad Company, and owned the majority of stock of said railroad company.

"The plaintiff further states that after the defendant had duly organized, as aforesaid, they accepted the results and enjoyed the benefits of his said labor, materials furnished, supplies advanced, and moneys on account, as aforesaid, and agreed to pay him therefor, and on the twenty-sixth day of October, 1876, did pay thereon the sum of $1,770, leaving due and unpaid thereon the sum of $8,053.77, with interest as aforesaid.

II. "The plaintiff further states that the defendant is in-

debted to and owes him the just sum of $109.20, on account of labor done, materials furnished, advances and money laid out and expended for and in the interest of said defendant, at its special interest and request; the items whereof will more fully appear from an account herewith filed, marked Exhibit 'B,' and that no part thereof has been paid by the defendant, or any person for him, and that the same is due, with six per cent interest thereon, per annum, from September 20, 1877."

Prayer for judgment for debt, cost, and other relief.

EXHIBIT A.

LITTLE ROCK AND FORT SMITH RAILWAY

In Account with J. H. PERRY.

1873.		
Feb. and March.	To 11,315 cross-ties at 30c....	$3,394.50
	By cash on same.....	270.00
	To balance due on cross-ties..	$3,124.50
June 30.	To building depot at Russellville, Ark..	$1,600.00
	To running account from January, 1873, to July, same year.....	4,829.22
		$6,429.27
	To amount brought forward.....	$9,553.77
1875.		
Oct. 26.	By cash.....	$1,500.00
	Total amount due October 26, 1875....	$8,053.77

EXHIBIT B.

LITTLE ROCK AND FORT SMITH RAILWAY

To J. H. PERRY, *Dr.*

1876.		
April 10.	To hauling fruit trees to farm and caring for same	$ 10.00
June 6, 7, 8.	To three days' attendance as a witness at Little Rock	6.00
	To mileage	7.50
Sept. 20.	To twenty cords wood at $2	40.00
1877.		
Dec.	To wood platform	23.50
	Total amount	$ 87.00
1875.		
Jan.	Paid Kimball & Perry, amount of overcharge.	22.20
		$109.20

The defendant answered specifically denying every material allegation in the complaint. Upon the trial before a jury, the plaintiff proved that, "in January, 1873, the Little Rock and Fort Smith Railroad Company had, through means derived from the sale of certain bonds of said company, secured by two mortgages executed by said company before that time, one upon the railroad then completed and to be completed from Little Rock to Fort Smith, and all the rolling stock and personal property appertaining thereto, for the sum of three millions five hundred thousand dollars, and the other to secure four millions of dollars of such bonds upon the congressional land grant belonging to said company, completed, or caused to be completed, the said railroad from Argenta to Perry's station, a distance of sixty-five miles, but had failed, become insolvent, and work upon the building of said road had

ceased at that point. That, by provisions of the act of Congress of February 9, 1853, granting said land to said company, and other acts of Congress supplemental thereto, it was required that twenty miles more of said railroad, from Perry's Station mentioned, should be completed by the nineteenth day of May of that year, or in default thereof, such land grant along the line of the road not completed would become forfeited to the United States, and that, unless twenty miles still further west should be built by the nineteenth day of May, 1874, all lands along the line of the road not completed, would likewise revert to the government. That certain persons in Boston, who had purchased and were holders of said bonds so secured by the mortgage of said company upon all of said lands, to-wit: Elisha Atkins, Benjamin F. Bates and others, entered into an agreement with the President and Directors of the said Little Rock and Fort Smith Railroad Company to subscribe and advance sufficient money to complete the said line of road from said Perry's Station to Clarksville, a distance of forty miles, with a view of protecting and increasing the security of the said land mortgage by saving the said land grant from such forfeiture. That said bondholders did subscribe and advance sufficient money so to complete the said road to Clarksville, to-wit, the sum of $50,000 and upwards. That, pursuant to such agreement with said company, and in order that said fund might not be misapplied, but might be faithfully appropriated to the building and completion of said line of road, one George Everett, of Boston, and who was also a holder of said land bonds, was employed and authorized to expend the said money and cause the same to be used and paid out in the work of completing the said line of road. That the said Everett, in performing the said work of completing the road, acted as agent for all parties concerned in the said railroad. That the said Everett, in January, 1873,

let the contract for completing the said road to a company composed of S. B. Beaumont, A. P. Curry and W. S. Oliver, who proceeded to lay down the track and complete the said road to Clarksville, and were paid according to the terms of their contract by the said Everett, with money subscribed by the parties in Boston, and during the completion of the said work, the said plaintiff, Perry, who was at that time acting as the agent of the Little Rock and Fort Smith Railroad Company, at Perry's Station, with his own means, built and constructed the depot building and store-house, at Russellville, upon the railway company's right of way, which was built under an agreement with the said Everett that he should be paid for the said building. That said Perry was the owner at that time of eleven thousand three hundred and fifteen cross-ties, which were piled up along the line of said road, and the said Perry entered into an agreement with the said Everett to sell him the said ties at the sum of three thousand three hundred and ninety-four dollars and fifty cents, which was thirty cents apiece, and the said Everett caused the said ties to be laid down and used in making the track of said road; but the said Everett, though he promised to pay for the said ties, never did pay therefor, except the sum of two hundred and seventy dollars, leaving a balance due of three thousand one hundred and twenty-four dollars and fifty cents." And thereupon the plaintiff, to prove the item of four thousand eight hundred and twenty-nine dollars and twenty-seven cents in his bill of particulars, exhibited with his complaint, produced in court his bill of particulars, comprising a running account amounting in the aggregate to that sum, and offered to read the same in evidence.

The account is long, containing a great many items, and is not necessary to be inserted here. The defendant objected to its being proven and read as evidence on the ground, "that the said defendant was taken by surprise thereby, the

same never having been filed in the cause nor exhibited to defendant;" but the court overruled the objection and permitted the same to go as evidence to the jury. The plaintiff then proved, by his own evidence, "that the supplies, material and money mentioned in the said bill of particulars were received by Everett, and he (Everett) agreed to pay the same, but had failed to do so. That the said amount exhibited with his complaint, comprising the items of $3,124.50 for ties and $1,600 for building depot at Russellville—$4,829.27, the aggregate of said running account, was a just claim against the said Everett, was contracted by him, and he agreed to pay the same, but never did pay it or any part of it. Said Perry said to the said Everett, at the time said debts were contracted, that he would not advance ties and material to the Little Rock and Fort Smith Railroad Company, because the company was insolvent and had failed to pay him a debt they already owed him, and that said Everett represented to him that it was not the Fort Smith and Little Rock Railroad Company that was doing the work; that said Everett represented the bondholders of said company, and they (the bondholders) were furnishing the money to do the said work, and were completing the said road to Clarksville in order to save the land grant to said road, without which the said bondholders had no interest in Arkansas, and that they (the bondholders) were doing so with a view of taking charge of the road themselves;" and thereupon it was admitted by the parties "that the bondholders of the Little Rock and Fort Smith Railroad Company, in April, 1874, caused bills in chancery for the foreclosure of the mortgages on said road and lands to be filed in the Circuit Court of the United States for the Eastern District of Arkansas, at Little Rock, and that on the sixteenth day of November in that year decrees were rendered in that court foreclosing said mortgages and ordering a sale of the whole of said mortgaged

property; such sale to take place at the door of the court-house of said United States Court, in Little Rock, on the tenth day of December, 1874. That such sale was made accordingly, and the property was sold to the highest bidder, for cash in hand. That the property was purchased by one George O. Shattuch, Francis H. Weld and George Ripley, as the agents and attorneys of persons holding a majority in value of the road and land bonds of the said railroad company, and such purchase was made for the benefit of all the bondholders who should, within one year, surrender their bonds and take stock therefor in a new company to be formed, under the provisions of the general railroad law of Arkansas, and of an act of the Legislature of Arkansas, supplementary thereto, approved the ninth day of December, 1874. That, on the nineteenth day of December, 1874, the said purchasers, and their associates, did organize themselves into a new joint stock company for the purpose of owning, completing and operating the said railroad, so purchased, in pursuance of the provisions of the general railroad law, as amended by the said act of ninth of December, 1874, under the name and style of the Little Rock and Fort Smith Railway, which is the defendant. That said company was incorporated on the nineteenth day of December, 1874, and never had any existence previous to that time. That, on the organization of said company, all the property so purchased under the decree foreclosing the said mortgages, was converted into stock at an estimated value, and such stock was put upon the market for sale. That a large majority, though not all of the holders of the railroad and land bonds secured by the said mortgages, did afterwards surrender their bonds to said company, and did receive in lieu thereof stock in the new company, and thereby became stockholders in said company and part owners of the said railroad and lands formerly belonging to the Little Rock and Fort

Smith Railroad Company, and many of whom still continue to be said stockholders and owners. That after said Little Rock and Fort Smith Railroad was purchased by said bondholders, those who had furnished the means to build said road-bed from Perry Station to Clarksville, in 1873, were reimbursed in bonds of the new company for such advances. And thereupon, the plaintiff further testifies, as a witness, that he had at divers times presented his said claim to Elisha Atkins, who was a large bondholder of the old company, and to other bondholders who have since become stockholders in the defendant company, when they were here from Boston, and urged upon them to pay his said claim, or to make some provision for the settlement thereof, and they had promised to do so, but had failed. That after the organization of the defendant company, he presented the claim to Joseph H. Converse, the President of the company, and he verbally promised to pay the same or have the same settled in some way, but kept putting him off from time to time until at last the said Converse, representing that the stock of the defendant company was, or would be, worth dollar for dollar in the market, he did agree with the said Converse to take $1,500 in cash and $5,500 in the stock of defendant company, and said Converse did pay him the sum $1,500 cash and draw an order upon the Treasurer of said company, in Boston, for the stock, which he accepted. That this settlement was to be in full for all claims which he (plaintiff) had or held against the defendant company, or the Little Rock and Fort Smith Railroad Company, or any of the bondholders thereof; and the plaintiff, upon the receipt of such order for stock, gave said Converse a receipt in full against all such claims, but that, finding that such stock was not worth dollar for dollar, but was worthless, or nearly so, he applied to said Converse to have said agreement rescinded, so far as the payment of the stock was concerned, and that

part of the agreement was rescinded, and the papers so given were returned to the parties respectively, and the said Converse has ever since failed and refused to pay anything. That the $1,500 cash payment was not rescinded, because it was the amount which plaintiff had agreed to take for the depot house and the depot house was given up upon such payment being made."

The plaintiff then proved that the items of his account stated in the second paragraph of his complaint were correct.

Among the instructions, given by the Court to the jury for the plaintiff, were the following, to which the defendant objected:

"*First*—If the jury find, from the evidence, that the bondholders of the Little Rock and Fort Smith Railroad Company, or any number of them constituting a majority of the defendants, according to the amount of stock in value, by themselves or their agents, duly authorized, contracted with the plaintiff for the materials and supplies, as claimed in the first count of plaintiff's complaint, with a view of organizing themselves into a company, and did afterwards organize themselves into what is now the Little Rock and Fort Smith Railway, the defendant, and that the plaintiff did furnish the same under said contract, the defendant thereby became liable to the amount thereof so furnished, and that the defendant accepted the same by themselves or by agents, and enjoy the benefits thereof, they will find for the plaintiff the amount they may find to be due therefor.

"*Second*—If the jury believe, from the evidence, that the defendant, the Little Rock and Fort Smith Railway, subsequent to its organization, accepted the results and enjoyed the benefits of the advances, supplies and materials furnished by the plaintiff, as charged in the first paragraph of

the complaint, and promised to pay therefor, they will find for the plaintiff."

For the defendant the court gave the first and tenth of the following instructions, and refused the others:

"*First*—That the defendant, the Little Rock and Fort Smith Railway, is a different person in law and fact from that of the Little Rock and Fort Smith Railroad Company, nor liable in any manner for its debts by virtue of its organization, nor by virtue of its having purchased the property formerly owned by that company, under decree of Chancery, foreclosing a mortgage executed by that company; that such debts are debts of a third person, as to this defendant company, and to authorize the jury to find against the defendant upon such debts it must be proved that the defendant assumed to pay such debts by a contract valid in law for that purpose.

"*Second*—That the defendant company is also a different person in law and fact from the bondholders or stockholders of the Little Rock and Fort Smith Railroad Company, or from its bondholders or stockholders either individually or collectively, and cannot be made liable for any debts or undertakings of any such bondholders or stockholders, except by a valid contract for that purpose by the company after its incorporation.

"*Third*—That under the law of its incorporation defendant company is wholly incapable of binding itself or becoming obligated to pay the debts of third persons, except by resolution of its board of directors or the resolution of a stockholders' meeting in regular session; that neither the president nor any of its officers has individually and separately any power to make any contract binding upon the company for the payments of any such collateral debts.

"*Fourth*—That unless the jury find from the evidence

that the plaintiff's cause of action was originally contracted with defendant company, they will find for the defendant, unless they further find that the defendant company assumed to pay the same by a regulation of its board of directors, or by a resolution of a regular stockholders' meeting.

"*Fifth*—That evidence showing that the plaintiff's cause of action was originally contracted with the Little Rock and Fort Smith Railroad Company, or by any and all persons holding the bonds of said company, secured by mortgage upon all the property of said company previous to the incorporation of the defendant company, and with the view of protecting or increasing their mortgage security by saving the land grant, is not evidence tending to show any obligation or liability on the part of defendant company to pay such claim, nor does evidence tending to show that the president or other officers of said defendant company verbally undertook or promised to assume and pay such claim, tend to prove an obligation or liability on the part of said defendant to pay such claim, and the jury will disregard all such evidence as immaterial.

"*Sixth*—That there is not evidence, sufficient in law, to sustain a verdict for the plaintiff upon the first count or paragraph of the plaintiff's amended complaint, filed on the twenty-sixth of September, 1879, and the jury must find for the defendant upon that paragraph or count.

"*Seventh*—That if the jury believe, from the evidence, that the defendant company, by its president or other officer, did verbally agree to pay the plaintiff's claim, contracted with other parties prior to the incorporation of said company, such verbal agreement or promise is void by the Statute of frauds, as an undertaking to pay the

debt of a third person, and the jury must find accordingly.

"*Eighth*—The jury are instructed that the defendant, the Little Rock and Fort Smith Railway, being an incorporation duly organized under the general incorporation laws of the State of Arkansas, is capable of contracting and being contracted with; and in order to hold the said defendant liable on a contract, it must appear that the contract was made with the said defendant incorporation, and not with the individual members of said incorporation in their private capacity; and in order to hold this incorporation—the defendants in this action—liable for the contracts of the members thereof, made in their individual or private capacity, before said incorporation was organized, it must appear that the said incorporation, after its organization, agreed and promised to carry out and perform said contract.

"*Ninth*—The jury are instructed that they will find the issues in favor of the parties producing the preponderance of proof, and that the *onus probandi*, or burden of proof, is on the plaintiff, and therefore the plaintiff must produce the greater weight of evidence before the jury can find in his favor.

"*Tenth*—The jury, in determining the weight of the evidence, will take into consideration the interest the witnesses have in the suit, as well as their manner of testifying."

The jury found for the plaintiff. The defendant filed a motion for new trial, because: 1st. The verdict was contrary to law and the evidence. 2nd. Not warranted by the allegations of the complaint. 3rd. The defendant taken by surprise in the admission as evidence of a bill of particulars, of which he had no notice. 4th. Error in giving and refusing instructions by the court.

The motion was overruled. The defendant then filed its bill of exceptions, and appealed.

Clark & Williams, for appellant:

This case does not come within the principal that a corporation is bound by contracts made with the promoters or getters-up of the company previous to its charter or organization, when such contract is in behalf of the company and inures to its benefit. *Edwards* v. *R. R. Co.*, 1 *Mylne & Craig*, 650; *Vauxhall Bridge Co.*, v. *Earl of Spencer*, *Jacob* 64; *Gooding* v. *R. Co.*, 15 *Eng.*, *L. & Eq.*, 596; *Preston* v. *Railway Co.*, 7 *Eng. L. Eq.*, 124; *Hawks* v. *Railway*, 15 *Eng. L. & Eq.*, 358, *S. C.*; *Whitman* v. *Wyman*, *S. C.*, *U. S.*, 10 *Cent. Law Journal*, 476; *1st Redfield on Railways*, *sec.* 5, *p* 16. These cases show that to make the corporation liable, a valuable consideration should have passed to the promoters; the contract should be intended to inure to the benfit of the proposed corporation, and that the corporation receive the benefit of the contract. An obvious corollary of this is, that the parties contracting should be the promoters of the corporation sought to be made liable, and that the corporation should be afterwards chartered. But there was already a corporation in existence who owned the road, and the contract was designed to and did inure to the benefit of that company.

Even if the bondholders did make the contract, and did afterwards organize and take possession, the appellant would not be liable, unless such subsequent organization and possession was in some manner the effect of the contract; but Everett could not bind the bondholders by merely assuming to be their agent. See *Carter* v. *Burnham*, 31 *Ark.*, 212; *Campbell* v. *Hastings*, 29 *Ark.*, 512.

The link is wanting to establish that the contract was one *promoting* such organization.

When there is no evidence to sustain a verdict, or when there is some evidence, thought not sufficient to sustain the verdict without a shock to our sense of justice, the court should instruct as in case of non-suit. We refer to authorities cited in our briefs in *L. R. & F. S. R. Co.* v. *Owen Duffie*, and *same* v. *Parkhurt*, and to *Oliver* v. *The State*, *MS. op.*, *this court*.

The company was incapable, in law, of binding itself to pay the debts of third persons, except by resolutions of its board of directors, or a meeting of stockholders, and a verbal promise of its president was void, as within the Statutes of fraud. The payment of debts of third persons is *ultra vires*. *State Bank* v. *U. S. Pottery Co.*, 34, *Vt.*, 144; *Smeed* v. *Indianapolis R. R. Co.*, 11 *Ind.*, 144; *Bank of Genessee* v. *Patchin*, 3 *Kern.*, 13 *N. Y.*, 309; *Angel & Ames on Corp.*, 256, 258.

No copy of the account, *i. e.*, a copy of the items, the particulars of the account, was filed as required by *sec.* 4599 *of Gantt's Digest*, and the defendant was taken by surprise.

Under the common law a plaintiff could not state that defendant was indebted to him in a *running account*, and then be permitted to prove any items he pleased. Such a complaint is subject to demurrer; evidence under it may be objected to, or judgment arrested. The rule is the same under our Code. *Newman Pl. & Pr. pp.* 258, 266, 659; *Clark* v. *Finnell*, 16 *B. Mon.*, 355; *Francis* v. *Francis*, 18 *B. Mon.*, 27; *Fible* v. *Caplinger*, 13 *B. Mon.*, 465; *Higgins* v. *Freeman*, 2 *Duer*, 65; *Burnham* v. *DeBoisse*, 8 *How.*, 159; *Hentsch* v. *Porter*, 10 *Cal.*, 555; *Ivany* v. *Carlien*, 30 *Mo.*, 142; *Masters* v. *Freeman*, 17 *Ohio St.* 323.

U. M. Rose, for appellee.

The English authorities, without exception, concur in supporting the rule, that the contracts of the projectors of a corporation, when the benefits of them are accepted by the company after its organization, are binding upon the corporation. *Edwards* v. *Grand Junction R. R.*, 1 *Mylne & Craig*, 650; *Preston* v. *Liverpool R. Co.*, 7 *Eng. L. & Eq.*, 124; 1 *Simons N. S.* 586; *Stanley*, 2 *C. & B. R. Co.*, 9 *Simons*, 264; *Webb* v. *D. L. & P. Railway*, 9 *Hare*, 129.

If this cause should have been in Chancery, the error is waived by acquiescence of parties. *Gantt's Digest, secs.* 4461, 4463, *and* 4464; *Talbott* v. *Wilkins*, 31 *Ark.*, 411. Besides the American cases held that the liability exists equally at law and in equity. 1 *Redfield on Railways, p.* 16, *sec.* 5; *Field on Corp. sec.* 221; the leading American case of *Low* v. *C. & P. Rivers R'way*, 45 *N. H.* 375; reported also 1 *Redfield Amer. Railway cases, p.* 1; *Cataivissa R. R. Co.* v. *Titus*, 49 *Penn. St.*, 277.

In *Grape Sugar Co.* v. *Small*, 40 *Md.*, 395, the corporation was held to be estopped from denying its liability, even though it did not appear that the company had authority to make such contract, and in *Whitney* v. *Wyman*, 101 *U. S.* (11 *Otto.*), 392, it was held that where the projectors of a corporation which had no power to do business, being incomplete, purchased machinery, afterwards used by the company, the corporation was liable.

Hall v. *Vt. & Mass. R. R.*, 28 *Vt.*, 401, is sometimes cited against us, but is, in reality, strongly in our favor. There the services were rendered gratuitously, merely in expectancy that the building of the road would enhance property, etc., but the company was held liable for services rendered in procuring stock-subscriptions necessary to its

organization. See, also, *Episcopal C. Society* v. *Episcopal Church*, 1 *Pick.*, 371.

The defendant is liable on the contract, though made on its behalf by an unauthorized agent, having ratified it by receiving the benefits.

It is insisted that the president had no right or authority to ratify the contract, but *omnia presumuntur rite et solemniter esse acta*, and it devolved on defendant to prove the want of power. The board of directors must have been informed of the payment by its president, of the $1500.00 to Perry, and since they in no way objected, they ratified his action. *New Hope and D. Bridge Co.* v. *Phœnix Bk.*, 3 *Comst.*, 156; *Sherman* v. *Fitch*, 98 *Mass.*, 59.

Where one has actual charge and management of the general business of a corporation, with the knowledge of its directors, the corporation is bound by his contracts, made on its behalf, in the course of the business, without other evidence of actual authority. *Goodwin* v. *Union Screw Co.*, 34 *N. H.*, 378.

Having received the benefit of the contract, the company is estopped to deny that Everett was its agent, and liable. *Field on Corp.*, *sec*, 194; *Foster* v. *LaRue*, 15 *Barb.*, 323; *Moss* v. *Rossir L. M. Co.*, 5 *Hill*, 137; *Merchants' Bk.* v. *Central Bank*, 1 *Kelly*, *Ga.*, 428; *Abbott* v. *School Dist.*, 7 *Greenl.*, 96; *Perry* v. *Simpson W. Co.*, 37 *Conn.*, 534; *Gooday* v. *C. & S. V. R. Co.*, 15 *Eng. L. and Eq.*, 598–9.

As to the liability of corporations on contracts of unauthorized agents subsequently ratified, see further, *Hooker* v. *Eagle Bk.*, 30 *N. Y.*, 36; *Angel & Ames on Corp.*, *sec.* 304; *Fleckner* v. *Bank U. S.*, 8 *Wheat.*, 363; *Hoyt* v. *Thompson*, 19 *N. Y.*, 218–9; *Peterson* v. *Mayor*, 17 *N. Y.*, 453–4; *Bank U. S.* v. *Dandridge*, 12 *Wheat.*, 64; *Hayward* v. *Pilgrim Society*, 21 *Pick.*, 270; *Stuart* v. *L.*

& N. R. R., 10 *Eng. L. and Eq.*, 63; *Renter* v. *Elec. Tel Co.*, 37 *Eng. L. and Eq.*, 189; *School Dist.* v. *Richardson*, 23 *Pick.*, 70; *Conso* v. *P. H. I. Co.* 12 *Barb.*, 53.

A new trial will not be granted on the ground of surprise unless the motion is supported by affidavit. *Sec.* 4691 *Gantt's Dig.;* and the party seeking must show surprise "which ordinary prudence could not have guarded against." *Gantt's Dig.*, *sec.* 4688.

Defendant not having moved for a more specific statement of the account, which it could have procured at any time, waived it.

OPINION.

EAKIN, J. The complaint is intended to set forth a cause of action at law, for services rendered, material furnished, money expended, etc., by Perry, for and in behalf of the defendant railway company, for which it afterwards promised to pay. The promise is the gist of the action, and its denial makes an issue exclusively cognizable at law. The history and circumstances of the transaction are set forth in the first paragraph of the complaint, not as grounds upon which the plaintiff directly seeks equitable relief, but, rather, to show the consideration of the promise, the inducement thereto, and the facts from which a promise might be implied. It cannot be said, from the face of the complaint, that the plaintiff "should have adopted proceedings in equity," which would have authorized the defendant, under *sec.* 4464 of *Gantt's Digest* (second clause), to move for a transfer. Nothing was waived by failure to make such motion, and the defendant has the right to insist that the plaintiff shall stand on the ground he has chosen, and succeed upon such principles alone as are cognizable at law.

1. PLEADING AND PRACTICE:

Perhaps the most perplexing questions, and least satisfactory decisions (not always in harmony with each other), which have sprung from the inauguration of the so-called system of American procedure, regard the kind and measure of relief which may be afforded in cases where the proof elicted under one mode of proceeding, reveals matter relievable under the other. This is especially the case in the few States which, like Kentucky and Arkansas, have adopted the Code system generally, with the interpolation of an effort still to preserve the distinction between proceedings at law and in equity. It is very hard to do that without separate Courts of Chancery, in the face of an express provision that an error as to the kind of proceedings shall not cause an abatement or dismissal of the action. Still, it is the duty of the courts to make the effort, and preserve the distinction, so far as they may be able, in harmony with all parts of the Code.

Equitable relief in actions at law.

The decisions in those States are, as yet, few, and no set of rules can be formulated from them, entirely satisfactory to the profession; but in our State it is now settled that relief of a purely equitable nature cannot be given in an action properly begun and prosecuted at law. This has been illustrated in a striking manner, with regard to mortgages of property, not in *esse*. They have been treated in actions at law as wholly void, but have been sustained in equitable proceedings. See *Apperson* v. *Moore*, 30 *Ark.*, 56; *Tomlinson* v. *Greenfield*, 31 *Ark.*, 557; *Roberts* v. *Jacks*, *Ib.*, 597 The case of *Talbot et al* v. *Wilkins et al*, 31*st Ark.*, 411, is not in conflict with this ruling. The Court expressly held that the case being at law to enforce subrogation, a purely equitable right, the defendants might have moved to have the action changed to equitable proceedings, and that the error was waived by neglect to do so. This does not apply to a case properly brought at law, in which no such

motion could be sustained. It is unreasonable that a defendant should be held to a court of law by the allegations of the complaint and be there subjected to the administration of principles purely equitable; but if he has an opportunity to have the change effected and neglects it, he should not complain. Even this practice has not, in all cases, been allowed; but the rule has been so modified as to prevent parties, by consent, from indulging in such proceedings as would, if common, entirely obliterate the distinction between law and equity; and a *special proceeding* at law, founded upon common law or statute, cannot be made, even without objection, to subserve the purposes of a bill in equity. In such plain and palpable cases of perversion of remedies, it is the duty of the Circuit Judge to interfere and refuse relief, unless the complainant shall approach the court in proper fashion. Thus it was held in *Crawford, Auditor*, v. *Carson (Ex.) et al*, 35 *Ib., Ark.* 565, which was an effort to make the writ of mandamus serve the purposes of an injunction, that "it is the duty of the Courts in clear cases, where the entertainment of a writ in the form presented, would lead to a confusion of the boundaries between proceedings at law and in equity, *and between ordinary actions and special proceedings*, to refuse of their own motion to do so." That case rested upon its peculiar nature. In ordinary civil actions it may now be considered as the settled rule of this court to be observed hereafter, that actions of a purely equitable nature and so appearing by the complaint, when brought at law, *may* be transferred to the equity side on motion of either party, or by the court on its own motion, by virtue of its inherent power over its proceedings and that the courts should be free in the exercise of that power to sustain the legislative intent in retaining the distinction, amidst the wreck of all forms of action; but that the

2. Transfer of cause from law to equity docket.

failure to do so, without a motion by parties for the purpose, is not error for reversal.

With regard to actions begun in Chancery, which upon their face appear to be exclusively and wholly cognizable at law, as, for instance, a bill to obtain judgment upon a note, or an ejectment bill without equitable elements, the rule is the same. It is always, however, to be borne in mind that if there be any equitable element to which the jurisdiction of a Court of Chancery may attach, then by the old doctrine, the court in the same proceedings may administer all legal relief connected with the subject matter and essential to do full and complete justice at once to all parties before it.

3. Legal relief, when administered in equity.

But when, as in this case, the action is purely legal upon its face, and properly brought at law, it must be decided on legal principles alone. It follows that the plaintiff cannot be sustained in his judgment, unless he has shown, by evidence, either an express promise of the defendant Railway Company, valid in law, to pay his claim, or circumstances from which, according to *legal* principles, a promise may be implied.

No equity at law in legal actions.

The plaintiff relied, and the court below seems to have acted upon, a principle which grew up in the English Courts of Equity, as an Equity doctrine; and which, like the vendor's lien, contravening the strict rules of law, was adopted, *ex aequo et bono*, to prevent fraud and imposition, and do substantial justice. It amounted to this: That where the formation of a corporation was in contemplation, and the promoters of the corporation were taking initiatory steps to perfect its organization, and obtain a charter, and provide in advance the means necessary for its successful operation, all contracts made by such promoters, for the benefit of the future corporation, and which were reasonable and proper to put it in operation, and the benefits of which were after-

4. R. R. Companies: When bound by contracts of projectors.

wards accepted by the corporation, became binding on the corporation without any formal contract to pay.

A brief notice of some of the cases cited by the attorney for the appellee, will render the nature and scope of the doctrine more intelligible.

The leading case is that of *Edwards* v. *The Grand Junction Railway Company*; 1*st Mglne & Craig*, 650. The promoters of the Railway had a bill pending in Parliament for their incorporation, which had passed the Commons and gone to the House of Lords. In the latter house, the Trustees of a certain Turnpike road, whose line would be crossed, had prepared and were about to present a petition in opposition to the bill. After some negotiations between the committees on behalf of the projectors, and the Trustees of the Turnpike, it was agreed between them that the latter should withdraw their opposition to the bill, in consideration that the railroad crossing should be carried under the turnpike by constructing a bridge for the road of a certain agreed width and structure. It was desired by the turnpike trustees that these conditions should be made provisions of the charter, but as the amendment would have involved new delays in the then advanced state of the bill, the trustees were induced to waive this demand, by the written undertaking of one of the promoters in behalf of all, to execute an agreement to the effect of the desired clauses, and to have the same confirmed by the company, as soon as circumstances should permit. The bill was allowed to pass, which provided for crossings of any Turnpike roads by bridges of a less width. The Railway Company was proceeding to construct a bridge at the crossing of the turnpike of complainants as authorized by the charter, but of less width than had been stipulated in the compromise. The Turnpike trustees applied for an injunction which was granted. Upon a motion before the Lord Chancellor to dis-

solve, he held in effect, that conceding there was no legal liability on the company, on account of a contract made before its existence, yet there was an equity binding it not to use its chartered power, obtained through and by means of such an agreement with the proprietors, who were pressing the bill in violation of its terms. The injunction was continued. This is a case where the agreement was made expressly for the benefit of the company, and under a pledge that the company when organized would carry it into effect.

The case of *Stanley* v. *Birkenhead Railway Co.*, 9 *Simons*, 264 (reported in 16 *Eng. Ch. Rep'ts.*, 264) was one in which the projectors of a railroad, seeking a charter and fixing their line, agreed with a landed proprietor, on behalf of the proposed company, in consideration that he would withdraw his opposition to their bill, to pay him 20,000*l* for the portion of his estate required by the road.

A bill for specific performance was brought against the company, after its complete organization, or, rather, against the company whose projeetors had expressly adopted the agreement, and there was a demurrer for want of equity. The vice-Chancellor held that the case was a very simple one; that the company was bound by the equity; and overruled the demurrer. In this case, as in the former, it appears that there was an existing organization for the purpose of promoting the railroad, and that the contract was made in the course of preliminary proceedings, necessary to obtain the franchises, and put the road into operation.

The cases of *Preston* v. *The Liverpool, Manchester, etc., Railway Co.*, 7 *Eng. L. & Eq.*, 124; and *Webb* v. *The Direct London and Portsmouth Railway Company*, 9 *Hare.*, 129, are of similar import. Whilst the equity is, in all of them, readily acknowledged, under the circumstances, they are all cases where the projectors were acting under a preliminary organization to obtain charters and perfect the

scheme, and the contracts, though made with the projectors, were properly *on behalf of* the intended companies, and with the view entertained by both parties, at the time, of having them adopted by the companies, when perfected and empowered to do so. The equity is based upon the ground that, under such circumstances, it would be a fraud upon the vendor, or the person withdrawing an opposition, if the company, which had been thus pledged in advance by its creators, and obtained its franchises, through such pledges, should be allowed to violate them. None of the cases go to the extent of holding that any and all contracts made with the projectors of a road, upon their *individual* responsibility, and without any mutual expectation that they would form a company, which would assume the contract, would nevertheless be binding on a company, if the persons bound should afterwards organize themselves into a corporation, and put into it the property acquired, or the results of the services rendered. Such a ruling would destroy all distinction between the liabilities of corporations, and those of its individual members, and it may be added, that so wide and sweeping an equity would be very apt to deter any new subscriptions of stock under any charter. Of course there is no question but that *liens* upon property, in the hands of individuals, would be followed into the hands of a corporation which they might organize, and enforced against it, but that is not now the question.

The rule as formulated by Redfield.

The rule has been freely adopted in the American courts, upon the English authorities, and with the same limitations. The rule is thus defined by Mr. Redfield, in his work on the *Law of Railways, vol.* 1., *p.* 16: "Whenever a third party enters into a contract with the promoters of a railway, which is intended to inure to the benefit of the company, and they take the benefit of the contract, they will be bound to perform it, upon the familiar principle that one

who adopts the benefit of an act, which another volunteers to perform in his name, and on his behalf, is bound to take the burden with the benefit." This is a very well formulated expression of the rule, and on all points carefully guarded to conform with the decided cases, and limit its scope. It has also, in some cases, been held in America, that a corporation is liable at law, upon an implied *assumpsit*, for services rendered before it came *in esse*, but which were necessary to perfect its organization, and which, after such organization was perfected, it accepted, and the benefits of which it enjoyed. See *Low* v. *Ct. & Passumpric Railuay*, 45 *N. H.*, 375, which was a suit for services rendered in procuring stock-subscriptions. This is certainly reasonable, with regard to services rendered for the direct object of perfecting the organization.

5. CORPORATION: When bound for services rendered before its existence.

From all the authorities, it seems clear that, in order to recover, in an action at law, the plaintiff must show either an express promise of the new company, or, that the contract was made with persons then engaged in its formation, and taking preliminary steps thereto, and that the contract was made on behalf of the new company, in the expectation on the part of plaintiff, and with the assurance on the part of the projectors, that it would become a corporate debt, and that the company afterwards entered upon and enjoyed the benefit of the contract, and by no other title than that derived through it. From these circumstances an affirmance would be implied. Whether equities might arise under other circumstances, is a matter to be considered when duly presented in a Chancery case. No authorities have gone the length of holding that any contract made with individuals, exclusively upon individual credit, will become the contract of any future corporation they may form, for the more convenient management and use of the benefits of it.

The verdict in this case seems justified, under the instruc-

tions, and saves comment on the evidence. We will consider the instructions in the light of the principles above announced.

The first and second instructions given for the plaintiff were given against the objections of the defendant. It is apparent that the first widens the liability of defendant much beyond the adjudged cases, and beyond any safe principle. It cannot be contended upon any authority, for instance, that if a number of gentlemen, with a view, amongst themselves, of organizing a corporation in the future, should buy property, and have labor done upon it, upon their individual responsibility, and should afterwards form a company and take stock for their respective shares, the vendor or laborers would thereby, in the absence of a lien, have the legal right, by virtue of a supposed *assumpsit*, to impose the obligation of payment on the artificial person, the corporation. This would be unreasonable. The corporation having given stock for the property, as well as stock to other subscribers (if any), for money paid in, would have the right to proceed unincumbered. It stands distinct from the component members, a person of itself. The creditors having no liens would have suffered no injury. They are left with the legal rights against the individuals upon which they at first reposed, and in enforcing them, may, by proper process, even reach the stock given for the property. Other elements are necessary in this action. It should appear that the view of future organization was mutual between the contracting parties, and that the labor, material, etc., were furnished, at the time, on behalf of the future company, with the view, authorized by the assurances of the projectors, that the company, when chartered, would assume the debt, as created in its behalf. In such case only would the acceptance of benefits of the contract amount to a ratification, and

implied promises at law, although there still might arise an obligation on a promise expressed and accepted.

The first instruction was erroneous and misleading. The second does not appear objectionable.

All the instructions asked by defendant were refused except the first and tenth. The first referred to the debts of the old company, and had little application; as the evidence is positive that the credit was not given to it, but exclusively to the bondholders. The tenth is a general truism.

The second should have been given. It is a clear statement of the law, considering that the contract may be expressed or implied.

The third and fourth would have been misleading, and were properly refused. Corporations may incur legal liabilities from conduct, as above indicated.

6. EVIDENCE: Competency of, when and by whom determined.

The fifth would have been improper. Whether evidence tends to prove an issue may, on objection, be determined by the court when offered. After it has gone to the jury, unless wholly irrelevant, it is the province of the jury to weigh it and determine how far it, with other circumstances, conduces to prove the issue.

7. PRACTICE: Directing jury what verdict to find, forbidden by constitution.

The sixth has been held improper by this court, under our Constitution, and we adhere to the former rulings. If there is any evidence whatever, however slight, pertinent to the issue, it should not be taken from the jury, even if the court is satisfied that it would grant a new trial, if a verdict were found upon it. The learned counsel for the appellant press this point in their brief with much force, upon the practice at common law, in the Federal Courts, and in the courts of other States. We think the positive injunctions of the State Constitution, however, settle the matter here: "Judges shall *not* charge juries with regard to matter of fact, but shall declare the law." *Art.* VII., *sec.* 23. If the juries abuse this power, there may be a new

trial; but that is quite different in its consequences, from a direction for a verdict.

8. STATUTE OF FRAUDS: Promise of corporation to pay debt contracted before its organization. (7th instruction.)

The seventh would have been misleading, perhaps, although literally correct, as an abstract proposition. Under the circumstances, it might have diverted the attention of the jury from the possible implied contract by conduct, and by use of the benefits of a contract. The refusal was not error. It would, have been better, however, to have qualified it by the insertion of "if there be no other sufficient evidence of an implied or express promise," or words to that effect.

9. Corporation not bound by contracts of its members. (8th instruction)

The eighth, although strictly correct, was subject to the same qualification, and might, as worded, have misled. It tended to divert the minds of the jury from the obligation of the company, which might attach, from circumstances as explained above, and might have led them to suppose that an express *assumpsit* was necessary. It would have been better to have inserted, or added, "either by express promise, or one to be implied in law."

10. VERDICT: Preponderance of testimony

The ninth instruction asked was clearly proper, and its refusal erroneous. It is certainly the duty of the party having the *onus* to produce a preponderance of proof; otherwise, matters should stand as they are. The degree of preponderance is immaterial, but there must be *some*, of which the jury should judge.

11. EVIDENCE: Bill of particulars when not filed as exhibit.

There was no error in refusing a new trial on the ground of surprise. The defendant might have called for a bill of particulars.

12. PRACTICE IN SUPREME COURT: Judgment on two counts, when erroneous as to one.

As to the second count in the complaint, no error is claimed, but the judgment being in *solido*, must be reversed.

On the return of the cause, the plaintiff, if so advised, may proceed upon the second count alone, and dismiss as to the first, with a view of filing a bill in equity as to the

matters therein, or he may have a new trial on the whole at law.

Reverse for the errors indicated, in overruling the motion for a new trial, and remand the cause for further proceedings, in accordance with law and this opinion.

BIRD ET AL V. JONES ET AL.

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1. WITNESSES: *Competency, under Constitution of 1874.*

In actions by the widow and heirs of an intestate for property descended from him, the defendant is not precluded by the Constitution of 1874 from testifying to transactions with and statements of said intestate in relation to the matter in controversy.

2. TAX SALES: *Assignment of certificate of purchase; effect of; erasing.*

The assignment of the certificate of purchase of lands purchased at a tax sale, vests in the assignee all the right and title acquired by the purchaser in the land; and the purchaser cannot divest the assignee or his heirs, of the title, by fraudulently procuring the certificate from the widow of the assignee, and erasing the assignment, and thereupon obtaining a deed to himself. Equity will not permit him, or one not an innocent purchaser, holding under him, to keep title so obtained.

3. ASSIGNMENT OF CERTIFICATE: *Impeachment of; burden of proof.*

Where the assignor of a certificate of purchase of tax lands denies that the assignment was for value, and asserts that it was for another purpose than to transfer the title to the assignee, he must prove it.

4. BONA FIDE PURCHASER: *Donee in deed of gift, is not; notice; forgery.*

The holder of title by deed of gift from one who has obtained the title by fraud, is not a *bona fide* purchaser for valuable consideration. Nor is one who has been informed, before purchasing the land, that the vendor had already conveyed it to another. Nor one who purchases from the fraudulent holder of the legal title, while the rightful owner is in actual possession. Nor one who obtains title from a vendor who has obtained his title by forgery.

APPEAL from *Lonoke* Circuit Court in Chancery, Hon. C. B. MOORE, Special Judge.

S. P. Hughes, for appellant:

Mrs. Simmons was not an innocent purchaser for value. Bird died in possession, and his family, since his death, continued in possession of the land. The purchaser of land in possession of a third party, takes it subject to all the equities between the vendor and the party in possession. 31 *Ark.*, 85; 30 *Ark.*, 417; 29 *Ark.*, 563.

Jones' testimony as to transactions and conversations with Nathan Bird, was clearly inadmissible. *Sec.* 2 *of the Schedule to the Constitution of* 1874.

Bird had the legal title at the time of his death, by reason of his possession, and the assignment upon the certificates, and no erasure or cancellation could divest it, and reinvest it in Jones. *Taliaferro* v. *Ralton*, 34 *Ark.*, 503; *Strawn* v. *Norris*, 21 *Ark.*, 80; *Neal* v. *Speigle*, 33 *Ark.*, 63; 3 *Washb. on Real Prop.*, 301–2, 271, 274, 275, *and cases cited in n.* 3, *to p.* 275.

The cancellation was a forgery, and neither Jones nor his assignee could take any benefit from it. *Lewis* v. *Payne*, 8 *Cowen*, 71; *Withers* v. *Atkins*, 1 *Watts.*, 237; *Menning* v. *Smith*, 2 *Barbour Ch'y.*; *Herrick* v. *Maulin*, 22 *Wendell*, 388, *Ct. of Errors*; *People* v. *Muzzy*, 1 *Denio.*, 240, 243; *Briggs* v. *Glenn*, 7 *Mo.*, 572, 575; *Hatch* v. *Hatch*, 9 *Mass.*, 307; *Barrett* v. *Thorndike*, 1 *Giff.*, 73; *Bliss* v. *McIntyre*, 18 *Vt.*, 466.

A subsequent alteration of a deed does not affect the title. 11 *M. & W.*, 778, 800, in case *Davidson* v. *Cooper*, affirmed on error. 13 *Id.*, 343.

Clark & Williams, for appellees:

Jones' evidence was competent. *Wassell* v. *Armstrong*, 35 *Ark.*, 247, 274; 1 *Greenleaf*, *sec.* 426.

On a mere preponderance of testimony this court will affirm. *Branch* v. *Mitchell*, 24 *Ark.*, 432.

English, C. J. I. The first question presented for decision in this case is, whether so much of the deposition of the appellee, William N. Jones, as relates to a transaction with, and statements of Nathan Bird, deceased, under whom appellants claim the lands in controversy, was competent evidence. The facts on which this question arises are substantially as follows:

Nathan Bird died intestate, in Lonoke county, eleventh August, 1873, leaving him surviving, Eliza, his wife, four adult children—Philip M., John H., Victoria and Alvorado E. (intermarried with John M. Barnett), and two minor children—Charles and Pauline. There was no administration upon his estate, and no guardians appointed for the two minors. The widow and heirs of Nathan Bird were the complainants in the bill, Mrs. Bird suing in her own right, as widow, and the two minors suing by her, as their next friend.

William N. Jones, his sister, Bettie Simmons, and her husband, Reuben Simmons, were made defendants.

The suit was commenced on the Chancery side of the Lonoke Circuit Court, second October, 1875; and the bill alleges that at a tax sale of delinquent lands, made by the collector of Pulaski county, on the twenty-ninth March, 1871, William N. Jones purchased the west half of the northeast quarter of section 36, T. 1, S. R. 9 W., 80 acres, for $10.13; and part of the west half of the southeast quarter, of the same section, 40 acres, for $8.62 (the lands then

being in Pulaski, but afterwards, by change of boundary, in Lonoke county), and received a certificate of purchase for each tract. That on the eighteenth April, 1873, he assigned and delivered the two certificates of purchase to Nathan Bird, for value received, and they continued in his possession to the time of his death.

That soon after the death of Bird, Jones, by deceitful and fraudulent representations, induced Mrs. Bird to deliver the certificates to him, promising to return them to her; and so obtaining possession of them, he criminally erased the assignments written upon them, procured the clerk of Pulaski county to execute to him tax deeds for the lands, upon the certificates, and afterwards made a pretended conveyance of them to his sister, Mrs. Simmons.

In support of his answer to the bill, Jones was permitted to make the following statement, in substance and effect, against the objection of complainants:

"Early in the spring of 1873, Nathan Bird was going to Little Rock, and came by where I was living, and wanted to know if I was going up to pay my taxes on the land in controversy and the land in section 25. I told him I was busy, and if he would pay my taxes for me, I would send the money by him, and he told me he would pay them for me. I gave him the money, and on his coming back from Little Rock he gave me a tax receipt for the land in section 25, and said the other, being the land in controversy, had been redeemed. In a few days after this, he came to my house and asked me to let him get my redemption money back; he said I would have to get a lawyer, and as he was owing me money, I had as well get him as any one; that he could pay me part of what he was owing me in that way. I gave him the certificates of purchase of the land in controversy, and he kept them about three months, and had gone up to Little Rock three times, as he said, and tried to get the redemption

money back for me on the land in controversy, and then came to see me twice, and said it would be impossible to get the redemption money back, unless I assigned the certificates of purchase to him, and I, not knowing any better, assigned them to him in June or July, 1873. I did not read the assignments at the time they were made, as I had full confidence in him. The assignments were made at the house of Nathan Bird. There were two certificates assigned, being for the land in controversy. Nathan Bird wrote the assignments. He was my uncle and I thought he would do an uncle's part by me. There was no other consideration for the assignments of the certificates of purchase by me to Bird than the obtaining of the redemption money through said Bird. There was no money paid me by him or any one else for him at the time the assignments were made, neither was there any agreement expressed or implied for the payment of any money to me, or for any valuable consideration to pass from said Bird to me, directly or indirectly, for the assignment of said certificate of purchase, but said assignments were for the sole purpose of obtaining the redemption money for said lands, I believing at that time that the same had been redeemed, relying on the statements of Bird to that effect."

Jones deposed to other statements as having been made by Nathan Bird to him, which have some bearing on the issues in the cause.

1. WITNESSES: Competency under constitution of 1874.

Section 2 *of the Schedule to the Constitution of* 1874, provides that:

"In civil actions no witness shall be excluded because he is a party to the suit, or interested in the issue to be tried," etc.

This establishes a general rule and removes the common law incompentency of parties to suits, and persons interested in the issues to be tried. But in a *proviso* exceptions are

made to the general rule so established in the following words:

"*Provided* That in actions by or against executors, administrators or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transactions with or statement of the testator, intestate or ward, unless called to testtify thereto by the opposite party," etc.

In this case none of the complainants sued as executor or administrator of Nathan Bird. Mrs. Bird sued in her own right as his widow, and the other complainants, claiming under him as heirs, sued in their own rights. The widow and heirs are not within the exceptions made by the *proviso* of the section to the general rule established by it.

In *Wassell* v. *Armstrong, ad. of Carroll*, 35 *Ark.*, 247, 274, the court adhered strictly to the exceptions made by the words of the *proviso*, in holding Wassell's evidence competent.

Whether the exceptions should be extended to other cases than those expressly named in the *proviso*, and which may seem to fall within its spirit, is a question for the Legislature, the subject being under its control.

See on this subject, 1 *Wharton's Law of Evidence, secs.* 464–477 *and notes*; *Bragg* v. *Clark*, 50 *Ala.*, 364.

Under the decision in *Wassell's* case it was competent for Jones to make the statements above copied from his deposition for what they were worth.

2. TAX SALE: Assignment of certificate of purchase.

II. Upon the back of one of the certificates of purchase was the following assignment:

"STATE OF ARKANSAS, }
"LONOKE COUNTY. }

"I assign the within to Nathan Bird, for value received.

W. N. JONES."

April 18, A. D., 1873.

Upon the back of the other certificate the assignment was as follows:

"I assign the within to Nathan Bird, for value received.

W. N. JONES."

April 18, A. D., 1873.

The two certificates so assigned, were in possession of Nathan Bird when he died, and after his death were in custody of his widow, until Jones induced her to deliver them to him, and he erased the assignments and procured tax deeds to be issued to himself upon the certificates.

Effect of.

The certificates were assignable in law, and the assignments, looking at them as instruments of conveyance, vested in Nathan Bird all the right and title to the lands acquired by Jones as purchaser at the tax sale, and after the time for redemption expired, the lands being unredeemed, Bird was entitled to have the tax deeds executed to him upon the certificates of purchase, and the assignments thereon, and on his death his widow and heirs succeeded to his title. *Gantt's Dig., sec.* 5195, 5206.

Erasing assignment.

Jones could not become re-invested of the title so transferred to Bird, by procuring Mrs. Bird to deliver the certificates of purchase to him, and erasing the assignments. *Strawn* v. *Norris et al*, 21 *Ark.*, 80; *Neal* v. *Siegel, ad.*, 33 *Ib.*, 63; *Taliaferro, ex'r.* v. *Ralton*, 34 *Ib.*, 503. And having, by means of such erasures, caused the tax deeds to be issued to himself, equity would not permit him, or one, not an innocent purchaser, holding under him, to keep titles so procured.

Denial of assignment, &c.

III. Jones, however, denies, in his answer, that he assigned the certificates to Bird, for value, and alleges as affirmative matter, that the assignments were made to Bird, as his attorney, to enable him to collect the redemption money on a false representation by Bird that the lands had been redeemed.

Burden of proof.

The burthen of proving this defense was upon Jones, the written assignments purporting to have been made for value. He proved it by his own deposition, after the voice of Bird was silenced by death, and he could not be heard to speak for himself. The decree of the court below was against complainants, and we have carefully examined all the evidence to see if it warranted the decree.

Jones deposed that he delivered the certificates to Bird early in the spring of 1873, and that Bird, after keeping them about three months, induced him to execute the assignments in June or July, of that year, by stating that it would be impossible for him to collect the redemption money unless he assigned the certificates to him. That at the time he assigned the certificates there was no one in the room but Bird and himself; that Phillip M. Bird was sitting on the door steps with his back towards the inside of the door.

In the material features of this statement, he is contradicted by three witnesses, as well as by the date of the assignments.

Thomas Bannon testified that the assignments were made by Jones, and the certificates delivered to Bird sometime in April, 1873; that he was then in the employment of Bird, was present, and saw him pay money to Jones for the land he had bought in Little Rock, &c.

Victoria Bird testified that the assignments were made early in the spring of 1873; that she was present, and saw Jones sign them; was not in the room all the time, and did not see any money paid, &c.

Philip M. Bird testified that the assignments were made by Jones on the eighteenth April, 1873, the day they bear date; that he saw Jones make them—that just as he walked into the room, Jones sat down to make them.

That Jones induced Mrs. Bird to deliver him the certificates, with the assignments upon them, after the death of Nathan

Bird, late in the year 1873, by disclaiming any interest in the lands, and promising to return them, (though he denies this in his answer and deposition), was proved by a number of witnesses; and no witness sustains his version of the matter.

That he erased the assignments, after so obtaining possession of the certificates, for the purpose of procuring the tax deeds in his own name, he, in effect, admits in his answer, but denies that the erasures were made feloniously, as charged in the bill, and submits that he had the right to make them. When directly asked, on cross-examination, if he erased the assignments, he declined to answer the question, on the ground that he might commit himself criminally.

If he had told Mrs. Bird that he had made the assignments to her deceased husband to enable him to collect the redemption money, as his attorney, and for no other purpose, and claimed the certificates and lands as belonging to him, it is not probable, from all the evidence, that she would have delivered them to him; but, if she had, being so advised, he would have stood much fairer upon the record now before us, than he does, and appeared more worthy of credit.

He failed to establish, by any direct evidence, except his own, which was contradicted, that the assignments were made to Bird without value, and for the sole purpose alleged by him. He proved by other witnesses vague declarations made by Bird, in his lifetime, that lands bought by him (Jones), at tax sale had been redeemed; but to overturn written evidence of title, as the assignments were, which Bird died in possession of, and which were unfairly obtained from his widow, after his death, by Jones, and an attempt made to destroy them, would require clear, unimpeachable and convincing proof, which he failed to produce.

On this branch of the case, the decree was, in our judgment, erroneous.

IV. It is claimed for Mrs. Simmons that she was an innocent purchaser of the lands for value, &c.

It appears that by deed, bearing date first of February, 1875, Jones conveyed the two tracts of land in controversy, and another tract of eighty acres, near by, to his sister, Mrs. Simmons, reciting as the consideration the love and respect that he had for his sister, and also five dollars to him in hand paid by her.

In her answer, Mrs. Simmons states that the deed was executed to her "for a good consideration in law and equity;" and again she states that it "was for a good and valuable consideration;" but she does not state what such "valuable" consideration was; nor that she paid him any money, or other thing of value for the lands.

W. T. Farguson, a Justice of the Peace, who wrote the deed, at the request of Jones, and took his acknowledgment of its execution, testified, in substance, that to his best recollection Jones came to him and said he was going away, and did not know that he would ever return, and had a preference as to whom the land should go in case he did not, and asked him to write a deed of gift. That he suggested to Jones that he should execute a deed with regular consideration, and told him that if he ever came back they could fix the matter up among themselves. To this he assented, and the deed was written as it now appears. Witness further stated that the reason why he suggested to Jones that he should execute a regular deed with consideration, was that he did not know how to write a deed of gift.

It appears that after Jones returned from Texas, he sold to his brother, at $4 per acre, the tract of land embraced in the deed to Mrs. Simmons, other than the two tracts in con-

troversy, gave him a bond for title, and received partial payments, &c.

4. BONA FIDE PURCHASER: Donee in deed of gift is not, nor &c.

It is probable, from all the circumstances in evidence, that the deed to Mrs. Simmons was simulated, or at most a deed of gift, and hence she was not a *bona fide* purchaser for valuable consideration. 2 *Story Eq.*, *sec.* 1502.

Moreover Philip M. Bird testified that he informed Mrs. Simmons, before the conveyance to her, that Jones had assigned the certificates to Nathan Bird, in his lifetime, and that his heirs were living on and claimed the lands.

Again, there was evidence conducing to prove that Nathan Bird was living on the lands as early as 1867, and at the time Jones purchased them at tax sale, and when he assigned the certificates to him, and until his death, and that afterwards his family continued in possession of the lands.

Furthermore, if Jones was guilty of forgery, in erasing the assignments, and by that criminal act obtained the tax deeds, (as to which, upon the case before us, we give no opinion), one holding under him could not be treated as an innocent purchaser. *United States* v. *Samperyac et al*, *Hempstead*, *C. C. Rep.* 118.

It is sufficient to say, upon the answer of Mrs. Simmons, and all the features of the evidence, that her defense of innocent purchaser was not made out.

The decree must be reversed and the case remanded to the court below, with instructions to render a decree in favor of complainants, divesting the title of defendants to the lands in controversy, and vesting it in complainants, as prayed by the bill, and for such further orders and proceedings as may be necessary and proper to close the case, in accordance with principles and practice in equity, and not inconsistent with this opinion.

FLETCHER ET AL V. MENKEN ET AL.

1. JUDGMENTS: *Summary, against sureties in attachment cases.*

By executing the delivery bond in attachment cases, provided for by *Sec.* 406 *Gantt's Digest,* the sureties become parties to the suit, and subject to summary judgment in the action, without service of notice or process upon them.

2. SAME: *For what amount on forthcoming bonds in attachment.*

The judgment against sureties on a forthcoming bond, provided for in *Sec.* 406 *Gantt's Digest,* must be for the value of the property, as found by the court or jury trying the case, and not the value fixed by the appraisers for taking the bond.

3. ATTACHMENTS: *Liability of surety on cross-bond and surety on the debt. Priority.*

When in an action against the principal and sureties in a note, the property of the principal is attached, and he executes a cross-bond with sureties, as provided by *Sec.* 406 *Gantt's Digest,* such sureties are, as between them and the sureties on the note, primarily liable to the extent of the value of the property attached, for the satisfaction of the debt.

4. PRACTICE IN SUPREME COURT: *Objection for want of bond in attachment suit; Affidavit insufficient.*

The defendant in an attachment suit cannot object here for the first time, that no bond was filed by the plaintiff before the writ of attachment was issued. Nor can he object here for the first time, that the affidavit for the attachment was insufficient. Such objections must first be made in the Circuit Court.

APPEAL from *Pulaski* Circuit Court.
Hon. J. W. MARTIN, Circuit Judge.

N. & J. Erb, for appellants:

I. The signature of appellants to the cross-bond, *after* it had been accepted, and the property restored "was unwarranted by law, and should not have been allowed. Delivery was as essential as signing, and when they signed the

bond, it had already been delivered, and there was, in fact, no delivery by them." *Hynes* v. *Dickinson*, 32 *Ark.*, 777; see also, *Dudley* v. *Goodrich*, 16 *How. Prac.*, 189; *Hartford Q. Co.* v. *Pendleton*, 4 *Abb. Prac.*, 40.

II. The value stated in the bond was conclusive on the court. *Drake on Attachment*, 5 *Ed.*, *sec.* 342.

III. Probst & Hilb were principal defendants, and should have been proceeded against first. *Page* v. *Long*, 4 *B. Mon.*, 121; *Goodman* v. *Allen*, 6 *La. Ann.*, 371.

The Act of November 10, 1875, expressly directs that execution shall be issued against the main defendant before it can be issued against the sureties. The act certainly contemplates that the remedy shall be exhausted against *all* the defendants before proceeding against the sureties.

Cohn & Cohn, for appellees:

Probst & Hilb's rights were superior to appellants'. *Brandt. on Guar. and Suretyship*, *sec.* 406.

The appraisement was had for the purpose of fixing the amount of the bond, and was not conclusive evidence of value. *Acts*, *adjourned sess.* 1875, *p.* 7, 8.

Appellants cannot object, in this court, for the first time, to the form of the affidavit, or that the record does not show that a bond was given before the writ of attachment issued.

English, C. J. Menken Bros. & Co. brought this action in the Pulaski Circuit Court, against Hersh Jacobi and Amelia Jacobi, as makers of a note, and Probst & Hilb, as endorsers.

The note was for $375, dated, Little Rock., Sept. 15, 1876, payable six months after date, to the order of Probst & Hilb, at the German bank, and by them endorsed.

It appears that with the complaint, plaintiffs filed an affidavit, stating, in substance, that the claim in the action against Hersh and Amelia Jacobi was for money due upon a promissory note; that it was a just claim; that they ought, as they believed, to recover thereon $375, principal, interest, etc.; and that said defendants had made, and were making, a fraudulent disposition of their property, with intent to cheat, hinder and delay their creditors, etc.

Upon this affidavit, etc., an attachment was issued against the property of Hirsh and Amelia Jacobi, levied by the sheriff on merchandise belonging to them, which was appraised at $450, and a bond executed by Hersh Jacobi as principal, and M. Stern, Caroline Stern, Richard Fletcher and John Barron, as sureties for the delivery of the property, etc.

Neither Hersh and Amelia Jacobi nor Probst & Hilb made any defense to the *personam* feature of the action, and judgment was rendered against them on the note for $375 debt, $50.04 damages, and for costs, and that plaintiff's have execution thereof.

But Hersh and Amelia Jacobi traversed the truth of the affidavit upon which the writ of attachment was sued out against their property, and on trial before the court the issue was found against them; and the court also found the value of the property attached, and rendered judgment against the sureties in the cross bond as provided by the Act of Nov. 10th, 1875 (*Acts of* 1875, *p.* 8). Fletcher and Barron, two of the sureties, filed a motion to set aside this judgment, which was overruled. They then filed a motion to modify the judgment, which was also overruled, and without taking any bill of exceptions they appealed.

I. The motion of appellants to set aside the judgment against them on the cross-bond, was on the following grounds:

1st. That the court had no jurisdiction of their persons —that they were not served with process in the action, did not appear, nor consent to the judgment, and it was rendered without their knowledge.

2nd. That they did not, nor did either of them, execute the bond on which the judgment was rendered against them, and were not liable thereon.

To this motion was attached the affidavit of Richard Fletcher, stating "that Fletcher and Barron never delivered the delivery bond herein to the sheriff or any other officer of the court; that they signed a certain delivery bond many weeks after the goods attached in the suit had been returned to the defendant, Hersh Jacobi, by virtue of the delivery bond aforesaid. That said bond had been executed and delivered to the sheriff by said Hersh Jacobi, M. Stern and Caroline Stern, on November 27th, 1879, many weeks before affiants signed the same, and which was some time in February, 1878, and that said sheriff had accepted said bond, and delivered the property to said Jacobi."

1. JUDGMENTS: Summary, against sureties in attachment cases.

1st. The bond was taken under section 406 of *Gantt's Digest*, and after the passage of the Act of November 10th, 1875, providing for summary judgment in the attachment suit against the sureties in such bond. By executing the bond, the sureties, became parties to the suit, and the statute provides for no process or notice to them before judgment. *White* v. *Prigmore* 29 *Ark.*, 208; *Callahan et al* v. *Saleski*, *Ib.*, 216.

2d. In the motion appellants stated that they did not execute the bond. In the affidavit of Fletcher in support of the motion, it was admitted that they signed the bond, but an attempt was made to show a want of consideration, by the statement, in effect, that they signed it after it had been executed by Hersh Jacobi, the principal, and two sureties,

accepted by the sheriff, and the goods attached, returned to Jacobi.

What evidence was before the court, on the hearing of the motion, appellants failed to show by bill of exceptions.

The sheriff in his return upon the writ of attachment states that he executed the writ "by taking possession of the stock of goods and merchandize of defendants H. and Amelia Jacobi, found in their place of business on Main Street, etc., in Little Rock. That thereupon, on demand of said defendants I summoned three disinterested householders, etc., to appraise said stock according to law. Said appraisement and a statement in detail of said stock are herewith returned marked exhibit A. The defendants thereupon executed cross-bond with M. Stern, Caroline Stern, Richard Fletcher and John Barron, as sureties, in the sum of nine hundred dollars, which bond is herewith returned, and I thereupon released said stock to said H. and Amelia Jacobi, etc."

2. SAME: For what amount in forthcoming bonds, in attachments.

II. After the court had sustained the attachment on trial of the issue made to the truth of plaintiff's affidavit by defendants Hersh and Amelia Jacobi, it proceeded to render judgment against the sureties in the cross-bond as follows:

"And it being shown to the court that defendants have given a bond herein under *section* 406 *of Gantt's Digest*, with M. Stern, Caroline Stern, Richard Fletcher and John Barron, as their sureties, and the court, on demand of the plaintiff's having found that the value of the property herein attached equals the amount of the debt, damages and costs, it is further considered, ordered and adjudged that said plaintiff's have and recover from said M. Stern, Caroline Stern, Richard Fletcher and John Barron, sureties as aforesaid for the amount of their said debt, damages and costs; and that in case of the property attached herein, and described in the return of the sheriff, etc., on the writ

of attachment, etc., be not delivered up by said defendants, or some person for them, to the said officer, to be sold, and it shall appear by the return of the said officer to a writ of execution issued against the property of said Hersh Jacobi and Amelia Jacobi, that the same is unsatisfied in whole or in part, that then, in that case, this judgment may be enforced against said sureties, and execution may then issue herein against the property of said sureties for so much of this judgment as shall not exceed the value of said property, and shall remain unsatisfied after a return of execution against the property of said Hersh Jacobi and Amelia, as aforesaid."

Appellants moved to modify this judgment as follows:

"*First.* That their liabilities be limited to the value of the property, as expressed in the delivery bond herein, to-wit: The sum of $400.

"*Second.* That plaintiffs be required to exhaust their remedy by execution against Probst & Hilb, as well as against said Hersh and Amelia Jacobi before execution be issued against them.

"*Third.* That in no event should their liability exceed the value of the property attached as expressed in the sheriff's official appraisement.

The *first* and *third* grounds of the motion may be considered together.

The goods attached were appraised by the three persons selected by the sheriff (John Barron being one of them) at $450, as shown by the sheriff's return. The body of the cross bond follows.

"We undertake and are bound to the plaintiffs, Menkin Bros., in the sum of nine hundred dollars, conditioned that defendant, Hersh Jacobi, shall have the property attached in this action a schedule whereof is hereto annexed, marked Exhibit A., or its value, to-wit: the sum

of four hundred dollars, forthcoming, and subject to the orders of the court for the satisfaction of the judgment in this case."

The bond was signed by H. Jacobi and the four sureties.

The schedule of the goods and appraisement annexed to the bond show that the goods were valued at $450, and not $400, as recited in the bond, which recital was evidently a clerical error.

The debt and damages adjudged against the original defendants amounted to $425.04; less, by nearly $25, than the appraised value of the goods, and leaving the last named sum as margin for costs. What the costs were is not shown, and so appellants have failed to make it appear upon the record before us that the judgment against them exceeded the appraised value of the goods attached.

Value of appraisers, not conclusive

But the court below, in rendering judgment against the sureties in the bond, was not obliged to take the value fixed upon the goods by the appraisers as conclusive.

It was the duty of the sheriff to take the bond in double the value of the property attached; and the appraisement which the Statute requires him to cause to be made, is for the purpose of enabling him to fix the amount of the bond (*Gantt's Digest, secs.* 406–7), which in this case, he fixed at $900, being double the appraised value of the goods.

But the act of November 10th, 1875, provides:

"But if the defendant [in the attachment] shall have given bond for the retention of the property attached, as provided by section four hundred and six (406), of *Gantt's Digest*, and the attachment shall be sustained, the court or jury, in addition to finding the amount of the debt or damages due to the plaintiff, shall, upon demand of the plaintiff, also *assess the value of the property attached;* and the court shall, in addition to judgment against said defendant for the

amount found due to the plaintiff, and costs, render further judgment, that in case said property shall not be delivered up to the proper officer to be sold, and said officer shall not be able to make said judgment out of the property of said defendant, execution shall then issue against the property of said sureties for so much of said judgment as shall not exceed the value of said property, which execution shall be enforced as in other cases."

In this case, after sustaining the attachment, the court proceeded, in accordance with the Statute, to assess the value of the property attached, and found it to be equal to the amount of the debt, damages and costs adjudged against the original defendants, and then rendered judgment against the sureties in the cross bond as required by the Statute.

Upon what evidence the court assessed the value of the property the record entry does not show, nor was it its province to show. Appellants might have shown that by bill of exceptions, had they paid attention to the suit after they became parties to it by signing the bond.

3. ATTACHMENTS: Liability of sureties on cross-bond and on the debt. Priority.

As to the *second* ground of the motion to modify the judgment:

We know nothing of the note in suit, except what appears upon its face, and the endorsement upon it. Hersh and Amelia Jacobi were the makers of the note. It was made payable to the order of Probst & Hilb, by them endorsed in blank, and, as the complaint alleged, delivered to plaintiffs for value. The makers and endorsers were all primarily liable to the plaintiffs. But if the plaintiffs had sued the endorsers and made the debt out of them, or if they had paid it voluntarily, they could have gone upon the makers for indemnity. As between the makers and the endorsers, the latter were, therefore, secondarily liable.

As to Probst & Hilb, the suit was an ordinary action in *personam;* no attachment was sued out against their proper-

ty—they were not defendants in the attachment branch of the suit. The attachment was against the property of Hersh and Amelia Jacobi; and their goods, sufficient in value to satisfy the debt, etc., were attached. But for the interference of appellants and their co-securities in the cross bond, the goods might have remained in the hands of the sheriff, been condemned, and sold to satisfy the judgment on the note, and thereby Probst & Hilb would have been saved harmless. But appellants, by becoming sureties, not of Probst & Hilb, but of Jacobi, procured the release of the goods. They bound themselves, by the bond, that their principal should deliver the goods in satisfaction of the judgment in the suit. Now they submit that the court below should have modified its judgment against them so that should the goods not be delivered, plaintiffs should be required to exhaust their remedy, by execution, not only against Hersh and Amelia Jacobi, the only defendants in the attachment, and whose goods were attached and released upon the bond, but against Probst & Hilb, before resorting to them for the value of the goods. Such a modification of the judgment would have been manifestly unjust to Probst & Hilb.

The court, in rendering the judgment against the sureties in the cross bond and refusing to modify it as moved by appellants, properly looked not only to the fact that Hersh and Amelia Jacobi were the only defendants in the attachment branch of the suit, and that their goods were attached and released on the bond, but noticed the further fact, apparent upon the note in suit, that they were primarily liable for the debt, and Probst & Hilb secondarily liable as between themselves. In rendering the judgment in *personam* against the original defendants on the note, however, the court also properly treated Hersh and Amelia Jacobi, the makers, and Probst & Hilb, the endorsers, as all primarily liable to the plaintiffs, and provided in the judgment that they might

have execution thereof, thereby preserving their legal right.

III. Counsel for appellants have made the point here that the transcript fails to show that appellees filed a bond before the writ of attachment issued. If no bond was in fact filed, this might have been pleaded in abatement of the writ of attachment in the court below, but it is bad practice to allow the objection to be taken here for the first time. The defendants in the attachment would hardly have traversed the truth of the affidavit and had a trial upon that issue, if no bond had been filed. It was the duty of the clerk to take a bond before issuing the writ; and it is probable that he did; but in making out the transcript omitted to include it, as no question was made about it in the court below.

4. PRACTICE IN SUPREME COURT: No bond in attachment suit.

IV. So counsel for appellants have objected here, for the first time, to the form of the affidavit. Any such objections should have been made in the court below, where appellees could have been permitted to amend the affidavit, if found to be defective in form.

Affidavit insufficient.

Affirmed.

BUSH v. THE STATE.

1. CRIMINAL LAW: *Cohabiting as husband and wife, what is.*

To constitute the offense of cohabiting as husband and wife, the parties must live together, in the same house, as husband and wife, without being married; and whether they so live must be determined by the jury, from the testimony in the case, as to their bed and board, and the intercourse and apparent relationship in which they live and bear themselves toward each other.

APPEAL from *Garland* Circuit Court.
Hon. J. M. SMITH, Circuit Judge.

STATEMENT.

At the August term, 1880, of the Garland Circuit Court, W. C. Bush and Mary Mann were jointly indicted for cohabiting as husband and wife, without being married. Bush was arrested and put upon trial.

Upon the trial, Ed. Brown, a witness for the State, testified that he had long known Mary Mann. That for eight or nine years past she and the defendant had lived in the same house. That for three months, in the summer of 1879, witness and James Brown, as employees of the defendant, resided, with their wives, at defendant's house. That Mary Mann worked about the house, washing, sweeping and cooking, and sat and officiated at the head of the table at meal times. That one morning, when witness and James Brown and their wives were sitting by the fire, Mary Mann, who was sick, sat down on the defendant's lap, but that the defendant seemed to dislike it, and she immediately got up. There were two rooms to the house, one of which contained two beds, and was occupied by defendant and Mary Mann. Witness did not know whether they occupied the same or different beds. Defendant and Mary Mann lived in the house alone, except when he had hands employed. From their conduct towards each other, any one unacquainted with them would suppose them to be husband and wife. They were not married. Defendant was a farmer. Witness visited him occasionally when not employed by him.

Thomas Brown testified that the defendant and Mary Mann had lived together for eight or nine years past, no other person living with them, except when he had laborers employed. That he lived on his farm, in Garland county, during the farming season, and at other times at his residence in Hot Springs, which had but one room. His farm residence had two rooms. Witness had stayed with de-

fendant at his residence at Hot Springs, and he and defendant slept in one bed, and Mary Mann in another, in the same room.

Lamb testified that defendant and Mary Mann lived in the same house, on defendant's farm, in Garland county, about a mile from witness' residence. He had frequently seen them passing his house, on their way to town, occupying the same seat in a wagon.

Honeycutt had stayed with defendant at Hot Springs. He and defendant occupied the same bed, and Mary Mann another, in the same room. Saw no other person about the place. Any one unacquainted with them would have taken them for husband and wife. Witness lived with them as a laborer on the farm for three weeks before he found out they were not married.

The defendant offered no testimony. He asked the following instruction:

"That the occupancy of the same house or room by the defendant and Mary Mann, coupled with the fact that they ate at the same table, is not enough to warrant a conviction in this case. The jury must find, beyond a reasonable doubt, from the evidence, that, in respect of both bed and board, they lived together as husband and wife; and if they do not, defendant is entitled to an acquittal."

The court refused the instruction, and instructed the jury: "That in order to sustain the charge contained in the indictment, it is necessary that the jury be satisfied, from the evidence, beyond a reasonable doubt, that the defendant lived with the said Mary Mann, in the same house, as husband and wife, without being married to her; and whether they so lived together is for the jury to determine, from the evidence in the whole case, as to the bed and board of the parties, and all other matters testified to, that may throw light upon their intercourse, and show their ap-

parent relationship in which they lived and bore themselves toward each other. And if the jury believe, from the evidence, beyond a reasonable doubt, that the defendant did so live, in the same house, with the said Mary Mann, in the manner that usually marks the bearing and intercourse between husband and wife, that is, in such manner as husband and wife usually live and bear themselves toward each other, they will find the defendant guilty."

The jury found the defendant guilty. He filed a motion for new trial, assigning for causes, the refusal of his instruction, error in the instruction of the court, and that the verdict was against law and the evidence. The motion was overruled, and he filed his bill of exceptions and appealed.

G. W. Murphy, for appellant:

The trial below seemed to proceed upon the idea that if the appellant was shown to be in a position where he *might*, as respects bed and board, exercise the *rights* of husband to Mary J. Mann, the case against him was perfect. This was wrong. *Blake* v. *Blake*, 70 *Ill.*, 618.

It is not enough that the parties live together in the same house *Carrotte* v. *State*, 42 *Miss.*, 334; *State* v. *Gastrell*, 14 *Ind.*, 280; *Wright* v. *State*, 5 *Blackf.*, 358. They must live together publicly, in the face of society, as if the conjugal relation subsisted between them, and there must be between them habitual intercourse. *State* v. *Crowner*, 56 *Mo.*, 147; *Sullivan* v. *State*, 32 *Ark.*, 187. In the last case cited, this court distinctly announces that living together, in the same house, in like manner, as respects bed and board, as marks the intercourse between husband and wife, is essential to conviction.

C. B. Moore, Attorney-General, for appellee:

The first instruction given by the court was proper, and

taken in connection with the second, which was *not objected to*, embraces the whole law, as expounded by this court. *Sullivan* v. *The State*, 32 *Ark.*, 187; *Taylor* v. *The State*, 36 *Ark.*, 34; *Howard* v. *The State*, *MS.*; *Lyerly* v. *The State*, 36 *Ark.*, 39.

HARRISON, J. The instruction objected to was properly given. It stated the law as declared in *Lyerly* v. *The State*, 36 *Ark.*, 39; and *Sullivan* v. *The State*, 32 *Ark.*, 187.

That asked by the defendant was properly refused. It was misleading—tending to restrict the consideration of the jury to the isolated facts to which it referred, and exclude from their consideration the other evidence in the case. *Reese* v. *Beck*, 24 *Ala.*, 651; *Chappell* v. *Allen*, 38 *Mo.*, 213; *Gruber* v. *Nichols*, 36 *Ill.*, 92.

Affirmed.

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37 219
55 191

EDGAR v. THE STATE.

1. LIQUOR: *Selling to minor under mistake of his age.*

It is no excuse or justification to one who sells liquor to a minor without the written consent of his parent or guardian, that both he and the minor believe at the time that the latter is of age. He sells at his peril.

2. SAME: *Selling to minor, onus as to parent's consent.*

The state need not prove that a sale of liquor to a minor was without the written consent of the parent or guardian. The burthen of proving such consent is upon the seller.

3. SAME: *Same. Evidence of minor's age.*

In a prosecution for selling liquor to a minor, the minor may testify of his age from an entry of his birth in the family Bible without producing it, or from any other source of information.

4. SAME. *Instruction that whisky is intoxicating. Judicial notice.*

An instruction in a prosecution for selling whisky to a minor, that whisky is an intoxicating liquor, without proof of it, is not objectionable. It is a fact of common intelligence and needs no proof.

APPEAL from *Craighead* Circuit Court.
Hon. L. L. MACK, Circuit Judge.

STATEMENT.

James T. Edgar was indicted and tried in the Craighead Circuit Court at the March term, 1881, for selling liquor to a minor without the written consent of his parents or guardian.

J. T. Reynolds, the minor, testified upon the trial that Edgar sold him a half pint of whisky on the thirteenth day of August, 1880, at his saloon in Craighead County. Witness was not 21 years of age until the twenty-sixth day of August, 1880. Edgar refused to sell him the whisky until witness told him he was of age on the sixth of August, 1880, which he really believed to be true, until he afterward referred to the register of births in the family Bible, and found that his birth day was the twenty-sixth instead of the sixth of August.

The defendant objected to the admission of the evidence in reference to the family Bible, but his objections were overruled and he excepted.

The court instructed the jury, among other things, that "whisky is an intoxicating liquor," to which the defendant excepted. He was found guilty, and after motion for new trial overruled, filed his bill of exceptions and appealed.

W. H. Cate and U. M. Rose, for appellant.

The evidence of the prosecuting witness was insufficient to sustain the verdict. *Bishop on Stat. Crimes, sec.* 1021;

State v. *Kalb*, 14 *Ind.*, 403; *Rincuran* v. *State*, 24 *Id.*, 80; *Ib.*. 85; *Brown* v. *State Id.* 113.

It was not shown that the person who made the entries in the family Bible was dead at the time of trial; consequently the Bible itself would not have been admissible in evidence. *Greenleaf* v. *R. R. Co.* 30 *Iowa*, 301.

The testimony as to what the Bible contained, was secondary, and wholly inadmissible, unless it was shown that the original was lost or destroyed. *Ryerson* v. *Grover*, 1 *Cox N. J. L.* 448; *Greenleaf* v. *R. R. Co.* 30 *Iowa* 301. *Curtis* v. *Patton* 6 *Serg. and R.* 135; *Blackburn* v. *Crawford*, 3 *Wall.* 175.

The State should have shown that Reynolds had no order from his parent or guardian; it was a necessary part of the offense, and whether Reynolds had a written permission or not, was peculiarly within his own knowledge, and if he had, it was under his control, and he should have shown it. *State* v. *Evans*, 5 *Jones*, (*N. C.*) *L.* 250.

In all cases on this subject heretofore decided in this Court, the State has duly proved that no written order had been given. *Cloud* v. *State*, *Ark.* *Hale* v. *State*, 36 *Ark.* 150.

The term "ardent, vinous, malt and fermented liquors" being descriptive, must be proved as laid in the indictment, and the whisky sold, should have been proved to have been ardent, vinous, malt and fermented. For where one substantive offence is charged with different descriptions, it must be proved to possess each quality named. 1 *Greenleaf*, *sec's* 64 *and* 67. Descriptive allegations must be proved as laid. 1 *Bishop*, *Crim. Pro.*, *sec's* 486 *to* 488; *Commonwealth* v. *Simon*, 4 *Gray*, 18.

C. B. Moore, Attorney-General, for appellee:

The evidence of witness, being uncontradicted, was sufficient, the jury being the judges of the evidence.

It is not *the minor* who is to have the written consent,

but it is the whisky seller who is *forbidden to sell* without it, and it was the seller's duty to prove such consent. Appellant sold to the minor at his peril. *Redman* v. *State*, 36 *Ark.*, 58.

The State made a *prima facie* case, and as there was no rebutting evidence this was sufficient. *Hale* v. *State*; 36 *Ark.*, 150.

"Whisky is intoxicating" (most courts know this *judicially*), and the evidence that the defendant sold a pint of whisky sufficiently sustains the indictment.

1. LIQUOR: Selling to minor under mistake of his age.

HARRISON, J. It was no justification or excuse for the defendant that when he sold the liquor, both he and the minor believed that the latter was of age. He sold it at his peril. *Redmond* v. *The State*, 36 *Ark.*, 58; *Crampton* v. *The State*, *ante*.

2. *Onus* as to parents' consent.

It was not necessary for the State to prove that the sale was not by the written consent of the parents or guardian of the minor; the burden of proving such consent was on the defendant. If given, the proof of it was peculiarly within his power.

Greenleaf says: "When the subject matter of a negative averment lies peculiarly within the knowledge of the other party, the averment is taken as true, unless disproved by that party. Such is the case in civil or criminal prosecutions for a penalty for doing an act which the Statutes do not permit to be done by any person, except those who are duly licensed therefor, as for selling liquors, exercising a trade or profession, and the like. Here the party, if licensed, can immediately show it, without the least inconvenience; whereas, if proof of the negative were required, the inconvenience would be very great." 1 *Green. Ev.*, *sec.* 79. And Bishop in his work on statutory crimes, says: * * * *

"If the law forbids the mass of the community to sell intoxicating liquors, but grants license to some particular individuals to sell it, then if some one person is indicted for making an unlicensed sale, the presumption that what is common in general belongs likewise to the particular stands as *prima facie* proof, and the defendant, if he has a license, must show it. This conclusion of legal reasoning is aided by the further consideration, that since the averment is a mere negative one, and, if it is not true, the defendant has in his own possession the evidence to show the truth, the orderly and convenient administration of justice is promoted, while no harm is done to the individual, by casting the burden on him." And he further remarks: "The question relates, not only to the want of a license from the public authorities, but the want also of the consent of parents, guardians and the like." *Bish. Stat. Crimes, secs.* 1051, 1052; 1 *Wharton Ev., sec.* 368; *Roscoes Crim. Ev.*, 79; *Hopper* v. *The State*, 19 *Ark.*, 143; *Farrall* v. *The State*, 32 *Ala*, 557.

The case of *Farrall* v. *The State*, is directly in point. It was an indictment for selling liquor to a minor—a student at school—without the consent of his parent or guardian, and it was held that the burden of proving such consent was on the defendant.

3. Evidence of minor's age. Bible record.

As the person to whom the liquor was sold, was a competent witness to prove his own age, there could be no objection to his stating that he derived his knowledge of the day on which he became of age from an entry of his birth in the family Bible, or from any other source of information. His evidence as to that fact, was, as a matter of course, but hearsay.

4. Judicial Notice, that whisky intoxicates.

As every person of common intelligence knows that whisky is an intoxicating liquor, and there was no question, and could be none, as to that fact, the instruction that it was so was unobjectionable.

The judgment is affirmed.

BRIDGES v. STATE.

1. INDICTMENT: *Charging one offense in separate counts.*
An indictment which charges the defendant in one count with violating the Sabbath, by selling whisky, and in another, by selling alcohol on the same day, charges but one offense, committed in two different modes, in distinct counts.

2. SABBATH BREAKING: *Selling alcohol.*
Alcohol is embraced in any one of the terms "goods, wares, or merchandise," the sale of which by retail, on Sunday, is prohibited by *Sec.* 1618 *Gantt's Digest.*

APPEAL from *Franklin* Circuit Court.
Hon. W. D. JACOWAY, Circuit Judge.

STATEMENT.

At the November term, 1880, of the Circuit Court of Franklin county, Bridges was indicted for Sabbath-breaking, as follows:

"The grand jury of Franklin county, in the name and by the authority of the State of Arkansas, accuse L. S. Bridges of the crime of Sabbath-breaking, committed as follows, to-wit: The said L. S. Bridges, on the fourteenth day of March, 1880, in the county and State aforesaid, the said day being Sunday, unlawfully did sell one pint of whisky to one A. J. Nichols, against the peace and dignity of the State of Arkansas.

"And the grand jury aforesaid, in the name and by the authority aforesaid, do further accuse the said L. S. Bridges of the crime of Sabbath-breaking, committed as follows, viz: The said L. S. Bridges, on the fourteenth day of March, 1880, in the county of Franklin, in the State of Arkansas, the said day being Sunday, unlawfully did sell one pint of alcohol to one A. J. Nichols, against the peace and dignity of the State of Arkansas."

After demurrer to the indictment overruled, the defendant moved that the State elect upon which count in the indictment it would rely. The motion was overruled, and he was tried upon the following evidence:

A. J. Nichols testified that in February, 1880, on Sunday, he and J. W. Bayliss went into the defendant's saloon, in Franklin county, and called for a pint of whisky. Defendant said they could not get it; but he let them have a pint of alcohol between them, saying he would not sell it to them. Some time after this he asked witness to see Bayliss about paying for the alcohol, which he did, and Bayliss said he did not then have the change, but would pay for it soon. He (witness) had paid his account to defendant since then, but didn't notice to see whether the alcohol was on it or not, but he was satisfied he had paid for it.

Bayliss, for defendant, testified that he was present when the alcohol was got, and proposed to pay for it, but the defendant said he would not sell it on Sunday, as it was against the law, but would give them a half-pint each, which he did. He had never paid for the part he got, and the defendant had never asked him for pay, or mentioned the matter since then. He told them when they got it, that if they wanted any more for Sunday they must come for it on Saturday.

The jury found the defendant guilty. He moved for a new trial; also in arrest, because the indictment charged two distinct and separate offenses. The motions were overruled, and he excepted and appealed.

Moore, Attorney-General, for appellee:

The indictment charged but one offense, and was good in form, under *Sec.* 1618 *Gantt's Digest.*

To sell alcohol, or anything else, by retail, is within the prohibition of the Statute.

HARRISON, J. But one offense was charged in the indictment. It was alleged to have been committed in two modes, in distinct counts, the first charging it to have been by selling, on Sunday, the fourteenth day of March, 1880, a pint of whisky; the second, by selling, on the same day, a pint of alcohol. See *Howard* v. *The State*, 34 *Ark.*, 433.

The indictment was under *Sec.* 1618 *of Gantt's Digest*, which is as follows:

"Every person who shall on Sunday keep open any store, or *retail any goods, wares or merchandise*, or keep open any dram-shop or grocery, or sell or retail any spirits or wine, shall, on conviction thereof, be fined in any sum, not less than ten dollars, nor more than twenty."

The evidence was clearly sufficient to prove the sale of a pint of alcohol on a Sunday, in the county, within twelve months before the finding of the indictment.

Alcohol is embraced in any one of the terms, *goods, wares* or *merchandise*. To sell by small parcels or quantities, and not in the gross, is *to retail.*

The judgment is affirmed.

BRADLEY COUNTY V. BOND.

COSTS: *Liability of Counties.*

Counties are liable for cost in all cases of acquittals on indictments.

APPEAL from *Bradley* Circuit Court.
Hon. T. F. SORRELLS, Circuit Judge.

A. A. Turner, County Judge of Bradley County, submits

that counties are not liable for fees in cases of misdemeanor. *Fee Bill, sec.* 5, *p.* 169, *Acts,* 1875.

A. N. Bond, *pro se.*, Appellee.

The county is liable. *Sec.* 5, *p.* 169, *Act* 1874-5; *approved Feb.* 25, 1875.

EAKIN, J. Appellee, Bond, presented to the County Court a claim for fees for services as Clerk of the Circuit Court, rendered to the State, in case of an indictment for misdemeanor, of which the defendant had been acquitted. The bill for fees had been approved by the Circuit Court, and certified by the Judge. No question is made of the amount.

The County Court refused to allow the same, upon the ground that the county was not liable. Upon appeal to the Circuit Court, the county was held liable and she appealed.

By the Revised Statutes (See *Gantt's Digest, sec.* 2015) it was provided that: "In all criminal or penal cases, if the defendant *shall be acquitted,* except when the prosecutor shall be adjudged to pay the cost, or if convicted will not have property to pay the costs, the same shall be paid by the county."

Sec 2831, *Ib.*, compiled from the Act of July 23d, 1868, and sec. 286 *of the Criminal Code,* as amended in 1871, provided that: "Fees allowed in criminal cases shall be paid by the defendant, but if sufficient property belonging to the defendant can not be found for the purpose, they shall be paid by the county where the *conviction* is had." This is but a modification of what had been provided in case of *conviction* by the Revised Statutes (*Gantt's Digest, sec.* 2016.)

Section 5 *of the Fee Bill of* 1874 *and* 1875 (*see Pamphlet, Acts, p.* 169) provides that: "Fees allowed in criminal cases shall be paid by the defendant, but if sufficient property

belonging to the defendant can not be found for that purpose, they shall be paid by the county where the conviction is had; except in cases of misdemeanor, when the county shall not be liable."

The two sections last quoted have no application to cases of *acquittal*, and leave the law as to them as before. It is good policy to encourage the prosecution of offences, when the necessity and propriety of the indictments is vindicated by conviction. In such cases grand juries should not be deterred by fears of crippling the county in her finances, and clerks may not unreasonably be required to take the risk for the public good. It is equally good policy perhaps, to discourage grand juries from frivolous or ungrounded prosecutions, often hastily made, by imposing the expenses of acquittals upon their counties.

We find no error in the judgment. As the law stands, the county is liable for costs in all cases of acquittals on indictments.

Affirmed.

DRAKE v. THYNG.

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59 511
37 228
66 451

1. PARTNERS: *Power of partner to sell partnership business.*

Though a partner may sell a part or the whole of any of the effects of the firm which are intended for sale, and if the sale be within the scope of the partnership business, yet he cannot without the consent of the other partners dispose of the partnership business itself, nor of all the effects, including the means of carrying it on. This is without the range of his implied powers, and contrary to the objects and designs of the association.

2. SAME: *Fraudulent sale of whole effects by one partner. Trust.*

When a partner in the absence of his co-partner who has furnished the capital, sells the partnership effects and business at a sacrifice,

to parties having knowledge of the interest of the co-partner, and when there is no necessity for the sale, a constructive trust will attach to the property in the hands of the purchasers, and as trustees they and the vendor will be held to a rigid accountability to the co-partner.

3. ATTORNEY'S FEES: *Receiver cannot pay.*

A receiver cannot claim credit in his account for attorney's fees paid by him for either of the partners; but if upon final settlement of accounts there be sufficient funds in court, belonging to the party for whom he has paid, the court may allow him to be reimbursed out of them.

APPEAL from *Sebastian* Circuit Court in Chancery.
Hon. JAMES A. YANTES, Special Judge.

Clendenning & Sandels,
Duval & Cravens, } for appellant.

The sale was a fraud, and the decree should so have declared.

The whole proceedings by which the Court required the receiver to pass his accounts after they had been fully adjusted, was *coram non judice.*

The testimony wholly fails to support either the master's report or the decree. The theory upon which plaintiff filed her bill was correct. Many of the amounts allowed are shown to have been for obligations that Tinker had no right to incur.

1. PARTNERS: Power of partner to sell partnership business.

EAKIN, J. It is now a well settled doctrine in the law of partnership, that, whilst one partner may sell a part or the whole of any of the effects of the firm, which are intended for sale, and if the sale be within the scope of the partnership business, yet he cannot, without the consent of the other partners, dispose of the business itself; nor of all the effects including the means necessary to carry it on. This is not fairly within the range of his implied powers; and is

contrary to the objects and designs of association. This is specially the case where the partnership is for a fixed term unexpired. See the rule stated in "*Parsons on Partnership*," *p*. 162.

In the case of *Rodgers* v. *Batcheler*, 12 *Peters*, 221, Mr. JUSTICE STORY delivering the opinion, announces this principle in clear and emphatic language. He says: "The implied authority of each partner to dispose of the partnership funds, strictly and rightfully, extends only to the business and transactions of the partnership itself; and any disposition of those funds by any partner, beyond such purposes, is an excess of his authority as partner, and a misappropriation of those funds, for which the partner is responsible to the partnership; though in case of bona fide purchasers, without notice, for a valuable consideration, the partnership may be bound by such acts. Whatever acts, therefore, are done by any partner (in regard to partnership property or contract) beyond the scope and objects of the partnership, must, in general, in order to bind the partnership, be derived from some further authority, express or implied, conferred upon such partner, beyond that resulting from his character as partner. Such is the general principle; and, in our judgment, it is founded in good sense and reason. One man ought not to be permitted to dispose of the property, or to bind the rights of another, unless the latter has authorized the act."

This is not a case of an assignment of the stock in trade for the payment of debts, as to which power there is much conflict of opinion. The cases on that point have no application.

The nature of this case will more clearly appear from a recapitulation of the principal facts. Drake & Thyng, in March, 1879, formed an equal partnership for brick making, to last until the first of January following. They leased

a lot from defendant, Hare, for $100. Drake, the complainant, put in almost all the cash capital; he says $2,000; the defendants admit $1,200. If Thyng put in anything, it was very little, and the amount is not shown; Thyng managed the business. Tinker was an employee of the firm, doing divers duties as foreman, book keeper, &c.

Hare, the landlord, had it seems, a store convenient, from which he sold goods, whisky, &c., to the hands, and furnished supplies of various kinds to the firm. His claim on account, including rent, amounted to $536. Tinker's claim for services, at $100 a month, amounted to $358—in all, $894. There were brick in the kilns of two or more hundred thousand, and others in the yard, unfinished. Thyng and Tinker were old acquaintances in Mississippi, and had come to Arkansas together a short time before the partnership had been formed. In this state of affairs, well known throughout by Hare and Tinker, Thyng, in the temporary absence of Drake, early in August, made in his own individual name, a sale to them of the whole brick yard, the brick on hand, burned and unburned, the lumber, wood for burning brick, and the lease itself, together with all the tools on hand for brick making, and a horse. The expressed consideration for the purchase was $2,000, but no cash was paid, or only an insignificant amount. The two accounts above mentioned were credited, and the balance was to be paid out of future sales of brick. Upon Drake's return he found defendants Hare and Tinker in possession, selling off the brick, who set him at defiance and refused to cancel the contract. He immediately brought this suit in August, 1861, obtained an interlocutory injunction, and had a receiver appointed.

2. SAME: Fraudulent sale of whole effects by one partner.

Whatever may have been the intention of the parties, or whatever may have been their mistaken ideas of their rights, Hare and Tinker must have been conscious that they were dealing in antagonism to the rights of Drake, who had en-

tered into the partnership for a fixed term, and furnished the capital, and who had the right not only to have the assets retained for the partnership debts, but to have the partnership continued during the term. No necessity for the sale was apparent. Suppose the firm had in fact owed the two debts of something near $900, about which we here express no opinion, there was a large amount of bricks on hand for sale, and others making, and it does not appear that the debts would not have been paid in due course of business. Why break up Drake by sweeping the partnership from under his feet, leaving the other debts unprovided for, and the whole property gone which his especial capital had created? Why not wait a few days for Drake's return? What was the pressure for instantaneous action? To allow Hare or Tinker to take any advantage from such a transaction, would be gross and palpable injustice. A constructive trust attached to the property in their hands; and as trustees, they, as well as Thyng, should be held to a rigid accountability. Drake appears to be the only innocent one, amongst all the parties.

The want of a full recognition of Drake's equities, rendered the first decree of Nov. 7th, 1870, not erroneous as far as it went, but lame and imperfect. An utter disregard of them by a different chancellor in the subsequent decree, pours a stream of error through all the subsequent proceedings based upon it.

Upon the first hearing, the court simply decreed a dissolution between complainant and Thyng, from the second day of August, 1869, upon the ground that the latter had violated the articles, by transcending his power, and an account was ordered between them as partners. This fell far short of the justice of the case as revealed by the pleadings and exhibits. The sale should have been cancelled and the purchasers should have been declared trustees, and made to

account for all that had come into their hands, to be held as assets of the firm. This was necessary to a complete disposition of the equities of all parties, and a Chancellor should decline to do justice by piece-meal, except as to matters which may be conveniently separated and reserved. There was a prayer for general relief; and no settlement could be made nor account stated of the partnership, without recovering as assets the property which had passed to Hare and Tinker, or ascertaining the extent of their accountability for their interferance.

Under this decree the receiver reported his receipts and expenditures, and the special master, to whom the partnership accounts had been referred, adopted the receiver's report, showing balance in receiver's hands of $201.10. This seems to have been done in Oct. 1871. In 1872, (Dec. 7th) the defendants came in and excepted to both reports, which were in fact the same, and there the matter rested for more than five years.

On the fifteenth of January, 1878, the court, under another Chancellor, sustained the exceptions which had been made, solely on the ground that the receiver had exceeded his authority in paying debts of Thyng and Drake, for the reason that the proceeds of the property belonged to defendants. No other objection had been made to the receiver's report, as adopted and incorporated with the report of the special master. This was an error based upon the idea that the sale to defendants was good and carried the effects free of the debts of the former firm. If the sale had been declared void on the first hearing, the error might not have arisen.

The cause was again heard on the eighteenth of February, 1878, on the pleadings and evidence which, besides the matters before the Chancellor at the first hearing, included the deposition of defendant Hare himself, which invites com-

ment. He says the consideration for the purchase was $2000, made up of about nine hundred and ninety-five dollars, of which $536.84 was due to himself, and $358.08 due Joseph Tinker. The balance, of a little over $1000, he says, they were to pay *to Thyng* from the proceeds arising from the sale of brick, "then on hand." It is to be observed that the sum of the two debts fall something short of nine hundred dollars, and the *balance* would be slightly over $1000. It seems unaccountable too, that there was a necessity for selling out the whole concern to settle a debt of $900, when the brick on hand, and which Thyng might have sold in due course of trade, were expected to bring over a thousand, and Thyng, himself, relied upon them for payment. He says that the trade was made with Thyng alone at deponent's own house, Thyng having his attorney with him. He exhibits twenty-eight vouchers to sustain his accounts; of these the 1st, 2d, 3d, 4th, 12th, 21st, appear on their face to be private orders of Thyng, signed for him by Tinker, without any showing that they were on partnership account. The 17th, 18th, and 22d, are signed by Tinker in his own name, without any allusion to the partnership. Many of the other orders are signed "Thyng & Drake, by Tinker," showing that there was intended to be a distinction between partnership and private orders. Another item consists of Tinker's board bill and sundries, charged to Thyng & Drake, $18.00, without any evidence of authority from the firm. Another item is for "refreshments, etc., supplied to brick yard hands up to June 5th, 1869," amounting to $24.00. The nature of the refreshments is not given, but there might well be a question whether they were necessary for brick making. These refreshments are stated to be "during the months of June and July, 1869." There is another charge of "refreshments" supplied the yard from June 6th, 1869, to July 31st, 1869, $37.90,

embracing the same time. The rent for the lease is charged in, and other items for board of hands, whisky, tobacco, etc. Such is the nature of the items which go to make up his claim against the firm of Thyng & Drake, for which he and Tinker had, in part, bought the property from Thyng, without the knowledge or consent of the only partner who seems to have had any substantial interest in it. It was a debt which he himself says Drake absolutely denied to be valid as soon as he was informed of it. There is nothing in his deposition to show that the articles were furnished, or the charges made on the authority of the firm. Nothing to show that the firm agreed to pay for board of Tinker or the hands, or for any sort of refreshments. Whether it did or not is left uncertain.

Tinker's account was made up wholly, it seems, for services in the brick-yard, as foreman and book-keeper, at $100 a month. The value of the services were not found *at the hearing.*

Hare says, further, that no money at all was paid at the time, except $25 paid to Thyng's attorney; and that he agreed, as a part of the balance on the purchase, to pay said attorney $200 more. He also says that out of the balance he was to pay $100 to Edmond Murphy, and did pay it in board, without any explanation of the nature of Murphy's claim. Out of the balance, also, he says he paid to Mr. Thyng about $125, in "board, money, and any thing I had that he wanted." He winds up by saying that he knew that Drake was Thyng's partner, and it was so understood by everybody.

Upon the showing made by the pleadings and this evidence, the Special Chancellor found that the sale to Hare and Tinker was *not* fraudulent and void, "but on the contrary, was made and executed in good faith, and for a sufficient and valuable consideration." Hare and Tinker were *dis-*

missed, to go hence without day, with their costs, and the injunction against them was dissolved. The cause, however, was retained as to the Receiver, to compel a settlement and payment to Hare and Tinker, of the amount found in his hands. The cause proceeded afterwards for that purpose. With regard to all these proceedings for compelling an account with the Receiver, it is useless to say more than that they stand or fall with the decree upon which they are based.

With regard to the decree itself, of the eighteenth February, 1878, let it suffice to say it was founded either upon a mistaken view of the law, or a strange misconception of the facts. It is erroneous and must be reversed, with all the subsequent proceedings. The purchasers should have been held as trustees, subject to a strict accountability.

3. ATTORNEY'S FEES: Receiver can not pay.

As touching the Receiver, it appears that he made out and filed his account in the year 1871, and that it was excepted to, "because the Receiver had exceeded his authority in paying debts of Thyng & Drake; because the proceeds arising from the sale are the property of defendants."

The exception was not, in itself, tenable. It was not pressed until 1878, when it was sustained by the Chancellor. This was error. The assets belonged to the firm of Thyng & Drake, and had been properly applied to the payment of their debts. It would be unjust now, after such a lapse of time, and was so in 1878, to hold him to another and stricter account, when the memory of events may have escaped his mind. There were some apparent errors in it, however, which the court, on its own motion. should correct; and as to the rest, let it stand. The Receiver had no authority to credit himself with attorney's fees paid to either party, or in their behalf. He must look for reimbursement to the parties themselves, and if on the final settlement of accounts there be sufficient funds in court, belonging to the parties

for whom he has paid, the court may allow him out of their respective shares, if the advances of fees have been proper and reasonable; or were made at the request of the party charged. So far as there may be a fund in court, the Receiver, under the circumstances, may well be subrogated to the lien which an attorney might have claimed upon his clients shares.

DIRECTIONS FOR A DECREE.

Let the order of the court of the fifteenth of January, 1878, sustaining the exceptions to the Receiver's report be reversed and set aside; also the decree of the court of the eighteenth of February, 1878, and all subsequent proceedings.

Remand the cause, with directions to the court below to correct the said report and account of the Receiver as to the credit for counsel fees, and confirm as to the rest, in accordance with this opinion.

With further directions to the court to enter a decree declaring the sale by Thyng to Hare and Tinker, fraudulent and void, and that they be held as trustees of the firm of Thyng & Drake, for all the property received by them under said sale; whether sold, wasted, or otherwise lost or disposed of before the property passed into the hands of the Receiver; against which they may be credited for all necessary and proper expenses regarding said property.

With further directions to order an account to be taken between the firm of Thyng & Drake, and said trustees; and that all balance found against them be considered and treated as the assets of the firm of Thyng & Drake, and that upon their failure to pay the same into court, execution issue therefor.

With further directions to order an account of the partnership affairs between Thyng & Drake, and that the assets

of the firm, including balances in the hands of the Receiver, and of Hare and Tinker, as trustees, be first applied to outstanding debts of the firm, next to adjustment of any balance due either partner from the firm, on account of partnership transactions; or if there be no balance, that the court enter a personal decree in favor of either partner against the other, for adjustment and equality.

And with further directions to remit said Hare and Tinker to their respective claims against the firm upon their accounts, the true amounts to be ascertained by proof.

And for such other and further proceedings as may be necessary to adjust the rights of all parties, concerning the subject matters in controversy, according to the principles and practice in equity, and those announced in this opinion.

A decree by default, for want of appearance, against Thyng, should be entered, that he may be held amenable for such share of the costs as the Chancellor may deem meet to impose.

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37 238
55 248

37 238
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62 307

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37 238
80 92
82 101

37 238
83 195

1. Criminal Practice: *Entering finding of indictment on record.*

When an indicted party is not in custody, the clerk should not disclose upon the record that an indictment has been found against him. It is sufficient for the record entry of the finding of an indictment to describe it by number, and an indictment endorsed with the same number and date of filing as the number mentioned in the entry of that date, will be sufficiently identified as the one filed.

2. Practice in Supreme Court: *Wrong but innocent instruction.*

Though an instruction be inapplicable, and calculated to mislead the jury, if the facts show that it did not have that effect, and other proper instructions were given on the same point, this court will not reverse.

3. PRACTICE IN CIRCUIT COURT: *Summing up evidence.*

The Constitution of 1874, in effect, prohibits judges from summing up the evidence, as under the common law practice.

4. CRIMINAL LAW: *Murder; manslaughter.*

Where parties quarrel, separate, arm themselves, and again meet and enter mutually into a fight, with deadly weapons, and one kills the other, or kills a third person in an attempt to kill his adversary, it may be murder or manslaughter, according to the time intervening the first and second difficulties, and opportunity for cooling.

5. INSTRUCTIONS: *To be considered together.*

Any one of several instructions given, should be considered in connection with the others, and with reference to the different phases of the evidence, in view of which the instructions were framed.

6. CRIMINAL LAW: *Murder in first degree.*

To constitute murder in the first degree, there must be the specific intent to take life, formed beforehand and carried out with deliberation.

APPEAL from *Phillips* Circuit Court.
Hon. J. N. CYPERT, Circuit Judge.

M. T. Sanders, for appellant:

It is an elementary principle that where fresh provocation intervenes, the act will be imputed to that, rather than to previous malice, unless conclusively proven that the killing was upon antecedent malice. The special instructions given for the State were nearly all predicated upon preconceived malice, and misled the jury.

Murder and the distinction between murder and manslaughter are the same, under our Statute, as at common law. *Bivens* v. *State*, 11 *Ark.*, 455. The characteristics of murder are malice and deliberation; of manslaughter, their absence. If Tujague had been slain, it would only have been manslaughter, and killing Tool would not be a

higher grade of homicide, unless the jury believed appellant had a specific intent to take his life.

If the killing of Tool, whether intentional or accidental, was the result of passion, * * * it was not murder in either degree.

A party who moves an instruction has the right to have it distinctly given or refused in the language he puts it. *Stanton* v. *State*, 13 *Ark.*, 317.

The first, and particularly the second, instructions for the State were misleading, in that they restricted the jury to provocation, offered by the deceased alone. Though correct, in the abstract, they, in effect, told the jury they could take no notice of any provocation by Tujague, however grievous, nor of any of the circumstances of the main contest. It was an error of omission, to leave to the jury the determination of what is legal "provocation." *State* v. *Crafton*, 6 *Iredell*, 164; *Payne* v. *Commonwealth*, 1 *Met.*, (*Ky.*), 370.

The proposition that an error shown in the record, in instructing the jury as to murder in the first degree, is cured by acquittal of murder in that degree, is untenable. Error without injury cannot be applied to offenses of this high grade. *Mitchell* v. *State*, 60 *Ala.*, 26; *Witt* v. *State*, 6 *Cold.*, 5; *People* v. *Williams*, 18 *Cal.*, 187.

The fourth and sixth instructions for the State were erroneous; first, because they deprived the appellant of the benefit of that part of the evidence which tended to prove that he abandoned the contest, and started on his way home; second, it was instructing the jury that the guilt of the accused must turn exclusively and solely upon the intent with which he may have returned to the saloon, regardless of the facts attending the difficulty which ensued. *Atkins* v. *State*, 16 *Ark.*; *Murray* v. *State*, 1 *Ct. Appeals* (*Tex.*), 420.

The sixth is abstract. Facts cannot be stated hypothetically, which do not appear in evidence. Where the jury might, if correctly instructed, have rendered a different verdict, this court will award a new trial. *Bizzell* v. *Booker*, 16 *Ark.*, 309; also, *Lombard* v. *Martin*, 10 *George*, 157; *Southern R. R. Co.* v. *Kendricks*, 40 *Miss.*, 584; *Hanks* v. *Naglee*, 54 *Cal.*, 51; *People* v. *Valencia*, 43 *Cal.*, 552; *Anderson* v. *State*, 3 *Heis.*, 86.

The eighth and tenth are too broad and misleading. A person when attacked by another, who manifestly intends to take life, or do great bodily harm, is not obliged to retreat, but may pursue his adversary, until he has secured himself from danger, and if he kill him in so doing, it is self-defense. 1 *East's P. C.*, 271; 2 *Stark. Ev.*, 721; *Luby* v. *Commonwealth*, 12 *Bush.* (*Ky.*), 1; *Bohannon* v. *Commonwealth*, 8 *Bush.* (*Ky.*), 481.

The twelfth was erroneous. It assumes that there was evidence that Tujague abandoned the conflict in good faith.

The fourteenth is vague, indefinite and erroneous. It assumes the two difficulties to be one contest, and authorized the jury to deduce that no subsequent assault by Tujague could justify appellant.

The rule is civil cases, that Courts of Appeal will not grant a new trial upon the facts, does not prevail in felonies. *Davis* v. *State*, 2 *Humph.*, 439; *Copeland* v. *State*, 7 *Humph.*, 479.

It does not affirmatively appear that the indictment was brought into court by the grand jury. *Chancellor* v. *State*, 33 *Ark.*, 315.

Moore, *Attorney-General*, contra:

The record shows that the grand jury returned unto court true bills numbered 11 to 18, inclusive, and indictment numbered 16 was against appellant. This is "affirm-

ative" and sufficient. *Shropshire* v. *State*, 12 *Ark.*, 191, quoted with approbation. *Green.* v. *State*, 19 *Ark.*, 186.

That Tool and appellant were friends *cuts no figure in the case.* The law holds him responsible precisely as if he had slain Tujague.

The court did not err in striking out a portion of the 10th instruction for appellant. *Stanton* v. *State*, 13 *Ark.*, 317, where it is held that if an entire instruction be good in part, and objectionable in part, *it will not be error* if the entire instruction be overruled. The court might have refused the entire instruction, but it chose to modify it so as to make it good law.

Similar instructions to the 1st and 2d were approved in *Sweeney* v. *State*, 35 *Ark.*, 585.

1. Entering upon the record the finding of an indictment.

ENGLISH, C. J. I. It is submitted by counsel for appellant that the record does not affirmatively show that the indictment was returned into court by the grand jury.

The term of the Circuit Court of Phillips county, at which appellant, Robert M. Fitzpatrick, was indicted for murder in the first degree, commenced, and the grand jury was organized, seventeenth of May, 1880.

On the twentieth of May the following entry appears:

Now, on this day, comes the grand jury into open court, and having answered to their names, returned, through their foreman, eight bills of indictment, which, being numbered 11, 12, 13, 14, 15, 16, 17 and 18, were ordered filed and process to issue immediately."

Then follows, in the transcript, the indictment against Robert M. Fitzpatrick, charging, in substance, that on the tenth of February, 1880, in the county of Phillips, he murdered John Tool by shooting him with a pistol; which is endorsed 16, and marked filed twentieth of May, 1880.

When the accused is not in custody, it is not proper for

the clerk to disclose upon the record that an indictment has been found against him by naming him in an entry (*Gantt's Dig.*, *secs.* 1798, 1800). The indictment in this case is sufficiently identified by its number and date of filing, as one of the eight shown, by the above entry, to have been returned into court the twentieth of May. *Shropshire* v. *State*, 12 *Ark.*, 190; *Green* v. *State*, 19 *Ib.*, 186.

II. Appellant was tried on plea of not guilty. The jury found him guilty of murder in the second degree, and fixed his punishment at fifteen years imprisonment in the penitentiary; a new trial was refused, bill of exceptions taken, he was sentenced in accordance with the verdict, and prayed an appeal, which was allowed by one of the judges of this court.

The 1st, 2nd and 3rd grounds of the motion for a new trial, were that the verdict was contrary to law, contrary to evidence, and against both.

That John Tool was shot with a pistol on the night of the tenth of February, 1880, between 10 and 11 o'clock, in the saloon of Mose Tinney, at Helena, during a *mardi gras fete*, and died soon after receiving the mortal wound, the evidence leaves in no doubt.

There was also evidence to warrant the jury in finding that he was shot by appellant.

The saloon fronted east, the counter was on the right; there was an entrance at the back, or west end of the house, as well as in front, and a beer garden in the rear. The front entrance was screened.

A. King, witness for the State, testified, among other things, that he was sitting on a box in the saloon looking at Tool, about eight feet from him; that Tool was sitting with his back to the shelving—squatting down with his left side towards the east end of the house and towards witness. That appellant came up to the east end of the counter (from

the front entrance) in a stooping position and presented his pistol towards Tool, who, motioning his hands towards him, said, "don't shoot, Bob" (appellant was familiarly known by the name of Bob), and about that time the pistol fired, and a second after Tool remarked, "I've caught it," or words to that effect. He was a bar-tender.

Further on, the same witness said appellant fired as soon as he got to the east end of the counter; and that was the time Tool motioned him not to shoot, and that was the shot that killed Tool. Again, witness said he saw appellant's face when he shot, and he knew he killed Tool.

Tom Robinson testified that he knew the parties; was in the saloon, near the ice-box, when Tool was killed, and knew appellant killed him.

D. C. Reed, a policeman, testified that on the night of the difficulty, he, the city marshal, and others, had appellant in custody, and he made a statement in his presence; said he killed Tool, and did not know what he did it for. It appears that the others did not hear this statement.

The doctors proved that the pistol ball entered the left side of Tool and ranged down.

There were but three persons [appellant, his brother, Thomas Fitzpatrick and Frank Tujague], who used fire arms in the fight, and Tool must have been killed by one of them. It could not have been Thomas Fitzpatrick, for he used a double barrel shot gun, charged with small shot, and Tool was killed with a pistol ball. Tujague entered the saloon at the west end, and fired his pistol toward the east.

T. D. Ramage, who was present, but did not see who shot Tool, testified that if he was sitting from four to six feet from the east end of the counter, between the counter and shelving, with his face to the south, and shot in the left side, it was not possible for Tujague to have killed him. He was a witness for defense.

Alonzo Fitzpatrick, brother of and witness for appellant (who was present, and armed, but did not engage in the fight), testified that if Tool was sitting in the position as described by other witnesses, it was not possible for him to have been shot by Tujague, from the west, etc.

No doubt, from the evidence, Tool's left side was to the east, and appellant, who was manifestly in a rage, fired his pistol repeatedly and wildly, from the east towards the west.

The above feature of the evidence is stated in response to a suggestion of counsel for appellant, that it was not satisfactorily proved that he shot Tool. The jury found, by their verdict, that he did, and there was evidence to sustain the finding.

As to the grade of homicide, the evidence was conflicting. If the jury believed the witnesses for the State (and none of them were impeached), they properly found appellant guilty of murder. On the version given of the whole quarrel and fight between the Fitzpatricks and Tujague, (in which Tool was shot), by some of the witnesses for the defence, the jury might have found that the homicide was of a lower grade than murder. We will notice other features of the evidence not indicated above, in considering the instructions.

III. After the evidence was closed, the court read to the jury certain sections of the Digest relating to the grades of homicide, self defense, etc., which are referred to in the bill of exceptions; and then gave twelve [misnumbered fourteen] instructions, moved by the attorney for the State, appellant objecting to each and all of them.

For appellant sixteen instructions were moved, the court refused the 9th, modified the 6th and 10th, and gave all of the others as asked.

The evidence as set out in the bill of exceptions is long and confused. A brief statement of leading facts, however,

will be sufficient to make remarks upon the instructions understood.

It was a festival occasion; the parties and eye witnesses were at a saloon, and probably all drinking. The Fitzpatricks commenced the quarrel. About 10 o'clock at night, Tujague, who was in costume, and at the back door of the saloon, attempted to detain a woman who wanted to leave; and Thomas Fitzpatrick, hearing the altercation between him and the woman, came up and struck him. Appellant also approached, and there being a pistol on a shelf, Tujague attempted to get it, but was prevented by Tool. While he was struggling with Tool for the pistol, appellant caught hold of him and bit his arm. Released by the interference of a by-stander, he ran out of the saloon in front, (making utterances which will be noticed hereafter), and went off, appellant pursuing him for some distance. Appellant returned to the saloon, and asked Tool for his pistol, which it seems, was under the counter; Tool at first refused to give it to him, but was finally prevailed on to let him have it; and he and his brothers went to Thomas Fitzpatrick's gun shop, not far off. It is evident that they knew from what Tujague said, when he left the saloon, that he intended to return to it. At the shop, Thomas Fitzpatrick charged a breech-loading gun with small shot. On being asked why he did not put buck-shot in the gun instead of the small shot, "he said they would do, he wanted to burn him," meaning, no doubt, Tujague. The three returned to the saloon, appellant armed with his pistol, and his brother Thomas, with his shot-gun.

In the saloon, several witnesses stated, appellant walked backward and forward, watching the back door—cocked his pistol several times—every time the back door was opened—said if Tujague came back there would be trouble; if he came in at the back door he would kill him.

After a while, a witness for the defense states, Thomas took a drink, and said, "let us go, not three brothers pitch on one man;" and Alonzo put his hand on appellant's shoulder, and said, "come on Bob, and let's go;" and they went to the front door, but did not go away.

Meanwhile, Tujague went to his saloon, took off his costume, dressed in citizen's suit, put on his overcoat, and placed a Smith & Wesson's pistol in each of his pockets. In about half an hour, (more or less, the witnesses differing as to time), from the time he had left Tinney's saloon, he returned to it, and entered at the west door.

There was a front screen, and if, as stated by some of the witnesses, Thomas Fitzpatrick was on a front step, and appellant on the side walk, when Tujague entered the saloon, they were not perhaps in his view.

He says that he stopped about midway of the saloon, and remarked that he was ready to defend himself; others testified that he said he was "ready to fight any son of a bitch in the house." Was asked to drink and declined. Had his hands in his overcoat pockets. It is probable that the Fitzpatrick's hearing him in the saloon, returned, passed the screen, Thomas in advance, with shot gun in hand, and that Tujague fired at him, and ran back out of the saloon into the beer garden in the rear. Some of the witnesses say that while retreating, he fired a second, and others, a third time. He testified that he fired but once, and in this he is corroborated by some of the witnesses for the state, and it is probably true, for he was arrested by the sheriff, and his pistols taken from him and examined shortly after the fight, and but one chamber was empty, as testified by the sheriff and others present.

It is probable from all the evidence, that six shots were fired, first shot by Tujague at Thomas Fitzpatrick, who fired one barrel of his shot gun while Tujague was retreat-

ing, and four pistol shots by appellant, who probably had his pistol in readiness when he entered the saloon and passed the screen. It seems that Tujague, and perhaps appellant, fired three shots after he was out of the saloon. Which one of appellant's four shots was fatal to Tool, does not distinctly appear.

Taking all the instructions given by the court together, it appears to have been fairly left to the jury to decide upon the conflicting and confused testimony, whether appellant was guilty of murder, manslaughter, or was acting in self-defense. Of course the jury were advised, that though the fatal shot fell on Tool, with whom appellant had been friendly, yet the offense was the same, if any, as if Tujague had been killed.

(*a*) The first and second instructions given for the state, were taken from the opinion of this court in *McAdam* v. *State*, 25 *Ark.*, 408–9, and were approved as correct expressions of law in *Sweeny* v. *State*, 35 *Ark.*, 585.

But one of them, the second, related to murder in the first degree, and it follows:

"If the jury believe from the evidence that the defendant, at the time he fired the pistol, intended to kill the deceased, and did kill him without any provocation, they will find him guilty of murder in the first degree."

This instruction was no doubt given in view of the testimony of witnesses King and Reed, the former having stated that when appellant presented his pistol towards Tool, he raised his hands and implored him not to shoot; and the latter, that appellant said he had killed Tool, and he did not know what he did it for. The same instruction was given in *Harris* v. *State*, 36 *Ark.*, 127, in which the accused was found guilty of murder in the first degree, and it was held that the instruction was inapplicable to the facts, and

improperly given, because all the evidence showed that the killing was upon provocation.

It is not probable, from all the evidence in this case, that appellant purposely killed Tool, and the above is the only instruction given for the State submitting to the jury the question whether such might have been his intention, and the jury by their verdict, in effect, found it was not.

2. PRACTICE IN SUPREME COURT: When misleading instruction does not mislead.

The counsel for appellant submits that the jury may have been misled by the giving of any instruction on the subject of murder in the first degree; to which it may be replied, first, that the verdict shows that they were not misled; and second, that the 2d, 3d, 4th, 5th and 7th instructions given for appellant, framed and moved by the same learned counsel, related to murder in the first degree, and the court gave them in the strong clear language in which they were drafted, favorable as they were to appellant. The seventh of them was, that "The absence of a motive to take life should be considered by the jury in determining whether it was done willfully, deliberately, and with malice aforethought, and if it appears to the jury from the testimony, that the defendant had no motive to kill the deceased (Tool), and was on friendly terms with him at the time, and had had no difficulty with him, these facts are proper to be considered in determining the *animus* of the defendant."

(*b*) Counsel for appellant criticises the *fourth* and *sixth* instructions given for the State, making no objection here to the *third* and *fifth*.

The *fourth* was:—"If the jury believe from the evidence that previous to the killing of deceased, defendant, Thomas Fitzpatrick and witness, Frank Tujague, had a difficulty, and after such difficulty went off, armed themselves with deadly weapons, and returned to renew the contest, and in that contest deceased was accidentally killed by defendant,

it would be either murder or manslaughter—murder if sufficient time had elapsed for passion to cool, and reason to be restored, and manslaughter if the contest was renewed in the heat of passion, and not in a spirit of revenge."

The *sixth* was:—"If the jury believe from the evidence that defendant, Thomas Fitzpatrick and witnesss Tujague, had an altercation in the saloon; that Tujague left the saloon stating that he was going off to arm himself, and would return and have it out, and that defendant and his brother Thomas knew, or believed, that Tujague would return, and they went off and armed themselves with deadly weapons, returned to the place of rencounter to meet Tujague, and in the difficulty following such preparation deceased was killed by defendant, it would be murder or manslaughter in the defendant, and the jury will so find, whether the killing was accidental or not."

It is submitted that both of these instructions were erroneous on two grounds; first, that they deprived appellant of the benefit of that part of the evidence which tended to prove that he abandoned the contest, and started on his way home; and second, that they made his guilt turn solely upon the intent with which he may have returned to the saloon, regardless of the facts attending the difficulty which ensued, etc.

If these two instructions were all that were given, they might be subject to the objections stated, but they were not all. They were given upon one view of the conflicting evidence, and others were given upon another view, and among them, the sixteenth, moved for appellant, which was as follows:

"If the jury believe, from the evidence, that defendant and Thomas Fitzpatrick withdrew from the saloon, intending to abandon the contest, and did so to avoid further difficulty, and that Tujague renewed the difficulty with a deadly

weapon, in a fierce and dangerous manner, after defendant had retired in good faith, Tujague became the assailant, and if the defendant had killed him, believing it necessary to save his own life, or his person from a great bodily injury, actually impending at the time, his act would have been justifiable homicide."

It is also submitted that the sixth instruction is subject to the further objection of being abstract. That there was no proof "that Tujague left the saloon, stating that he was going off to arm himself, and would return and have it out," and none that appellant went off and armed himself, and returned to meet Tujague.

Alonzo Fitzpatrick, brother of appellant, testified that Tujague said, when leaving the saloon: "I've got no show here; fix yourselves. I'm going away and will come back fixed."

It is manifest, from the testimony of this witness, and others, that the Fitzpatricks understood, from what Tujague said on leaving the saloon, that he intended to arm himself and return to it. It may not be literally true that appellant "went off and armed himself," for it appears that his pistol was in the saloon, under the counter, when Tujague left; that after pursuing him for some distance, he returned to the saloon, got his pistol, and went to the shop, where the brothers prepared themselves with arms, and returned to the saloon, expecting Tujague to come back armed.

3. PRACTICE IN CIRCUIT COURT: Summing-up evidence.

The facts stated hypothetically in the sixth instruction, may not have been literally in evidence, but they were substantially. The instruction assumes no facts to be true, or to have been proved, but declared what the law was upon the facts stated hypothetically, if the jury believed, from the evidence, that such were the facts; a mode of instructing a jury allowable under the present Constitution, which,

in effect, prohibits the judges from summing up the evidence, as under the common law practice.

(*c*) It is submitted that the *eighth* and *tenth* instructions for the State were too broad and misleading; that a person, when attacked by another who manifestly intends to take his life, or do him great bodily harm, is not obliged to retreat, but may pursue his adversary, until he has secured himself from all danger; and if he kill him in so doing, it is justifiable self-defense.

The instructions so complained of follow:

"Eighth—If the jury believe, from the evidence, that the fight between defendant, Thomas Fitzpatrick, and witness, Frank Tujague, was mutual, or entered into by the parties willingly, and in that affray deceased was accidentally shot by defendant, you will find the defendant guilty of murder, or manslaughter, according to the circumstances in the case, and in that case, it would make no difference who struck the first blow, or fired the first shot."

1. CRIMINAL LAW: Murder. Manslaughter.

"Tenth—If the jury believe, from the evidence, that the defendant could have, at any time, from the beginning of the first difficulty to the ending, when deceased was killed, reasonably withdrawn from or avoided the difficulty, without immediate danger to himself, and failed to do so, he could not justify the killing by self-defense:—A man cannot set up self-defense, until he has done everything reasonable in his power to prevent, abandon and retreat from the difficulty."

The eighth instruction was given in view of the first quarrel between the parties, referred to in other instructions of the series. No doubt, where parties quarrel, separate, arm themselves, and again meet and enter mutually into a fight, with deadly weapons, and one kills the other, or one of them kills a third person, in attempting to kill his adversary, it may be murder, or manslaughter, according

to the time intervening between the first and second difficulties, and opportunity for cooling.

And such is the substance and effect of the eighth instruction, taken in connection with others given, and in view of evidence as to the first quarrel and the final fight.

The counsel for appellant objects particularly to the word "*retreat*," as used in the last clause of the tenth instruction.

The court had read to the jury the 1285th section of the Digest, which defines self-defense, in which the words, "that the slayer had really, and in good faith, endeavored to *decline* any further contest, before the mortal blow or injury was given," are used, and perhaps the tenth instruction was needless. But it is evident, from the language employed in the whole instruction, that the court did not mean to charge the jury that a man was obliged to retreat when attacked, etc.

On the contrary, the court charged the jury by the thirteenth instruction moved for appellant that, "A man has the right to repel force by force, in defense of his own person, against one who manifestly intends, by violence or surprise, to take his life, and may *pursue* his adversary, until out of danger, if the attack is of such character as to render the attempt to escape from danger hazardous to life or personal safety."—And in the fifteenth instruction given for the appellant that:—"If danger to defendant was actual, urgent and pressing, he was not bound to flee, but was justified in repelling or preventing the impending danger, by the use of such means as to a prudent and courageous person appeared necessary and reasonable, under the circumstances."

It is impossible to read the evidence without seeing that either Tujague, or the appellant and his brother, Thomas, might have avoided the final fight, and that they prepared

themselves for it, and returned to the saloon where it occurred. True, there is some evidence that appellant, after waiting and watching for Tujague, making hostile demonstrations and threats, was persuaded by his brothers to leave the saloon before Tujague returned, and went front, but did not go away, as he might have done. On the contrary, after Tujague had come back to the saloon, and was boasting of more courage than the sequel showed him to have, Thomas Fitzpatrick and appellant, shot-gun and pistol in hand, returned into the saloon from the front, and passed the screen, when Tujague fired, and fled.

(*d*) The eleventh instruction for the state, and which counsel for appellant criticises, was that:—"If the jury believe, from the evidence, that Tujague, after he fired the first shot, retreated, and in good faith abandoned the conflict, and defendant pursued him, firing at him, and the shot or shots from defendant's pistol took effect upon deceased, and killed him, the defendant would be guilty of murder, or manslaughter."

5. INSTRUCTIONS: To be considered together.

In several of the instructions given, the Court left it to the jury to determine, upon the evidence, whether the killing of Tool was murder or manslaughter, having read to the jury the Statute definitions of those offenses. In other instructions the question of self defense was submitted to the jury, the court having also read to them the Statute defining self defense in ordinary cases of killing. In considering any one instruction given, it is proper to look at it in connection with others of a series given, and also to look at the different phases of the evidence, in view of which the instructions were framed. It is not just to the court below to isolate an instruction and pass upon it, or to criticise its phraseology, as if an independent proposition.

It is probable that Tujague fired the first shot when Thomas Fitzpatrick passed the screen and came in view with

shot gun in hand. He, no doubt, on firing, retreated and that rapidly. It is perhaps not literally true that he retreated in good faith, abandoning the conflict, but more probable that he fled to escape impending danger. Thomas Fitzpatrick, who was doubtless cooler than appellant, appears to have fired but once at his retreating adversary, while appellant fired repeatedly and wildly as above shown.

His firing, under such circumstances, was certainly not in necessary self defense, for he was in no danger at the time. Had there been no previous quarrel and he had fired at the retreating Tujague on the provocation of his having fired the first shot, and killed him, or, by misadventure, Tool, it would not have been murder. But the jury doubtless believed that he fired repeatedly and recklessly at and after Tujague in a spirit of revenge engendered by the previous quarrel.

(*b*) It is objected that the twelfth instruction (numbered 14 in the transcript) is vague, indefinite and erroneous. That it consolidates the first quarrel and the after fight with arms, assumes them to be one and ignores the interval during which Tujague went to his saloon, armed himself and returned, etc. It is true that this instruction, when considered alone, is subject to the criticism that it confuses the two difficulities, but when considered in connection with others of the series given for the State, and yet others given for the defense, in which the first quarrel and after fight are distinctly kept in view, its want of verbal accuracy could hardly have been misleading. It was perhaps framed, though inaptly, with the view of expressing the proposition that if the jury believed, from the evidence, that the defendant and his brother Thomas brought on the fight with Tujague, the fact that he fired the first shot would not justify defendant in taking his life, or the life of Tool by accident, but it would be otherwise, if defendant had, in good faith, abandoned any further combat after the first difficulty.

Had there been no screen in front and had the Fitzpatricks been in view when Tujague entered the saloon, and had he fired on them before they made any armed movement toward him, the case would have been different.

Construing the instructions given for the State fairly, and as a whole charge, in connection with such as were given for the defense, there appears to be no error of law prejudicial to appellant in them and nothing that could probably have misled the jury. *Thompson on Charging the Jury, p.* 173–4.

6. MURDER In the first degree.

IV. The sixth instruction moved for appellant was in these words: "Unless the jury find from the testimony the specific intent to take life, that it was formed before hand and carried out with deliberation, they must acquit the defendant of murder."

To which the court added after the final word "murder," the words "*in the first degree.*"

The *sixth* was of the series of instructions, from two to seven, both included, asked by appellant, relating to murder in the first degree. The court gave, as moved, all but the sixth, and gave it with the additional words above indicated, which made it harmonize with the others. The specific intent to take life and deliberation are features of murder in the first degree, and these expressions in the sixth instruction made the additional words appropriate. *Bivens* v. *State*, 11 *Ark.*, 455; *Sweeney* v. *State*, 35 *Ark.*, 585.

Had the court merely refused the instruction as moved, appellant would have had no just ground of complaint. *Stanton* v. *State*, 13 *Ark.*, 324. But as modified by the court, it was a correct expression of law, and the court had the right to give it in that form; and appellant had the right to except to the refusal of the court to give it in the form moved.

V. The ninth instruction moved for appellant as fol-

lows: "If the jury believe from the evidence, that the killing of Tool, if done by defendant, was not committed with deliberate malice, but that it was done without malice, and in a sudden heat of passion, the killing would be manslaughter only, and if they further believe, from the facts and circumstances of the case, that it was not an intentional or voluntary act on the part of the defendant, *then the offense would be involuntary manslaughter only.*"

The whole of this instruction is marked refused in the margin, and the bill of exceptions states that the defendant excepted to the ruling of the court in refusing to give so much of it as relates to *voluntary* manslaughter; and the fifth ground of the motion for a new trial is, that the court erred in refusing to grant so much of the ninth instruction asked by the defendant as related to *voluntary* manslaughter.

The first clause of the instruction is not an accurate definition of voluntary manslaughter, which is the unlawful killing of a human being without malice express or implied, and without deliberation, upon a sudden heat of passion, apparently sufficient to make the passion irresistible. *Gantt's Dig., secs.* 1264–5. This definition the court gave in charge to the jury from the Statute.

But the last clause of the instruction, which was an attempt to reduce the homicide to *involuntary* manslaughter, was inappropriate, and the court for that reason might, as it did, refuse the whole instruction. *Stanton* v. *State, sup.*

VI. The form in which the court gave the tenth instruction moved for appellant follows:

"If the jury believe from the evidence, that Tujague, by making a felonious assault upon defendant and his brother Thomas, under circumstances calculated to excite the fears of a reasonable person, that he intended to kill, or that defendant and his brother Thomas were in immediate and pressing danger of receiving great bodily injury, it was law-

ful for the defendant to employ such means of defense as were reasonably necessary to prevent or overcome the impending danger, provided he really acted under the influence of such fears and not in a spirit of revenge."

And this instruction, so given, was followed by the 11th and 12th, moved for appellant, and given as asked, thus:

"Whether the danger to defendant was real or apparent, if he had reasonable cause as a reasonably prudent man to believe, in order to save his own life, or prevent Tujague from inflicting great bodily injury upon him, that it was necessary to shoot, he was justified in doing so as long as the danger appeared urgent and pressing."

"If the jury believe from the evidence that the defendant was justified, under the circumstances, in firing on Tujague, and during the firing, and while intending or attempting to shoot Tujague, by accident or misadventure, shot deceased, against whom he had no evil design, he is not guilty of the crime charged."

These instructions were as favorable to appellant as the strongest testimony on his side warranted.

It is objected that the court refused to give a part of the tenth, but the instruction was not thereby rendered less favorable to appellant, or its force and value as a legal proposition, in his behalf impaired.

The part of the instruction omitted, was a hypothetical view of the conduct of Tujague before he fired his pistol, some of the expressions of which the court, perhaps, deemed more strongly put than warranted by the evidence.

Upon the whole, the instructions given on both sides fairly submitted the case to the jury, on the different phases of the evidence, and there was no substantial error of law to the prejudice of appellant.

VII. Finally, we have carefully considered all the features of the case in response to the earnest argument of

the learned and zealous counsel for appellant, and though he has sincerely insisted that his client should have been acquitted on the evidence, the jury, the rightful tribunal to weigh the facts, were of a different opinion, and calm reflection may convince him, when the partial view of the advocate has faded out, that the jury were right.

Affirmed.

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF ARKANSAS,

AT THE

NOVEMBER TERM, 1881.

DOVE v. THE STATE OF ARKANSAS.

37 261
72 118

37 261
84 149

1. CRIMINAL LAW: *Presumption from age of prisoner.*

By Statute, an infant under twelve years of age cannot be convicted of any crime or misdemeanor; and the common law presumption that one between the ages of twelve and fourteen years is incapable of discerning good from evil until the contrary be affirmatively shown, still prevails.

2. LARCENY: *The intention in taking the property.*

When one takes another's horse, without any intention of converting him to his own use, but to ride him for some miles, which he does, and then abandons him, it is a trespass, but not larceny.

3. CRIMINAL EVIDENCE: *Proving one felony by evidence of another.*

Generally it is not competent to prove one guilty of one felony by proving him guilty of another; but when several felonies are committed together, and form parts of one entire transaction, then one is evidence to prove the character of the other.

APPEAL from *Lincoln* Circuit Court.
Hon. X. J. PINDALL, Circuit Judge.

D. H. Rousseau, for appellant:

Insists that the court erred in giving to the jury *Sec.* 1358 *Gantt's Digest.* The punishment for larceny of the animals named therein is not fixed by that section, but by the *Act of 22nd March, 1881.* See *Acts 1881, pp.* 144, 145.

C. B. Moore, Attorney-General, for the State:

The admission of the evidence that appellant stole the bridle is too slight an error to reverse the judgment.

There is no other error, unless, possibly, on the ground of *surprise in the evidence of the father.* The court should have granted a new trial.

ENGLISH, C. J. The appellant, Dove, was indicted in the Circuit Court of Lincoln county, for stealing a bay mare, of the value of $100, the property of J. M. Martin. The jury found him guilty, and fixed his punishment at imprisonment in the penitentiary for five years. A new trial was refused him, and he was sentenced in accordance with the verdict.

It was not made ground of the motion for a new trial that the court committed any error in its instructions to the jury.

There is nothing in the first ground assigned that the verdict was contrary to law. It was responsive to the allegations of the indictment, in good form, and fixed the punishment of the accused at the shortest period of imprisonment in the penitentiary prescribed by the Statute for the offense charged. *Gantt's Digest, sec.* 1358.

I. The assignment that the verdict was contrary to the evidence, deserves grave consideration, in view of the age of the accused.

1. CRIMINAL LAW: Presumption from age of prisoner.

According to the testimony of William Dove, the father of appellant, he was born in March, 1867, and was, therefore, between twelve and thirteen years of age on the tenth day of August, 1879, the time at which the offense is alleged to have been committed.

By the common law, if a child more than seven and under fourteen years of age is indicted for a felony, it will be left to the jury to say whether the offense was committed by the prisoner, and if so, whether, at the time of the offense, the prisoner had a guilty knowledge that he or she was doing wrong. The presumption of law is, that a child of that age (between seven and fourteen) has not such guilty knowledge, unless the contrary be proved by the evidence. 1 *Hale, Pleas of the Crown*, (1 *American Ed., notes by Stokes & Ingersoll*), *p.* 25 *to* 28, and cases cited.

By Statute:—"An infant under twelve years of age shall not be found guilty of any crime or misdemeanor." *Gantt's Digest, sec.* 1230.

Yet when the accused is between the ages of twelve and fourteen, the common law presumption still prevails that he or she is not *doli capax*, or capable of discerning between good and evil, until the contrary is affirmatively shown by evidence.

No witness was examined as to the intelligence of appellant, or as to his knowledge of right and wrong, good and evil.

Without his own confession there was not sufficient evidence (putting aside hearsay) that he took the mare from the lot of the owner and rode her away.

LORD HALE said that the circumstances should be inquired

into by the jury, and the infant should not be convicted upon his own confession. 1 *Hale, P. C.*, 27.

The rule is stated in note to 1 *Hale*, above cited, thus: "From the supposed imbecility of mind, the protective humanity of the law will not, without anxious circumspection, permit an infant to be convicted on his own confession. Yet if it appear, by strong and pregnant evidence and circumstances, that he was perfectly conscious of the nature and malignity of the crime, the verdict of a jury may find him guilty," etc.

The rule was so expressed in a case of murder where the accused was between the ages of twelve and fourteen.

2. LARCENY: Intention in taking property.

Moreover, it is doubtful upon all the evidence, including the confession of appellant, whether the mare was taken with a felonious intent. It appears that on the evening of the tenth of August, his father had threatened to whip him for disobedience, and on the following night he took the mare from the lot of the owner, rode her some miles, turned her loose, and then traveled on, on foot, to the house, where he was found and arrested. If he did not intend to convert the mare to his own use, when he took her from the lot, but his intention was to ride her for some miles, as he did, to escape a whipping, and then abandon her, it was a trespass, and not a theft. *Roscoe, Cr. Ev., p.* 590.

II. Jacob Martin, the owner of the animal, a witness for the State, after stating where he found the mare, and where he found and arrested appellant, and that when he brought him back to where he turned the mare loose, he went out in the bush, and got the bridle he said he had ridden the mare with, was permitted to state, against the objection of the counsel of appellant, "that the bridle belonged to another man; that the bridle belonged to Taggart, from whom he (appellant) had stolen it;" and the admis-

sion of this evidence was made ground of the motion for a new trial.

Generally speaking, it is not competent to prove a man guilty of one felony, by proving him guilty of another; but where several felonies are connected together, and form part of one entire transaction, then one is evidence to prove the character of the other. *Baker* v. *State*, 4 *Ark.*, 61.

3. EVIDENCE: Proving one felony by evidence of another.

The form in which the statement of the witness objected to was made, was calculated to prejudice appellant in the minds of the jurors. The witness did not state when nor where appellant stole the bridle from Taggart. The mare was taken from the lot of her owner, on the tenth of August. If the bridle was stolen from another person, and at a different time and place, it was a distinct offense, though appellant used it in riding the mare.

Upon the whole record, we think it safer to reverse the judgment, and remand the case for a new trial.

HOWARD v. THE STATE.

1. CRIMINAL LAW: *Prisoners right to copy of indictment.*

In criminal prosecutions the accused is entitled by the Declaration of Rights, to counsel, process for witnesses, trial by jury, and to have a copy of the indictment before arraignment; but the Legislature has the power to regulate the manner of securing these rights to him; and by Statute, he can not, in a prosecution for an offense not capital, have a copy of the indictment, without tendering the fee for the copy.

APPEAL from *Benton* Circuit Court.
Hon. J. H. BERRY, Circuit Judge.

E. P. Watson, for appellant:

Appellant was entitled to a copy of the indictment before

plea. *Sec.* 10, *Bill of Rights*; *Cons. Ark.*, *sec.* 1826, *Gantt's Dig.*; *Futs.* v. *State*, 8 *Ohio* (*State*), 102; *Smith* v. *State*, 8 *Ohio*, 294.

C. B. Moore, *Attorney-General*, for the State:

The clause in section 10, Bill of Rights, Cons., 1874, is the same, almost *verbatim*, as in section 11, Bill of Rights, Const., 1836.

Section 1825, Gantt's Digest, provides that in *capital cases* a copy of the indictment shall be served on defendant, etc.; but section 1826, Ib., only provides that he shall have a copy (in all other than capital cases) *on payment of the fees for same*. These sections are taken from the Revised Statutes, and have been the law since March 1, 1838. They declare, as the Legislature had a right to do, how and under what restrictions the right to a copy shall be exercised.

No fees were tendered or offered, and no showing was made that defendant was unable to pay them.

The Ohio cases cited for appellant have no bearing. In both of them the question of *time for the service of a copy* enters, under the Ohio Statutes.

It does not appear that defendant was not on bail. If not in custody, he had no right to a copy of the indictment, even if a capital case. *Dawson* v. *State*, 29 *Ark.*, 116.

English, C. J. The indictment in this case was returned into the Circuit Court of Benton county, by the grand jury, on the twenty-ninth of September, 1881, charging appellant, W. J. Howard, with grand larceny—stealing a mare and saddle.

On the same day he was brought into court in custody of the sheriff, informed of the nature of the charge against him, and being unable to employ counsel, an attorney of the court was appointed to defend him, and the cause set for trial on the first of October. On that day he appeared

in court in his proper person, as well as by attorney (the record states), and not being ready for trial on account of the absence of certain witnesses, the cause was continued until the third of October, on which day he again appeared, etc., was formally arraigned, pleaded not guilty, was tried by a jury, found guilty, moved for a new trial on the ground that he had not been furnished with a copy of the indictment before arraignment, and the motion overruled.

From a bill of exceptions taken by appellant, it appears that on the third of October, before he was arraigned, he, through his attorney, demanded of the court that he have a copy of the indictment, duly certified by the clerk as such, served upon him before he entered his plea. Whereupon the court asked him if he had, since the filing of the indictment in court, had access to the same, to which he replied, through his counsel, that he had. Thereupon the court offered to him the original indictment, and refused to order the clerk to make out a certified copy thereof, and have it served upon him, and ordered him to be forthwith arraigned and to plead to the indictment. No fees were tendered, or offered to be tendered, to the clerk for a copy of the indictment, and appellant made no showing that he was unable to pay the fees of the clerk for such copy.

The only question presented on this appeal is whether the court below erred, upon the above facts shown by the record entries, and the bill of exceptions, in refusing to order the clerk to make out a certified copy of the indictment, and that it be served upon appellant before his arraignment and plea.

At common law, the accused, in case of treason or felony, was not entitled to a copy of the indictment; but in offenses inferior to felony, the right of having a copy was, at all times, admitted. 1 *Chitty, Cr. Law*, 403–4.

Section 11 *of Our Declaration of Rights of* 1836 pro-

vided :—"That in all criminal prosecutions the accused hath a right to be heard by himself and counsel: *to demand* the nature and cause of the accusation against him, and to have a copy thereof," etc.

Had there been no legislation to regulate the enforcement of this section of the Declaration of Rights, the courts might have made rules of practice to secure to persons accused of crimes the benefits intended by it, or have looked to Statutes of the British Parliament in aid of or to supply the defect of the common law, made prior to the fourth year of James I., so far as they were applicable to our form of government, etc. *Gantt's Dig.*, *sec.* 772.

But on the third of February, 1838, the legislature passed an act regulating criminal proceedings, which became *Chapter* 45 *of the Revised Statutes*, and contained the following sections, among others :—

"Section 110.—It shall be the duty of the clerk of the court in which an indictment against any person for a capital offense may be pending, whenever the defendant shall be in custody, to make out a copy of such indictment, and cause the same to be delivered to the defendant, or his counsel, at least forty-eight hours before he shall be arraigned on such indictment; but the defendant may, at his request, be arraigned and tried at any time after the service of such copy.

"Section 111.—Every person who shall be indicted for an offense, who shall be in custody, or held by recognizance to appear and answer such indictment, shall, on demand, and on the payment of the fees allowed by law therefor, be entitled to a copy of the indictment, and all endorsements thereon."

Section 112 provides for the appointment of counsel for persons accused of felony, who are unable to employ any, etc.

Sections 110 and 111, as above copied, have never been altered or repealed, and they were carried into *Gantt's Dig.* as sections 1825–6. They are also in harmony with the *Bill of Rights* adopted subsequent to that of 1836.

Section 11 of the *Declaration of Rights* of 1864, is a literal copy of the same section of the *Declaration of Rights* of 1836.

Section 8 of the *Bill of Rights* of 1868, provides that:—"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury, etc., and to be informed of the nature and cause of the accusation against him." The words "*and to have a copy thereof*," being omitted. But they were restored in the tenth section of the *Declaration of Rights* of 1874, which provides that: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, etc., and to be informed of the nature and cause of the accusation against him, and to have a copy thereof."

Only in capital cases that prisoner may have copy of indictment without fee.

It is only in capital cases, when the accused is in custody, that the Statute imposes the duty upon the clerk to make out a copy of the indictment, and cause it to be delivered to him, or his counsel, at least forty-eight hours before arraignment. In all other cases, when the accused is in custody, or on recognizance, he has a right to such copy, on application to such clerk, and payment of fees. *Dawson* v. *State*, 29 *Ark.*, 116.

Perhaps (though the question is not presented in this case), if it be shown to the court that the accused is unable to pay for a copy, and it has been refused by the clerk for that reason, it would be the duty of the court to order the clerk to furnish it.

The accused is entitled, under provisions of the *Declaration of Rights*, to counsel, process for witnesses, a trial by jury, and to have a copy of the indictment; but it is within

the province of the legislature to regulate the manner of securing to him these rights.

The Statute regulating the furnishing of a copy of the indictment has been administered in the criminal practice of this State, under all the constitutions, for forty years, and there has been no decision that it was in conflict with the provisions of any of them.

Under Article VI of the *Federal Bill of Rights*, the accused is entitled to be informed of the nature and cause of the accusation against him.

In *United States* v. *Bickford*, 4 *Blatchford*, 339, the defendant applied to the court for an order, that a copy of the indictment be furnished to him, by the government, before trial, and relied upon the above article. The Court held that no copy of the indictment could be furnished at the expense of the government, inasmuch as the law had made no provision therefor. That was not a capital case. In treason, and other capital offenses, an act of Congress provides that the accused shall be furnished with a copy of the indictment before trial. *Rev. Stat. U. S.*, *Sec.* 1033; *United States* v. *Curtis*, 4 *Mason*, 232.

A section of the Revised Statutes of New York, like ours, provided that every person in arrest, or on recognizance, to answer an indictment, should on demand, and paying the fees allowed by law, be entitled to a copy of the indictment, etc. *Colby's Cr. L.*, 265.

In People v. *Warren*, 1 *Wheeler's Cr. Cases*, 140, it was ruled that the counsel for the accused had no right to demand of the district attorney a copy of the indictment; that he must apply to the clerk, whose duty it was to furnish the copy on payment of fees.

Under the Statutes and practice of the several states and the United States, differing somewhat in minor provisions, the prisoner, (says Mr. Bishop), may have a copy of the

indictment furnished at his pleasure, etc. He should be careful not to waive the right if he wishes to exercise it, and should keep himself within the terms of the Statute of his own State. 1 *Bishop Cr. Pr.*, *sec.* 959, and cases cited in notes.

In this case the indictment was short and simple, charging appellant in the usual form, with stealing a mare and saddle. On the day it was found, twenty-ninth September, he was brought into court, informed of the nature of the charge, an attorney appointed to defend him, and the cause set for trial on the first of October. On that day, it was put over to the third, at his instance, on account of absent witnesses. From the time the indictment was filed in court, to the day of trial, he had access to it. It is not made to appear that he or his counsel applied to the clerk for a copy of the indictment, and that it was refused. But on the day of trial, before arraignment, he demanded of the court an order that he have a copy of the indictment, duly certified by the clerk, served upon him before he entered his plea. It is made to appear, by the bill of exceptions, that no fees were tendered, or offered to be tendered, to the clerk for such copy, and that appellant made no showing that he was unable to pay the fees. The order was demanded of the court as a constitutional right, regardless of the Statute regulating the manner in which the right is to be obtained. As demanded, it was refused by the court, and properly on all the facts made to appear.

Neither of the Ohio cases relied on by the counsel for appellant is applicable to the question presented for decision in this case.

In *Smith* v. *State*, 8 *Ohio*, 294, Smith was convicted for uttering counterfeit money, and moved in arrest of judgment on the ground that he had not been furnished with a copy of the indictment twelve hours before trial as provided

by Statute. The court held that the Statute was directory, and that the accused had waived the right to have a copy of the indictment, by going to trial without demanding it.

In *Fouts* v. *State*, 8 *Ohio State*, 98, Fouts was convicted of a capital offense, and moved in arrest, and assigned as error, that he had not been furnished with a copy of the indictment before trial, It appears from the opinion of the court, that by a constitutional provision, like ours the accused had the right "to demand the nature and cause of the accusation against him, and to have a copy thereof." It also appears that a Statute of Ohio provided that:—"A copy of the indictment, etc., shall be delivered to every person who may be indicted for an offense, the punishment whereof is capital, at least twelve hours before the trial. The court held, as in the above case, that the right to a copy was waived by going to trial without claiming it, and so this court ruled in *Dawson* v. *State*, *Sup*.

Affirmed.

Lane v. The State.

1. Liquor: *License.*

One who has license to sell liquor may lawfully sell the liquor of another who has no license.

APPEAL from *Franklin* Circuit Court.
Hon. W. D. Jacoway, Circuit Judge.

STATEMENT.

J. A. Lane was indicted in the Franklin Circuit Court for being "unlawfully interested in the sale, to one R. A. Eichenberger, of one pint of whisky, the same being, in quan-

tity, less than one quart of whisky, when the owner thereof had not previously thereto procured a license from the County Court of said Franklin county authorizing the same, against the peace," etc.

He demurred to the indictment; the demurrer was overruled, and he was tried, found guilty, and fined $200. He filed a motion for a new trial, and also in arrest of judgment, for insufficiency of the indictment. Both motions were overruled, and he filed his bill of exceptions, and appealed.

C. B. Moore, Attorney-General, for the State:

The indictment is drawn in the language of the Statute, and the case differs from *State* v. *Keith*, 36 *Ark.*, 153, in its charge that appellant was "*interested* in the sale," etc., etc.

The proof shows that he was a partner, and that he sold, etc., and "*if the seller has no license, and the owner or person interested in the sale none, all may be liable.*" *State* v. *Keith*, 36 *Ark.*, 153.

HARRISON, J. In this case the defendant is charged in the indictment with having been interested in the sale of the liquor; and in that particular only, differs from the case of *The State* v. *Keith*, *ante*, in which we held the indictment bad, because it was not alleged that the defendant himself had no license, and that it is not a violation of law for one having a license, to sell the liquor of another who has none.

The demurrer to the indictment should have been sustained.

It is unnecessary to consider the questions raised by the motion for a new trial.

The judgment is reversed.

Boze Smith v. The State.

1. Accessory: *Must not be indicted as a principal.*

One who advises or encourages the commission of a felony, but is not actually or constructively present when it is committed, can not be convicted under an indictment charging him as principal in the crime.

APPEAL from *Faulkner* Circuit Court.
Hon. J. N. Cypert, Circuit Judge.

STATEMENT.

At the March term, 1881, of the Circuit Court, of Faulkner county, Boze Smith was indicted for larceny of a bale of cotton. Upon the trial, the evidence showed that the cotton was stolen by other parties—that Smith was not present, but that he advised and encouraged them to steal it.

The Court instructed the jury "that larceny is the felonious stealing, taking and carrying away the personal property of another, and all persons being present, aiding and assisting, or not being present, hath counseled, advised or procured the larceny to be committed, are principals in law and punished as such; and if the jury should find in this case that the goods stolen were actually taken by another, that the defendant not being present at the taking, had advised, encouraged or procured the same to be taken, they will find him guilty."

The jury found the defendant guilty, and he filed a motion for new trial for error in the instruction of the court, which being overruled, he filed a bill of exceptions and obtained an appeal from one of the judges of this court.

Clark & Williams, for appellant.

Argued orally.

C. B. Moore, Attorney-General, for the State:

I. The testimony shows that the appellant, if not present, aided and abetted in the theft, and was properly indicted as a principal. *Sec.* 1240, *Gantt's Dig.*

OPINION.

HARRISON, J. *Section* 1238, *Gantt's Digest*, declaring that one who aids, assists, abets, advises or encourages another in the commission of a crime "shall be deemed in law a principal and punished accordingly," has no reference to the manner of charging the offense. Construed with section 1243, part of the same Act (*Act of February* 16, 1838), which says: "An accessory before or after the fact, may be indicted, arraigned, tried and punished, although the principal offender may not have been arrested and tried, or may have been pardoned or otherwise discharged," its obvious meaning is, but that the punishment of the accessory shall be the same as the principal's, and shall not depend, as at common law, upon the conviction of the principal. *Bish. on Stat. Crimes, sec.* 142; *State* v. *Ricker*, 29 *Maine*, 84; *People* v. *Trim.*, 39 *Cal.*, 75; *People* v. *Campbell*, 40 *Cal.*, 129.

The indictment should contain a statement of the facts and circumstances constituting the offense, that the accused may be apprised of the nature of the particular accusation on which he is to be tried, and be prepared for his defense. The facts and circumstances being so materially different, one who has advised or encouraged the commission of a felony, but was not actually or constructively present when it was committed, cannot be convicted upon an indictment

charging him, not as an accessory before the fact, but as a principal perpetrator of the crime. 1 *Bish. Crim. Law.*, *sec.* 803; *Rex.* v. *Manners* 7 *Car. & Payne*, 801.

The instruction was erroneous and should not have been given.

The judgment must be reversed and the cause remanded.

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MINEHART v. HANDLIN.

1. BILLS AND NOTES: *When drawer entitled to notice of dishonor.*

When the drawee, in a bill of exchange, is indebted to the drawer, or in other words, has funds of the drawer in his hands, the drawer has the right to draw, and is entitled to notice of the dishonor of the bill, though he had no expectation at the time of drawing it that it would be paid; and default of the holder in presenting the bill for payment or in giving notice of its dishonor to the drawer will discharge him, both from the bill and the original debt for which it may be given, though it was given in discharge of the debt only if paid, and though the action be upon the debt for which it was given and not upon the bill. The want of injury or prejudice to the drawer will not excuse the holder's default in making demand or giving notice of the dishonor.

2. SAME: *Notice of dishonor, when to be given.*

When the parties to a bill of exchange reside at different places, notice of its dishonor should be deposited in the post office in time to go by the mail of the day after the dishonor, if the mail is not closed before early and convenient business hours of that day, in which case it must be sent by the next mail thereafter; or it may be sent by messenger or given personally, but must reach the party at furthest on the same day it would have reached him in due course of mail.

APPEAL from *Fort Smith* Circuit Court.

Hon. J. H. ROGERS, Judge.

STATEMENT.

In November, 1878, Handlin sued Minehart before a Justice of the Peace in Sebastian county, upon an account for $298.25. Minehart pleaded in defense that on the twentieth day of July, 1876, he gave to Handlin an order on J. N. Sarber for the full amount of the debt in satisfaction of it, and that Sarber was indebted to him at the time in a greater sum than the order. The Justice gave judgment against him and he appealed to the Circuit Court at Fort Smith.

Upon the trial in the Circuit Court, the evidence showed that Minehart, being indebted to Handlin in the sum sued for, gave him, on the twentieth of January, 1876, an order on J. N. Sarber for the amount; that Sarber was at the time indebted to Minehart in a larger amount than the amount of the order, and had authorized Minehart to draw the order. The order was given, Minehart says, in settlement of the account. Handlin says it was to be in discharge of the account, if paid by Sarber. A few days after it was given, Handlin presented it to Sarber for payment. He did not pay it, but informed Handlin that he owed the amount to Minehart, and if he got money from the government, which he claimed to be due him and was expecting, the order would be good, but if he did not, it would be worthless. Sarber was at the time United States Marshall of the District. He never got the money; but to the contrary, the government recovered judgment against him for a large amount, and Minehart lost the balance of what he owed him above the amount of the order. Handlin never gave Minehart any notice of the non-payment of the order until he met him in Fort Smith some three or four weeks after the dishonor of it.

The defendant asked the following instrustions:

First. It is the duty of a creditor, who receives a draft

from his debtor on a third person, to present it to the drawee for payment and to give notice within a reasonable time to the drawer of its non-payment; and on failure to give such notice to the drawer he will be discharged from liability on the draft; and the creditor cannot, under such circumstances, maintain an action on the original debt; and if the jury find, from the evidence, that the plaintiff, in this case, received from the defendant a draft on Sarber for the amount of his indebtedness, that Sarber was indebted to the defendant at the time and the plaintiff neglected to give notice to the defendant of the non-payment of the draft within a reasonable time, they should find for the defendant.

Second. If the jury find from the evidence, that the plaintiff received from the defendant the draft in question in full satisfaction of his pre-existing indebtedness to him, then they should find for the defendant.

The Court refused to give these instructions, and of its own motion instructed the jury that if they found, from the evidence, that at the time of the delivery of the order by Minehart to Handlin there was no specific agreement between them that the order was to be in full satisfaction and discharge of the account, they should find for the plaintiff.

Third. If they found, from the evidence, that when the order was made and delivered to Handlin, that Minehart either had sufficient amount of money in Sarber's hands to pay it, or that Sarber being indebted to Minehart, in a larger amount than the order called for, Minehart had reasonable grounds to believe that it would be paid upon presentation, and that under either of these two conditions of thnigs, Handlin took the order and failed to present it within a reasonable time for payment, or having presented it within a reasonable time and payment being refused, neglected to give defendant due notice of its non-payment they should find for the defendant. But on the other hand, if they be-

lieved from the evidence, that when the order was delivered it was understood by the parties thereto that Sarber had no money on hand to pay it, or that his ability to pay it depended upon his subsequently obtaining money from the government, or that it was not contemplated by the maker that the draft should be presented for payment and if not paid that notice should be given to him, they should find for the plaintiff.

Fourth. If the jury find from the evidence, that when Minehart gave Handlin the order, it was intended by him that Handlin should present the draft, and if not paid give him due notice of its non-payment, and that Handlin having taken the draft and presented it for payment failed to give due notice to Minehart of its non-payment, the verdict should be for defendant, unless Handlin show that the omission to give the notice has in no way resulted in a loss to Minehart."

The jury found for the plaintiff, and after motion for new trial overruled, the defendant filed his bill of exceptions and appealed.

B. T. Duval, for appellant:

The order was a Bill of Exchange, and the rights of the parties are governed by the law merchant. *Adams adr.* v. *Boyd*, 33 *Ark.*, 47.

Appellee was bound to present for acceptance and payment within a reasonable time, and give notice of dishonor within the time prescribed by law; on failure to do either, appellant was exonerated from all liability. *Ibid*, 48, 49, and cases cited.

Notice should be given by first mail. 3 *Kent.*, 105, 106; *Smith's Merchantile Law*, 328–9; *Chitty on Bills*, 325, 433–4; *Edwards on Bills*, 548–9.

Even where presentment is excused by insolvency of the

maker or acceptor, the holder should return or tender the instrument to the person from whom it was received. 2 *Am. L. C.*, 122; *Dayton* v. *Snell*, 23 *Wend.*, 345.

Appellee was bound to use the due diligence required by the law merchant. *Starr* v. *Kerr*, 21 *Miss.*, 191; *Jarmon* v. *Parker*, 7 *Mich.*, 335.

Presentment, notice, and production of the instrument at trial, are conditions precedent to recovery on the original debt. *Dayton* v. *Snell*, *sup.*

If the creditor fails to give notice he makes the bill his own. *Byles on Bills*, 229. See also 2 *Am.*, *L. C.*, 290, 291.

Sarber's insolvency was no excuse, for by his laches appellee made the bill his own. *Robson* v. *Oliver*, 10 *Q. B.*, 704.

Sarber owed appellant, and had promised to pay the draft, hence appellant was entitled to notice of non-payment. *Stanton* v. *Blossom*, 14 *Mass.*, 116; *Campbell* v. *Pettengill*, 7 *Greenl.*, 126; *Hill.* v. *Norris*, 2 *Stew. & Porter*, 114; *Robinson* v. *Ames*, 20, *John*, 146; *Dunbar* v. *Tylar*, 44 *Mississippi*, 1.

Clendenning & Sandels, for appellee:

Having knowledge that Sarber had no funds, out of which to pay, and having no reasonable grounds to believe that the order would be paid at once, appellant was not entitled to notice. *Bickerdike* v. *Bollman*, 1 *T. R.*; *McRea* v. *Rhodes*, 22 *Ark.*, 315; *Sullivan* v. *Deadman*, 23 *Ark.*, 15; *Edwards on Notes and Bills*, *marg. p.*, 640. He was not injured, and if he was, the *onus* was on him to show it. *Sullivan* v. *Deadman*, *sup.*; *Edwards on Bills*, *marg. p.*, 397 *and* 491.

As to *due diligence*, see notes to *Aymar* v. *Beers*, 17 *Am.*, *Decisions*, 538.

This case is wholly different from *Adams adr.* v. *Boyd*,

33 *Ark.*, 33. That case does not touch upon our position at all.

1. BILLS AND NOTES When drawer entitled to notice of dishonor.

HARRISON, J. The order on Sarber was a bill of exchange, and as he was indebted to the defendant, or in other words, had effects of his in his hands, the defendant had the right to give it, and upon its non-payment, was entitled to notice. *Adams, Adm'r.*, v. *Boyd*, 33 *Ark.*, 33.

2. When notice to be given.

The rule is well settled, that where the parties reside in different places, the notice should be deposited in the postoffice, in time to go by the mail of the day after the dishonor, if the mail is not closed before early and convenient business hours of that day, in which case, it must be sent by the next mail thereafter; or it may be sent by messenger, or given personally, but must reach the party, at farthest, on the same day it would have reached him in due course of mail. 2 *Dan. on Neg. Ins.*, *sec.* 1033, 1039.

That the defendant, when he gave the order, had really no expectation that Sarber would pay it—there was, however, no evidence of such fact—could make no difference. He had effects in his hands, and it was the duty of the payees to present it, and if not paid, give him due notice of its dishonor. The want of injury or prejudice to the drawer is not sufficient excuse for default in making demand or giving notice of dishonor. "The law requires," says Daniel, "presentment and notice as conditions precedent to the fixed liability of the drawer and endorser, not merely as an indemnity against actual injury, but as security against a possible injury, which might result from the holder's laches. It is true, that when the drawer has no funds in the drawee's hands, he can, as a general rule, suffer no injury from want of presentment or notice; but drawing in such a case would be a fraud, and it is for that reason, rather than absence of actual injury, that presentment and notice are excused."

2 *Dan. on Neg. Ins.*, *sec.* 1176; *Staples* v. *O'Kine*, 1 *Esp.*, 332.

The suit, however, was not on the order, but on the debt for which it was given. If it was given as absolute payment of the debt, the debt was, of course, discharged; but if not so given, did the failure to give notice of its dishonor have that effect? The authorities conclusively show that it did. Edwards says: "When a debtor gives to his creditor a draft or bill of exchange, drawn on a third person, and it is received in full satisfaction of the debt, when paid, the person so receiving it, assumes the duty of presenting it properly, for acceptance and payment, and giving timely notice of its dishonor. Failing in either of these respects, he makes the bill his own, and it is deemed a satisfaction of the debt. So, when a merchant buys a bill of goods, and gives a bill of exchange in payment of the purchase money, the vendor cannot recover in an action for the goods, without showing that the drawer has been regularly charged on the bill. Whether the bill is received as conditional payment, or on an agreement so to apply the money, when collected, does not alter the principle; for the duty of presenting the bill results from the nature of the security. *Edwards on Bills*, 423. And Daniel says: "So absolute is the necessity for notice to an indorser, in order to charge him, that if a note has been indorsed to the holder, in conditional payment of a debt, the failure to give notice to the indorser, will not only discharge the indorser, as a party to the note, but also as debtor upon the original consideration, even though it be secured by a mortgage or deed of trust.

The note, then, is made an absolute discharge of his liability, and the indorser must look solely to prior parties. And so in respect to a bill given in conditional payment." 2 *Dan. on Neg. Ins.*, *sec.* 971; *Gracie* v. *Sanford*, 9 *Ark.*,

233; *Adams, Adm'r.*, v. *Boyd, supra.; Dayton* v. *Trull*, 23 *Wend.*, 345; 2 *Am. Lead. Cases*, 256.

It follows, that the court erred in its instructions to the jury, and in refusing to give those asked by the defendant.

The judgment is reversed, and the cause remanded.

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EUPER v. ALKIRE & CO.

1. HOMESTEAD: *Temporary removal from, no abandonment.*

Continuous actual occupation is not necessary to preserve the homestead. A removal from it for a temporary purpose, or with the intention of re-occupying it, is not such an abandonment as will forfeit the homestead right

2. SAME: *Scheduling.*

When a schedule of the homestead has been filed against an execution, it is not necessary to file another against an alias execution on the same judgment, where there has been no change of circumstances.

APPEAL from *Sebastian* Circuit Court in Chancery. Hon. J. H. ROGERS, Circuit Judge.

STATEMENT.

Euper filed in the Circuit Court, at Fort Smith, his complaint, in equity, against the appellees, alleging, in substance, that he was a citizen of Arkansas, and a married man, and the owner in fee of a certain house and lot in Fort Smith, called the Euper House, which he and his family had occupied as a homestead for sixteen years, keeping a hotel—but from the infirmities of old age and the want of means to carry on the hotel, had leased it for two years and rented a small house near by, for the temporary occupancy of him-

self and wife, which they had since occupied about ten months. That in leasing his house and renting the other, he had no intention of abandoning his homestead, or acquiring another, but was forced by his necessities to lease it for two years, with the design of returning to it at the expiration of the lease. That the defendants, Alkire & Co., had caused an execution to issue out of said Circuit Court, upon a judgment in their favor against the plaintiff, and to be levied on said homestead, and he had thereupon filed his schedule, as required by law, claiming said property as his homestead, and the execution had been superseded; but said defendants had caused another to be issued on the same judgment, and levied by the sheriff, the defendant Falconer, on said homestead, and it would be sold unless they were restrained. That said homestead did not exceed in amount or value that allowed by the constitution, and the debt for which said judgment was rendered was not one of the excepted debts mentioned in the constitution.

Prayer for injunction.

A demurrer to the complaint was sustained, and the plaintiff appealed.

Wm. Walker, for appellant.

M. H. Sandels, contra.

OPINION.

1. HOMESTEAD: Temporary removal from, no abandonment.

HARRISON, J. When a homestead right has once attached, a continuous actual occupation is not indispensable for its preservation. It is well settled by the authorities, that a removal from the homestead for a temporary purpose, or with the attention of returning and again occupying it, is not such an abandonment as will forfeit the homestead right.

In the case of *Wiggins* v. *Chance*, 54 *Ill.*, 175, where the owner rented out the premises for three years, and removed with his family from them, in the fall of the year, to a town in the same county, for the purpose of earning money to pay his debts, but with the intention of returning, and did return the following spring, and resumed their occupancy with his family, it was held there was no abandonment of the homestead.

In the case of *Fyffe* v. *Beers*, 18 *Iowa*, 4, the owner had removed from the premises and been absent more than four years, and had, in that time, been engaged elsewhere in the business of inn keeping, but as she always intended to return and again occupy them, as her homestead, it was held that her homestead right still subsisted.

In that case the court said * * * * * "If the removal is temporary and the *animus revertendi* is established, and third persons have not been led to believe it was not a homestead by the owner, thus out of possession, and to act upon this belief by purchasing or specifically altering their condition, upon the faith that it was not exempt as a homestead, the law would treat the homestead right as still subsisting."

And, in the case of *McMillan* v. *Warner*, 38 *Tex.*, 410, the Court said: "The question of abandonment is almost exclusively a question of intent, since no legal abandonment can occur without a fixed intent to renounce and forsake, or to leave never to return; and to abandon a homestead, a party must forsake and leave it with the intent never to return to it again as a homestead." *Tumlinson* v. *Swinney*, 22 *Ark.*, 400; *Stewart* v. *Brand*, 23 *Iowa*, 477; *Moss* v. *Warner*, 10 *Cal.*, 296: *Potts* v. *Davenport*, 79 *Ill*, 455; *Walters* v. *The People*, 18 *Ill.*, 194; *Shepherd* v, *Cassiday*, 20 *Tex.*, 24; *Gouhenant* v. *Cockrell*, *Ib.*, 96; *Hixon*

v. *George*, 18 *Kan.*, 253; *Thomp. on Homesteads, secs.* 265, 266.

The complaint in this case alleged that when the plaintiff leased and removed from his homestead, it was with the intention of returning to and resuming the occupancy of it upon the termination of the lease, and had always so intended; the truth of which allegation was admitted by the demurrer to the complaint.

2. SAME: Schedule of, repeating.

And it was in like manner admitted that he had, after the original execution was sued out, explicitly selected and designated his homestead, by filing a schedule of the property in question as such, with the clerk, and he was not required again to do so upon the suing out of the alias execution.

There can be no reason for a second selection or schedule in the same case, where there has been no change of circumstances.

The demurrer to the complaint should have been overruled. The decree is therefore reversed, and the cause remanded for further proceedings.

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CONGER V. COTTON.

1. CHANCERY PRACTICE: *When there is jurisdiction of one matter, all will be disposed of.*

When Chancery once obtains jurisdiction of a matter in controversy it will retain the cause for the settlement of all rights between the parties growing out of and connected with the subject-matter, whether legal or equitable, so as to do complete justice, and may even give damages, for compensation, which it could not do if they were the principal object of the suit.

2 DEMURRER: *Suit brought in wrong forum.*

That an action at law has been brought in equity is no ground for demurrer. The error should be corrected by motion to transfer to the proper docket.

3. PRACTICE: *Forum, when equitable cross-bill filed.*
When a defendant files a cross-bill, setting up equitable grounds for relief, to a complaint in equity which should have been brought at law, the case should proceed in equity.

4. SAME: *Amending certificate to depositions.*
There is no error in allowing an officer to amend his certificate of the taking of depositions so as to conform to the facts, after it is filed in Court.

5. SAME: *Amount of proof required when answer responsive to complaint.*
The rule that when an answer is responsive to the complaint it requires two witnesses, or one with strong corroborating circumstances, to overturn it, does not obtain, under the Code practice.

6. SAME: *Evidence: Testimony of a party.*
The testimony of a party taken subject to the test of a cross-examination is a different thing and of a higher nature, than sworn allegations in pleading, and is sufficient when unimpeached, and credible, to sustain a decree in the absence of evidence on the other side.

7. STATUTE OF FRAUDS: *Assumption by partner of debts due to the firm.*
If, upon the close of a partnership, one partner takes to his own use a portion of the assets, whether choses in action or anything else, on an oral agreement to account to his copartners for a definite share, it is a separate and direct agreement, on a new consideration, and not within the statute of frauds.

APPEAL from *Yell* Circuit Court in Chancery.
Hon. T. W. POUND, Chancellor.

STATEMENT.

On the twenty-sixth of March, 1875, W. E. Cotton filed in the Yell Circuit Court his complaint in equity against the appellant, Thomas C. Conger, alleging, in substance, that on the eighth of January, 1872, the plaintiff and defendant, and Jacob Conger and Claiborne Cotton, were equal partners in a steam mill in Yell county, under the firm name of T. C. Conger & Co. That on that day plaintiff bought the interest of appellant in said mill, for $1000, of which he paid, in cash, $300, and thereupon appellant delivered

to him his entire one-fourth interest in said mill. On the thirteenth of the month the plaintiff executed to appellant his note for the balance of the purchase-money—seven hundred dollars—and, to secure its payment, executed to him a mortgage upon real and personal property in Yell county, describing it, and including his interest in the mill, to be void upon payment of the seven hundred dollars, which were to be paid as follows: $300 in lumber, at $10 per thousand feet, upon demand; the balance, $400, to be paid as far as could be, out of plaintiff's interest in the accounts due the firm of T. C. Conger & Co., which should be collected by the first day of July, 1872; and the balance of the $400, if any, to then be paid in cash.

The mortgage authorized the mortgagee to take possession and sell, upon default of payment, as stipulated. By the first day of July, 1872, the plaintiff had delivered to the defendant and others, at his request, 55,032 feet of lumber, with the express understanding and agreement with defendant that it should be credited to the notes and mortgage, at $10 per thousand feet. Soon after the execution of the note and mortgage said Claiborne Cotton transferred to plaintiff his entire fourth interest in the partnership accounts due and to become due to said firm of T. C. Conger & Co., whereby plaintiff became entitled to one-half of the proceeds of said accounts when collected. That the defendant collected on said accounts $412, but refused to account to plaintiff for any portion of it, but converted the whole to his own use, instead of applying plaintiff's half to the note and mortgage, and the excess to plaintiff, as he should have done. The complaint further alleges that after plaintiff purchased the mill and executed the note and mortgage, the defendant assumed the payment of large amounts for other persons who were at that date indebted to said firm of T. C.

Conger & Co., and promised and agreed to account to said plaintiff for one-half of said amounts assumed by him, which half amounted to the sum of $161.51, for which sum said defendant was indebted to him. He further alleged that he had paid off debts due from the firm of T. C. Conger & Co., at the date of his purchase, to the amount of $293, for the fourth of which the defendant was liable to him and had promisd to pay him. He had also paid defendant $27 to be credited on said note; and said defendant had also collected other sums due to the plaintiff, and had received and appropriated to his own use divers debts and large amounts of lumber without accounting to plaintiff for any portion of them. He is unable to state the amounts so received and appropriated, and asks that the defendants be required to disclose the amounts and pay them over to plaintiff.

Plaintiff further alleges that the amount so paid by plaintiff for the defendant, and assumed by the defendant, and the several amounts in lumber and cash received by him and not accounted for, which are positively known to plaintiff, exceed in the aggregate the amount due on said note and mortgage by the sum of $315.75. He alleges that said note and mortgage have been paid for more than three years, but the defendant refuses to deliver up the notes, or to satisfy and cancel the mortgage, and also refuses to pay to plaintiff the $318.75 due to him; and refuses to make any settlement as to the matters in the complaint set forth.

Prayer, that the defendant discover and account as to the various items set forth in the complaint; that on final hearing he be decreed to deliver up said note and mortgage to the plaintiff, and pay him the $318.75 balance due him, and for general relief.

The mortgage was exhibited with the complaint. Exhib-

its of the debts assumed by the defendant, those collected by him, and of the partnership debts paid by the plaintiff, and of the lumber received by the defendant, were also filed with the complaint.

Appellant demurred to the complaint, because the plaintiff's remedy, if he had any, was at law, and Chancery had no jurisdiction, and the complaint was insufficient to entitle the plaintiff to any relief.

The demurrer was overruled, and the appellant answered.

He admits the partnership as alleged; the sale of his interest in the mill to the plaintiff, upon the terms stated; the payment of $300, and the execution of the note and mortgage for the balance—$700. Denies that he assumed to pay any person's indebtedness to the firm, and if he did, pleads the Statute of frauds, on the ground that the promise was not in writing. Denies that he promised to account to plaintiff for one-fourth of the debts of the firm, which plaintiff might pay off, and if he did, pleads the Statute of frauds as to this also, and says if plaintiff paid off such debts, it was with partnership funds. Says the partnership had never been settled up. And denies the other allegations in the complaint—claims a balance due him from the plaintiff of four hundred dollars, and interest, and by cross-complaint asks for a foreclosure of the mortgage to pay it.

The plaintiff answered the cross-complaint, denying any balance due to the defendant, re-asserting that the whole debt had been fully paid, and repeating the prayer of his original complaint.

During the progress of the cause, the defendant filed a motion to suppress certain depositions, because the certificate of the officer taking them did not show that the witnesses were properly sworn, nor that their depositions were taken at the time specified in the notice. Thereupon the

plaintiff asked a rule upon the officer to amend his certificate to conform to the facts; which was granted by the court, and the officer appeared and amended the certificate, showing that the witnesses were duly sworn, and the depositions were taken at the time specified in the notice; and the motion to suppress was then overruled.

Upon the hearing, the court held that the Statute of frauds did not apply to the defendant's promises; that the plaintiff's note and mortgage had been fully paid, and discharged, and the defendant was indebted to the plaintiff in the sum of $359.95, and decreed that the note and mortgage be cancelled, and the plaintiff recover of the defendant the sum of $359.95, and cost of the suit. Defendant appealed

W. N. May, for appellant:

1. The demurrer should have been sustained. *Story Eq. Pl.*, *secs.* 472, 473, 479, 482; *Ky. Code*, *p.* 353, *note* "*G.*," *p.* 359, *note* "*A.*"

2. As to when Courts of Chancery have jurisdiction in matters of accounts. See 8 *Ark.*, 57; 9 *Ark.*, 501; 14 *Ark.*, 50. Plaintiff's remedy was at law, there being no complication of accounts.

3. The promises were not in writing *Sec.* 2951 *Gantt's Digest; Hughes* v. *Lawson*, 31 *Ark*,, 613, and cases cited.

4. The *onus* was on appellee to prove payment of the note and mortgage.

5. The answer being responsive to the allegations of the bill, and sworn to, should be *taken as true*, unless contradicted by two witnesses, or one with corroborating circumstances. 8 *Ark.*, 10; 12 *Ib.*, 391; 13 *Ib.*, 593; 18 *Ib.*, 118; *Ib.*, 124; 19 *Ib.*, 166; 20 *Ib.*, 309.

6. The motion to suppress the depositions of Cotton and

Hensley should have been sustained, and the notary should not have been allowed to amend his certificate. *Fancher* v. *Armstrong*, 5 *Ark.*, 187.

7. The decree was for more than complainant asked, or proved.

S. R. Allen, for appellee:

1. A bill in equity is the proper proceeding to compel an accounting, and compass the cancellation of a note and mortgage outstanding.

The Statute of frauds does not apply—it was a promise by one partner to account to another for his portion of the assets of the firm. This he was bound to do, without any promise or agreement.

2. The certificate of the notary was not a part of the deposition, and the court properly allowed the notary to amend.

3. The decree is in accordance with the evidence, and the prayer of the bill.

OPINION.

1. CHANCERY PRACTICE: When there is jurisdiction of one matter, all will be disposed of.

EAKIN, J. The bill, considered simply as a suit to recover a balance due complainant for money advanced for lumber, and for money had and received by defendant to the use of complainant, did not present such a case of mutual accounts, as to require the interposition of a Court of Equity. The relief, as to that much, might have been effectually rendered at law. But the bill further seeks to have complainant's note delivered up and cancelled and to have an outstanding mortgage declared satisfied. This was the peculiar province of a Court of Equity, and draws to it all legal relief connected with the subject matter. The well settled rule is, that where, by reason of any equitable element, a Court of Chancery acquires jurisdiction of a matter in controversy, it

will retain it for the settlement of all rights between the parties, growing out of and connected with the subject matter, whether legal or equitable, so as to do complete justice, and may even adjudge damages for compensation, which it could not do, if they were the principal object of the suit.

2. DEMURRER: Suit brought in wrong forum.

3. Forum: Where equitable cross-bill to legal action.

If it were true that the action should have been brought at law, the objection should not have been made by demurrer, but by motion to correct the error made at the time of filing the answer. *Gantt's Digest*, *Sec.* 4464. This, defendant could not have done, because he made his answer a cross bill, setting up equitable grounds for relief, and which required the cause to be retained on the equity docket. This cause was, therefore, properly heard and determined in equity.

7. PRACTICE: Amending certificate to depositions.

There was no error in allowing the notary, who took the deposition, to amend his certificate in accordance with the facts. Whatever may be the case with regard to the proof and acknowledgment of deeds, where rights of third parties may be affected, there is no more reason for refusing to allow a commissioner to amend his certificate of the taking of depositions than there would be for refusing to allow a sheriff to amend a return. A sheriff not only may do that, but may be compelled to do it. As amended, it showed that the depositions had been taken at the time and place stated in the notice, and that the witnesses were duly sworn. It was not necessary to repeat the form and substance of the oath administered. In all material matters, the certificate corresponds with the directions of *Gantt's Digest*, *Sec.* 2580. The motion to suppress the depositions was properly overruled.

5. SAME: Evidence: Testimony of a party.

The proof was all upon the part of complainant and fully sustains all the allegations of the bill. It is not only unimpeached, but impresses the mind with its truth in the absence of all effort on the part of the defendant, either by cross

examination or by counter testimony, to destroy its force or explain it. He does not himself offer his own evidence to sustain the denials of his answer. His counsel contends here that the exact amounts of the account are only proven by the testimony of the complainant, and that the answer, being responsive to the allegations of the bill, should overbear the testimony of one witness, without strong corroborating circumstances. It requires no citation of authorities to show that such was the old rule in equity. But, save as to amounts, there was in this case very strong corroboration by other witnesses—quite sufficient under the rule, if it were applicable under the code. But it is not. The system has been changed. Formerly the complainant, without any oath of his own (save in exceptional cases provided by Statute), drew the defendant before the chancellor to probe his conscience. He made his adversary his own witness, and being allowed to do so, contrary to the course of common law, he was held bound by the answer unless he could disprove it by still stronger countervailing evidence. This was reasonable.

The new system proceeds on different principles. All parties are allowed to testify, and bills of discovery are almost wholly abolished. They are no longer necessary where either party may testify for himself, and make his adversary a witness. All pleadings are required to be verified on both sides. The probing of conscience has been applied to both with equal severity before issues are made. The pleadings only make the issue, leaving the preponderance of testimony only necessary for him who has the onus of showing the fact from which the equity arises. His own testimony taken subject to all the tests of cross examination is a different thing from sworn allegations in pleading. It is of a higher nature, being more deliberate, cautious and plain, besides being in his own language, without the forms

of pleading. It is enough when unimpeached and credible, to sustain a decree, in the absence of evidence on the other side. In short, the rule urged upon the court, has in the Code States, passed out of equity practice, and belongs only to the history of Equity Judicature. (*See Gantt's Digest, Section* 4591).

The matters in controvesy grew out of the old partnership transactions of T. C. Conger & Co., of which firm complainant, defendant, and two other persons, to-wit: Jacob Conger and Claiborne Cotton, were the component members. Claiborne Cotton's interest appears, both from the bill and his own deposition, to have passed to the complainant; but no notice whatever, in the suit, is taken of the interest of Jacob Conger. The defendant did not, in any proper way, ask that he be made a party, or object to proceeding without him. The question still arises, whether the court should have proceeded in his absence. The test of the duty of the Chancellor, in such cases, is found in *section* 4481 *of Gantt's Digest*, which provides that: "The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights. But, when a determination of the controversy *between the parties before the court cannot be made*, without the presence of other parties, the *court* must order them to be brought in." The meaning of this is plain; and, in most cases, easy of application. A Chancellor should not allow his own time, and that of the court, to be consumed in doing a vain thing, which may be unsettled by the subsequent assertion of equities on the part of others not bound by the decree. Whenever it is apparent, from the pleadings, or seems probable, that there are other parties interested in the subject matter, whose rights, when asserted, might make a decree as to the parties before it, different from that which might appear proper in a con-

troversy between themselves alone, then a court should not proceed until all parties interested are present, that the ultimate rights, on final result, of the parties before it, as to each other, may be permanently determined. But if it appears that the assertion of other equities in the subject matter, by third parties, could not alter the liability of the parties before the court, as between themselves, then, although such third parties may be properly brought in, they are not absolutely necessary. This is such a case. It is not a bill to wind up and settle a partnership, and marshal the assets, and appropriate them in due order, first to have payment of debts, next to the adjustment of equities between the partners, and then for partition of the remainder. That would have required all the partners to be present, in order to determine how much either one of them should pay the other. But here, it seems, that, by agreement, the old partnership was closed in 1872, and there are no outstanding debts of estimable importance. It appears that complainant is entitled to one-half of the old assets, and defendant and Jacob Conger each to one-fourth. If the defendant is held liable to complainant for one-half of the debts to the firm, which he collected or used, and for one-fourth of the old debts of the firm, which complainant paid, that does not touch the rights of Jacob Conger in any way, and the amount due complainant, from defendant, cannot be altered by any assertion hereafter of Jacob Conger's right against either, nor by the assertion of complainant's rights against him for one-fourth of the debts paid. There is no distribution in this case of assets on hand. What remains is a personal matter between Jacob and each of the others, which may be independantly settled, without disturbing this decree. Certainly it would have been better, and more consonant with the general purpose of Chancery, to close all litigation in one suit, if the Chancellor had directed Jacob Conger to be

brought in, that he might disclaim or assert his rights, but it was not imperative. The court might, and did, determine the controversy *between parties before it*, without prejudice to the rights of Jacob Conger.

Statute of Frauds.

The appellant contends that his agreement to account to complainant for a proportional part of the accounts, which he took and *assumed*, was within the Statute of frauds, and was not in writing. This position is not tenable. If, on a close of partnership affairs, one partner is allowed to take, for his own use, a part of the assets, whether choses in action, or anything else, on an agreement with his copartners to account to them for a definite share, it is a separate and direct agreement, on a new consideration. It becomes to the other partners, then, a matter of indifference, whether the debts are collected or not. They belong to the partner taking them, and he may collect them, or use them in trade, or to satisfy his own individual debts; or he may release them wholly. It amounts to nothing more nor less than a purchase of the interest of others in property belonging to them jointly. The Statute of frauds has no application.

The decree is in excess of the amount proved, but in all other respects, clearly just and equitable. The excess was probably the result of an error in calculation, or of a clerical error in the entry. However that may be, it is, nevertheless, an error which sustains the appeal, at least to the extent of carrying the costs of this court against appellee, and for the correction of excess.

Enter a decree here for the amount of $329.05, in favor of the complainant below, with interest at 6 per cent. from the second day of July, 1872. Let the appellee be ordered to pay the costs of the appeal, and remand the cause to the court below for execution.

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KLENK v. KNOBLE AND WIFE.

1. HOMESTEAD; *Wife need not join husband in conveying.*

A wife has no interest in the homestead during her husband's life, nor vested right to a future interest, and her concurrence in its alienation is not necessary.

2. HUSBAND AND WIFE: *Parties: When wife may testify.*

In an action against husband and wife to foreclose a mortgage on a homestead, the wife may defend to avoid foreclosure of dower, and as to this, may testify for herself, but not in aid of the defense of her husband.

3. HOMESTEAD: *Owner may prosecute his business on.*

The owner of an actual homestead may transact any business on it he may deem necessary for the support of his family—may erect conveniences proper for the business, and occasionally rent out such portions of the premises as may be temporarily spared: or, he may contract its area by cutting off a portion and appropriating it to other than family uses.

4. SAME: *Mortgage of, under Constitution of* 1868: *Estoppel.*

Where, during the life of the Constitution of 1868, a party has declared, in a mortgage of property, which he might claim as part of his home tead, that it was "no part or parcel of his homestead," he is estopped to afterwards assert to the contrary and avoid the mortgage, unless such estoppel would contravene the policy of the law by allowing him to denude himself, by the mortgage, of a necessary part of his homestead.

APPEAL from *Sebastian* Circuit Court.
Hon. JAMES A. YANTIS, Special Judge.

STATEMENT.

In February, 1874, Klenk filed, in the Circuit Court at Fort Smith, his complaint in equity against Joseph Knoble and his wife, to foreclose a mortgage executed to him by Knoble, with relinquishment of dower by his wife, on the twenty-sixth day of September, 1871, on lot No. 6, and the

north-east half of lot No. 5, in block F, in Fort Smith, to secure the payment of a note of the same date, for $650, for borrowed money, payable two years after date, with 10 per cent. interest from date.

The defense to the action was, that the mortgaged property was a part of the family homestead, and, under the Constitution of 1868, could not be mortgaged for the debt for which the note was given, and the mortgage was, therefore, void; and the wife further pleaded that her relinquishment of dower was obtained by the frand and coercion of her husband.

Among other witnesses the wife was permitted to testify as to the homestead character and use of the property, and that she was induced to sign the relinquishment of dower by the fraud and coercion of her husband.

Upon the hearing, the Chancellor found, from the evidence, that the property was part of the homestead when the mortgage was executed, and dismissed the complaint as to the mortgage, and rendered a personal decree against Knoble for the amount of the debt and accrued interest, and cost.

Klenk appealed.

The facts disclosed by the evidence as to the homestead character of the property sufficiently appear in the opinion.

M. H. Sandels for appellant.

I. The homestead is "the *home* place, *the roof that shelters*," etc., and the land contiguous thereto which contributes to the family comforts and supplies the home wants of the family. It is the dwelling house and its appurtenances. 29 *Ark.*, 400.

The brewery building was never part of the homestead. 1 *Wash. Real Prop*, and 10 *Peters*, 25.

The homestead of any resident was exempt when "*selected by him.*" *Const.* 1868, *Art.* 12.

Conceding that the brewery (for argument), up to date of mortgage, *was* part of the homestead, as an appurtenance (10 *Peters, sup.*), the giving of the mortgage upon it, with the recitals therein contained, was *not* an agreement to waive exemptions (see cases cited in *Norris et al.* v. *Kidd*, 28 *Ark.*, 485), but a selection of the remainder of lots 4 and 5, upon which stood the dwelling house, etc., as the homestead, and the abandonment of the brewery. 1 *Wash. Real Prop.*

In this State no conveyance of the homestead right is necessary, because the homestead is not an estate in the land (29 *Ark.*, 407), and no further conveyance from the wife was necessary than the conveyance of real estate generally.

2. An estoppel is the preclusion of a person from asserting a fact, by previous conduct inconsistent therewith, etc. 1 *Bouv. Law Dict.*, 541. A party is precluded from repudiating his representations, or denying his admissions. *Rawl. Cov. Tit.*, 407; 5 *Ohio*, 199. The recitals in a deed or bond, if certain and relevant, are conclusive. 2 *Smith's L. C.*, 673, '74, '75, '76; 4 *Peters*, 175; and *N. B.* 11 *Howard*, 294, 325; 3 *Wash. Real Prop.*, 68, 94, *et seq.*; 1 *Wash. Real Prop.*, 366; 11 *Ark.*, 675; 12 *Ark.*, 524 and 730; 30 *Ark.*, 230.

3. The wife's plea is *special non est factum.* 17 *Ark.*, 9, 71; 2 *Greenl. Ev.*, *sec.* 300; 32 *Ark.*, 327, and the *onus* is on her.

Thomas Marcum, for appellee:

Art. 12, *Sec.* 3, *Const.*, 1868, is self executing. *Frits* v. *Frits*, 327, and *Sec.* 2, *Ib.*, prohibits the encumbering of the homestead in any manner. For what constitutes a lot, see *Wassell* v. *Tunnah*, 25 *Ark.*, 101, and for definition of

homestead, *Tumlinson* v. *Sweeney*, 22 *Ark.*, 400; 24 *Ark.*, 155; *Thompson on Homesteads, Sec.*——

A married man cannot encumber his homestead. 27 *Ark.*, 648. A mortgage is invalid. *Harbison* v. *Vaughn*, 33 *Ark.*, and case cited. *Frits* v. *Frits, sup.*

A homestead, under one and the same permanent enclosure, may embrace the office of a lawyer, the shop of a mechanic, etc., etc., if the value does not exceed the amount prescribed by law. 1 *Wash. R. P.*, 335, *Sec.* 17–19; 58 *Ill.*, 425; 34 *Tex.*, 617; 30 *Ib.*, 440; *Thompson on Homestead, Sec.* 107, 120, 133; 74 *Ill.*, 202, and may be occupied for other purposes. *Sec.* 244, 245, *Freeman on Ex*; *Greeley* v. *Scott*, 2. *Cent. Law Jour*, 361.

The provisions of the Constitution are for the *benefit* of the family, the wife and children solely. 29 *Ark.*, 280, and if the husband fail to assert his right the wife may claim it. 2 *Dill*, 45, 63, 92; *The Reporter, vol.* 6, *p.* 548; *Kerr* v. *South. P. Com'rs.* The wife only relinquished dower, did not join in the statement that the property formed no part of the homestead, and was not estopped, and having a substantive right to homestead, relinquishment of dower does not affect her right. *Thomp. on Home.*, *Sec.* 42 *and* 555; *Rorer on Jud. sales*, *p.* 524.

The property mortgaged being his homestead, the husband cannot waive his right or release it or estop himself by false recitals. *Thomp. on H.*, *Sec.* 42, 474; *Rorer Jud. sales*, 1424–5–6 *and* 1431–3–4; 29 *La. Ann*, 333, and other cases. Any such waiver is void as against public policy.

The consent and joinder of the wife was necessary. 47 *N. J.*, 375; 11 *Bush.* (*Ky.*), 622; 1 *Nevada*, 568; *Rorer on Jud. sales*, *Sec.* 1393; 64 *Ill.*, 157; 10 *Bush.* (*Ky.*), 276; 11 *Ib.*, 296.

The Constitution formed a part of the contract. 21 *Ark.*, 85, and even if Knobel was guilty of deception or false

representation, the property is protected. *Thomp. on H.*, *Sec.* 842; 15 *N. Y.*, 489.

The wife testified in her own behalf. *Thomp. on H.*, 693–5–7–8, and her evidence was competent.

1. HOMESTEAD: Wife need not join in conveying

EAKIN, J. Defendant's wife joined in the mortgage, only for the purpose of relinquishing dower. She had no interest in the homestead during her husband's life, nor vested right to a future interest. The courts regard the family only in construing the law, and determining its policy. The wife's concurrence in the alienation of the homestead is not, in this State, necessary. Only confusion, on this point, arises from considering decisions from those States, where, by Statute it is. She was entitled to defend to avoid preclusion of dower, and *quoad hoc* might testify for herself, care being taken to disregard it, so far as it might assist the defence of the husband. She failed to establish her defence, and, for the rest, her testimony may go for nothing.

2. HUSBAND AND WIFE: Parties: When wife may testify.

Passing by the interests of the wife, we are called to determine, *First:* Whether the lots in the mortgage were, in fact, when it was made, a part of the homestead of defendant Knobel; and, *next:* Whether, if so, they could be encumbered in the manner attempted.

3. HOMESTEAD: Husband may prosecute business on.

The first is a question of fact. It appears that the defendant had resided, with his family, upon an enclosed parcel of ground in Ft. Smith, embracing the platted lots, lying contiguous in one block, and that the whole enclosure was at first used for family convenience. It included, with the residence, a small garden, stable and open space, all together under $5,000 in value. All these might, under the Constitution of 1868, have been held as a homestead. *Wassell* v. v. *Tunnah*, 25 *Ark.*, 101.

It is certainly reasonable that the owner of such a homestead, after its character, as such, had been impressed by

residence and acts manifesting intention, should be allowed to transact any business upon it he might deem necessary for the support of his family, to erect conveniences proper for the business, and to, occasionally, rent out such portions of the premises as could be temporarily spared. It would very much neutralize the advantages of a homestead if these things could not be done. It would discourage industry and domestic thrift; and so it has been held by many authorities, to be found collected in the text books, that the character of homestead, once impressed, is not lost for any portion of it, by such uses, alone. It is certainly true, upon the other hand, and equally reasonable, that any one may, by acts equally indicative of intention, contract the area of his homestead, by cutting off a portion and appropriating it permanently to uses apart from his family conveniences. It is a matter of intention to be derived from the facts.

In this case, the owner, who was a stone mason, and also a brewer, had, before the mortgage, erected a brewing house and carried on the business upon the mortgaged portion of the premises, at intervals, from about the year 1857 to within two weeks of the date of the mortgage. During this period the brewery had been several times closed. There had been a cellar dug upon the same lot "for stowing away beer," which had been used also for storing milk and vegetables for family use. Defendant, Knoble, slept in the brewery, not, it seems, for want of room in his house, but on account of the business, and because he did not live pleasantly with his wife. The dwelling was wholly on the part of lot five, not mortgaged, and upon lot four, making, independently of the mortgaged premises, a front of seventy-five feet running back one hundred and forty. It consisted of two rooms and a kitchen. The family consisted of himself, wife and six or seven children. Plaintiff knew the family and the situation of the premises. There was also a

stable on the back end of lot six. The garden occupied the back ends of lots four and five. The defendants say, further, that the brewery was always considered a part of the homestead, and that the main dwelling was considered too small for the family.

Upon this evidence we think the Chancellor properly considered the character of the homestead, as impressed at the time of the mortgage upon all three of the lots. They might have been scheduled as such, against an execution, as was done in *Wassell's case*, (*supra*).

4. SAME: Mortgage of under constitution of 1868: Estoppel.

A more difficult question, and one entirely new, is presented by the use of the words in the mortgage, describing the lot and a half conveyed; "the same being the lots upon which the said Joseph Knoble now has a brewery, and *not a part or parcel of his homestead.*" By plain principles of law these words will estop the defendant from claiming the mortgaged lots as a part of his homestead, unless it should appear from the circumstances that such estoppel would contravene the policy of the law. Neither in law nor in equity is an estoppel allowed to have that effect—either to remove an incapacity depending on facts, or to establish conclusively a state of things without which the instrument would be invalid. The reason is too obvious to admit of question. The law might, otherwise, at times be evaded, or its policy defeated by a few strokes of the pen. The question then really is, conceding that the homestead, up to this time, embraced all, does this mortgage, executed under the circumstances, contravene any public policy or violate any law? Have the parties by force of an estoppel, attempted to do what otherwise they could not have done?

If so, the mortgage cannot be upheld. If not, it should be enforced.

The constitution of 1868, then in force, amongst other things, exempted as a homestead, in the hands of every

married man or head of a family "any lot in any city, town or village, with the dwelling and appurtenances thereon, owned and occupied by any resident of this State, and not exceeding the value of five thousand dollars;" and provided further, that it should "not be encumbered in any manner while owned by him," except in certain cases not here in question.

Actual residence is a palpable thing of which every one must take notice, and any attempt by a lender to take, or a borrower to give a mortgage on an actual residence, must of necessity be an effort to evade the constitutional policy. It would be mere child's play to enable the lender to neutralize that, by exacting from the borrower a statement in the instrument, denying the character of the property, and then closing his mouth by an estoppel.

But this is not exactly, nor, indeed, substantially such a case. The defendant retained his dwelling-house, and a considerable amount of ground with it; seventy-five feet in front, running back one hundred and forty feet, to an alley. What he cut off constituted no part of his actual residence, although occasionally used for family convenience. The brewery-house and cellar had not been built with a view to domestic convenience. The head of the family slept there, mostly, but that is explained by the necessity of watching the brewerage, and by his disagreeable relations with his wife. The use of the cellar, for vegetables and milk, was not designed in its structure. It was for storing beer. There is no proof of the uses of the stable. It may have been to keep a horse for the business of the brewery, or it may have been for family purposes.

Minimum area not limited by constitution of 1868.

It is to be observed that the Constitution does not limit the *minimum* extent of the lot. The resident may make his homestead as small as he pleases, provided it be not so contracted as to show an intent to evade the law, by making it

too small for actual use as a homestead. This is a matter to be determined by a Chancellor, or a jury, on evidence. Provided he does not retain a homestead fairly reasonable in extent, with his actual residence upon it, there is nothing in the policy of the Constitution to prevent the owner from utilizing other portions of his property as a basis of credit—although he might, if so disposed, have held it all against execution. His design so to separate it, may be as fairly inferred from acts and circumstances, as was his orignal design to invest it with the homestead character.

There is no mode prescribed by which he must declare his intention before encumbering the part separated. Why should he be burdened with the expense of first taking it out of the same enclosure, or running a cross fence? If he has a right to do the thing, he has the right to manifest his intention in his own way. It is the *doing* of the thing, not the *mode* of doing it, which contravenes the law, if it be contravened at all.

Some perplexity has arisen in our minds, from a class of cases in equity, arising under laws made for the protection of persons supposed to be under a pressure of undue influence from creditors or lenders. The general current of authority is, that they are not allowed, contemporaneously, with the loan or benefit, and by the same instrument given for security, to waive the benefit of the protection. A familiar instance is the case of a note given, waiving all exemptions; or a deed of trust, waiving the right to redeem, after sale, in those States where that right is given for a limited time by Statute. But those are all manifest efforts to elude laws, which throw a shield over an unfortunate class, who require to be protected against their own improvidence. In the case now in judgment, giving full effect to the mortgage, the defendant would still appear to be left in the possession of a fair and reasonable homestead—suitable

to his condition in life. This is all the constitution contemplated. The court can take notice of the general course of human affairs, and knows that a large number of homesteads, and tenement houses, in towns and cities, are upon areas much smaller than that reserved by the defendant, and make comfortable residences.

The result of the reasoning is, that one owning a lot in a town might, then, to any reasonable extent, have retained the whole of it as a homestead, if kept for family convenience or pleasure. But he was not required by any policy to retain forever, as part of his homestead, more of it than he might deem reasonably sufficient, and might determine to hold and use the balance as other property. He might manifest his intention in any sufficient way, without being driven to visible separation by walls. Any facts or circumstances showing a permanent design, may be considered. As it was a thing, in itself, which he might properly do, it would show no intent to evade the law to declare it in a mortgage of the property so divested of its homestead character. With this qualification that the amount retained must appear to be reasonable, and *bona fide*, and not colorable.

It appears to us that the Chancellor, under the circumstances shown, erred in holding the mortgage void as against public policy, and should have decreed a foreclosure.

Reverse the decree and remand the cause, with instructions to the court below to decree and execute a foreclosure, in accordance with this opinion and the practice in equity.

H. A. Pierce v. T. H. Scott, et al.

1. Construction of Contracts: *Partnership: Conditional Sale.*

Pierce and the appellees entered into an agreement, by which Pierce engaged to put in $3000 to $5000, as he might deem best, to the founding and promoting a newspaper, provided the appellees should put in, to aid the enterprise, the sum of $2000, which should represent a proportionate amount of the stock of said business. Pierce was to conduct the editorial management of the paper, and give it his best abilities and influence. He was, also, to keep an accurate record of all expenditures, in a set of books provided for that purpose, Scott and the other subscribers were to pay their subscriptions as the same should be required to pay rents, materials and other expenses incident to the enterprise, and Pierce was to have the privilege of refunding all or any of the sums subscribed and paid in, within one year from such payments, with interest thereon, and might then assume sole proprietorship of the paper; but, until such sums should be refunded, they should stand as so much stock in the business and paper. *Held,* in a bill against Pierce for an account and distribution of the profits: *First,* That the agreement constituted a partnership, and the last clause was a conditional sale of the appellee's shares to Pierce, upon payment to them of their money, and interest, in a year. *Second,* That time was of the essence of the contract, and that he could not claim to purchase, after the year. *Third,* That the interest of the parties in the profits was in proportion to the amounts paid in by them. *Fourth,* That Pierce, having failed to keep books, was liable, to the strictest account of the profits which the proof would justify. *Fifth.* He could not, under the agreement, claim compensation for his services as editor, etc.

2. Mortgage: *Nesessary elements of.*

There can be no mortgage without something conveyed by the mortgagor to the mortgagee, and a debt to be paid.

3. Master in Chancery: *Should act only on proof, in taking account.*

In taking an account, the Master in Chancery should not act on his own knowledge, or the unsworn statements of others, but as a jury, solely upon the evidence adduced.

APPEAL from *Sebastian* Circuit Court in Chancery.
Hon. *James A. Yantis*, Special Judge.

STATEMENT.

This suit, brought in the Circuit Court at Fort Smith, by the appellees, against the appellant, was founded upon the following instrument:

"Memoranda of agreement made and entered into this day, by and between H. A. Pierce & Co., of the first part, and the parties whose names are hereto signed, of the second part, witnesseth: Whereas, the said H. A. Pierce & Co. propose starting a newspaper at the city of Fort Smith, Arkansas, to be issued daily, or weekly, as may be deemed best; and the said Pierce & Co., represented by the said H. A. Pierce, agree to put into said business the sum of from $3000 to $5000, as he or they shall find necessary; *Provided*, the said parties of the second part shall also put in, to aid said enterprise, the sum of $2000, that shall represent a proportionate amount of the stock of said business. That said Pierce shall conduct the editorial management of said newspaper, give it his best abilities and influence; said paper to be known as the Arkansas Patriot, to be thoroughly Republican in politics, devoted to securing harmony and unity of action in the Republican party, and thereby insuring its success.

"That for the purpose of securing the proper expenditure of the money hereinafter subscribed in aid of said enterprise, the same shall be paid into the hands of ——, who shall only pay the same out for materials actually furnished for said printing office and newspaper.

"That said Pierce shall keep an accurate record of all expenditures, in a set of books provided for that purpose, which books shall always be open to the inspection of the parties hereto agreeing.

"The said parties of the second part agree to pay the sums set opposite their names, as the same may be required,

in the purchase of materials, rents and other expenses connected with said paper.

"It is further agreed that said Pierce shall have the privilege of refunding any,or all, of said sums subscribed and paid in, as aforesaid, within one year from the date said sums were paid, with interest thereon, and may then assume sole proprietorship of said paper. But until said sums are refunded, as above, the same shall stand as so much stock in said business and paper.

"Witness," etc., "this third day of June, 1871."

Here follow the signatures.

For the rest, the opinion sufficiently states the case.

Clendenning & Sandels, for appellant:

1. The Chancellor totally disregarded the evidence produced by defendant.

2. Many sums are charged appellant, without an atom of proof, and based alone upon the experience of the special master in running a newspaper.

3. The Chancellor *charges* Pierce with the $3000 put into the concern, when he should have been *credited* with it.

4. By the agreement there was no stock company or partnership, and the declaration that until Pierce repaid Scott and Patterson the amounts advanced, they should hold stock, etc., was nothing but a mortgage *pro tanto*, to secure payment.

Thomas Marcum, for appellee:

The second deposition of Pierce, taken without leave of the court, should have been excluded. *Bentley's Master in Ch'y., p.* 17.

The presumptions are all against appellant, because he failed to keep proper books, or to produce them, or allow

them produced. Entries, to be competent, must be verified by those who made them. *Phillips' Ev.*, *p.* 690. Non-production of books is a strong circumstance against the party. *Ib.*, 700. See further, as to admission of books, and proof of entries, *Ib.*, 694–5–6–7.

Argues upon the evidence and findings, and insists that the decree was proper.

EAKIN, J. This is a bill by two of the promoters of, and subscribers to, a newspaper enterprise, against the editor, principal capitalist and sole manager, to enforce an account, and a distribution of the assets among them, in proportion to the amount of their several subscriptions. The bill is filed in behalf of themselves and all others interested, who may come in and make themselves parties. It charges that all the subscribers were, by agreement, to be shareholders in the enterprise to the extent of, and in proportion to, their subscriptions. There was a demurrer for want of equity, and also for a defect of parties defendant. This was not insisted upon, however, and the sole defendant answered. As it appears from the subsequent proceedings, that only the parties before the court had paid anything into the concern, it follows, from the articles of agreement, that no others can have any interest.

1. CONSTRUCTION OF CONTRACTS: Partnership: Conditional sale.

The first and most important question of law arises upon the construction of the articles. The appellant contends that they do not make either a joint stock company or a partnership, but that the stipulation therein, that each subscriber should hold stock to the amount of the sums paid, until he should be repaid by defendant, was only a mortgage of so much stock to secure repayment. Several important elements in a mortgage are wanting. There was no loan by the several subscribers to Pierce, nor any *convey-*

ance, by him to them, of any stock or interests in the concern as a security for any debt. It was a joint undertaking in which Pierce (under the style of H. A. Pierce & Co.) united with others to raise a joint fund for its object. Their respective shares were their own originally, for which they owed each other nothing. Their ownership was born with the enterprise itself, and sprung from the investment of their own capital. They did not derive their interest from each other, and, in case of loss of their capital by failure of the enterprise, had no claim upon each other for repayment. It was, in fact, a conditional sale by complainants to Pierce of their respective shares, upon payment to them of their money, with interest, in the course of a year. Time was, from the nature of things, of the essence of this contract. It would not have been reasonable to have allowed Pierce to delay indefinitely, and then exercise his option of purchasing or not, as he might find the business lucrative or disastrous. He allowed the opportunity to pass, and cannot now claim the privilege, nor object to becoming chargeable with a pro rata share of the capital and profits which came to his hands. There can be no mortgage without something conveyed from the mortgagor to the mortgagee, and a debt to be paid. The court properly held that there was a partnership, and that the same should be dissolved, and an account taken.

2. MORTGAGE: Elements of.

Neither of the two interlocutory orders made for a reference, fixed the rates, or proportion, in which the plaintiffs were to share in the distribution of the assets. That seems to have been left to the master to determine for himself, upon his own construction of the contract. It was not the better practice, as it was purely a question of law, and all such should be first settled by the Chancellor, so far as they can be, on the pleadings and evidence before him. The plaintiffs claimed, in their bill, a pro rata according to their

respective amounts *subscribed*. It was not all paid in, and it seems to have been contemplated that it might not be necessary to do so; but that a less amount might, perchance, serve the purpose of the enterprise. The last clause of the articles makes it clear that their interests were to be in proportion to the amount subscribed and *paid in*. As this proportion, however, was actually taken as the basis of the decree, the omission was not important.

All other questions arise on exceptions to the report of the master, as finally reformed and confirmed by the court. As presented by appellant's brief, they are as follows:

1. That there was a total disregard of the evidence adduced by the defendant.

The agreement itself constituted the partnership, and the proof of the amounts paid in originally by plaintiffs was sufficient. They were shown by the receipts of defendant, one to Patterson for $150.00, and to Scott for $278.70, and upon these amounts the shares of complainants were apportioned. As to the repayment of any part of these amounts, and as to many other matters connected with the accounts, the evidence was conflicting; and the master, in taking the account, and the court, in modifying it, were not bound to consider the evidence of defendant as conclusive. We find no error upon this point.

2. That the master, as to many of the items, acted without evidence, but was governed by his own experience in newspaper management.

As regards the report, this exception was well founded. Many of the estimates of work done, and the value of materials, are founded upon the master's own knowledge, of the price lists of the times, and, as he says, the opinions of those most competent to judge. So far as the measurement of the work is concerned, and the estimate of it, *where legal prices are fixed*, that might be legitimate, but as to other

matters, a master should not act upon his own knowledge, or upon his best judgment, derived from conversation with others. In deciding upon facts, his position is analagous to that of a jury, and the evidence upon which he reaches conclusions, should be properly taken on oath, and returned with the report, to be examined by the Chancellor upon exceptions. Values of work and of materials should be proved as other facts, and not collected by the master from his own experience, or from the price lists of the times, or from consultations with others. This would be dangerous, in the first instance, and preclude a party injured from the proper mode of correction. The master could take judicial notice of such things as courts might, and of prices fixed by law, and might himself inspect and measure work, in the files, provided the files themselves be returned with his report, or be accessible to the court. Otherwise, he must act upon some proof, the best, under the circumstances, that can be adduced.

Partner. failing in obligations to keep correct books, liable to strictest account.

As it was the duty of defendant to keep books, and produce them, if there be any failure by them to show the full nature and history of the business, the defendant is liable to the strictest account which the nature and character of the business, upon the *proof* as to that and its value, will justify.

There was no error in refusing to allow defendant anything for his services as editor or manager or for literary work done by others. There was no stipulation for that in the original agreement, and no implied contract as to that, arises from the nature of the agreement.

There were, in this case, two references and two successive accounts, to both of which exceptions were made and sustained. It was reasonable to suppose that all legal light had been shed upon the transaction which could be obtained, and the Court undertook the statement of the account for itself.

Obviously, from the claim of defendant to exclusive ownership and from the imperfect manner in which his accounts were kept, and from the want of clear and explicit statements of amounts received and expended, and from lapse of time, an exact accounting has become and remains impossible. In such cases it is the duty of Courts of Equity to approximate substantial justice as nearly as may be.

Passing over the two reports, save in so far as they afford material for estimates, we will consider the statement finally made by the Court, and which seems to be as well supported by the evidence as the nature of the case will admit of. The report of the master charged defendant with a balance of $12,975.25. The statement of the Court reduces this to $7,565.15, reached as follows: He is charged with the original capital $3,428.70, sums received for publishing delinquent tax lists $5,138.75; for other legal advertisements $2,581.50; and from other work of all kinds $2,400, making in all $13,548.95.

He is allowed credits for overcharge in tax lists $648.75; cash paid for paper and other material of all kinds for two years, $1,200; office rent $960; cash paid printers, $2,975.05; other incidental expenses $200, in all $5,983.80.

The balance is divided to complainants in proportion, as shown in a former portion of this opinion. The modification was very favorable to defendant, and a review of the evidence discloses, that, in fixing these sums, the court has found some firm ground on legal evidence for each, and that it has been tender of the rights of appellant.

The only objection which could be made to the account is, that it seems to throw the loss, by wear and tear, of the furniture and machinery of the office, on the defendant; but the evidence shows that it could not have been great, and there was no distinctive proof to show what it was. All of it was left in his hands, and there was no ground for the claim.

that he should be credited with the $3,000 of his own money which went to purchase it. It was firm money and was invested in firm property.

In other respects defendant has been liberally treated in the estimates, both as to charges and credits. To review it all would serve no useful purpose; substantial justice seems to have been done upon the whole case and any better or more satisfactory disposition of the tangled mass of confused statements, and partial evidence, is utterly hopeless. It is the defendant's own fault that the accounts have not been clearly kept.

Affirmed.

ALTHEIMER v. DAVIS.

1. HOMESTEAD: *Infant can not waive.*

A minor can not waive his right to a homestead during minority, and, being supposed to be under the control of others, does not perfect it by residence. The purchaser, at a probate sale, of the tract of land, to which the homestead of a deceased parent appertained, must take notice of the minor's right, and, if he use the homestead for his profit, must account to the minor for the rents.

APPEAL from *Jefferson* Circuit Court.
Hon. X. J. PINDALL, Judge.

Bell & Elliott for appellant.

There was no occupation by appellee, and no *selection* of a homestead, and no one was bound, until such *selection* was made. *Norris* v. *Kidd*, 28 *Ark.* No rent should have been estimated, prior to the bringing of the suit.

Thos. B. Martin, for appellee.

Johnston v. *Turner*, 29 *Ark.*, 280, *and Booth* v. *Goodwin*, 29 *Ark*, 635, are conclusive of this case.

EAKIN, J. This is an action by a minor for possession of a homestead, against purchasers of the tract, of which the homestead was a part, at a sale under order of the Probate Court. There was judgment for possession, and for one year's rent. Defendants appealed, and, upon the statement of appellee's attorney, endorsed upon the transcript, the cause has been advanced as a delay case.

The only error complained of is that rents were estimated for a period before the commencement of the suit.

A minor cannot waive his right to a homestead, during minority; and being supposed to be under the control of others, does not perfect it by residence. The proceeds may be applied to his maintenance and education. Those who buy, at probate sale the tract of land to which the homestead appertains must take notice of the minor's rights; and if they use his property for their own profit, cannot complain on being called to account.

What course might be proper for them, if the homestead had not been marked by metes and bounds, out of a larger tract, it is not necessary here to determine. Upon the whole transcript it sufficiently appears that it had been done in this case, and was matter of sufficient notoriety to have been easily ascertained. It is alleged in the complaint, and not directly, nor even impliedly, denied.

The assignment of the value of the rent is sufficiently supported by evidence, and seems reasonable.

All the points in this case are either settled by, or flow legitimately from, the rulings in the case of *Booth* v. *Goodwin, et al.*, 29 *Ark.*, 633.

Affirm.

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PAYNE V. MCCABE.

1. CERTIORARI: *None, where appeal may be prosecuted.*
The writ of *certiorari* should not be issued in any case where there is or has been a right of appeal; unless the opportunity for appealing has been lost without fault of the petitioner.

2. INJUNCTION: *Dissolved, not revived by an appeal.*
An appeal to the Supreme Court from an order of a Chancery Court, dissolving an injunction, does not revive the injunction during the pendency of the appeal.

WRIT OF CERTIORARI to *Pulaski* Chancery Court.
Hon. D. W. CARROLL, Chancellor.

STATEMENT.

This was a petition to this court by W. R. F. Payne for a writ of *certiorari*, to bring up the record of a cause in the Pulaski Chancery Court, in which M. D. McCabe was plaintiff, and petitioner was defendant, to the end that an order of that court in said cause might be quashed.

Upon the statements of the petition the writ was ordered as prayed for, and the record of the cause has been removed into this court, from which it appears, that on the first of December, 1880, McCabe filed in the Pulaski Chancery Court his complaint, praying, upon facts stated therein, for an injunction against the execution of a judgment which the petitioner had recovered against him before a Justice of the Peace in said county. That a temporay injunction was issued, which was afterwards, on the twenty-ninth of March, 1881, in term time, upon hearing of the cause, dissolved, and the complaint dismissed for want of equity. That McCabe appealed from the decree dissolving the injunction,

and gave a supersedeas bond; and that afterwards, on the fourth of April, 1881, and during the same term, the Chancery Court, upon application of McCabe, made the following order:

"Come the plaintiff and defendant by their respective solicitors, and it appearing to the court that an appeal has been taken from the decree of this court, heretofore made herein, and a good and sufficient appeal bond has been filed herein, on motion it is ordered by the court, for good cause shown, that the order of this court, heretofore made, dissolving the injunction in this cause, do not take effect at once, and that said injunction is hereby revived, pending the appeal of this cause in the Supreme Court."

The petitioner afterwards filed his motion in the Chancery Court to vacate this order, which the court overruled, and he now brings his petition to this court to quash it.

A. D. Jones, for petitioner:

The order reviving the injunction is void; the injunction having been dissolved, and the bill dismissed, the court had no jurisdiction to make such order. *High on Inj.*, 2 *Ed.*, *sec.* 1701; 5 *Sawyer U. S. Ct. Rep.*, 121.

W. L. Terry, for respondent:

The jurisdiction of this court does not attach until transcript filed. *Clay's Ad.*, v. *Notrebe*, 11 *Ark.*, 631.

The allowance of an appeal, and execution of bond, could not operate to continue the injunction until the appeal could be heard. 29 *Ark.*, 92. Proceedings could only be stayed by a specific order; the Chancery Court only could do this, as this court had no jurisdiction until transcript filed. *Pike* v. *Scott*, 11 *Ark.*, 681. Petitioner's remedy,

in case the appeal was not duly prosecuted, is plainly pointed out in the last case cited, and *Evans* v. *Walker*, 27 *Ark.*, 348.

OPINION.

EAKIN, J. The writ was allowed to go, in this case, not without considerable doubt in the mind of the court as to its propriety, but in order that the matter might be more intelligently decided upon the return of the transcript and argument of counsel.

The offices and functions of the common law writ of *certiorari*, which issued in England from the King's Bench, or out of Chancery, to supervise the action of inferior courts and *quasi* judicial tribunals, have been much contracted in the American States by Constitutional provisions and Statutes defining the jurisdictions of the several courts, opening up the channels of appeal to a common center, and providing definite means for the correction of errors. Hence, a great many cases may arise here, where the necessity of the writ would not be apparent; as between citizen and citizen its use is in the sound discretion of the court, it should in such cases be refused.

It is to be remembered also, that with regard to a very large class of the cases in which the writ was used by the King's Bench, it is the Circuit and not the Supreme Court which occupies the position analogous to the King's Bench. They are cases where causes before judgment were lifted into the Superior Court for the more certain administration of justice, where errors of inferior courts were to be corrected, and trials *de novo* ordered, and where proceedings of public boards and commissioners were to be corrected. These require the exercise of original jurisdiction. It is only where the writ of *certiorari* is to subserve the purposes of a writ of error, or to bring up or perfect a record, that this

court can be considered as occupying the position of the King's Bench. The common law powers of that tribunal devolves *generally* upon the Circuit Courts, which are our highest courts of original jurisdiction.

Further, the writ of *certiorari* in England was never issued to the Court of Chancery. That was a court of equal dignity with the King's Bench, and in no way subject to its control. Errors in chancery decrees could be corrected by Bill of Review in the court itself, or by appeal to the House of Lords. Whilst in this country the Courts of Chancery are made courts of record, and equally with the Circuit Courts subordinate to the supreme appellate tribunals, by writs of error as well as by appeal, it would still seem that without legislation or some plain necessity, the writ of *certiorari* should not, as a consequence, be extended to cover cases, which it did not at common law. This is the view of the case taken by M. Powell in his work on Appellate Proceedings. *Citing Ohio decisions.* (*See Sec.* 6 *of chapt.* 8).

1. MANDAMUS: None where appeal lies.

For the rest, the general current and greater weight of the American authorities, although they have not been uniform in their treatment of this question, is still clearly to the effect that it ought not to issue in any case where there is, or has been, a right of appeal, unless the opportunity of appealing has been lost without fault of the petitioner. This view of the case has been taken by this court in the case of *Smith* v. *Parker*, 25 *Ark.*, 518, and other cases.

Looking to the constitution, we find the writ of *certiorari* specially mentioned amongst those writs which this court may issue and determine, "in aid of its appellate and supervising jurisdiction," connected with an express provision that the jurisdiction of this court shall be appellate only. The only exceptions are in cases of *quo warranto* to Circuit Judges and Chancellors, and to officers of political corporations to question their legal existence. In these the juris-

diction is original. *Art. VII, secs.* 4 *and* 5. It is further invested with "a general superintending control" over other courts, which is elsewhere designated as a "supervising jurisdiction." It is well understood that these terms do not give the power to direct the proceedings of inferior courts, in matters of discretion, whilst the cases are in progress, but to keep them within the bounds of their jurisdiction, and to correct errors when committed. This may be done by prohibition, mandamus, appeals, writs of error and, where no jurisdiction exists in the court below, or where records are to be brought into court, by writs of *certiorari*. These writs and the others mentioned in this connection by the constitution are to be used by this court only as auxiliaries.

It will thus be seen how far the common law use of the writ of *certiorari* has been superseded, or has fallen into disuetude in modern American practice, especially in appellate courts. In view of this tendency, and considering it as always discretionary, it should not be used unless essential to purposes of justice.

In this case the court at the same term, after the first decree had been entered, and an appeal taken, modified the decree so as to extend the injunction over the time during which the appeal might be pending here. The defendant might have appealed for that modification of the decree, but that was not necessary to his protection, as he had the power to cause the complainant's appeal to be prosecuted in due time, and the judgment or order of this court would of itself have determined the injunction as effectually as upon his own appeal, in case the decree of the Chancellor on the merits should be affirmed. Besides, he incurs no danger of loss. The sureties on the original injunction bond remain bound during the pendency of the appeal here, and if he should have the appeal docketed and dismissed for want of

prosecution, the injunction would cease, and would not be revived by any new appeal taken by complainant. The order of the court below, applied only to the specific appeal already granted.

2. INJUNCTION DISSOLVED: Not revived by an appeal.

The court had jurisdiction of the persons and the subject matter, and if the order continuing the injunction in complainant's favor, after a decree adverse to his equities were improper, it could only be error in the court, in improperly moulding the decree to subserve, what seemed to the chancellor, the purposes of justice. It is not uncommon in equity to make orders to protect the rights of parties for a reasonable time after the determination of the suit in that court. How far the court acted prudently may be matter of comment when an opinion may be rendered on the merits. Suffice it here to say, that there is no objection on the ground of jurisdiction. The appeal itself did not revive the injunction. That is well settled. It required a judicial order. But the records and decrees of all courts are within their power during the term, and may be set aside or modified. The effect of both orders, taken together, is not at once to dissolve the injunction, but to continue it for a determinable period, beyond which it could not extend; a period which the defendant had the power to bring to a termination and within the time necessary for the hearing of the case here, and the action of the court upon it; which time indeed, this court might possibly make shorter, upon a motion to dissolve even during its pendency here, if that should from any cause seem desirable. After this court acquires jurisdiction it has full power over the whole cause with regard to all things appearing on record.

Upon all the circumstances of this particular case, we are of the opinion that the writ of *certiorari* was not within the ordinary rules of practice, nor essential to the purposes of justice. It should be dismissed. Judgment accordingly.

GRIFFITH v. THE STATE.

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1. CRIMINAL PRACTICE: *Amending at the trial, examination before committing court. Impeaching deceased witness.*

When, in the trial of a criminal case in the Circuit Court, the written examination of a witness before the committing court (who has since died) is read as evidence against the accused, he may impeach the evidence by proof of previous contradictory statements made by the witness, provided that he was interrogated, in the examining court, of such contradictory statements, with a proper specification of the time and place they were made; and if the written examination fails to show that such foundation was laid for impeaching the witness, the committing magistrate may amend it, to show the fact.

APPEAL from *Little River* Circuit Court.
Hon. H. B. STUART, Circuit Judge.

Hon. C. B. Moore, Attorney General, for the State:

The testimony of Lee was of no very material weight or effect, and, if the whole of it had been stricken out, there was sufficient evidence to sustain the verdict.

The Court properly refused to allow the committing magistrate to amend the minutes of his examination.

ENGLISH, C. J. Appellant, Linsey Griffith, was indicted, at the March term, 1881, of the Circuit Court of Little River county, for larceny, the indictment charging, in substance, that, on the seventeenth of November, 1880, he stole a coat of the value of $8, the property of B. F. Love. The jury found him guilty and fixed his punishment at imprisonment in the penitentiary for one year. He moved for a new trial, on the grounds that the court excluded evidence offered by him, etc., and for misconduct of the jury, and the motion was overruled.

The State proved that the coat belonged to B. F. Love, and that about the seventeenth of November, 1880, it was taken from a shed room of the house of Mrs. Hendricks, in the suburbs of Richmond, where Love had left it. Appellant having been seen with the coat on, at a party, Love obtained a search warrant, and went, with a deputy sheriff, to the house of Dan Griffith, the father of appellant, where he was arrested, and the coat found in a box, under a bed. Appellant stated to Love and the deputy sheriff (as he had to his father) that he found the coat by a log, between the houses of Mrs. Hendricks and his father. To another witness he stated that he bought the coat in Texarkana, and, to another, that he purchased it of a Mr. Mims.

He was arrested on the twenty-fifth of November, 1880, and, it appears, taken before N. J. Cook, a Justice of the Peace, whose certificate of examination bears date on the twenty-ninth of the same month.

It appears, from the certificate, that among the witnesses examined for the State, was one Robert Lee, who was sworn, examined in the presence of appellant and his counsel, his testimony reduced to writing and signed by him.

During the trial in the Circuit Court, the State proved that Robert Lee had died, and read in evidence, without objection, his testimony as taken and certified by the committing magistrate, as follows:

"I am fifteen years old, and live in Little River county, etc. I know Linsey Griffith, the defendant. I saw him with the coat on, the night of the party at the court house. (Here witness was shown the coat, and recognized it as being the coat defendant had on at the party.) I told defendant it was Mr. Love's coat. He told me he found it, Sunday before last.

"I was cutting wood at Mrs. Hendricks' gate. Defendant came to me, and told me to give him something to eat.

I told him the victuals belonged to my mother, and to go into the house, and Mrs. Hendricks would give him something. Defendant told me he did not want to go in the yard. I then picked up a turn of wood, and carried it in the kitchen, in the back part of the yard. Defendant followed into the yard. I don't know where he went; but when I came back into the front yard he was gone. I am not positive that it was last Sunday, a week ago, that defendant went into Mrs. Hendricks' yard.

"Defendant told me Lawrence Griffith had just turned off from him when he found the coat."

CROSS-EXAMINATION.

"I live about two hundred and fifty yards from Mrs. Hendricks'. I am at Mrs. Hendricks' every night, chopping wood, sometimes. There was a side room to Mrs. Hendricks' house; only one door to it; I don't know whether it locks.

"I did not, in the presence of Dan. Griffith, Cas. Griffith, John Trammell, or any one of them, or any other person, have a quarrel or dispute with the defendant, or claim the coat in dispute, and want him to give it up to me; nor did I say it was my coat, and that I left it where defendant found it; nor did I want Dan. Griffith to make him give it up to me. I saw this coat at Mrs. Hendricks', last Saturday was three weeks ago; it was hanging in Mrs. Hendricks' big room, on a nail; I never saw it at Mrs. Hendricks' at any other time. I never saw Mr. Love with the coat on but once in my life. It was at the time we moved up to where we now live, which was about six weeks ago, that I saw Mr. Love with the coat on, at Mrs. Hendricks'. I did not take the coat off the nail in Mrs. Hendricks' big room, and hide it out where the defendant found it."

1. After the State had read, in evidence, the above tes-

timony of Robert Lee, as reduced to writing, and returned by the committing magistrate, appellant offered to prove by Dan. Griffith that at the court-house in Richmond, at the party, on the night before appellant was arrested, Robert Lee had a difficulty with appellant about the coat, and claimed it as his own, and said he had put the coat where appellant had found it, by the old log, and had asked witness to make appellant deliver the coat to him.

And appellant offered to prove the same by Cas. Griffith and John Trammell.

The State objected to the introduction of the proposed evidence, because the foundation as to time and place was not sufficiently laid. The court sustained the objection, excluded the evidence, and appellant excepted.

Appellant then offered to prove by two of the above witnesses, John Trammell and Cas. Griffith, that on the streets of Richmond, on the same night of the party at the court-house, on the evening before appellant was arrested, Robert Lee had a conversation about the coat with appellant; that Lee claimed the coat; wanted appellant to give it to him, and said he had left it where appellant had found it.

Which the court ruled out, on the ground that the foundation as to time and place had not been sufficiently laid, and appellant excepted.

2. Then, for the purpose of laying the foundation to impeach Robert Lee, appellant offered to prove by W. F. Joyner (one of the appellant's counsel), and others, that Robert Lee, before the examining court, was asked whether at the court-house, at the party, in Richmond, on the night before appellant was arrested, he and appellant were engaged in a quarrel about the coat, in the presence of Dan. Griffith, Cas. Griffith, John Trammell and others, and whether he, Lee, did not then and there claim the coat, and say that he left the coat where appellant found it, and

whether he did ask Dan. Griffith to make appellant deliver the coat to him.

Which the court ruled out, and appellant excepted.

Appellant then, for the purpose of laying the foundation to impeach Robert Lee, offered to prove by W. F. Joyner, and others, that on the examination of said Lee before the examining court, he was asked whether, in the streets of Richmond, on the night of the party at the court-house, on the evening before appellant was arrested, in the presence of Cas. Griffith, John Trammell and others, he had a quarrel with appellant about the coat, and then and there said that the coat belonged to him, Lee, and that he left it where appellant found it, and wanted appellant to give it up to him.

Which the court ruled out, and appellant excepted.

3. Appellant then, for the purpose of laying the foundation for the impeachment of Robert Lee, proposed to have the transcript and minutes of the examining court amended by N. J. Cook, the Justice of the Peace who examined said cause and witness, so as to show that, on said examination, said witness, Robert Lee, was asked whether, at the party at the court-house, on the night of said party, he had a difficulty about the coat with appellant, in the presence of Dan. Griffith, Cas. Griffith, John Trammell and others, and whether, in the presence of said parties, the witness had claimed said coat, and said he had left it where appellant found it, and asked Dan. Griffith to make appellant give the coat to him.

At the time this motion was made the examining Justice was in court.

The court overruled the motion, and appellant excepted.

The above rulings of the court, the bill of exceptions shows, were made grounds of the motion for a new trial.

I. The rule is well established in England, and by the

current of adjudications in the United States, that a witness cannot be impeached by showing that he had made contradictory statements from those sworn to, unless, on his examination, he was asked whether he had not made such statements (specifying time and place) to the individuals by whom the proof was expected to be given. See *Conrad* v. *Griffey*, 16 *Howard, U. S.*, 46, and cases cited; *Unis et al* v. *Charlton's Adm'r. et al*, 12 *Grattan*, 484, and cases cited.

The rule has been repeatedly recognized by the decisions of this court. *Beebe* v. *DeBaun*, 8 *Ark.*, 511; *Yoes* v. *State*, 9 *Ib.*, 42; *Drennan* v. *Lindsay*, 15 *Ib.*, 359; *Atkins* v. *State*, 16 *Ib.*, 569. And has been formulated and adopted by statute. *Gantt's Dig.*, *secs.* 2524–5–6.

In *Conrad* v. *Griffey*, *sup.*, JUSTICE MCLEAN said: "The rule is founded upon common sense, and is essential to protect the character of a witness. His memory is refreshed by the necessary inquiries, which enables him to explain the statements referred to, and show they were made under a mistake, or that there was no discrepancy between them and his testimony."

And JUSTICE DANIEL, in *Unis, et al.*, v. *Charlton's adr.*, *et al.*, *sup.*, concurred with Mr. Greenleaf, "that the rule proceeds from a sense of justice to the witness; for, as the direct tendency of the evidence is to impeach his veracity, common justice requires that by first calling his attention to the subject, he should have an opportunity to recollect the fact, and, if necessary, to correct the statement already given, as well as, by a re-examination, to explain the nature, circumstances, meaning and design of what he is proved elsewhere to have said."

"These reasons," said the same learned Judge, "it is obvious, apply just as forcibly to depositions as to oral examinations in court. And, indeed, there are considerations

which urge the application of the rule to the case of an impeachment of a witness who has given his testimony in the form of a deposition, which may not arise in an effort to discredit a witness who has been examined in court. In the latter case the witness usually remains in or about the court till the trial is concluded; and, if an assault is made upon him by proof of inconsistent statements, he might, even before the adoption of the rule requiring him to be first examined as to such statements, be recalled and re-examined by the party in whose favor he had testified; and he may thus have an opportunity of repelling, or explaining away, the force of the assault; whereas the witness whose deposition has been taken is usually absent from the scene of the trial, and has no shield against attacks on his veracity, other than that provided by the rule."

In *Conrad* v. *Griffey*, *sup.*, an effort was made to discredit a witness, who had given a deposition under a commission, by proof of antecedent contradictory statements; and the court were unanimous in the opinion, that as the witness had not been interrogated as to those statements when he was examined, the proof was not admissible. And the court quoted, with approbation, the opinion of the Supreme Court of New York, in the case of *Kimball* v. *Davis*, 19 *Wend.*, 437 (affirmed in the Court of Errors, 25 *Wendell*, 259), holding, that where the imputed contradictory statements are alleged to have been made since the taking of the deposition, the adverse party can avail himself of such statements only by taking out a second commission.

And the rule has been held applicable to depositions as well as to oral examinations of witnesses in court, in a number of other cases. *Matthews et al.* v. *Dare et al.*, 20 *Maryland*, 269; *Gregory* v. *Cheatham et al.*, 36 *Mo.*, 161; *Story et al.* v. *Saunders et ux.*, 8 *Humphries*, 663; *Richmond* v.

Richmond, 10 *Yerger*, 347; *Howell* v. *Reynolds*, 12 *Ala.*, 129; *Sawyer v. Sawyer*, *Walk. Ch. R.*. 48.

In *Runyan* v. *Price et al.*, 15 *Ohio State*, 1, the deposition of a subscribing witness was taken, in probating a will, and afterwards, in a suit to contest the validity of the will, the witness in the meantime having died, an attempt was made to impeach his testimony by proof of antecedent contradictory statements as to the sanity of the testator, and the court, on full review of the authorities, held that it was inadmissible, no foundation for it having been laid by examination of the witness before his death.

And, on the authority of that case, it was held, in *Wroe* v. *State*, 20 *Ohio State*, 472, when the dying declarations of the person slain were introduced in evidence, by the State, that the accused could not be permitted to impeach him by proof of antecedent contradictory declarations.

In this case the deceased witness, Robert Lee, testified, on cross-examination before the examining magistrate, that he did not, in the presence of Dan. Griffith, Cas. Griffith, John Trammel, or any one of them, or any other person, have a quarrel or dispute with appellant, or claim the coat in dispute, or want appellant to give it up to him, or say that it was his coat and that he left it where appellant found it, nor want Dan. Griffith to make appellant give it up to him.

It is probable that these denials were made by the witness in response to interrogatories put to him on behalf of appellant, with a view to his impeachment, and that the examining magistrate omitted to reduce the interrogatories to writing.

The court ruled out the impeachment evidence offered on the trial, because it did not appear from the statement of the deceased witness, made on cross-examination, as reduced to writing by the magistrate, that his attention had

been directed to the time and place of the antecedent contradictory declarations, This may or may not have been so, and though strictly the ruling of the court was right, it might have been safer, in a case involving liberty, to give the accused the benefit of the doubt.

II. In *Irving* v. *State*, 9 *Texas Court of Appeals*, 66, after laying the proper predicate, the State introduced the testimony of a witness, taken before and reduced to writing by the committing magistrate; and then was allowed to supplement that testimony by oral proof of additional statements deposed to by the witness, before the examining magistrate, and not reduced to writing, which was held by the Court of Appeals to be an error, and ground of reversal.

In this case appellant did not offer to prove any statement of the deceased witness, Robert Lee, not reduced to writing by the examining magistrate, but proposed to prove by several witnesses that, by interrogatories propounded to him on his examination before the magistrate, and which he had omitted to put down in writing, the attention of the witness had been properly directed to time and place of antecedent contradictory statements, as a foundation for his impeachment.

The proposed evidence, if admitted, would have been for the court, and not for the jury, and after hearing the statements of the witnessess, and ascertaining whether they were present at the examination of the deceased witness, and heard the interrogatories put to him, and judging of their intelligence, the accuracy of their memories, etc., the court might then have determined whether the foundation for the impeachment of the witness had been properly laid.

III. But the committing magistrate himself being present in court, the better practice would have been to permit him to amend his return, under the supervision of the

court, by putting in writing the interrogatories propounded to the deceased witness, on his cross-examination, or the substance of them. We can see no good reason why that might not have been permitted by the court.

As the judgment must be reversed, for the error last above indicated, and the cause remanded for a new trial, it is not necessary to inquire whether appellant was prejudiced by misconduct of the jury.

NEWTON V. THE STATE.

1. INSTRUCTIONS: *Should be on all the evidence.*

   Instructions should not be based upon isolated facts or only part of the evidence, but should be so framed that all parts of the evidence should be considered and weighed by the jury.

2. NEW TRIAL: *For newly discovered evidence.*

   A new trial will not be granted on the ground of newly discovered evidence where it appears that the evidence was known to the party before the trial and no good reason is shown for not producing it.

APPEAL from *Clark* Circuit Court.
Hon. H. B. STUART, Circuit Judge.

STATEMENT.

At the January term of the Circuit Court of Clark county, Eli Newton was indicted for larceny of two steers, the property of Lewis Speaks; one a red and white spotted steer, two and a half years old, marked with a hole in each ear and split in the right ear; the other, a dun steer, two years old, with smooth crop in the right ear and over half crop in the left ear.

Upon the trial, the prosecuting witness, Lewis Speaks, testified that hearing that the defendant was killing stock, he went to look after his own stock; found an old cow but none of his yearlings; missed his red and white spotted steer, two and a half years old, crumpled horns. Went then to the beef market and told Horner to look out for cattle in witness' mark, and gave him the mark. Horner said there was a hide there then, of that mark. Mr. Ballentine was in beef wagon, and he and witness looked and found the hide in his mark. It was red and white spotted hide with ears on it in witness' mark. They told witness the horns were crumpled. Witness also saw a yellow hide and told Ballentine it was his. He knew the yellow yearling—bought it of John Taylor—it was dun all over alike. It had been half cut and had one seed. Defendant knew the cattle—had told witness about seeing them before then, and that they were doing very well. After witness saw the hides he saw the defendant, and he said he had not seen the steers for some time. Witness told him he had found the hides and would make the man smoke who got them. Defendant replied he had been having some stock killed and may be there was some mistake; that he would pay witness for them, and prosecute him for saying he stole them. One of the steers was worth eight dollars, the other seven. Witness' mark was hole in each ear and split in the right. Witness told defendant that the yellow hide was witness'. Defendant said Alex. Reed got the yearling from Burton, or some such name. Witness did not know the marks of the dun—he bought him. The defendant never claimed to witness that he had any such steer as the red and white one. Defendant knew the steers—saw them in the old Johnson field below town. He did not know the dun was witness'. Defendant begged witness to take pay for the steers after the writ issued for him, but said they were not witness',

but he would pay for them for satisfaction. Witness knew the yellow hide by the flesh marks. The steer was raised in witness' pen. Ballentine told witness he got it from defendant.

Taylor, witness for the State: I sold to Lewis Speaks a light dun steer. It belonged to Lucy Miller; was in my control. It run on the old Johnson field below town. Marked it with crop off one ear and over half crop in the other; had but one seed; saw the head and hide at Ballentine's; think it the same I sold to Speaks. Cannot say the defendant was present when the hide was examined; don't think he was. The butcher admitted that the steer had but one seed.

George Dunn, for the State: I am thirteen years old. The defendant got me to help him to drive a yellow yearling to Ballentine's pen. I told him it looked like Aunt Lucy Miller's yearling. He gave me a dime for helping him to drive it up. He told me he got it from some one whose name I forget. We drove it up in day time to Mr. Ballentine's slaughter pen.

Homer Long, for State: I recollect Lewis Speaks coming to claim hides. He claimed the hide of a red and white spotted steer, it was in his mark and was a crumply horn steer. Mr. Crow and myself drove him up from description given by the defendant from the old Johnson field below town. Speaks knew the hide as soon as he saw it. Don't know who brought the dun steer—he had one small seed.

Ballentine, for State: I bought several cattle from defendant. Crow and Long went for the spotted steer from description given by the defendant. I think I sent Crow and Homer to see defendant. He was sick and not able to get up stock; paid him some money at his house; he was in bed. Bought the dun steer from him, but don't know who put him in my pen.

Dave Dickerson, for the defendant: I know both Speaks and the defendant. Defendant had a little dun bull about the color of saw dust. The last I saw of him he was in the Johnson field below town in the fall of 1879. I know defendant bought cattle of Reed and Reed bought of Burton. Think Burton bought of Mr. Tyler.

Washington Kellogg, for the defendant: I knew the defendant's cattle, and was present when Reed pledged a little dun bull, called the Burton little dun bull, to the defendant for ten dollars. I knew it when a calf, afterwards in the cane and after that in the old field.

Among other instructions asked by the defendant was the following, which the court refused:

"*Second*, If the jury find from the evidence, that the defendant was the owner and possessor of two steers, of the same description as those charged in the indictment to have been stolen, and that he was, or had been sick for a long time, and sold said steers in the woods, and by description only, and without seeing them, they may acquit him of the charge of larceny; notwithstanding the jury may believe that the steers killed by Ballentine were the property of Lewis Speaks."

The jury found the defendant guilty, as charged in the indictment, and assessed his punishment at one year in the penitentiary, and he filed a motion for new trial, assigning for causes:

First. Verdict contrary to law and evidence.

Second. "Because the defendant has discovered important evidence in his favor since the verdict was rendered, to wit: He can prove by Thomas Heard, that late in the fall of 1878, he sold to the defendant a cow and calf. The calf was a red and white spotted bull calf, unmarked.

He can prove by Charles and Martha Reed that he continued to own and control what was known as the Heard

little steer, up to the time of selling it to Ballentine. He can prove by Iasiah Burton that he sold to Alex. Reed a dun bull yearling. He can prove by Charles Reed that he has exercised ownership over the same little dun bull up to the time it was sold to Ballentine."

Third. Error of the Court in refusing his second instruction.

With the motion were filed affidavits of the witnesses mentioned in it, corroborating its statement of their testimony. The motion was overruled, and he was sentenced in accordance with the verdict, and filed his bill of exceptions and has obtained an appeal to this court.

C. B. Moore, Attorney-General, for the State.

The evidence for the State was vastly preponderating, abundantly so to sustain the verdict.

There was no allegation or pretence that the newly discovered evidence was not attainable, or could not have been discovered by reasonable effort or diligence *before the trial.*

OPINION.

HARRISON, J. The court very properly refused to give the jury the second instruction asked by the defendant. Instructions should not be based on isolated facts, or only part of the evidence, but should be so framed that all parts of the evidence should be considered and weighed by the jury. *Proff. on Trial by Jury, sec.* 319; *Thomp. on Charging the Jury, sec.* 71; *Bush* v. *The State, ante* 215; *Winter* v. *Bandel et al.*, 30 *Ark.*, 383. It did not necessarily follow, because the defendant had cattle of like description to the steers owned by Speaks, and sold them by description, as they run at large, that the evidence which tended to prove, that knowing they were not his own, he himself drove and delivered one of Speaks', to the purchaser, at his slaughter

pen, and that by claiming it as his own and as one of those he had sold, induced the purchaser, or his servants, to drive the other there, could not have been true.

A new trial will not be granted on the ground of newly discovered evidence, where it appears that the evidence was known to the party before the trial, and no good reason is shown for not procuring it. *Holeman* v. *The State*, 13 *Ark.*, 105; *Bourland* v. *Skimne*, 11 *Ark.*, 671: *Fikes* v. *Bentley*, *Hemp.* 61.

The facts which the defendant alleged he would be able to prove, were, if true, within his own knowledge, and he could as easily before as after the trial have found the witnesses.

There was no want of evidence to sustain the verdict.

The judgment is affirmed.

EAKIN, J. Conceding that no technical error exists in this case, I am dissatisfied with the proceedings and the result, and would prefer, for safety and in favor of liberty, to direct a new trial. The Court on several occasions has done this, where there has been no specific error upon any one point, sufficient of itself to justify reversal.

It is evident that the main defense rested upon this point; that the defendant was sick and infirm, and sold the cattle in the woods by description; that he had cattle of like description; and that if he meant to sell his own, and other cattle of like description had been taken from the range, in place of them, by mistake, or by the vendee or his servants, without defendant's special directions, the case would not be one of larceny. There was evidence upon that point before the jury, and they should have been instructed with regard to it in some way, to have enabled them to act intelligently *upon that particular point*. The second instruction was so intended. It was not framed however, so as to be strictly

correct. The Court refused it absolutely, without proposing to modify it, or to give any upon that point in lieu of it. I cannot say that the judge was obliged to do so, but I think it would have been better. As it was, the jury went out wholly uninstructed on the point.

The evidence is brought up by the bill of exceptions in a very confused condition, and perhaps is not as clear to us as it was to the jury. Still it is apparent that a good deal of it was hearsay and incompetent— admitted without objection. That was not error, but it made it more important that the jury should be well instructed. The evidence, as it appears in the transcript, does not make on my mind, that clear and undoubting assurance of guilt, which it is important that a jury should have, although I would not make this an objection to a verdict on full and clear instructions; yet I cannot resist the apprehension in this case, that it might have been different if the second instruction, with a slight modification, had been given.

PULASKI COUNTY v. COUNTY JUDGE OF SALINE COUNTY.

1. COUNTIES: *Power of Legislature over.*

The Legislature may, according to its own views of public policy and convenience, enlarge or diminish the powers of counties, and may extend, limit or change their boundaries, without the consent of the inhabitants except that by the Constitution, "no part of a county shall be taken off to form a new county without the consent of a majority of the voters in such part proposed to be taken off."

2. SAME: *Power to apportion indebtedness on partition of county. Notice.*

The Legislature may require of a county, to which a part of another territory has been attached, payment of part of the latter's indebtedness, and may direct how the debt shall be ascertained; and when the act designates the time for the adjustment of the amount

by the County Court from which the territory is severed, the other county to which it is attached has notice, and may contest the correctness of the adjustment, and appeal it to the Circuit Court.

3. SAME: *Partition of, as affecting Senatorial district.*

The transferring a portion of a county in one Senatorial district to another county, in a different Senatorial district, constitutes no change of those districts. They are each composed of the same counties as before; and counties, not territory or inhabitants, are the constituents of the districts.

APPEAL from *Saline* Circuit Court.
Hon. J. M. SMITH, Circuit Judge.

STATEMENT.

On the second of April, 1878, Pulaski county filed in the Circuit Court of Saline county her petition for mandamus, against James W. Adams, Judge of the County Court of that county, alleging, in substance, that in accordance with the provisions of the Act of the Legislature of the seventh of December, 1875, entitled, "An Act to define the boundaries of Pulaski and other counties," the County Court of Pulaski county, at its January term, 1876, being the first regular term after the passage of said act, made a *pro rata* division of the debt of Pulaski county, according to the assessed value of all the real and personal property within the territory cut off and attached to each of the counties of Lonoke, Faulkner and Saline, according to the last assessment made in Pulaski county, and entered the same in full upon the records of said County Court, whereby it appeared that the proportion of the debt of Pulaski county due from Saline county, on account of the territory of Pulaski attached to Saline county, was $19,109.75. That said county of Pulaski thereupon, on the twentieth of April, 1876, caused a transcript of said proceeding, under the seal of

said court, and the official signature of the clerk of said court, to be transmitted to the clerk of the County Court of Saline county, to be by said clerk laid before the County Court of Saline county at its next regular term. That said clerk laid said transcript before said County Court of Saline county at its next regular term—the July term, 1876; but the judge, treating said proceeding as the institution of a suit by Pulaski county against Saline county, held, that Saline county was not indebted to Pulaski county in any sum, and dismissed the cause at the cost of Pulaski county, and refused to enter said transcript upon the records of the County Court of his county.

Prayer for a writ of mandamus, commanding said Judge to cause said proceedings to be entered at large upon the records of his court.

A certified copy of the transcript from Pulaski county, and the proceedings thereon in the Saline County Court, were exhibited with the petition.

The defendant appeared and filed his answer to the petition, denying that the County Court of Pulaski county had made a *pro rata* division of the county's debt, in pursuance of the act of the Legislature, as alleged in the petition; denying that the County Court of Pulaski county ascertained that the portion of the debt to be paid by Saline county was $19,109.75, or any other sum, as alleged in the petition, and alleging, in substance, that the ascertainment of the debt of Pulaski county, the *pro rata* division thereof, and allottment of the portion due from Saline county, were, each and every one of said items, found by the *clerk* of the County Court of Pulaski county without authority of law, and were not made by the County Court of Pulaski county as required by law.

Defendant further denied that it was his duty to have said transcript entered upon the records of his court,

because Saline county was in no way bound, legally or morally, to pay any part of said debt; alleging that neither the county or its citizens had ever agreed or consented to pay any part of it; that said territory was added to Saline county without the consent and against the will of the inhabitants of said territory, or of Saline county or its inhabitants; and if Saline county was liable for any portion of said debt of Pulaski county, the County Court of said county had failed to comply with said act of the Legislature in leaving it to the clerk of said court to ascertain the amount of said debt, instead of ascertaining it by its own examination.

And the defendant further says that said County Clerk, in making up the indebtedness of Pulaski county, included a large amount of fraudulently issued and allowed unjust and illegal bonds, coupons, warrants, certificates, scrips, claims and accounts, which should not have been included; also large amounts of unjust, fraudulent and collusive judgments obtained by consent and collusion, against said county, founded on said illegal and fraudulent scrip, and in consequence, the *pro rata* of Saline county was exorbitantly and unjustly increased beyond the amount justly and legally due from her. That said act of the Legislature was unconstitutional in this:

It attempts to cut off from Pulaski county a large portion of her territory and resident voters therein, and attach them to Saline county, without first obtaining their consent, as required by article 13, section 2 of the Constitution of Arkansas. That neither said voters nor a majority of the voters of Saline county have ever consented to attaching said territory to Saline county. That there was no notice of the intention to apply to the Legislature for such an act. Said act purports to change the line of the Ninth and Tenth Senatorial districts, in violation of the Constitu-

tion. It divides a county now embraced in a Senatorial District, and changes the arrangement of said district, in violation of the Constitution (Art. 8, Sec. 2), and breaks up the apportionment of Representatives, as fixed for the House of Representatives by the Constitution, which could not be done before the year 1880. The Legislature could not impose a part of the debt of Pulaski county upon Saline county without the consent of its citizens.

Many other matters are alleged in defense, and reasons assigned why the act is unconstitutional, but the Court has not deemed them material to pass upon, and they are omitted here as unnecessary to an intelligent understanding of the matters decided.

The petitioner demurred to the answer. The demurrer was overruled, and, electing to stand upon the demurrer, her petition was dismissed, and she appealed.

Z. P. H. Farr, for appellant:

The County Court of Saline county had no discretion in the matter; nothing to do but to perform a plain, legal act (*Acts* 1875, *p.* 120, *sec.* 4), and, for refusing, mandamus would lie. *Cheatham, ex parte*, 6 *Ark.*, 437; 26 *Ark.*, 100.

Sec. 2, Art. 13, Constitution, only applies to *new counties*, hence no consent of the voters was necessary.

The Legislature clearly had the right to pass the act. *Com'rs Laramee Co* v. *Com'rs Albany Co.*, 92 *U. S.* (2 *Otto*), 307; *Eagle* v. *Beard*, 33 *Ark.*, 497.

Counties may be modified, changed, or entirely destroyed by the power that created them. *Eagle* v. *Beard, Supra.*, and *Cooley Con. Lim.*, *p.* 191, *secs.* 192–3; and cases cited; 14 *La.*, 406; 16 *Mass.*, 16; 3 *Bush*, 93; *City St. Louis* v. *Allen*, 13 *Mo.*, 414.

The act does not violate *Art.* 8, *Const.* (apportionment.)

It neither increases nor diminishes the number of members of the General Assembly, nor adds a county to, or takes one from, the Senatorial or Legislative district. Appellee can not raise the question of apportionment, as that question does not affect his rights. *Cooley Const. Lim.*, 162, *sec.* 163.

No private property was taken by the act.

John Fletcher, for appellee:

The statement required by the Act of December 7, 1875, was made by *the Clerk*, and not by *the Court*. This was *a judicial act* which only *the Court* could perform, and the Clerk's act was void. Saline county had no notice and no opportunity to appeal.

The Act changes the lines of the Senatorial districts, and is void. *Art*, 8, *secs.* 2 *and* 4 *Const*, ; 20 *N. Y.*, 447; 29 *Mich.*, 116; 30 *Barb. N. Y.*, 349; 2 *Gray*, 84; 33 *Maine*, 587.

The act (through taxation) makes the inhabitants of Saline county pay a debt of Pulaski county—in effect, imposes a tax on the people of Saline, without any law authorizing the levy of such tax—and, in fact, deprives them of their property without the judgment of their peers, or the law of the land—a direct violation of the Bill of Rights. *Art* 20, *sec.* 21; *Art.* 2, *sec.* 7 *Const.*; *Cooley Con. Lim.*, 353, *note* 1 *et seq.*, 357; *Art.* 21, *sec.* 11 *Const.*; 20 *Wallace*, 663.

Any attempt to take away from the Saline County Court any particle of its jurisdiction, as conferred by the *Constitution*, or *general statutes*, is void. *Worthen* v. *Badgett*, 32 *Ark.*, 496. The Act attempted to do so. *Gantt's Dig.*, 595, 602, amended by *Act* 1875, *p.* 52; and *secs.* 938, 946, 947 *Gantt's Dig.*; *State ex rel. Walsh* v. *Duncan*, 28 *Wis.*, 541.

The Act, though in form a law, is in effect a legislative decree; it prescribes a rule contrary to general law, and orders it enforced. *Cooley Con. Lim.*, 90–92 *side p.*; *Envins Appeal*; 16 *Penn. St.*, 265; *Sealborn* v. *Com'rs, etc.*, 9 *Minn.*, 278; 50 *Cal*, 388; 11 *Penn. St.*, 495; 2 *Allen, Mass*, 380.

Section 4 of the Act clearly gives Saline County Court discretion and power to examine and pass upon the legality and correctness of the transcript; and, having so passed upon it, Pulaski county's remedy was by appeal, and, not having appealed, the matter is *res adjudicata* (*Gantt's Dig.*, *secs.* 1191, 1193), and mandamus will not lie. See 8 *Ark.*, 424; 14 *Ib.*, 368; 25 *Ib.*, 614; 26 *Ib.*, 510; 27 *Ib.*, 382; 28 *Ib.*, 294; *High on Extraordinary Rem.*, *secs.* 156, 176; *State ex rel. Watkins* v. *Macon county, etc.*, 68 *Mo.*, 50; *U. S.* v. *Lawrence*, 3 *Dall*, 42; 5 *Burney*, 87; 14 *East*, 395.

1. COUNTIES: Power of Legislature over.

HARRISON, J. Counties being created by the authority of the Legislature for political and judicial purposes, and deriving all their powers, where the Constitution has not otherwise provided, from that authority, the Legislature may, according to its own views of public policy and convenience, enlarge or diminish their powers, and it may extend, limit or change their boundaries, without the consent of the inhabitants, except that, as inhibited by Section 2 of Article XIII of the Constitution, "no part of the county shall be taken off to form a new county without the consent of a majority of the voters in such part proposed to be taken off." *Eagle et al* v. *Beard et al*, 33 *Ark.*, 497; *Loftin, Sheriff*, v. *Watson*, 32 *Ark.*, 422; *Cole* v. *White county*, *Ib.* 51; *English* v. *Oliver*, 28 *Ark.*, 327; *Pulaski county* v. *Irvin*, 4 *Ark.*, 489; *Laramie Co.* v. *Albany Co.*, 2 *Otto*, 307.

2. Power to apportion indebtedness on partition of county.

That the Legislature may require from the county to which a part of another's territory has been attached, payment of a portion of the latter's indebtedness, and direct that the same be ascertained in the manner described by the act in this case has been settled by this court. *Eagle et al* v. *Beard et al, supra*; *Reynolds* v. *Holland, Sheriff*, 35 *Ark.*, 56; *Phillips Co.* v. *Lee Co.*, 34 *Ark.*, 243; *Lee Co.* v. *The State ex rel, etc.*, 36 *Ark.*, 276; *Monroe Co.* v. *Lee Co.*, *Ib.*, 378.

In the case of *Phillips county* v. *Lee county*, in speaking of the manner of adjustment of the portion of Phillips county's indebtednss, to be paid by Lee county, prescribed by the act creating the latter county, the court say:

"The proceedings are not of the nature of a suit or action by Phillips against Lee county, to enforce an obligation resting in 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."

The fourth section of the Act of December 7, 1875, is as follows:

"Section 4. It shall be the duty of the County Court of Pulaski county, at the next regular term held after the passage of this Act, to make a *pro rata* division of the debt of Pulaski, according to the assessed value of all the property, both real and personal, within the territory cut off and attached to each of the counties of Lonoke, Saline and Faulkner, said *pro rata* division to be determined according to the last assessment made in Pulaski county, and enter

the same in full upon the records of the County Court, and cause a full, true and perfect transcript to be made, under the seal of the court, and transmitted to the clerk of each of the counties named; and it shall be the duty of the clerk of each of the counties of Lonoke, Saline and Faulkner to lay the same before the next regular term of the County Courts of said counties held thereafter; and it shall be the duty of each of the judges of the respective counties to cause said transcript to be spread at length on the County Court records of their respective counties, and the same shall from thence thereafter stand and become a valid indebtedness due the said Pulaski county from each of the counties herein named."

There was nothing in the objection that the statement—showing Saline county's portion of the Pulaski county indebtedness—was made up by the clerk. It does not follow that because the clerk prepared it (which he might very properly do, as an auditor of the court) that it was not duly examined by the court and found to be correct. And as the term at which the adjustment was to be made was fixed by the act, Saline county had notice of the proceeding, and might have insisted on its correction, if incorrect, and if not done, appealed to the Circuit Court from the order of adjustment.

Notice to county.

Appeal to Circuit Court.

The statement is sufficiently plain to show the liability of Saline to Pulaski, and the facts upon which the *pro rata* division was made; but if Saline county desired it to be made more specific, it might readily have caused it to be done.

Though, by the change of the line between the counties, a part of Pulaski, which is in the Tenth Senatorial district, was attached to Saline, in the Ninth, there was not, as objected by the respondent, a change of those districts, contrary to Section 2 of Article VIII., which prohibits any change of Senatorial districts until after the national census

3. COUNTIES: Partition of, as affecting Senatorial districts.

of 1880. They are each still composed of the same counties as before. Counties are the constituents of the districts, not territory or inhabitants. *Howard* v. *McDiarmid*, 26 *Ark.*, 100.

The answer to the petition contained no matter of defense, and the demurrer to it should not have been overruled. The judgment of the court below is, therefore, reversed, and the cause remanded to it, with instructions to sustain the demurrer, and for further proceedings.

[37 348
67 531]

HARRIS V. HANIE ET AL.

1. VENDOR'S LIEN: *None for performance of an act.*

A vendor's lien is a creation of equity—is unknown at law, and arises to secure the payment of purchase money, but not to secure the performance of an act, the non-performance of which would make a claim for unliquidated damages.

2. SAME: *None, where land sold for cotton.*

Where one sells land for cotton, to be afterwards delivered, he has no lien on the land for performance. The non-delivery creates no debt, but only an injury sounding in damages, which equity will not liquidate, and then declare a lien to pay them.

3. BILL OF REVIEW: *Vacating decree; Lien, etc.*

Estes executed to H. Harris, for land purchased of him, two obligations to deliver cotton at Christmas, 1877 and 1878, respectively. Harris transferred the first, with his lien on the land, to Hanie, the other, to J. R. Harris. Hanie sued in equity to enforce the vendor's lien for his obligation, not noticing J. R. Harris' interest; and pending the suit, he and Estes and J. R. Harris submitted their rights to arbitrators, who awarded that Hanie should accept a designated forty acres of the land, and one hundred dollars from Estes, and deliver up the first obligation; that the balance of the land stand as security for payment of the second obligation held by J. R. Harris, and that Hanie assume the payment of that obli-

gation, and upon payment, Estes should convey to him the balance of the land The award was accepted and ratified by the parties. Afterward Hanie and Estes, without notice to Harris, had a consent decree entered in the pending suit, to sell the land in payment of the first obligation. Upon a bill by Harris to review and set aside the decree, and enforce his equities. *Held:* That there was no vendor's lien for the enforcement of the obligation; that Estes could not create a lien against Harris by consenting to the decree; that Harris was not prejudiced by it, and could not maintain a bill of review; but the decree, after the arbitration, was a fraud upon him, and the bill would be retained and the decree vacated.

4. ARBITRATION: *As at common law, good.*

An arbitration, as at common law, which appears regular and unimpeached by facts or denials, is of the very highest authority. The question in controversy is as fully determined, and the rights of the parties as fully settled as could be by their own agreement or the judgment of a court.

APPEAL from *Dorsey* Circuit Court in Chancery. Hon. T. F. SORRELLS, Circuit Judge.

T. B. Martin and R. L. Elliott, for appellant:

The award of the arbitrators, *ratified in writing*, was an accord of the original contract, and constituted a new contract, by which Hanie's right to sue on the original, if not *annulled*, was suspended. 30 *Vt.*, 424; 28 *Conn.*, 392; 4 *Iowa*, 219; — *Barb.*, *N. Y.*, 485; *Parsons on Cont.*, 2 *vol.*, *secs.* 681 and 683. This ratification and Hanie's false statements, that he would dismiss the suit, induced appellant to take no action to save his equities in the suit by *Hanie* v. *Estes*. Add to this Estes' fraudulent statements, and the conclusion is irresistible that the decree was obtained by fraud.

Appellant was a *necessary* party. *Penn* v. *Hayward*, 14 *Ohio St.*, 302, 306; *Newman Pl. and Pr.*, 192, 201; *Jen-*

kins v. *Smith*, 4 *Metc.*, 384; 13 *B. Mon.*, 211. If not a *necessary*, he was a *proper* party. *Gantt's Digest*, 4476; 41 *Ind.*, 339; 25 *N. J. Eq.*, 41; *Ib.*, 112.

The demurrer admits that the decree attacked was obtained by fraud, and the injunction should have been made perpetual, and the proceedings reformed so as to allow appellant to assert his rights. 17 *Ark.*, 512; *Hump. Ct. Ct. Rep.*, 251; *Freeman on Judgments*, *secs.* 99–100.

The obtaining possession of the note, delivered to Estes, etc., upon his false and fraudulent statements, which he knew to be untrue, was a fraud and the court erred in not granting the relief sought. 23 *Ala.*, 312; 25 *Tex.*, 148; 32 *Ala.*, 427; 16 *Ga.*, 432; 5 *J. J. Marsh* (*Ky.*), 96; 5 *Hoyn.* (*Tenn.*), 248; *Law Reporter VIII.*, *Nov.* 12, 1879, *p.* 173; *Goodwin* v. *Robinson*, 30 *Ark.*, 535.

Eakin, J. Hilliard Harris, in 1876, conveyed to Estes some lands, in consideration of two written obligations by Estes to deliver him certain amounts of cotton, one-half on or before Christmas, 1877, and the other half on or before Christmas, 1878. The first he assigned to W. N. Hanie, with the lien, if there was any which he could assign. The second he afterwards assigned to J. R. Harris, the appellant.

It may be gathered from the allegations of the bill in this case, taken with the reasonable inferences, which must suffice in the absence of a motion to make more specific, that early in 1878, Hanie filed a former bill against Estes, claiming a lien upon the lands for the value of the cotton, to have been delivered at Christmas. He mentioned the existence of the other obligation given, also, as part of the consideration of the purchase by Estes, which he said Harris had assigned, but he did not know to whom. J. R. Harris,

the holder and complainant in this case, was not made a party, and did not appear.

It appears, however, that Hanie must have found out soon, that the present complainant was the owner. On the seventh of March, 1878, he and complainant, and Estes, the obligor and respective owners of the two instruments, executed amongst themselves, without any order of court or reference to the pending suit, articles of agreement by which they referred their rights regarding the subject matter to a board of five arbitrators, who made an award, as follows:

1. That Hanie should give up his note (as it is called) which he held against Estes, and should accept a forty-acre tract of the same land which Estes seems to have sold to one J. Hanie. Who J. Hanie was, does not appear, but as Hanie was the son-in-law of Estes, it was probably his wife, or near relation.

2. That Estes repay to said W. N. Hanie a hundred dollars, which had been paid on the purchase money of said forty acres.

3. That this complainant, J. R. Harris, should hold his note, and that the land purchased of Hilliard Harris should stand as collateral security for its payment: and—

4. That Hanie assume the payment of complainant's note, and, when that should be done, Estes should convey him the remaining interest in the land.

This award was duly approved and ratified, under the signature of the three parties concerned.

The bill charges, that notwithstanding this arbitration, and whilst Hanie and Estes were both professing to be willing to abide by it, they conspired together to defraud him; and, at the September term, 1878, of the Circuit Court, caused a consent decree to be entered in the pending suit, in Hanie's favor, against Estes, for $319, as for the value of the cotton due

on Hanie's note, which was declared a lien upon the land; and a commissioner was appointed to sell. That both Hanie and Estes represented to him that the suit had been dismissed. That Estes told him he had fully settled with Hanie, who had given up his note. That he offered complainant to make him a deed of all the lands remaining, after the sale of the forty acres to J. Hanie, if he would give up his note also. That he consented, did so, and received the deed. That the cotton due on Hanie's note was not worth more than $200. In short, that the whole was a plan concocted and executed to deprive complainant of all benefit of his note, He says that Estes has his note and is insolvent, and that Hanie has been in enjoyment of the property for two years before the decree, the rents and profits of which will cover his claim,

He prays that the decree may be revised so as to protect his rights. That, on a final hearing, his note may be restored, and the deed to him be cancelled, or that he have a conveyance of a half interest in the land, or that it be sold for his benefit.

The sale, by the master, was suspended, by an interlocutory injunction. Afterwards, a general demurrer to the bill was sustained. The complainant declined to amend further, and, his bill being dismissed, appealed.

As a bill of review, the question upon it is, does the former decree show any error on the face of the record? There is no claim on the ground of newly discovered facts, for which, by leave of court, a bill of review might lie.

1. VENDOR'S LIEN: None for performance of an act.

The deed from Hilliard Harris to Estes, for which the cotton obligations were given, is not set forth; and there is no allegation that a lien was retained upon the land to secure the delivery of the cotton. Was there an equitable vendor's lien? That is created by equity, and is unknown at law. It arises to secure the payment of the

purchase-money, but does not arise to secure the performance of any act, the breach of which performance would make a claim for unliquidated damages. In such cases it is considered that the obligation for performance, with the legal right to damages on breach, is taken itself as payment. Whilst Courts of Equity will create the lien for amounts which are liquidated, they decline the double task of liquidating the damages and then declaring a lien in favor of parties who have not reserved one in the deed. This, though sometimes questioned, and first held in very strong cases of obligations requiring great length of time for performance, has come now to be a recognizable principle, both in England and in those American States which have not rejected the doctrine of the vendor's lien altogether. *Parrott* v. *Sweetland*, 3 *Mylne & Keene*, 655; *Brawly* v. *Catron*, 8 *Leigh*, 522; *Arlin* v. *Brown*, 44 *N. H.*, 102; *Payne* v. *Avery*, 21 *Mich.* 504.; *McCandlish* v. *Keene et als.*, 13 *Grattan*, 615.

2. SAME: None, where land sold for cotton.

There was no contract by Estes to pay any sum of money whatever, nor the equivalent of any definite sum, in property or services. What was the "purchase-money" to be paid on this bargain? So much cotton; it may be said, which always has a marketable value. True, but that value depends always upon the quality, and fluctuates almost with each day of the year. "So many pounds of cotton" can not, by force of the language, stand for any definite sum of money. The failure to deliver cotton creates no debt. It is a civil injury, sounding in damages alone. There was no vendor's lien in this case, at all. If there had been, it would not have passed by the assignment of the obligations, either to Hanie or complainant, inasmuch as the assignments were absolute. *Hecht* v. *Spears, adm'r*, 27 *Ark.*, 229.

3. BILL OF REVIEW. Vacating decree.

As no lien, for either party, is shown on the face of the record of the former suit, a consent, by Estes, that one should be declared in favor of Hanie, could not injure the holder of the other obligation, as to any vested right. He cannot be said to have been prejudiced or aggrieved by anything appearing in the decree, and a bill of review would not lie. This renders it useless to consider whether this comes within the somewhat limited and not very well defined class of cases where a bill of review may be maintained by one not a party to the former suit.

Considering this simply as a bill of review, it was properly held demurrable. But it has a far more important aspect considered as a bill to attack and set aside a decree for fraud, and to enforce the equities of all parties amongst each other, connected with the objects and subject-matter of the suit.

1. ARBITRATION, as at common law, good.

The facts connected with the arbitration, and the conduct of the parties in procuring the decree, if true, as they must, on demurrer, be assumed to be, make a case of fraud, imposition and circumvention which Courts of Equity can not, without renouncing their functions, allow to stand, if the results are, or would be, injurious to the complainant. They speak for themselves, standing confessed.

The arbitration, although made *pendente lite*, has upon its face no reference to the suit. It does not seem to have been made under any order of the court, or with any view of being made the order of the court in the case. One of the three parties to it, was not a party to the suit. It was an arbitration at common law. It appears regular, and, until impeached by facts or denials, is of the very highest authority. "Thereby," says Mr. JUSTICE BLACKSTONE, "the question is as fully determined, and the right transferred or settled, as it could have been by the agreement of the parties, or the judgment of a court." *B., III, p.*

16. This is strong language. But it impresses the policy of the courts to discourage litigation, and support the Christian injunction upon all men, to agree with their adversaries quickly, while they are in the way with them.

By that arbitration, complainant obtained the first and *only* lien which appears in the whole history of the transactions, and, while it lasted, it became, between the parties, as effectual as if retained in the original deed to Estes. Any step taken after that, by the parties in the suit, to press it to a termination inconsistent with the arbitration, was a fraud.

The complainant alleges that afterwards, upon representations made to him by Estes, that Hanie had given up his note, he agreed to do the same, and to accept a conveyance of the land remaining in Estes' hands, and that the agreement was executed. I cannot see how a mere misrepresentation as to the obliging spirit of a third person would be a fraud, cognizable in equity, upon one who, with full knowledge of the value of his property, should be prompted to do something of like nature. Upon this matter, however, the court now makes no special ruling. It will rest hereafter with the Chancellor, upon clear knowledge to decide, whether the complainant shall have his note and lien again, or rest content with having his title quieted.

He will get neither, if the old decree is enforced. His lien arose *pendente lite*, and is not shown by any record, of which a purchaser could take notice. The sale being by consent of the owner of the legal title when the suit commenced, of lands then encumbered by no lien, would pass a clear title to the purchaser. The proceeds will go largely to Hanie, and there may be no surplus. The complainant must have relief in equity, on his showing, or he will suffer irreparable injury.

The defendant should be required to answer the bill.

What aspect of the case will be presented, upon final hearing, should not be anticipated.

Enough has been said to afford a safe and easy guide to the Chancellor and attorneys.

Reverse the decree and remand the cause for further proceedings.

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STATE OF ARKANSAS v. KATE MARSH.

1. LIQUOR LAW: *Act of March 8, 1879: Constitutionality of.*

The first section of the Act of March 8, 1879, regulating the sale of liquor in this State, is not, in any provision, in conflict with the Constitution of the United States; but section 15 of the Act is, as it reads, in conflict with that provision of the Constitution which empowers Congress to regulate commerce with foreign nations and between the States; because it undertakes to discriminate in favor of wines made of the products of this State and against those of other States. The Legislature has no power to make such discrimination. But the constitutional part of the section, being separable from the unconstitutional, the latter willbe treated by the courts as stricken out, and the section read without the discriminating provision.

2. STATUTES: *Constitutional only in part, when good pro tanto.*

When part of an Act, or, of a section of an Act, is unconstitutional, that part will be considered by the courts as stricken out, and the constitutional part maintained, if it can be separated from the unconstitutional part and stand without it.

3. LIQUOR: *Indictment for selling vinous liquor: Demurrer; Proof.*

An indictment for selling vinous liquors in less quantities than five gallons, without license, is good, on *demurrer*; but *proof* that the wine sold was manufactured from grapes, berries, or other fruits, and that the defendant sold no other liquors, will acquit him.

APPEAL from *Pulaski* Circuit Court.
Hon. J. W. MARTIN, Circuit Judge.

C. B. Moore, Attorney-General, for the appellant:

If part of a statute is violative of, and other parts consistent with, the Constitution, the latter will be maintained, if they can be separated from, and stand without, the former. *The unconstitutional parts will be treated as if stricken out of the statute.* 2 *Peters*, 526; 4 *Blatchford*, 263; 36 *Cal.*. 379; 33 *Ills.*, 390; 11 *Ind.*, 424; 2 *Iowa*, 165; 31 *How.(N. Y. Pr.)*, 289; 3 *R. I.*, 33, 62; 29 *Ala.*, 573; 7 *Cal.*, 97; 19 *Ib.*, 513; 22 *Ib.*, 379; 7 *Miss.*, 625; 3 *Ohio St.*, 1; 5 *Ib.*, 497.

W. F. Hill, for appellee.

Sec. 15, *Act March* 8, 1879, is unconstitutional, being in conflict with *Sec.* 8, *Art.* 1, *Const. U. S.* 1 *Otto*, 275; 12 *Wheat*, 425, 444; 4 *Wash.*, 371; 9 *Wheat*, 1; 24 *How.*, 169; 6 *Wall.*, 35; 8 *Ib.*, 123; 15 *Ib.*, 232; 19 *Ib.*, 589; 5 *Otto*. 485; *Pensacola Tel. Co.* v. *W. U. Tel. Co.*, 6 *Ib.*; 21 *Wal.*, 558; 2 *Otto*, 259, 275; 3 *Ib.*, 99; 4 *Ib.*, 246, 113, 155, 164; 5 *Ib.*, 459, 465; 8 *Wall*, 148; *Southern Law Review, pp.* 257 *to* 403, *vol.* 4; and, *Turnan* v. *Rinker*, 12 *Otto*, 123.

English, C. J. It appears from the transcript in this case that on the twenty-third of July, 1880, an information, in writing and under oath, etc., was filed before a Justice of the Peace of Pulaski county, against Kate Marsh, for selling, in the county of Pulaski, on the fifteenth day of June, 1880, *vinous liquors, in less quantities than five gallons, without license.* Whereupon a warrant of arrest was issued, etc. She was tried, found guilty by the Justice, fined $200, and appealed to the Circuit Court.

In the Circuit Court her counsel demurred to the cause of action (as it is styled in the demurrer) because it did not state facts sufficient to constitute a public offense. The

Court sustained the demurrer and discharged the accused, and the State appealed.

The charge was (with specification of time and place) for selling vinous liquors in less quantities than five gallons, without license.

1. LIQUOR LAW, of 1879, Constitutionality of.

The charge is plainly within the words of the first section of the Act of the eighth of March, 1879 (*Acts* 1879, *p.* 33), which provides:

"That it shall not hereafter be lawful for any person to sell any ardent, vinous, malt or fermented liquors, in this State, or any compound or preparation thereof, commonly called tonics, bitters, or medicated liquors, in any quantity or for any purpose whatever, without first procuring a license from the County Court of the county in which such sale is to be made, authorizing such person to exercise such privilege; *provided*, manufacturers of ardent, vinous, malt or fermented liquors can sell, in original packages, without license; *provided, further*, that said original packages shall not contain less than five gallons."

It is manifest, from the language of the *provisos*, that all manufacturers of ardent, vinous, malt or fermented liquors can sell in original packages of not less than five gallons, without license, and that this exemption from license is not limited to citizens of this State, but is extended to all manufacturers of such liquors, regardless of citizenship or residence.

No provision of the section, therefore, is, in our opinion, in conflict with the clause of the Constitution of the United States, which declares that Congress shall have power "to regulate commerce with foreign nations," and among the several States, and with the Indian tribes; nor in conflict with the section which declares that, "The citizens of each State shall be entitled to all privileges and immunities

of citizens in the several States." See *Const. U. S.. Art.* 1, *Sec.* 8; *Art.* 4, *Sec.* 2.

It has, however, been more earnestly urged in argument that the fifteenth section of the act is in conflict with one or both of the provisions of the Constitution of the United States, above quoted, and that the whole act is therefore null and void.

Section 15 is as follows:

"This act shall not be held to apply to one who manufactures and sells wines in this State, from native grapes or berries, or other fruits grown in this State, and who sells no other liquors, ardent, malt, vinous or fermented."

Under this section, taking it as it reads, a person in another State, California, for example, cannot manufacture wines there from native grapes, berries, or other fruits grown in that State, and sell them in this State, otherwise than in packages of not less than five gallons, without procuring license, at an expense of $200.00, with officers' fees added (Sec. 4), under penalty of not less than $200.00 nor more than $500.00, while any person may manufacture and sell wines in this State (in any quantity, however small) from native grapes, berries or other fruits, grown in the State, who sells no other liquors, ardent, malt, vinous or fermented, without procuring license.

Not in conflict with Sec. 2, Art. 4, Constitution of U.S.

This section is not in conflict with the section of the Constitution of the United States, which declares that "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States," because a citizen of any State may manufacture and sell in this State, regardless of quantity, wines from native grapes, berries or other fruits, grown in the State, without license, if he sells no other liquors, ardent, malt, vinous or fermented. Citizenship is not involved in the matter. But the section, as it

Is in conflict with Sec. 1, Art. 8

reads, is in conflict with the clause of the Constitution of the United States, which declares that Congress shall have power (and in effect, not the States), "to regulate commerce with foreign nations, and among the several States," etc., because it undertakes to discriminate in favor of wines manufactured in this State, from its products, and against wines manufactured out of the State, and from grapes, berries and other fruits grown out of the State. That a State Legislature cannot make such discriminations, is now too well settled by a series of decisions of the Supreme Court of the United States, to admit of question.

Welton v. *The State of Missouri*, 1 *Otto*, 275, is in point. A statute of Missouri required the payment of a license tax, by peddlers, who dealt in the sale of goods, wares and merchandize, which were not the growth, produce, or manufacture of the State, and required no such license tax from persons selling in a similar way goods, which were the growth, produce or manufacture of the State; and it was held that such discrimination was forbidden by the commerce clause of the Constitution of the United States.

So in *Tiernan* v. *Rinker*, 12 *Otto*, 123, where a Texas statute discriminated in favor of wines and beer manufactured in the State, a case similar to the one now before us.

See also *Gray* v. *Baltimore*, 10 *Ib.*, 434; *Machine Co.* v. *Gage*, *Ib.*, 676; *County of Mobile* v. *Kimball*, 12 *Ib.*, 691; *Hinson* v. *Lott*, 8 *Wall.* 148.

In *Gray* v. *Baltimore*, *sup.*, JUSTICE HARLAN, in an able opinion, reviewing previous decisions of the court on the subject, said: "In view of these and other decisions of this court, it must be regarded as settled, that no State can consistently with the Federal Constitution, impose upon the products of other States, brought therein, for sale or use, or upon citizens, because engaged in the sale therein, or the

transportation thereto, of the products of other States, more onerous public burdens or taxes than it imposes upon the like products of its own territory."

2. STATUTES: Constitutional only in part, when good, *pro tanto.*

It does not follow, however, that because a particular section or part of a section of an act is not in harmony with a constitutional provision, Federal or State, the whole statute is therefore necessarily void.

If some of the provisions of a statute violate the constitution, while others are consistent with it, the latter will be maintained, if they can be separated from and stand without the unconstitutional and void parts of the law. The court will treat the unconstitutional parts as if they were stricken out of the statute. *Mobile & Ohio Railroad Co.* v. *State*, 29 *Ala.*, 584; *Sturgis* v. *Crowninshield*, 4 *Wheaton*, 122; *Bank of Hamilton* v. *Dudley's Lessee*, 2 *Peters*, 492; *Clark* v. *Ellis*, 2 *Blackford*, 8; *Tiernan* v. *Rinker*, 12 *Otto*, 123; *Mills* v. *Sargent*, 36 *Cal.* 379; *Nelson* v. *People*, 33 *Illinois*, 390; *Santo* v. *State*, 2 *Iowa*, 165.

Nor does it necessarily follow that because part of a section of an act is unconstitutional the whole section is therefore void.

Thus, in *C. & F. R. R. Co.* v. *Parks*, 32 *Ark.*, 144, where a section of a tax act undertook to make the recitals of a tax deed "*conclusive*" evidence of the regularity of the tax sale, the court held that it was not in the power of the Legislature to make the recitals of the deed "*conclusive*" evidence, and treated the section as if the word "*conclusive*" were stricken out.

It was manifestly the policy of the Legislature, by the fifteenth section of the license act, in question, to encourage the home manufacture of wines, from home grown fruits, and we cannot undertake to say that the act would have been passed without the section; but by treating as stricken from the section, the discriminating words, which are in con-

flict with the commerce clause of the Constitution of the United States, and leaving the section to stand as thus reformed, the policy of the Legislature, in enacting the section may be to some extent preserved.

The section will be in harmony with the Federal Constitution, as construed by the Supreme Court of the United States, when made to read as follows:

"SEC. 15. *This act shall* not be held to apply to one who manufactures and sells wines from grapes, or berries, or other fruits, and who sells no other liquors, ardent, malt, vinous or fermented.

The substance of the charge against appellee was that she unlawfully sold vinous liquors in less quantities than five gallons, without license. The charge was good on demurrer, but if on trial, under the plea of not guilty, the State proves that she sold wines in less quantities than five gallons, she may bring herself within the exception made by the fifteenth section of the act as reformed, by proving that the wine sold by her, was manufactured by her from grapes or berries, or other fruits; and that she was engaged in selling no other liquors, ardent, malt, vinous or fermented.

For the error of the court in sustaining the demurrer to the charge, the judgment must be reversed, and the cause remanded to the court below for further proceedings.

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STATE OF ARKANSAS v. MCGINNIS.

1. PEDDLERS: *Act defining and imposing license on, unconstitutional.*
The Statute (*Gantt's Dig. Sec. 4376, et sequitur*) defining peddlers and imposing license on them, discriminates in favor of the products and manufactures of this State, and against those of other States, and is therefore unconstitutional and void.

APPEAL from *Nevada* Circuit Court.
Hon. DAN W. JONES, Special Judge.

C. B. Moore, Attorney-General, for the appellant:

Montgomery & Hamby, for appellee.

Sections 1494, 5050, 5054, *and* 4377, *Gantt's Digest*, are each repugnant to the second clause of *Sec.* 8. *Art.* 1, *Con. U. S.*, and void. *County of Mobile* v. *Kimbal*, 102 *U. S.* 691; *Welton* v. *State of Mo.*, 91 *U. S.*, 275; *Webber* v. *Virginia, Ms., U.S. October Term*, 1880.

ENGLISH, C. J. On the twenty-fourth of January, 1881, Thomas McGinnis was charged and convicted before a Justice of the Peace of Nevada county, "with the offense of going from place to place peddling and selling goods, wares and merchandize, other than the growth, produce, or manufacture of this State, in said county," etc.; fined $200, and appealed to the Circuit Court.

In the Circuit Court a demurrer was interposed to the charge, which the court sustained, discharged defendant, and the State appealed.

The Statute provides that:

"Whoever shall deal in selling of goods, wares or merchandize, other than the growth, produce or manufacture of this State, by going from place to place, either by land or water, to sell the same, is declared to be a peddler." *Gantt's Dig.*, *Sec.* 4376, *etc.*

Other sections require peddlers to obtain license, and prescribe the penalty for selling without, etc. *Ib.*, *Secs.* 4577, 4385, 5050–1, 1494; *Miller's Dig.*, *pp.* 4, 5.

There is no subsequent act defining a peddler, and no act requiring peddlers of goods, wares or merchandize, which

are the growth, produce or manufacture of this State, to obtain license.

The above act clearly discriminates against the products and manufacture of other States, and in favor of the products and manufactures of this State. In *Welton* v. *State*, 1 *Otto*, 275, just such an act of Missouri, was held by the Supreme Court of the United States to be in conflict with the commerce clause of the Constitution of the United States, and therefore null and void. See also *State* v. *Kate Marsh*, *ante*.

If the Legislature deems it expedient to require peddlers to obtain license, and to punish them for peddling without license, no discrimination must be made against goods, etc., of the growth, produce or manufacture of other States, etc.

Affirmed.

BRIZZOLARI v. THE STATE.

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1. VAGRANCY: *Jurisdiction of municipal courts.*

The Constitution of 1874 (Sec. 28, Art. VII.) did not abrogate the jurisdiction of municipal courts to try and punish vagrancy. The jurisdiction conferred by that section upon county courts, as to vagrants, extends only to such matters of police regulation as are designed to prevent them from becoming burdensome to the county.

ERROR to *Sebastian* Circuit Court, Fort Smith District. Hon. J. H. ROGERS, Circuit Judge.

STATEMENT.

At the November term, 1879, of the Circuit Court at Fort

Smith, James Brizzolari, John Kemp and Bynum Colbert were indicted for false imprisonment of Thomas Lacey.

Upon the trial before a jury, upon the plea of not guilty, the State proved that on the sixth of May, 1879, Colbert filed before Brizzolari, who was mayor of the city of Fort Smith, an affidavit that Lacey was a vagrant within the city limits, in violation of an ordinance of the city; that thereupon Brizzolari, as mayor, issued a warrant for his arrest, and delivered it to Kemp, the marshal of the city, to be executed, and Kemp executed it, by arresting Lacey and carrying him before Brizzolari, the mayor, for trial. The mayor, against the demand of Lacey for an immediate trial, set the case for the thirteenth of May, and required Lacey to give bond and security for his appearance, in the sum of $1000. Lacey immediately made application to the Circuit Court, which was then in session, for a writ of *habeas corpus*, and was discharged, after being in custody about two hours.

The defendants, in justification of the arrest, offered to read, in evidence to the jury, the following ordinance of the city, which was passed December 23, 1873:

"AN ORDINANCE RELATING TO VAGRANTS.

"Section 1. *Be it ordained by the Common Council of the incorporated town of Fort Smith*, That it shall be deemed a misdemeanor for any able-bodied person to be found within the limits of the corporation having no visible or apparent means of subsistence, and neglecting to apply himself to some honest calling, or being found habitually loitering around street corners, or bawdy houses, or tippling houses. Any such person shall be deemed a vagrant, and on conviction thereof, before the mayor, shall be fined in any sum not less than five nor more than twenty-five dollars.

"Section 2. Any traveling keeper of any gaming table,

bank or other gambling device, and all persons who travel and go about from place to place, for the purpose of gaming, shall be treated as vagrants, and deemed guilty of a misdemeanor, and on conviction thereof, before the mayor, shall be fined in any sum not less than five nor more than twenty-five dollars."

The State objected to admitting this ordinance in evidence, on the ground that it was inconsistent with, and abrogated by, the Constitution of 1874, and the mayor had no jurisdiction over the charge of vagrancy. The court sustained the objection—refused to admit the ordinance in justification of the defendants, but admitted it in mitigation of damages.

Among the instructions given and refused by the court were the following, given for the State, against the objections of the defendants:

"5. Neither the mayor, in his official capacity as such, nor as *ex-officio* justice of the peace, has any jurisdiction of the crime of vagrancy; and a warrant issued by him for vagrancy, in either capacity, is without authority of law, and will afford him nor the officer executing it any protection, when charged with the offense of false imprisonment, committed by arresting the person named in such warrant; and one who procures such a warrant, by filing an affidavit before the mayor for that purpose, is equally culpable, in the eye of the law, with the judge who issued it and the officer who served it."

"6. If the jury find that the defendant, Colbert, made an affidavit before the defendant, Brizzolari, charging Thomas E. Lacey with vagrancy, and that defendant, Brizzolari, issued a warrant upon said affidavit for the arrest of Lacey, charging him with vagrancy, and placed the same in the hands of defendant, Kemp, and that Kemp arrested said Lacey under said warrant, and detained him thereunder for

any length of time, then they will find each of the defendants guilty."

The jury found Brizzolari guilty, and acquitted the other defendants; and after motion for new trial overruled, he filed his bill of exceptions and brought error.

W. M. Cravens, *Thomas Marcum*, for appellant, and *J. Brizzolari*, *pro se*:

1. The Mayor's court has jurisdiction. *Const.* 1868, *sec.* 47, *Art.* 5; *sec.* 3232, *Gantt's Digest*; *Ib.*, 3222; *St, Louis* v. *Bentz*, 11 *Mo.*, 61; *Kennedy* v. *Phelps*, 10 *La., Ann.* 227; *Cooley Const. Lim.*, *p.* 198; *State* v. *Noyes*, 30 *N. H.* (10 *Frost*), 279; *Clark* v. *Rochester*, 28, *N. H.*, 605; 1 *Dillon on. Mun. Corp.*, *sec.* 401 (*3rd Ed.*), *note* 3.

2. The ordinance was not abrogated by the Constitution of 1874, or the General Incorporation Law of 1875. *Act* 1875, *sec.* 33, *p.* 14; *sec.* 9, *p.* 7 *and sec.* 22, *p.* 11; *Const.* 1874, *sec.* 1, *Art.* 7; *Ib. Art.* 7, *sec.* 43.

3. The police power of municipalities over the *crime* of vagrancy was not taken away, and conferred upon the county courts by *Sec.* 28, *Art.* 7, *Const.*, 1874. This section only gives such courts superintending control over vagrants, etc., to regulate how they shall be dealt with when liable to become a burden on the county, etc., and gives them no *criminal jurisdiction*. *Secs.* 11, 40 *and* 43, *Art.* 7, *Ib.*

C. B. Moore, *Attorney-General*, for the appellee:

Art. 7, *Sec.* 28, *Const.* 1874, provides: "The County Courts shall have *exclusive original jurisdiction* in *all matters* relating to * * * vagrants, etc., * * *." This took away all right from all other courts to deal with vagrants; the ordinance was a *nullity* and not continued in force by *Sec.* 33, *Act. Mch.* 9, 1875, being "inconsistent with the Constitution."

OPINION.

VAGRANCY: Jurisdiction of municipal courts.

HARRISON, J. When the ordinance for the violation of which Lacey was arrested was passed, section 3232 of *Gantt's Digest*, was in force. The said section was as follows:

"Section 3232. Municipal corporations shall have power to make and publish from time to time, by-laws, or ordinances, not inconsistent with the laws of the State, for carrying into effect or discharging the powers or duties conferred by the provisions of this Act; and it is hereby made the duty of the municipal corporation to publish such by-laws and ordinances, as shall be necessary to secure such corporations and their inhabitants against injuries by fire, thieves, robbers, burglars and other persons violating the public peace; for the suppression of riots and gambling, and indecent and disorderly conduct; for the punishment of all lewd and lascivious behavior in the streets and other places, and they shall have power to make and publish such by-laws and ordinances, not inconsistent with the laws of this State, as to them shall seem necessary to provide for the safety, preserve the health, promote the prosperity and improve the morals, order, comfort and convenience of such corporations and the inhabitants thereof."

Though vagrancy is not expressly mentioned it comes within the purview of the Statute, for it is an evil as detrimental to the good order and well being of the community as any other within the power and discipline of the corporation, and there can be no question that the ordinance was authorized by the Statute.

Dill on Munic. Cor., section 334; *St. Louis* v. *Bentz.* 11 *Mo.*, 61; *Mayor and Aldermen* v. *Allaire*, 14 *Ala.*, 400.

By section 33 of the Act of March 7th, 1875, for the incorporation, organization and government of municipal cor-

porations, "all laws, ordinances and orders which had been before passed or adopted" by the council were continued in force.

Not abrogated by constitution of 1874

But it is contended that the ordinance was inconsistent with and abrogated by the present constitution, and so not in force when the Act of March 7th, 1875, was passed.

Section 28 of Article VII of the Constitution says:

"The county courts shall have exclusive original jurisdiction in all matters relating to county taxes, roads, bridges, ferries, paupers, bastards, *vagrants*, the apprenticeship of minors, 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."

It plainly appears by the language here used, considered in connection with the other provisions of the constitution distributing the judicial power of the State among the tribunals created by it, that the jurisdiction given the county court is confined to matters relating to the "internal improvement and local concerns of the county," and so far as respects vagrants, extends only to such matters of police regulation as are designed to prevent them from becoming burdensome to the county, or in their nature local or of special concern to the county.

And the object of the power conferred by the Statute upon the Mayor was not an investiture of jurisdiction over violations of public law, but to provide a mere police regulation for the enforcement of good order within the limits of the corporation.

The ordinance was therefore not abrogated by the adoption of the Constitution of 1874, but was a valid and subsisting one at the passage of the Act of March 7th, 1875, and was continued in force by it, and the enforcement of it

was within the appellant's jurisdiction as mayor of the city.

The fifth and sixth instructions given for the State were erroneous and should not have been given.

The judgment is reversed and the cause remanded.

WATKINS v. STATE.

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1. BILL OF EXCEPTIONS: *By whom to be signed.*
A bill of exceptions can be signed only by the judge who tries the case, though he be a special judge, and it be not signed until after the term.

2. CRIMINAL PLEADING: *Joinder of offenses—burglary and larceny.*
A count for burglary and one for grand larceny may be joined in the same indictment.

3. VERDICT: *On sundry counts.*
A general verdict of guilty on an indictment containing a count for burglary and one for grand larceny is good. But if the verdict evidently applies to only one of the charges, the defendant may require it to be specified.

4. INDICTMENT: *Signing by Prosecuting Attorney not necessary.*
It is not necessary that an indictment be signed by the Prosecuting Attorney. It is sufficient if found by the grand jury, and endorsed by the foreman.

ERROR to *Jefferson* Circuit Court.
Hon. J. A. WILLIAMS, Special Judge.

STATEMENT.

In May, 1881, Percy Watkins, Joseph Wesson, Thomas Ferguson and Charles Beasley were jointly indicted in the Circuit Court of Jefferson county, by two separate counts in the same indictment, for burglary and larceny—the first

count charging them with burglary, and the second with grand larceny.

The indictment was not signed by the Prosecuting Attorney, but was endorsed, "a true bill," and the endorsement signed by the foreman of the grand jury, and the bill regularly filed in court.

Watkins, demanding a severance, was put upon trial upon the plea of not guilty. The jury returned a general verdict of guilty against him, and assessed his punishment at three years' imprisonment in the penitentiary. A motion for new trial was refused, and judgment was rendered against him in accordance with the verdict. He asked and was allowed ninety days to file his bill of exceptions, and within the time filed it in vacation, signed by the regular judge of the court, and has brought the case here by writ of error. The trial was before the Hon. John A. Williams, elected special judge, in the absence of the regular judge.

C. B. Moore, Attorney-General, for the appellee:

1. An indictment need not be signed by the Prosecuting Attorney. It is sufficient if found "a true bill," and signed by the foreman of the grand jury. *Anderson* v. *State*, 5 *Ark.*, *p.* 444.

2. Larceny and burglary may be joined in the same indictment, in different counts. *Gantt's Digest*, *sec.* 1351; and a general verdict of "guilty" is good. *Baker* v. *State*, 4 *Ark.*, 56; *Brown* v. *State*, 10 *Ark.*, 507; *Youngblood* v. *State*, 35 *Ark.*, 35.

HARRISON, J. A bill of exceptions could only be signed by the Special Judge before whom the case was tried and the exceptions taken.

Judge Pindall, the regular Judge, could not have had that direct and certain knowledge of the proceedings and rulings

of the court as might enable him to make the matters excepted to a part of the record by a bill of exceptions.

The paper purporting to be a bill of exceptions, and signed by him as such, therefore, constitutes no part of the record, and is a nullity.

A count for grand larceny may be joined with one for burglary, in the same indictment. *Gantt's Digest*, *sec.* 1351; *Toliver* v. *The State*, 35 *Ark.*, 395. And there may be a general verdict of guilty, on the whole indictmen. *Howard* v. *The State*, 34 *Ark*, 433; 1 *Bish. Cr. Proceed.*, *sec.* 1015*a*; 3 *Whar. Crm. Law*, *sec.* 3047.

But "where the counts are for distinct offenses," says Mr. BISHOP, "though a general verdict of guilty will operate as a conviction of all, still it has been held, and it seems in reason just, that the defendant is entitled, on request, to have separate findings returned upon them, or, at least, to have the jury in some way pass upon each by itself." 1 *Bish. Crm. Proceed.*, *sec.* 1015*a*.

As the least punishment for burglary is three years imprisonment in the penitentiary, and, for grand larceny, one year, it is evident the defendant was not found guilty of both, but only of one or the other. That the verdict did not show which, was not an error for which the judgment might have been arrested, or should be reversed. The defendant could have required it to be certain and distinct. 1 *Bish. Crm. Proceed.*, *sec.* 1013.

An indictment need not be signed by the prosecuting attorney. It is sufficient if found by the grand jury and indorsed by their foreman. *Anderson* v. *The State*, 5 *Ark.*, 444; 1 *Chit. Crim. Law*, 324; 1 *Arch. Crim. Prac.*, 97; 1 *Bish. Crim. Proceed.*, *sec.* 702.

Finding no error, the judgment is affirmed.

FITZPATRICK v. THE STATE.

1. CRIMINAL LAW: *Selling Liquor without license: Proof of particular day.*

In prosecutions for the sale of liquor without license, it is not necessary to prove a sale on the particular day named in the indictment. Proof of a sale at any time within twelve months before the finding of the indictment is sufficient.

APPEAL from *Lincoln* Circuit Court.
Hon. X. J. PINDALL, Circuit Judge.

STATEMENT.

Indictment for selling whisky in less quantity than one quart, without license.

The State proved the sale without license, within twelve months next before the finding of the indictment, but did not prove a sale on any particular day. The court instructed the jury that the State was not required to prove a sale on the particular day named in the indictment. To this the defendant excepted, and, being convicted, has regularly brought the question to this Court, by appeal.

J. M. Cunningham, for appellant:

The *time* was an essential description and material ingredient of the offense, and must be strictly proven. 1 *Greenleaf Ev*, 56; *Ree* v. *Johnson*, *M. & S.*, 548; *1 Arch. Cr. Pr.*, 85, 119; 1 *Bish. Cr. Pr.*, 237. If the precise day of the fact be a necessary ingredient of the offense, it must be truly stated. *Petersdorf's Ab.*, *title* "*Indictments*," 324 *note*. See, also, 1 *Bish. Cr. Pr.*, 268; *Dennon* v. *State*, 29 *Ark.*, 42.

C. B. Moore, Attorney General, for the State.

The court properly instructed the jury, and the verdict and judgment were in accordance with law and the evidence.

OPINION.

HARRISON, J. The day upon which the liquor was sold was not a matter essential to the description of the offense. It could as well be committed on one day as another. In the case of *Marre* v. *The State*, 36 *Ark.*, 222, which was a prosecution for Sabbath-breaking, it was decided that the State, in proving the offense, was not confined to any particular Sabbath within the period of limitation. It was, therefore, not necessary to prove that the sale was on the day named in the indictment, and the instruction was, therefore, correct, and the verdict sustained by the evidence.

Affirmed.

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56 113

TRAMMELL v. BRADLEY, COUNTY JUDGE.

1. LEGISLATURE: *Resolution extending session of 1881.*

The resolution of the Legislature extending the session of 1881, did not require the approval of the Governor. It was constitutional without such approval.

2. LIQUOR: *Local option act of 1881, constitutional.*

The Act of 1881, authorizing the County Courts to make an order prohibiting the sale or giving away of liquor within three miles of any church or school house, upon the petition of a majority of the adult residents in said limit, is constitutional and valid.

APPEAL from *Pope* Circuit Court.

Hon. W. D. JACOWAY, Circuit Judge.

Henderson & Caruth and *J. Erb*, for appellant:

The Act of March 2nd, 1875, differs in several very important features from the Act of March 21st, 1881. The former was "An Act *to prevent* the sale * * * of liquors, etc." The latter, "An act providing for the prohibition of the sale * * * of liquors," etc. In the former the Legislature declared that the sale of spiritous liquors should be prohibited; but in the latter, it only declared, in its title, that it provided the means for the prohibition of the sale, etc., of liquors, and in its first section, that whenever the adults *shall desire to prohibit the sale*, etc., they may obtain an order, etc.

The latter Act is unconstitutional, because of the delegation of legislative power to the adult residents within certain limits.

Sammert v. *Tidwell*, 62 *Mo.*, 188; *Ex parte*, *Wall.* 48, *Cal.*, 279; *State* v. *Wilcox*, 45 *Mo.*, 458; *Bank of Chenango*, 26 *N. Y.*, 470; *State* v. *Swisher*, 17 *Tex.*, 441; *Barto* v. 8 *N. Y.*, 490; *Cooley Con. Lim.*, 146–7; *State* v. *Reynolds*, 5 *Gilm.* 1; *State* v. *McNeil*, 24 *Wis.*, 149; *Response to House Resolution*, 55 *Mo.*, 295; *People* v. *Nally*, 49 *Col.*, 478; *Pike County* v. *Barnes*, 51 *Miss.*, 305; *Call* v. *Chalburn*, 46 *Me.*, 206; *Brunswick* v. *Finney*, 54 *Ga.*, 317.

2. The Act of 1881 does not attempt to repeal the Act of March 8th, 1879, but there is a clear repugnance and irreconcilable conflict between the two. The latter Act directs that the question of license or no license shall be submitted to the *electors* of the several townships, etc. If a majority vote for license, licenses may issue, etc. Within the same locality, by the former Act, a new element of political power (aliens, females, idiots, etc.), is added, and authority conferred upon them, to prohibit the sale, etc., of liquors, thus nullifying the will of the electors at the former election.

The two laws occupy the same space, at the same time and are so opposed that one or the other must fall. The elective franchise can be exercised by males of sound mind alone, *Sec.* 1, *Art.* 3, *Const.*, and if the Act had authorized females, idiots, aliens and insane persons to vote by ballot, the act would certainly be void. The signature to the petition is the substance of a ballot, in taking the sense of the community, and it follows that the elective franchise has been extended beyond the limits of the Constitution and the Act is void. *Starin* v. *Genoa*, 23 *N. Y.*, 441; *Gould* v. *Sterling*, 23 *N. Y.*, and the dissenting opinion of TARBELL, J., in *Rohrbacker* v. *City of Jackson*, 51 *Miss.*, 730.

3. The effect of the Act of 1881 is to repeal or displace the Act of 1879, in the localities mentioned. The electors, much less the whole body of the population, by vote or petition cannot repeal a Statute or amend it. This can only be be done by the Legislature. *State* v. *Weir*, 33 *Iowa*, 134; *Ex parte Wall*, 48 *Cal.*, 279; *Lammert* v. *Lidwal*, 62 *Mo.*, 188.

4. It is void for uncertainty as to county lines, and because it confers extra territorial jurisdiction on County Courts, where the edifice is within three miles of county lines.

C. B. Moore, Attorney-General, for the appellee:

The Act is constitutional. *Locke's Appeal*, 72 *Penn.*, 72; *Rohrbacker* v. *City of Jackson*, 51 *Miss.*, 735; *Cooley's Con. Lim.*, 151–2, and cases cited in note, 2 *p.*, 152.

The Act is similar to the Act of 1875, which has been held constitutional. *Bryant* v. *Boyd*, 35 *Ark.*, 69; *Wilson* v. *State*, *Ib.*, 414; *Blackwell* v. *State*, 36 *Ark.*, 178.

The whole matter is "within the Constitutional control of the Legislature, *as a police regulation.*" *Whittington Ex parte*, 34 *Ark.*, 394.

STATEMENT.

EAKIN, J. The relator, Trammell, on the twelfth day of July, 1881, applied by petition to the County Court for license, under the Act of March 8, 1879, to keep a dram-shop, or drinking-saloon, in the town of Atkins, in Wilson township, Pope county, which was refused.

He shows in his relation, which was immediately made to the Circuit Court, that the question had been previously submitted, as required by law, to the qualified electors of said township, and that a majority had voted in favor of the granting of such licenses, for the term of two years, succeeding said election; that he had accompanied his petition to the County Court with a proper receipt in full of the collector, for the commissions and fees due and chargeable on such licenses for State and county revenue, and had tendered a proper bond, as required by law, with all which the County Court was thoroughly satisfied, and so caused its record to say.

And he relates that his petition was rejected by the County Court solely because, at the same term, another petition had been presented by persons claiming to be a majority of the "adult inhabitants residing within three miles" of a certain church and academy in the town of Atkins, praying that the sale or giving away of any alcoholic, vinous, spirituous, or intoxicating liquors, etc., be forbidden within said area of three miles; which petition had been presented under a pretended act of the Legislature, approved March 21, 1881, and in accordance with which the County Court had made an order as prayed.

He states that the County Court had decided that he is a proper person to receive the license he asks, and that he had fully complied with all the requirements of the Statute, but conceives itself precluded from granting the license by

the said prohibitory order, made on petition of the majority of the adult inhabitants.

The relator submits that said Act of March 21, 1881, is invalid, because the session of the General Assembly was, by force of the Constitution (Art. V., Sec. 17), adjourned on the ninth day of March, 1881, at 12 M., and that a concurrent resolution, extending the session for ten days beyond that time, was never approved by the Governor; and that said act was not passed previous to said ninth day of March.

Moreover, that said act of March 21, is otherwise in conflict with the Constitution of the State, and of the United States.

The prayer is for a writ of mandamus, to compel the County Court to grant the relator a license. To this relation a demurrer was sustained, and the relator appeals.

OPINION.

The attorneys for the County Court make no point here of the propriety of the writ of mandamus to control the direction of the County Court, in case the Act of March 21, 1881, should be held unconstitutional, but desire the constitutionality of that act to be tested. In deference to the attorneys in the case, and in view of the grave public interests involved in the question, this court consents to waive that point, although directly presented by the demurrer, and to determine the validity of that act.

1. LEGISLATURE: Resolution extending session of 1881, constitutional

It was approved on the twenty-first of March, 1881. The regular biennial session of the Legislature had begun on the tenth of January. During the session, by concurrent resolution, not signed by the Governor, the session "was extended and continued" until 12 o'clock M. on the nineteenth of March, 1881. The session, *if not properly extended*,

expired on the ninth of March, and the act, having been passed after that period, would be invalid.

The clauses of the Constitution touching this point are as follows:

By Art. V., Sec. 17: "The regular biennial sessions shall not exceed sixty days in duration, unless by a vote of two-thirds of the members elected to each house of said General Assembly." By Art. VI., Sec. 16: "Every order or resolution in which the concurrence of both houses of the General Assembly may be necessary, *except on questions of adjournment*, shall be presented to the Governor, and before it shall take effect be approved by him," or, as in case of bills, be returned, etc.

Is the matter of the concurrent resolution a question of adjournment, as contemplated by the Constitution? "An adjournment," says Mr. Blackstone, "is no more than a continuance of the session from one day to another, as the word itself signifies." The concurrent resolution had for its sole object the continuance of the session from the ninth of March, 1881, when it would have otherwise expired, till the nineteenth of the same month. This is clearly germain to the matter of adjournment, and the resolution did not require the approval of the Governor. This was the construction put upon the Constitution by the legislative department, in a matter regulating its proceedings, and also by the Executive. The Governor approved many bills passed during the time of extension, which he could not have done had he supposed his approval of the concurrent resolution to be necessary. The act is not subject to constitutional objection, on account of the time of its passage.

2. LIQUOR: Local option Act of 1881. constitutional

It is more urgently pressed upon the court that the act is in violation of Section 1 of Article V. of the Constitution, which vests all the legislative power of the State in the Senate and House of Representatives; and also of Section 1

of Article III., defining the qualifications of electors; which, for the purposes of this opinon, it is sufficient to say, do not embrace all "adult inhabitants." This requires a closer scrutiny of the act, in connection with previous legislation, and the law existing at the time of its passage.

There were numerous special laws forbidding the sale of intoxicating liquors in special localities. Retaining all these intact, the Legislature, on the second of March, 1875, passed a general law, making it unlawful for any person to sell, or give away, any liquors (describing them) within three miles of any academy, college, or university, in the State, outside of cities of the first and second class. Section 4, however, so far neutralized the general prohibition as to require some action on the part of the *adult residents* of the *township*, in order to give efficacy to the Act, in any particular locality. It was required that a majority of them should petition the County Court for the purpose, showing the existence of the institution in the township, and that pupils were taught there; and praying that the sale, or giving away of spirituous liquors be prohibited within three miles of the same. The County Court was required, on becoming satisfied as to the facts, to make an order in accordance with said prayer. The Act provides that "from thenceforth" it shall not be lawful to vend, or give away, any spirituous liquors within the limits aforesaid. There were other provisions, not important in this connection. (See the Act, on p. 206 of Pamph. Acts of 1874–5; and, also, set forth at large in *Boyd* v. *Bryant*, 35 *Ark.*, *p.* 70.) The constitutionality of this Act came before this Court in the case just quoted, and it was, upon careful consideration, sustained. All the objections were answered, in the careful opinion delivered by CHIEF JUSTICE ENGLISH, who sustained it, as one of that class of local option laws which it was within the

power of the Legislature to pass. It can serve no useful purpose to repeat the views therein expressed. The case expresses the deliberate position taken by this Court in the matter of local laws. That position is in line with those courts which hold, upon this vexed question, that local option laws are not delegations, in any true sense, of legislative power, but derive their whole efficacy from the legislative will. That they are made operative, or not, in particular localities, upon certain contingencies, or under certain circumstances, which are referred to the County Court for determination; but, when set in operation, they derive their vigor from the original legislative life infused into them as general laws of the land. It must be confessed that the question was not, originally, without very grave difficulties; but now, upon a review of them all, and weighing the dangers and inconveniences of each side, this Court adheres to the views there taken. And this, we think, is sustained by the weight of authority, as well as of reason.

What is good for one locality, under certain circumstances, may not always be good for another, under different circumstances. General laws of an adjustable nature, become a necessity. The purposes of good government cannot be fully subserved without them, and their certainty is not impaired by their adjustable nature.

The counties are governmental agencies—the Briarean arms of the sovereign power; and, through the County Courts, the operations of general police regulations may be best adapted to circumstances. The Constitution has invested them, under legislative direction, with the exclusive original jurisdiction of all matters connected with the internal improvement and local concerns of their respective counties. It seems to harmonize with that, to make them the proper tribunals, under fixed laws, to ascertain and

declare the facts and circumstances under which certain police laws are to operate, as depending upon the knowledge, by the inhabitants of special localities, of their best interests, and the expression of their desires. What may, in some localities, be a great evil, may, in others, be a convenience or a necessity.

The same act came again to be discussed by this Court, in the case of *Wilson* v. *The State*, 35 *Ark.*, 414. Although there was, in that case, a dissenting opinion, as to the construction and effect of the Act, no member of the Court made any question, or had a doubt of its validity.

Again, in *Blackwell* v. *State*, 36 *Ark.*, 178, the constitutionality of the Act of 1875 was called in question, and this Court, adhering to the former decisions, sustained the Act.

Meanwhile, under other general acts of the General Assembly, the sale of liquors without license had, at all times, been prohibited throughout the State. The laws, from time to time, had been changed, but the policy of regulating the retail of liquors and the keeping of dram shops had been persistently maintained; so that no time occurs to the mind of the Court, since an early period in the history of our State, when it has not been a misdemeanor to retail liquor, as a business, or keep a drinking saloon, without license.

The last General Act upon that subject, and the one in force when this Act of 1881, now in question, was passed, is that of March 8, 1879. The first section is sweeping, and, with a saving for manufacturers, makes it unlawful for any person to sell liquors, of a certain description, without license, under a very severe penalty. The mode of procuring license is pointed out, and, in this connection, it is provided that, at each general State election, it shall be submitted to the *qualified electors* of each township and city ward,

whether or not *any* license shall be granted by the County Court to keep a dram shop or drinking saloon in that township or ward, for the next two years. If the vote be for license, then, and not otherwise, "it shall be lawful for the County Court" to grant it.

Such, in effect, was the state of the law, as settled by judicial decisions, when the Act of March 21, 1881, was passed, the validity of which is the matter now in judgment. (See Pamph. Acts of 1881, p. 140.)

It begins with no sweeping section, declaring it unlawful for any person to sell, or give away, liquors within three miles of any academy, etc. This was unnecessary, as the act was passed with reference to existing laws; and such a section, even in the former Act of 1875, was only formal and insignificant. Because, by the fourth section of the last named Act, the law was to be, with regard to each township, entirely dormant, until the County Court, upon the petition of a majority of the adult residents of the township in which the academy, etc,, was situated, should make an order in accordance with the prayer, prohibiting the sale within three miles of the institution, That Act and this are, in this aspect, precisely the same, in effect.

The Act of 1881 made a slight change in the policy. It did not require for the petition a majority of the "adult residents of the township but a majority of the *inhabitants residing within* three miles of the named institution. There does not seem to be any other difference in the Acts, which can affect the question of their constitutionality.

Counsel for relator, conceding the force and binding obligations upon this Court, of its decisions rendered upon the Act of 1875, contend that a new question may be opened upon the construction of the Act of 1881, and press the point that the latter Act attempts to confer legislative powers

upon local bodies, unknown to the Constitution either as organizations, or individually as qualified electors.

To what has already been said in former decisions and in this, it may be added: That it would be a matter sadly to be regretted, if the legislative power were so trammeled by the constitution that it would not, whilst affording to the citizens, everywhere, all the comforts and conveniences supposed to exist in a well regulated liquor traffic, at the same time protect the youth of the country, assembled at a tender age at these institutions of learning, from the temptations to a vice which has strewn the surface of the earth with wrecks of noble natures. The family, society, and civil government are all deeply concerned in this question, and whilst the civil liberties protected by the constitution are the highest *par excellance*, overriding all other considerations, the constitution should be very clear to prevent the legislature from any well-devised tentative efforts to so adjust its laws as to allow a fair liberty to the citizens, with a saving of such cases as, under surrounding circumstances, would make the danger of the privilege greater than any benefits would compensate.

This, in its various legislation upon this subject, the general assembly has attempted to do, not by delegating law-making powers to the County Courts or to bodies of men in localities; but by enabling those courts, having by the constitution the charge, under legislative direction, of the local concerns of their territory and people, to determine upon proper and prescribed information, the localities within which the provisions of the general license law would be dangerous to the morals, or repugnant to the feelings of the inhabitants, and making it obligatory upon them to refuse a license upon such determination. This does not constitute legislation. The courts are not empowered to order anything positive. They act only by negation. They

only interpose a shield to protect those localities which the legislative power has defined as proper for protection, by a law general and uniform over the state; and in doing this they follow the modes marked out by the law itself, which modes are also applicable everywhere. This is not the exercise of legislative power. It is the use of agencies by the legislature to direct and adjust the operation of its laws uniformly, under like circumstances, all over the State. The laws operate by their own vigor, and are as valid at the beginning as, at law, a conveyance would be, with shifting and springing uses, conditional limitations and contingent remainders.

The mode of information prescribed for townships is by vote of electors at a general election. We understand that no objection is made to that. With regard to institutions of learning, the court derives its information from the expressed wishes of a majority of the adult inhabitants residing within three miles. If the petitioners made the law for the district, or were required to express their views and feelings at the regular legal polls, it would be fatal that females and others, not qualified electors, might participate. But considered simply as a condition upon which the County Court must decline to issue license, and as a prescribed means of information, the provision for the voice of women is neither unreasonable nor unconstitutional. They are not beings wholly ignored by the constitution and the laws, and there is much reason to believe that their womanly instincts and keen foresight of demoralizing influences are truer than the often careless judgment of electors. It is undoubted everywhere that men and children are safest under the moral influences and social surroundings which are approved by women.

That trouble may arise in giving effect to an act where the institution is so near a county line that the surrounding

area of three miles would enter two or more counties, is simply a question of practice. Of course the courts would refrain from any construction giving the act an unconstitutional effect, but that would not affect its legitimate operation in cases like this where the difficulty does not occur. It is not advisable to make any construction by anticipation. Perhaps some additional act may solve the difficulty. Few systems are launched perfect, but the defects revealed by experiment may be supplied. The court concludes that there is no difference in principle between the acts of 1875 and 1881, and adheres to its decisions upon the former. The act of 1881 is valid, and the circuit court did not err in sustaining the demurrer to the petition for a mandamus, and refusing the writ.

Affirmed.

37	386
57	197
37	386
63	343
37	386
f79	591
37	386
f 84	602

FALCONER v. SHORES.

1. COLLECTOR OF REVENUE: *Office forfeited if bond no given in prescribed time.*

The sheriff is by law *ex-officio* collector of revenue, but if he fails to give bond as such collector by the time prescribed by the Statute (the first Monday in January), he forfeits the office, and cannot be restored to it by executing the bond afterwards.

2. SAME: *Appointment of successor on failure to give bond.*

Upon the failure of a sheriff to give bond as collector of revenue within the time prescribed by law, the Governor is required, upon notice of such failure from the county clerk, to declare the office vacant and fill it by appointment. No judicial ascertainment of the vacancy is required. The power is rightfully vested by the Legislature in the Governor.

3. SAME: *Not elective. Vacancy, how filled.*

The office of collector of revenue is not elective, and the filling of vacancies in the office is not within the provision of Sec. 50, Art. VII, of the Constitution.

4. SAME: *Legislative power over.*

The office of collector is subject to the control of the Legislature, which has power to provide for his appointment by the Governor or in any other mode it may direct.

5. SAME: *When the appointee of Governor may enter into office.*

A collector of revenue appointed by the Governor in place of a sheriff failing to give bond as collector, may enter upon the duties of his office, or sue the sheriff for the office, immediately after having his bond approved by the Circuit Judge within ten days after his appointment. He need not wait for approval in term time.

APPEAL from *Franklin* Circuit Court.
Hon. G. S. CUNNINGHAM, Special Judge.

James A. Yantis and *Clendenning & Sandels*, for appellant:

I. The proceedings in and about the appointment of appellant were in exact conformity to the Act of the Legislature. *Acts* 1874–5, *p.* 165.

II. The Act is constitutional. The *office* of collector and the *officer* are to be distinguished. The *office* is now and always has been a legislative creation. In the Constitutions prior to 1874, the office and officer were without recognition or mention. In the Constitution of 1874 it was provided that the sheriff of each county should be *ex-officio* collector, etc. He must give bond, etc. This is not a mere direction, but a condition *precedent* to his right to act. If one have title to an office, conditioned upon the performance of certain conditions, his right becomes absolute upon the performance of those conditions, and a Statute enabling the Executive in an *ex parte* proceeding without notice, to divest his title, is unconstitutional and void. *Carnall* v. *The State*, 10 *Ark*,, 156; *People* v. *Scannell*, 7 *Cal.*, 440. But in this case it is different. The Statute (*Acts* 1874–5, *p.* 165, *Secs.* 1 *and* 3) being construed with *Sec.* 6, *p.* 194, says that

upon the failure to give bond, etc., that a vacancy shall be declared by the Governor, etc.. and he shall appoint, etc. *See People* v. *Scannell*, 7 *Cal.*, 432, 439, 440. The power to make this declaration is expressly given and the Act is constitutional. *Martin* v. *Mott*, 12 *Wheaton*, 19.

The right and propriety of its exercise are strongly recognized in 1 *Ala.*, 559; 48 *Ga.*, 137; 46 *Ib.*, 630; 44 *Ala.*, 696; 58 *Miss.*, 556; 53 *Miss.*, 615; 46 *Ala.*, 340; 50 *Ala.*, 522; 43 *Ala.*, 568; 52 *Ala.*, 66; 7 *Vol.*, *U. S. Dig.* (*new series*), 614; 9 *Ga.*, 314; 11 *Ga.*, 210; 95 *Ills.*, 593; 16 *Hull*, 520; 57 *N. Y.*, 399; 10 *N. J. Eq.*, 70; 10 *Mo.*, 681; 27 *Ind.*, 496; 13 *Wis.*, 365; 10 *Ohio St.*, 128; 13 *Bush.*, 37, and other cases. *Bosely* v. *Woodruff county*, 28 *Ark.*, 306–315. Any subsequent attempt of Shores to give bond and reinvest himself with the right to the office was nugatory. 22 *Wis.*, 363; 1 *Ala.*, 559. Appellant has pursued the proper remedy. *Lambert* v. *Gallagher*, 28 *Ark.*, 451.

III. The rights of appellant are sufficiently stated in the complaint, and the suit properly brought under *Sec.* 5748, *Gantt's Digest.*

W. W. Mansfield and *Henderson & Caruth*, for appellee:

I. The facts stated in the complaint do not show that on the day of plaintiff's appointment, a vacancy existed in the office of collector. *Art.* 7, *Sec.* 46, *Const. Ark.*, 1874; *Acts*, *Feb.* 25, 1875; *Sec.* 12, *Act Mch.* 5, 1875; *Act* 1875, 225. The former Act, *if not repealed* by section 12, of the latter Act, is plainly unconstitutional, in so far as it attempts to oust the sheriff upon the mere certificate of a clerk by a non-judicial and *ex parte* proceeding, and to enable the Governor to fill the supposed vacancy by appointment (*Sec.* 50, *Art.* 7, *Const.*, 1874).

If appellee, by his failure to give bond, etc., was in fact never collector, then the office could not be vacated by any

act or omission of *his*, and appellant was not appointed collector, because there can be no appointment to fill a vacancy, until the office has once been full. *Ex parte Dodd*, 6 *Eng.*, 152; *Brightly's Leading Cases on Elections*, *p.* 677, *note.* If he was collector, it does not appear from the complaint that he has gone out by death, removal or resignation. By mere lapse of time an office never becomes vacant (*Constitution Ark.*, *Art.* 19, *Sec.* 5.). One does not go out until another by the act of qualification displaces him. *Commonwealth* v. *Hanley*, 9 *Penn. St.*, 513. Shores being the incumbent there was no vacancy to fill. He could only be ousted by the judgment of a court of competent jurisdiction after notice, etc. *Cooley's Const. Lim.*, 351 *to* 358; *State* v. *Carnall*, 10 *Ark.*, 456; *State* v. *Hixon*, 27 *Ark.*, 401–402; *Chandler* v. *Montgomery county*, 31 *Ark.*, 25; *Boseley* v. *Woodruff county*, 28 *Ark.*, 306; *Scott* v. *Watkins*, 22 *Ark.*, 559.

II. The appointment of appellant was made in violation of the Constitution. The office of collector is a constitutional one. *Art.* 7, *Sec.* 46. It is a distinct and separate office. *McCabe ex parte*, 33 *Ark.*, 398. There should have been a special election, if the office was vacant. *Sec.* 50, *Art.* 7, *Const.*

III. Sec. 12, Act March 5, 1875, is directory and not mandatory. *Cooley's Const. Lim.*, 74; *Edwards et al.* v. *Hall*, 30 *Ark.*, 31; *Boseley* v. *Woodruff county*, 28 *Ark.*, *and cases cited.* *Neal* v. *Burrows*, 34 *Ark.*, 491.

English, C. J. At the general election, sixth Septem- 1880, Richard Q. Shores was elected sheriff of Franklin county; he was commissioned by the Governor on the eleventh of September, executed a bond as such, which was approved by the County Judge on the first of October, 1880, and on the eighteenth of the same month took the oath of office.

He failed to give bond, as collector, before the first Monday of January, 1881, as required by law. The clerk of the County Court notified the Governor of the failure, and the Governor, on the eleventh of January, 1881, appointed and commissioned John P. Falconer as collector, who executed a bond as such, which was approved by the Circuit Judge on the nineteenth of the same month, and on the same day he took the oath of office.

In the meantime, on the fourteenth of January, 1881, Shores made a bond as collector, which on that day was approved by the County Judge.

On the eleventh of April, 1881, he procured the County Clerk to deliver to him the tax books for 1880, with a warrant for the collection of the taxes of that year; and on the twenty-fifth of the same month Falconer commenced this suit against him for the office of collector, etc.

Shores, in his answer to the complaint, relied for defense on the fact that he had made and procured the approval of his bond as collector on the fourteenth of January, 1881. The plaintiff demurred to the answer; the court overruled the demurrer, holding the complaint bad, and plaintiff resting, judgment was rendered in favor of defendant, and plaintiff appealed.

1. COLLECTOR OF REVENUE. Forfeits office by not giving bond in prescribed time.

Before the adoption of the present Constitution the office of collector of taxes was statutory. The Statute in force when the Constitution was adopted provided that the sheriff of each county should be *ex-officio* collector, and before entering upon his duties as collector should give bond before the first Monday of January of each year, etc. *Gantt's Dig.*, *secs.* 5157–9.

Section 46, Article VII., of the Constitution provides that the qualified electors of each county shall elect one sheriff, who shall be *ex-officio* collector of taxes, unless other-

wise provided by law, for the term of two years, thereby leaving the office of collector under legislative control.

A person who is sheriff and collector, under existing laws, holds two distinct offices, and is required to give bond as sheriff, and also to give bond as collector. *McCabe, ex parte*, 33 *Ark.*, 396.

Appellee, Shores, was sheriff when he received his commission, and qualified as such by executing bond and taking the oath of office. But he could not enter upon the duties of the office of collector until he executed bond, as prescribed by law.

He was required to give bond as collector before the first Monday of January, 1881. *Acts of March* 5, 1875, *sec.* 12; *Acts of* 1874–5, *p.* 225.

2. SAME: Successor appointed on failure to give bond.

The Act of twenty-fifth February, 1875 (*Acts of* 1874–5, *p.* 165), in effect, declares that when a sheriff shall fail to give the bond required by law, as collector of the revenue, at the time required by law, he shall forfeit his right to the office of collector; and makes it the duty of the clerk of the County Court immediately to notify the Governor of such failure, and of the Governor to appoint some suitable person collector of revenue, and provides that the person so appointed shall hold the office until his successor is elected and qualified; and requires him to qualify and give the bond required by law within ten days after he is notified of his appointment; and if he fail, the Governor is required to appoint some other person, etc.

Appellee failed to give bond in the time prescribed by law; the failure was certified by the clerk to the Governor, who, on account of such failure, declared the office of collector vacant, and appointed and commissioned appellant to fill the vacancy; after all of which appellee made a bond, but that did not help him; he was too late.

This case is unlike *State* v. *Carnell*, 10 *Ark.*, 156, in

which it was decided that a sheriff could not be deprived of his office for failing to return his assessment list within the time prescribed by law, without a judicial ascertainment of the delinquency.

There the sheriff was in office, and there was an attempt to oust him for an omission of official duty, without judicial inquiry. Here appellee had not entered into the office of collector, and forfeited his right to do so by failure to give bond as such, and within the time fixed and limited by law. There is no constitutional reason why the Legislature might not entrust to the Governor the ascertainment of such failure.

It is sufficient to say of *Boseley* v. *Woodruff County Court*, 28 *Ark.*, 306, that it arose under a different Statute from the one now in question, and the case, on its facts, is not like this.

The giving of a bond by the sheriff, and the time of making it before he enters upon the office of collector of revenue, is of public importance. The Statute requires it to be given before the first Monday of January. If, in disregard of the law, he may defer it to the fourteenth of the month, he may postpone it through the period prescribed for the collection of the revenue, to the detriment of the public. In other words, he may disregard the time prescribed by law for him to execute the bond, and fix his own time at pleasure, or as convenient.

The statute fixing the time cannot be treated as directory, because the Legislature has declared the consequences of the neglect; that is, in effect, that the sheriff shall forfeit his right to the office of collector, and the Governor, on being informed by the county clerk of such failure, shall appoint and commission some person to be collector in his place. *Sedgwick on Construction of Statutory and Constitutional*

Law, second edition, p. 326; *Basham, &c.* v. *Commonwealth*, 13 *Bush*, 36.

It was submitted in argument that the Governor had no power to appoint appellant collector, because the vacancy in the office occurred more than six months before the then next general election, citing Sec. 50, Art. VII of the Constitution.

3. SAME: Not elective. Vacancy how filled.

That section provides that: "All vacancies occurring in any office provided for in this article, shall be filled by special election; save that in cases of vacancies occurring in county and township offices, six months, and in other offices nine months, before the next general election, such vacancies shall be filled by appointment by the Governor."

This section applies to elective officers, and not to the office of collector, which, as such, is not filled by the voice of the electors.

The sheriff is elected by the qualified electors, "who," section 46 of the same article declares, "shall be *ex-officio* collector of taxes, unless otherwise provided by law." This, as above observed, leaves the office of collector under legislative control, and doubtless the Legislature has power to provide by law for collectors to be appointed by the Governor, or in such other mode as may be directed.

SAME: Office of subject to legislative control.

By the acts above cited, passed since the adoption of the Constitution, the Governor is authorized to appoint and commission some suitable person collector of revenue, on the failure of the sheriff to give bond as collector at the time required by law, etc., and these acts are in conflict with no provision of the Constitution.

It was further submitted, in argument, that at the time appellant commenced this suit, his bond as collector had not been approved by the Circuit Ccourt in term; that his title to the office had not, therefore, been perfected, and he was not in a condition to maintain the action.

When appointed, may enter into office, or sue for it.

The Statute requires the person appointed by the Governor to give the bond require by law within ten days after he is notified of his appointment, and if he should fail, the Governor is required to appoint some other person.

Appellant was commissioned on the eleventh of January, 1881, and executed a bond, which was approved on the nineteenth of the same month by the Circuit Judge, in vacation, as authorized by the Act of March 1, 1875. (*Acts of* 1874–5, *p.* 194.)

He had the right, on such approval of his bond, to enter upon the duties of the office of collector, and to bring suit against an intruder.

To require him to delay entering upon the duties of the office, or to sue an intruder, until his bond should be finally approved by the Circuit Court in term, might be to postpone his right to collect the taxes, and to sue for the office, until the whole period prescribed by law for the collection of the public revenue, making tax sales, etc., had transpired, as no term of the Circuit Court might be held in his county during that time, there being but two regular terms a year.

The amended complaint, which the court held bad on demurrer to the answer, showed a good cause of action (under *Sec.* 5748 *Gantt's Dig.*), and the answer set up no valid defense.

Reversed and remanded, with instructions to the court below to sustain the demurrer to the answer, and for further proceedings.

37 395
54 538

HILL v. THE STATE.

1. PRACTICE IN CIRCUIT COURT: *Suspending trial for further evidence.*

The suspension of a trial after it has commenced, to enable a party to get further testimony, is within the sound discretion of the Circuit Court.

2. EVIDENCE: *What sufficient proof of sale of liquor.*

If one goes into a dram shop and calls for a pint of whisky, and it is drawn and delivered to him by the keeper, this is evidence tending to prove a sale of the whisky, though it is proven that no money was paid, nor any directions given to the keeper to charge it.

3. LIQUOR: *Sale of to minors.*

The permission or order of a parent or guardian of a minor to sell liquor to him must be in writing.

APPEAL from *Johnson* Circuit Court.
Hon. W. D. JACOWAY, Circuit Judge.

STATEMENT.

At the October term, 1880, of Johnson Circuit Court, John Hill was indicted for selling whisky to Henry Yates, a minor, without the written consent of his parent or guardian.

Upon the trial Thomas L. Yates, the brother of Henry, testified that he went with Henry into defendant's saloon, at Coal Hill, in Johnson County, in the winter or spring of 1880, and Henry called for a pint of whisky, which the defendant drew and delivered to him, and he and Henry then left. Henry was between eighteen and nineteen years of age. He didn't see Henry pay for it, nor hear him tell the defendant to charge it to him. He called for the whisky just as others did, and the defendant drew it and delivered it to him.

E. L. Yates, the father of Henry, testified that he signed a written instrument authorizing the defendant to sell whisky to his son Henry, but it was, as he remembered, after the sale, and after the indictment had been found. It was gotten up and signed to protect the defendant, and to save the witness from personal attendance at court. It was dated of a date before the sale. He had before the sale given the defendant verbal authority to sell liquor to his son. He identified the order as follows:

COAL HILL, April 3d, 1880.

JOHN HILL:

Sir—You are at liberty to sell my son Henry all the whisky that he wants, with the understanding that I am not held for the pay. E. L. YATES.

On motion of the State, the testimony of the verbal authority to sell the liquor was excluded.

At the conclusion of this testimony, the Court, upon application of the State, and against the defendant's objections, then continued the case to the next day, to enable the State to procure further testimony of the sale.

On the following day neither party offered any further testimony.

The Court gave for the State, against the defendant's objections, the following instructions:

"*First.* The law prohibits the sale of ardent liquors to a minor without the written consent or order of the parent or guardian of the minor, and if you believe, from all the facts and circumstances of this case, as shown by the testimony, that the defendant, at any time within one year next before the finding of this indictment, sold any quantity of whisky to Henry Yates, without the written permission of his parent or guardian, and that said Henry Yates was at that time a minor, you will find the defendant guilty, and assess

his fine at not less than fifty nor more than one hundred dollars.

"*Second.* Verbal permission of the parent or guardian to sell will not protect the defendant. It must be in writing, and must have been given before the sale. A written permission after the sale will not protect the seller.

"*Third.* If you find from the evidence that the defendant kept liquor for sale at his house, kept for such business, and that Henry Yates called for liquor at such place or house, and it was drawn and delivered to him by the defendant, these facts are evidence of the sale of the liquor to him.

"*Fourth.* The State is required to prove all the material allegations in the indictment, and to establish the defendant's guilt by competent testimony, and beyond a reasonable doubt."

The defendant asked the following instructions:

1. "The court instructs the jury that it devolves upon the State to establish, by competent and sufficient proof. every material allegation in the indictment, and if it fail to establish the same, you must acquit the defendant."

2. "The court instructs the jury that the allegation in the indictment that the defendant sold the whisky to one Henry Yates is a material allegation, and it devolves upon the State to prove the sale *by competent proof, and establish the same beyond a reasonable doubt.* The defendant is not required by law to introduce any proof until the State makes out a *prima facie* case against him. The finding of the indictment raises no presumption of the defendant's guilt."

3. "If the jury believe, from the evidence, that the defendant sold liquor to said Henry Yates, but that he did so by the permission and authority of the father of said Henry Yates, then they must acquit the defendant."

4. "If the jury believe, from the evidence, that the defendant sold the liquor to Henry Yates, a minor, but that he did so with the verbal authority and consent of said minor's father, and that said father afterwards put his authority and consent in writing, then they must find for the defendant."

The court gave the first instruction, refused the third and fourth, and modified the second by striking out the words in italics; and to the refusal and modification the defendant excepted.

The jury found the defendant guilty and fined him fifty dollars, and he has properly brought the case here, by appeal.

C. B. Moore, Attorney General, for the State:

Defendant was bound to *know* of Yates' minority, and sold at his peril. He was liable under the statute, whether the whisky "was sold" or "given away,"

Evidence of the verbal authority to sell was properly rejected—the law requires it to be in writing.

OPINION.

HARRISON, J. We can see no reasonable ground for the objection that the trial was for a time suspended by the court. Such suspension was within its sound discretion. *Johnson* v. *The State*, 32 *Ark.*, 309.

The evidence of the father's verbal consent to the sale of the liquor to the minor was properly excluded from the jury. His consent, to have been a justification to the defendant, should have been in writing, as required by the statute.

The third instruction given for the State was not as clear, perhaps, as it might have been, as, if standing alone, the jury might have understood from it that the facts mentioned

in it were conclusive evidence of the sale; but its language was equally susceptible of the meaning and correct proposition, that they but tended to prove the sale, or that it might be inferred from them; and, taken in connection with the fifth, there is no room for the supposition that the jury were mistaken by it. The other instructions for the State were unobjectionable.

The third and fourth instructions asked by the defendant, being in palpable contradiction to the statute, were, of course properly refused; and the court did not err in its modification of the second, having already given instructions of similar import to it as framed; besides, the jury not being the judges of the competency of the evidence, might have been misled by it.

The evidence fully sustained the verdict.

Affirmed.

POUNDERS v. THE STATE.

1. EVIDENCE: *Of age from family Bible.*

In a prosecution for the sale of liquor to a minor, the alleged minor may testify of his age from the record of his birth in the family Bible.

2. SAME: *Record excluded must be in bill of exceptions.*

When the record of another court, excluded as evidence in the trial of a cause, is not incorporated in, or made part of, the bill of exceptions, this Court can not tell the grounds for its exclusion, and will presume that it was excluded for sufficient cause.

3. LIQUOR: *Selling to minors.*

That a minor is carrying on business for himself, will not justify a sale of liquor to him without the written consent or order of his parents or guardian.

4. SAME: *Same: Burden of proof of consent.*

In prosecutions for selling liquor to minors without the written consent or order of the parent or guardian, the burden of proving the consent is upon the defendant.

5. SAME: *Same: Ignorance of age no excuse.*

Ignorance of the minor's age, and the honest belief that he was adult, afford no justification for the sale of liquor to him without the parent's or guardian's consent. The seller sells to him at his peril

ERROR to *Lincoln* Circuit Court.
Hon. X. J. PINDALL, Circuit Judge.

STATEMENT.

James H. Pounders was indicted in August, 1881, in the Circuit Court of Lincoln county, for selling whisky to a minor without the written consent of his parents or guardian,

Upon the trial the State proved by Hardy Morgan, the minor, that the defendant sold whisky to him, as charged in the indictment; and, against the defendant's objections, he was permitted to testify of his age, from the record of his birth in the family Bible, which showed him to be a minor. He had no father or guardian, but his mother was living. The defendant asked that the witness' testimony from the family Bible be excluded, but the court refused to exclude it.

The defendant then asked the witness the following questions: "Are you now transacting business on your own own account? How do you conduct your business in Tyro, in Lincoln county? In such manner as to lead persons to believe you were acting for yourself, and not under authority?" But the court refused to allow the questions to be answered, announcing, in the hearing of the jury, that if the witness was, in fact, a minor, and the defendant sold

him whisky, it was immaterial whether he had knowledge of the fact whether he was a minor or not. He must know, at his peril, that the party to whom he sold was authorized to buy. The State also proved the sale of whisky to the minor, by Jefferson Brown.

The defendant offered no evidence except the record of the Probate Court of Lincoln county, removing the disability of minority of Hardy Morgan, which the Circuit Court refused to admit, and the defendant excepted.

The court instructed the jury, in substance, that if they found, from the evidence, that the defendant sold whisky to Hardy Morgan, in Lincoln county, within one year next before the finding of the indictment; that Morgan was, at the time, under the age of twenty-one years; and the defendant had not the written consent or order of Morgan's parent or guardian to sell him the whisky, they would find him guilty; that it was immaterial whether the defendant knew that Morgan was a minor or not, if he was, at the time, in fact, a minor.

The jury found him guilty, and, after motion for new trial overruled, he filed his bill of exceptions and brought error.

J. M. Cunningham, for appellant:

The evidence of Morgan was incompetent to prove his own age. The record in the family Bible was insufficient, even if it had been produced; being no proof of his identity. 1 *Greenleaf Ev.*, 82, 493. There was no proof that the entry was made by a deceased parent or relation. *Kelly's heirs* v. *McGuire*, 15 *Ark.*, 601–5.

There was no proof that the sale was made without the consent of parent or guardian. This was a material averment and must be proved. The minor's mother was not made a witness, nor her absence accounted for.

The order of the Probate Court removing Morgan's disabilities was improperly excluded.

C. B. Moore, Attorney-General, for the State.

The court properly excluded the evidence that the minor's disabilities had been removed, and that he had been engaged in business on his own account.

OPINION.

HARRISON, J. Morgan, to whom the liquor was sold, was a competent witness to prove his own age, and there was no error in permitting him to testify thereto, although his only knowledge of the date of his birth was derived from the family Bible. *Edgar* v. *The State, ante*. 219.

As the record of the proceedings in the Probate Court, for the removal of Morgan's disabilities as a minor, was not incorporated in, or made part of, the bill of exceptions, we are unable to know upon what ground it was excluded from the jury; and passing by any consideration as to whether the subject-matter is within the jurisdiction of the Probate Court, and as to which we express no opinion, we must presume it was excluded for a sufficient cause.

The statute makes no exception as to minors who are working for themselves, or transacting business on their own account. The court, therefore, properly refused to allow the witness to answer the questions asked him by the defendant.

The burden of proving the written consent or order of the parent or guardian was on the defendant. *Edgar* v. *The State, Supra; Williams* v. *The State*, 36 *Ark.*, 430.

Ignorance of the fact that he was not of age, and the understanding or honest belief of the defendant, when he sold him the liquor, that he was, was not an excuse or justification. He sold it at his peril. *Edgar* v. *The State*,

Supra.; Crampton v. *The State, ante.* 108; *Redmond* v. *The State*, 36 *Ark.*, 58.

There was no error in the instructions, and the verdict was sustained by the evidence.

Affirmed.

THE STATE v. ASHLEY.

1. BIGAMY: *Divorce decree as evidence of life of divorced party.*

In a prosecution for bigamy, a decree divorcing from the accused his former wife, rendered after the alleged bigamous marriage, and awarding to her the custody of their infant child, is *prima facie* evidence that she was living at the time of the bigamous marriage.

2. PRACTICE IN SUPREME COURT: *In erroneous judgments of acquittal.*

A verdict and judgment of acquittal on a valid indictment, though erroneous, cannot be reversed in the Supreme Court on appeal by the State.

APPEAL from *Clark* Circuit Court.
Hon. H. B. STUART, Circuit Judge.

C. B. Moore, Attorney-General, for the appellant:

The record of the divorce tended to show that the first wife was living, and the wife of the defendant up to *June 30, 1880*, and it should have been admitted. *Holbrook* v. *The State*, 34 *Ark.*, 519. A certified copy of a decree alone is sufficient evidence that such a decree has been made. *Denton et al* v. *Roddy*, 34 *Ark.*, 642.

"Every reasonable presumption in favor of the rightful exercise of jurisdiction ought to be indulged," and it is reasonable to suppose that the Tennessee court had jurisdic-

tion, and that defendant had notice, etc. *Borden et al* v. *The State*, 11 *Ark.*, 570.

The decree having been excluded, it was useless to offer evidence of identity of parties. *Holbrook* v. *The State*, *supra*, 519–20.

ENGLISH, C. J. Anderson Ashley was indicted for bigamy in the Circuit Court of Clark county; tried on plea of not guilty; there was a verdict of acquittal, and he was discharged by judgment of the court. During the trial the court ruled out the evidence offered by the State, and the purpose of this appeal is to obtain the opinion of this court upon that ruling.

The indictment charged that Anderson Ashley, on the second of December, 1879, in Clark county, intermarried with one Phenie Meeks, having at the time a living wife, named Mary Ann Ashley.

The State proved that the accused, before he came to Clark county, lived near Winchester, in Franklin county, Tennessee, and was married to his cousin, Mary Ann Ashley, in Alabama, on the twenty-seventh of September, 1874, by whom he had a female child.

The State also proved that the accused married Phenie Meeks, in Clark county, on the second of December, 1879.

1. Divorce decree as evidence of life of divorced party.

The State, in order to prove that the first wife was living at the time of the second marriage, offered in evidence a certified copy of a decree rendered in the Chancery Court, at Winchester, Franklin county, Tennessee, thirtieth of June, 1880, divorcing Mary Ann Ashley from Anderson Ashley, awarding to her custody of their child, and adjudging the costs of the suit against him.

The decree was excluded by the court, on what particular ground does not appear; and the State having no other evi-

dence to prove that the first wife was living when the second marriage occurred, the jury were instructed by the court to return a verdict of acquittal.

It is not probable that the Tennessee Chancery Court rendered a decree divorcing and awarding custody of a child to a dead woman. The decree in her favor (fixing her status) should have been admitted as *prima facie* evidence that she was living when it was rendered. *Holbrook* v. *State*, 34 *Ark.*, 519.

But the accused having been acquitted on a valid indictment, there can be no reversal of the judgment on this appeal by the State. *State* v. *Hand*, 6 *Ark.*, 169; *Gantt's Digest*, *sec.* 2129.

2. Acquittal, though erroneous, not reversible.

MANN V. THE STATE.

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1. CRIMINAL LAW: *Taking or holding real estate by force: Jurisdiction.*
By Statute (*Gantt's Digest, Sec.* 1518), it is a misdemeanor to take or hold possession of real estate by force or violence without authority of law; and a Justice of the Peace has jurisdiction of the offense.

2. CRIMINAL PRACTICE: *Bonds for cost in misdemeanors before J. P.*
A failure of the prosecutor to give bond for cost in a misdemeanor case before a Justice of the Peace, is matter in abatement, and is waived by the defendant pleading not guilty, instead of requiring him by rule to give the bond.

3. SAME: *Judgments against sureties on appeal bond: Scire facias.*
Previous to the Act of March 15th, 1879 (*Acts of* 1879, *p.* 84), it was error to render judgment against sureties in appeal bonds from in misdemeanor cases from Justice of the Peace.

4. PRACTICE IN SUPREME COURT: *As to error against party not appealing.*
Judgments, though erroneous, as to parties who do not appeal, will not be reversed upon the appeal of a party as to whom there is no error.

ERROR to *Garland* Circuit Court,
Hon. J. N. CYPERT (on exchange), Circuit Judge.

C. B. Moore, Attorney-General, for the appellee.

The prosecutor's bond for costs is discretionary. If magistrate sees fit to try the cause without requiring it to be given, and accused does not object, he cannot raise the objection here.

Sec. 1518, *Gantt's Digest,* is plain and unambiguous. It was a misdemeanor, and Justices of the Peace have concurrent jurisdiction in all misdemeanors.

There is *no exception noted—no motion for a new trial*—no bill of exceptions.

English, C. J. It appears from the transcript returned on the writ of error sued out by George W. Mann to the Circuit Court of Garland county in this case, that on the first of February, 1879, Jacob Kempner made complaint on oath before a Justice of the Peace of said county, charging that on that day said George W. Mann committed the offense of taking possession of real estate, by violence, belonging to said Kempner in said county. That thereupon a warrant of arrest was issued against Mann, and he was brought for trial before the justice on the fifth of the same month, pleaded not guilty, waived a jury, was tried and found guilty by the justice, and fined $50 and costs.

That on the next day he took an appeal to the Circuit Court, by filing in the office of the clerk, a transcript of the warrant of arrest and the judgment of the justice, and executed an appeal bond with G. C. Greenway and P. H. Ellsworth as sureties. The bond was dated on the fifth and filed in the clerk's office on the sixth of February, 1879.

That on the nineteenth of August, 1879, Mann filed a motion in the Circuit Court to dismiss the case on the grounds: 1st. That Kempner was prosecutor, and was not required to give bond for costs before the Justice of the

Peace, and gave none. 2nd. That the justice had no jurisdiction of the offense charged.

It does not appear that this motion was ever called up, or decided by the court, and no entry appears to have been made in the case until the August term, 1880, when the case was called, and Mann failing to appear and prosecute his appeal, the judgment of the justice was affirmed, and judgment entered against Mann and his sureties in the appeal bond for the $50 fine and for costs.

Mann, only, brought error.

I. It is made a misdemeanor by Statute (*Gantt's Digest, Sec.* 1518), to take or keep possession of any real estate by actual force or violence, without authority of law, etc., and the offense is within jurisdiction of a Justice of the Peace.

II. As to the bond for costs, appellant should have prosecuted his appeal, appeared in the Circuit Court, called up his motion to dismiss, and had it ruled upon by the court, which he failed to do.

It may be remarked, however, that if the prosecutor failed to give a bond for cost as required by section 2020 of *Gantt's Dig.*, or was not excused from doing so on affidavit of inability as authorized by *section* 2023, *Ib.*. Mann should have applied to the Justice of the Peace to rule him to give the bond, or to show cause.

The failure to give bond for costs could only be matter in abatement, and was waived by the plea of not guilty. *See cases cited in Rose's Digest, Title Bond for costs.*

III. The Circuit Court erred in rendering judgment against the sureties in the appeal bond without *scire facias*, as required by the Statute in force when the bond was executed. *Gantt's Digest, Secs.* 2112–15. The judgment was, per-

haps, rendered under the Act of March 15th, 1879 (*Acts of* 1879, *p.* 84), which was passed after the execution of the bond. But the sureties did not join in the writ of error.

As to plaintiff in error the judgment must be affirmed.

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THOMPSON v. THE STATE.

1. CRIMINAL PLEADING: *Indictment charging offense in the alternative, bad.*

An indictment charging that the defendant "did sell *or* give away whisky," under an act making it an offense to sell or give it away, is bad for uncertainty; but to charge that he "did sell *and* give away," is good. So to charge that he sold whisky *or* brandy is bad, but a charge that he sold whisky *and* brandy is good.

2. INDICTMENT: *Negativing prescription of physician.*

Where an act makes it an offense to sell liquor without the prescription of a graduated physician, or regular practitioner of medicine, the indictment charging the offense must negative the prescription of both.

3. PHYSICIAN: *Answerable for false certificate.*

If a physician give a false certificate under the liquor act of March 5, 1879, he is answerable therefor.

APPEAL from *Union* Circuit Court.
Hon. JAS. K. YOUNG, Circuit Judge.

C. B. Moore, Attorney-General, for the appellee.

The indictment was good under the *Act of* 1879, *pp* 22-23, and the evidence sufficient.

ENGLISH, C. J. The indictment charged in substance, "That J. B. Thompson and Paul E. Thompson, on the 10th day of April, 1880, in the county of Union, did, then

and there being in the town of El Dorado, in said county, sell, and at divers other times did give one Jesse B. Moore, a citizen of said county, intoxicating liquors, commonly called whisky, and also brandy, without a prescription therefor from a regular practicing physician, without any examination of the physical condition of said Moore having been made or certified by any such physician, and without any such examination of said Moore having been made to ascertain the kind and quantity of such intoxicating liquors, necessary to the particular case and cases of the said Jesse B. Moore, and when the health of the said Moore in fact did not require the same, contrary to the statute and against the peace," etc.

Appellant J. B. Thompson demurred to the indictment on the grounds following:

First. The indictment fails to state facts sufficient to constitute a public offense.

Second. It sets up more than one offense.

Third. It charges defendant with both selling and giving away whisky.

Fourth. It charges that he both sold and gave away both whisky and brandy, to one and the same person, at one and the same time.

Fifth. It fails to charge that defendant was not then and there a practicing physician, and not such as could prescribe either whisky or brandy.

Sixth. It alleges that the sale, etc., was made without any prescription from, or examination by, a practicing physician, but fails to charge that the same was made without a recommendation from such physician.

The court overruled the demurrer, the appellant was tried by a jury, found guilty, fined twenty-five dollars, and motion for a new trial and arrest in judgment overruled.

I. The demurrer and motion in arrest both relate to the sufficiency of the indictment.

The statute, under which appellant was indicted, makes it a penal offense to sell, vend, or give away, in any manner, vinous or alcoholic liquors within three miles of the town of El Dorado, except for medical, chemical or sacramental purposes, upon the prescription or recommendation of a graduated physician or regular practitioner of medicine, who has taken the oath prescribed by the act. See *Act of March* 6, 1877, as amended by *Act March* 5, 1879. (*Acts of* 1877, *p* 26; *Acts of* 1879, *p* 22.)

It is an offense to sell, vend or give away, etc.

1. Indictment must not charge offense in the alternative.

To charge that defendant did sell *or* give away would be bad, for uncertainty. But the charge that he did sell *and* give away, etc., is good. So, to charge that he sold whisky *or* brandy is bad; but to charge that he sold whisky *and* brandy, etc., is good.

"If a statute makes it a crime to do this or that, mentioning several things disjunctively, all may, indeed, in general, be charged in a single count; but it must use the conjunctive "and" where "or" occurs in the statute, else it will be defective as being uncertain. All are but one offense, laid as committed in different ways. And proof of it in any one of the ways will sustain the allegation. On the other hand the indictment may equally well charge what comes within a single clause of the statute, and still it embraces the complete proportions of an offense." 1 *Bishop, Crim. Pro.*, 3 *Ed.*, *Sec.* 585-592.

The act, as amended, does "not prohibit the sale of vinous or alcoholic liquors, nor any alcoholic, stimulating, or intoxicating bitters of any kind or form, when sold for medical, chemical, or sacramental purposes, upon a prescription or recommendation of a graduated physician, or

a regular practitioner of medicine," etc., who has taken the oath prescribed by the act, etc.

To come within the exceptions of the statute, the sale must be for medical, chemical. or sacramental purposes, upon a "*prescription*" or "*recommendation*," etc. There is no substantial difference between the words *prescription* and *recommendation*, as used in the act, and either, or both, disjunctively, may be used.

2. Indictment.

But the prescription or recommendation may be given by a "*graduated physician*," or "*regular practitioner of medicine*."

The indictment negatives a prescription by a "regular practicing physician," but does not negative a prescription or recommendation by a "graduated physician."

All that is alleged in the indictment might be true, and yet appellant guilty of no offense; for he may have sold and given to Moore whisky and brandy, upon the prescription and recommendation of a *graduated physician*, (though not a regular practitioner of medicine,) who had taken the prescribed oath.

3. Physician, answerable for false certificate.

All that the indictment alleges about the examination and health of Moore is surplusage. If the sale is made upon the prescription or recommendation of a physician, acting under oath, it is a justification. If the doctor makes false or fraudulent prescriptions, etc., he is answerable therefor.

The demurrer should have been sustained to the indictment, for the fault above indicated; and for the same reason the judgment should have been arrested.

But little need be said of the evidence introduced on the trial. Appellant kept a drug store in El Eorado, was a physician, and had taken and filed the oath prescribed by the statute. But he did not, it seems, make the sale of whisky and brandy, alleged in the indictment, for medical

or chemical purposes, upon his own prescription or recommendation as such physician, or the prescription, etc., of any other physician. The jury took it to be an ordinary beverage sale, and the evidence seemed to warrant their verdict.

But the indictment being bad, the judgment must be reversed, and the cause remanded with instructions to the court below to sustain the demurrer to the indictment.

COOPER (I. Z.) v. THE STATE.

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1. CRIMINAL LAW: *Removing mortgaged property; recording the lien.*
Actual recording of the instrument creating the lien is not necessary, under either *Sec. 1409 Gantt's Digest*, or the *Act of 3d February, 1875*, to make it a felony for one to remove, sell, barter, or otherwise dispose of the liened property. Filing in the Recorder's office, as required by the acts, is sufficient.

2. CRIMINAL PLEADING: *Indictment for disposing of mortgaged property.*
An indictment charging that the accused "feloniously did sell, barter, or *otherwise dispose of*" a mortgaged horse, is bad for uncertainty. The manner of the disposal must be specified.

3. SAME: *General demurrer to several counts.*
A general demurrer to an indictment containing several counts should be overruled, if either count be good.

4. CRIMINAL LAW: *Verdict on several counts, when good.*
A general verdict of guilty on an indictment containing several counts is good, if either of the counts be good, and be sustained by evidence.

5. SAME: *Removing mortgaged property not condoned by giving other property.*
After the offense of removing mortgaged property has been committed it cannot be condoned by satisfying the creditor with other property.

APPEAL from *Lawrence* Circuit Court.
Hon. R. A. POWELL, Circuit Judge.

Isaac Z. Cooper, pro se.

It is a felony to dispose of mortgaged property when the mortgage is properly recorded. *Acts* 1875, *p.* 129; but by the *Acts* 1877, *p.* 81, which provides for filing mortgages, etc., no penalty is attached for disposing of the property so mortgaged.

No copy of the indictment was served upon appellant. *Const. Ark.*, *p.* 4, *sec.* 10.

C. B. Moore, Attorney-General, for the appellee:

The indictment is founded on the latter part of the section of the Act of February 3, 1875. *Acts* 1874–5, *p.* 129–30. The *lien is created by the execution of the deed of trust*, and no matter whether it was ever recorded, or filed for record; if the lien existed and the property is disposed of without consent, the offense is complete. The filing or recording is only to give notice, etc. The lien exists and is complete, as between mortgagor and mortgagee, *though never acknowledged or recorded.* *Main* v. *Alexander*, 9 *Ark.*, 112; *Jacoway* v. *Gantt*, 20 *Ark.*, 190; *Hannah* v. *Carrington*, 18 *Ark.*, 105.

The Act of March 10, 1877, *Acts* 1877, *p.* 80, certainly intended that "filing" is to be, to all intents and purposes, a *recording* of the instrument. Any mortgage, under the old law, was regarded as recorded from the hour of its *filing*, and since the last act provides that it shall be notice, etc., "*without further record,*" such filing is a *recording of the lien*, and a party removing the property, etc., is amenable, under the Act of February 3, 1875.

English, C. J. On the third of September, 1881, Isaac

Z. Cooper was indicted in the Circuit Court of Lawrence county for removing mortgaged property, etc.

There were three counts in the indictment, the first count charging, in substance:

That said Isaac Z. Cooper, on the first day of June, 1881, in the county of Lawrence, etc., feloniously did remove beyond the limits of said county, one sorrel horse, of the value of fifty dollars, upon which sorrel horse then and there did exist a lien, by virtue of a deed of trust executed by the said Isaac Z. Cooper, on the thirteenth day of January, 1881, in favor of G. Kaufman, as trustee, for the benefit of E. Krone & Co., a firm composed of E. Krone and J. B. Oppenheimer, which said deed of trust was endorsed as follows, to-wit:

"This instrument is to be filed, but not recorded.

"E. KRONE & Co.,
"By GABE."

And was duly filed in the office of the Recorder of Deeds in and for said county of Lawrence; he, the said Isaac Z. Cooper, then and there not having the consent of the said G. Kaufman, trustee as aforesaid, or E. Krone & Co., so to do, against the peace, etc., etc.

The second count charged, in substance;

That the said Isaac Z. Cooper, on the first day of June, 1881, in the county aforesaid, feloniously did secrete a certain sorrel horse, of the value of fifty dollars, on which said sorrel horse then and there did exist a lien, by virtue of a deed of trust executed by the said Isaac Z. Cooper, on the thirteenth day of January, 1881. in favor of G. Kaufman, as trustee, etc., etc.

The remainder of this count was the same as the first.

The third count charged, in substance:

That the said Isaac Z. Cooper, on the first day of June, 1881, in the county aforesaid, feloniously did "*sell, barter,*

or otherwise dispose of" a certain sorrel horse, of the value of fifty dollars, on which said sorrel horse a lien then and there existed, by virtue of a certain deed of trust executed by the said Isaac Z. Cooper, on the thirteenth day of January, 1881, in favor of G. Kaufman, as trustee, etc., etc.

The remainder of this count was the same as the first and second.

The defendant entered a demurrer, in short, to the whole indictment, which the court overruled; he was tried on the plea of not guilty, the jury found him guilty, and fixed his punishment at imprisonment in the penitentiary for two years. He filed a motion for a new trial, which was overruled, and he was sentenced in accordance with the verdict.

I. Did the court err in overruling the demurrer to the indictment? Did it charge against appellant any public offense?

1. Removing mortgaged property. Recording the lien.

Appellant was indicted under the Act of the third of February, 1875 (*Acts of* 1874–5, *p.* 129), which is as follows:

"Sec. 1. That section 1409 of *Gantt's Digest* be and the same is hereby amended so as to read as follows: Any person, or persons, who shall hereafter remove beyond the limits of this State, or of any county wherein the lien may be recorded, property of any kind, upon which a lien shall exist, by virtue of a mortgage, deed of trust, or by contract of parties, or by operation of law, or who shall sell, barter, or exchange, or otherwise dispose of any such property, without the consent of the person or persons in whose favor such lien shall have been created or exists by law, or who shall secrete the same, or any portion thereof, shall be deemed guilty of a felony," etc.

The original act thus amended, passed December 21, 1846, provided that "Any person who shall remove beyond the limits of the State, or of any county wherein the lien

may be recorded, property of any kind upon which a lien shall exist by virtue of a mortgage, deed of trust, or otherwise, as now prescribed by law, without the consent of the person in whose favor such lien shall have been created, upon conviction thereof, shall be sentenced to hard labor in the penitentiary," etc.

At the time the original act was passed, and at the time it was amended, under our system of registration, a mortgage, or deed of trust, properly acknowledged and filed in the recorder's office, was constructive notice to all persons, from the time of the filing. *Gantt's Dig. Secs.* 860, 4288; *Hannah* v. *Carrington*, 18 *Ark.*, 85; *Oats* v. *Walls*, 28 *Ark.*, 248.

When the conveyance was so filed the lien was, in legal effect, for all purposes of notice, recorded. Such must have been the understanding of the Legislature when the acts were passed making it criminal to remove, etc., property on which a lien so existed. If the conveyance must actually be recorded before it is an offense to remove, secrete, sell, barter or exchange, or otherwise dispose of the property, it may be done without the commission of any crime, at any time between the filing of the instrument and its actual registration. It is not to be supposed that the law-makers left open such a gap for the perpetration of wrong without punishment. There can be no good reason why the maker of a mortgage, or deed of trust should be punished for wrongfully removing or disposing of property covered by it, after the deed is actually recorded, and go unpunished for the same wrongful act, done after he has solemnly executed and acknowledged the conveyance, and it has been filed for record, but before the recorder has had time or convenience to copy it on his record book. The latter is within the spirit of the statute, and as much

within the mischief intended to be prevented by them as the former.

So, upon principle, we think, a mortgage, or deed of trust, of personal property, filed in the recorder's office, under the provisions of the Act of the tenth of March, 1877, (*Acts of* 1877, *p.* 80), is a recorded lien within the meaning and intention of the Act under which appellant was indicted, though, by the terms of the Lien Act, such conveyance is never to be actually recorded.

Filing the lien sufficient. Actual recording unnecessary.

The Act provides that the mortgage, or trust deed, shall be a lien on the property therein described, from the time of the filing, and the same shall be kept there for the inspection of all persons interested, and said instrument shall be, thenceforth, notice to all the world of the contents thereof, without *further record*, except as hereinafter provided. *Sec.* 1.

The fourth section requires the recorder to keep a book, in which shall be entered a minute of mortgages and trust deeds of personal property, etc., ruled in separate columns, and showing the time of reception, names of mortgagor and mortgagee, date of instrument, amount secured, when due, description of property, etc.

This minute book is, by the act, substituted for full registration, when the mortgagee indorses on the deed, "This instrument to be filed, but not recorded."

Why should the maker of a mortgage, or trust deed, go unpunished for wrongfully removing property from the county where the instrument is made matter of public record in the mode prescribed by the statute, and is a lien upon the property, and notice to all the world? Or why permit him to remove it from the State, or secrete it, or sell, barter, exchange, or otherwise dispose of it, in fraud of the rights of creditors secured by it, and yet be guilty of no crime? In view of justice, there can be no differ-

ence between his wrongful conduct and that of one who removes or disposes of property covered by a deed spread at length on a record book in the recorder's office; and the Legislature intended no such distinction in the criminal Acts.

The demurrer was to the whole of the indictment, and if any one of the three counts was good, it was properly overruled.

The first count, for removing the horse, embraced in the trust deed, beyond the limits of Lawrence county; and the second count, for secreting the horse, was good.

2. Indictment must specify manner of disposal.

The third count charged that appellant "feloniously did sell, *barter*, or *otherwise dispose of*" the horse.

There are several modes by which the offense intended to be punished by the Statute may be committed, as by removing the property beyond the limits of the State, or of the county, or to secrete it, or, in the language of the act, to "*sell, barter, or exchange, or otherwise dispose of* any such property," etc.

A *sale* is an exchange of goods or property for money paid or to be paid. *Barter* and *exchange* are of about the same meaning. *Barter*—the exchange of one commodity or article of property for another. *Exchange of goods*—a commutation, transmutation, or transfer of goods for other goods, as distinguished from *sale*, which is a transfer of goods for money. *Burrill Law Dic.*

A count charging the sale of the property would be good. So a count charging a barter *or* exchange of the property, or using either word, or both in the conjunctive, would be good. 1 *Bishop on Crim. Pro., secs.* 585 to 592.

But the third count in the indictment, charging that appellant did "*sell, barter or otherwise dispose of*" the horse, was too uncertain in an indictment for felony, and had there

been a separate demurrer to this count, it should have been sustained.

In drafting an indictment, under the Statute, if there is uncertainty about the mode in which the offense may have been committed, counts may be added, charging it in different modes.

II. The verdict was general upon the indictment. Where there is a general verdict of guilty on an indictment consisting of several counts, if any one of them is good, it is sufficient. *Brown* v. *State*, 10 *Ark.*, 607. But the good count must be sustained by evidence. *State* v. *Mathis*, 3 *Ark.*, 84.

4. Verdict on several counts, when good.

It appears from the bill of exceptions that on the trial there was no evidence that the appellant removed the horse embraced in the deed of trust (which, with its certificate of acknowledgment and endorsement of filing by the recorder, was read in evidence) beyond the limits of Lawrence county, as charged in the first count of the indictment.

Nor was there any evidence that he secreted the horse, as charged in the second count.

There was evidence conducing to prove that in the spring, or early in the summer of 1881, appellant sold or *traded* the horse to one Gentry, who lived near him, in Lawrence county, and that he disposed of the horse to another person, and it was taken to Randolph county.

Appellant admitted that he knew he was doing wrong when he sold or traded the horse.

But all this evidence related to the third count in the indictment, which charged that he "feloniously did *sell, barter, or otherwise dispose of*" the horse.

The appellant objected to so much of the first instruction given by the court to the jury as charged them "that if they found, from the evidence, that defendant secreted, or sold, or bartered, or otherwise disposed of said sorrel horse, they

should find him guilty," on the ground that it was too general and misleading—"that he could not tell what the *otherwise* was."

This objection, though overruled by the court, was well taken. It would be unsafe to permit an accused to be convicted in a case involving liberty on a charge so loose and uncertain.

5. Removing mortgaged property not condoned by giving other property.

III. Appellant asked the court to charge the jury that:—"If the jury find, from the evidence, that E. Krone & Co. agreed with the defendant that they would accept another horse in place of said sorrel horse, and that said E. Krone & Co. took possession of said other horse, this was a satisfaction of the lien of said Krone & Co. on said sorrel horse, and they will find for the defendant."

This instruction was refused by the court, and properly. There was evidence that appellant first represented to the beneficiaries in the trust deed that the sorrel horse had died, but that after they ascertained that this was not the truth—that he had sold or traded the horse to Gentry—and had him arrested, he delivered to the trustee another horse, which he sold, and credited the price on the trust debt.

It was well for the appellant thus to satisfy his creditors, but this was no condonation of his offense against the public.

But for the errors above indicated the judgment must be reversed, and the cause remanded to the court below for a new trial; or appellant may be held to answer a new indictment, at the election of the prosecuting attorney.

COOPER (G. M.) v. THE STATE.

1. CRIMINAL PLEADING: *Indictment for disposing of mortgaged property.*
An indictment charging that the accused "feloniously did sell, barter or otherwise dispose of" a mortgaged horse is bad for uncertainty. The manner of the disposal must be specified.

2. SAME: *General demurrer to good and bad counts, bad.*
A general demurrer to an indictment containing several counts should be overruled if either count be good.

3. CRIMINAL LAW: *General verdict on good and bad counts, when good.*
A general verdict of guilty on an indictment containing good and bad counts is good, if the good count be sustained by evidence.

4. INFANT: *His trust deed not void, nor voidable for necessaries.*
An infant's trust deed is not void, nor voidable, to the extent it is for necessaries.

5. SAME: *How far and by what contracts bound.*
An infant is bound for necessaries for both himself and his wife, but he is not bound by any express contract for necessaries to the extent of the contract, but only on an implied contract for their value.

6. SAME: *His contracts: when void and voidable.*
When the instrument given by an infant as security for payment is such that its consideration cannot, by the rules of law, be inquired into, it is void and not merely voidable; but if it be such that the consideration can be inquired into he is liable thereon for the true value of the necessaries for which it was given.

7. EVIDENCE: *When exclusion of legitimate is no prejudice.*
A party is not prejudiced by the refusal of the court to admit legitimate testimony which he offers, if it would be unavailing without other testimony which he does not offer.

APPEAL from *Lawrence* Circuit Court.
Hon. R. H. POWELL, Circuit Judge.

Cooper, for appellant.

No offense to remove property mortgaged under Act 1877. *See Acts* 1877, *p.* 81.

Court erred in excluding testimony of mother of defendant. An infant cannot be held guilty, criminally, for the violation or breach of a civil contract. 1 *Story on Cont.*, *Secs.* 66 *and* 79, *and notes on pp.* 109–10–11. *Parsons on Cont.*, 268–269.

C. B. Moore, *Attorney-General*, for appellee:

(See preceding case.)

English, C. J. There were two counts in the indictment in this case, which is similar in some of its features to the case of *Isaac Z. Cooper* v. *State*, *ante*.

The first count charged in substance, that George M. Cooper, on the first day of June, A. D., 1881, in the county of Lawrence, etc., "feloniously did *sell*, *barter or otherwise* dispose of a certain mule of the value of fifty dollars, on which said mule a lien then and their existed by virtue of a certain deed of trust executed by the said George M. Cooper on the twenty-eighth day of February, 1881, in favor of G. Kaufman, as trustee for the benefit of E. Krone & Co., etc., on which said deed of trust was the following endorsement, to-wit: This instrument is to be filed, but not recorded. E. Krone & Co., "and was duly filed in the office of the recorder of deeds in and for said county of Lawrence, he, the said George M. Cooper, then and there, not having the consent of said G. Kaufman, trustee as aforesaid, or E. Krone & Co., so to do," etc.

The second count charged, in substance, that said George M. Cooper on etc., at, etc., *feloniously did remove beyond the limits of said county of Lawrence*, a certain mule of the value of fifty dollars, on which said mule a lien then and there existed by virtue of a certain deed of trust executed by said George M. Cooper, etc., etc., describing the deed of trust, etc., as in the first count.

I. Appellant entered a general demurrer in short to the whole indictment, which the court overruled.

1. Indictment, bad for uncertainty.

The first count of the indictment, which charges that the appellant did *sell, barter, or otherwise dispose of the mule*, was bad, for uncertainty, as held of the third count of the indictment in Isaac Z. Cooper's case.

But the second count, charging the removal of the mule beyond the limits of Lawrence county, in which the deed of trust was in legal effect recorded, was good, and the demurrer being to the whole indictment, was properly overruled.

2. General Demurrer to good and bad counts, bad.

II. On plea of not guilty, appellant was tried by a jury; there was a general verdict of guilty, and he was sentenced to the penitentiary for one year, and refused a new trial.

3. General verdict on good and bad counts, when good.

The bill of exceptions shows, that on the trial there was evidence conducing to prove that after the deed of trust, described in the indictment, had been executed, acknowledged and filed in the office of the recorder of Lawrence county, and before the 1st of June, 1881, appellant, without the consent of the trustees or beneficiaries, took the mule to Randolph county, and there sold or traded it to one, Bud Davis. The evidence related to, and sustains the charge in the second count of the indictment, and the general verdict was good, though the first count was bad, as held in Isaac Z. Cooper's case.

III. After the state had closed, having introduced additional evidence to that stated above, which will be noticed below, appellant offered to prove by Amanda Horseman, his mother, that he was a minor, but twenty years old when the deed of trust was made, and was still under twenty-one years of age; that his father was dead, and that he had no guardian, and that she resided in Randolph county; which the court excluded.

4. Infant's trust deed for necessaries, not void nor voidable.

Appellant offered to introduce no other evidence.

The recitals of the deed of trust, executed 28th February, 1881, showed that the appellant represented to Krone & Co. that he intended to, and agreed to cultivate, that year, twenty acres in cotton on a farm in Lawrence county, known as the Jenkins place; that he was then indebted to them in the sum of fifty dollars for supplies theretofore furnished, and proposed to purchase of them such other articles of merchandise as might be necessary or useful to himself, his family and laborers, for the purpose of making and gathering his said crop, etc.

The deed, after the recitals, proceeds to convey to the trustee the future cotton crop and the mule in controversy, to be kept on the farm as security for the then indebtedness of appellant, and for the supplies to be thereafter furnished by Krone & Co.

The state proved by Kaufman, the trustee, that Krone & Co. furnished the appellant, after the execution of the trust deed, about fifty dollars in value, of supplies; that the goods bought by appellant, under the trust deed, were such as were necessary for him and his wife to live upon and to make a crop with; that he had a wife, lived to himself, and owned the property mortgaged.

The State also proved that E. Krone went to the residence of appellant in Lawrence county, in June, 1881, and asked him where the mortgaged mule was; that he first denied having sold or removed the mule, but upon being pressed as to where it was, finally said he had taken it to Randolph county and sold it to Bud Davis; said he knew he was doing wrong when he removed and sold the mule, and wanted to compromise the matter with Krone.

It was also proved that after this that Krone went to Randolph county and got the mule.

The only material matter which appellant offered to prove by his mother was that he was but twenty years of

age when he executed the trust deed, and had not reached majority at the time of the trial. He did not offer to prove by her or any other witness, that the supplies, advanced upon the trust deed, were not necessaries, as proved by Kaufman, the trustee.

The trust deed was not void, for the reason that appellant was a minor when it was executed, nor was it voidable, to the extent that it was for necessaries.

5. INFANT: How far, and for what contracts bound.

Appellant was living to himself and had a wife, and was liable for necessaries for both. *Metcalf on Contracts*, *p* 69, *etc.*

6. HIS CONTRACTS: When void, and voidable.

An infant is not bound by any express contract for necessaries to the extent of such contract, but is bound only on an implied contract to pay the amount of their value to him. When the instrument given by him as security for payment is such that, by the rules of law, the consideration cannot be enquired into, it is void and not merely voidable; but whenever the instrument is such that the consideration thereof may be enqired into, he is liable thereon for the true value of the articles for which it was given. *Ib.*, *p* 75; *Reeve's Domestic Relations*, 229-230; *Stone* v. *Dennison*, 13 *Pick.*, 6-7; *Guthrie* v. *Morris et al*, 22 *Ark.*, 411.

In the case last cited, this court approving the above rule, held that an infant might bind himself for necessaries by a bond, inasmuch, as by statute, the consideration of a bond might be inquired into and impeached, and that in a suit on the bond, plaintiff might recover, if infancy was pleaded, so much as was for necessaries.

The deed of trust was under seal, but private seals being abolished, the seal added nothing to the dignity or solemnity of the instrument.

In a foreclosure suit the consideration would be open for inquiry, and recovery had, on plea of infancy, for the value of such of the supplies as were necessaries.

7. EVIDENCE: When exclusion of legitimate, no prejudice.

Appellant was not therefore prejudiced by the exclusion of the evidence offered as to his age. Of itself, (and no other was proposed,) it would have been of no legal benefit to him, if admitted. *Lawrence County* v. *Coffman*, 36 *Ark.*, 642.

The deed of trust was not void or voidable, to the extent it was for necessaries, and appellant could not treat it as invalid, or disaffirm it by removal and sale of the mule.

Affirmed.

McCLURE v. THE STATE.

1. JURISDICTION: *For punishment of Justice of the Peace for not filing abstract of misdemeanors tried by him.*

For the violation of the Act of February 11, 1875, "prescribing and defining the duties of Justices of the Peace in certain cases," the justice must be prosecuted criminally, and not by civil action; and the Circuit Court has concurrent jurisdiction, with Justices of the Peace, of the offense.

2. JUSTICE OF THE PEACE: *His abstract of misdemeanors must be complete.*

If the abstract of misdemeanors required of Justices of the Peace by the Act of eleventh February, 1875, "prescribing and defining the duties of Justices of the Peace," omit any item of information required by the act, the justice is guilty of a violation of the act, and liable to its penalty and to removal from office—although he may honestly believe and intend that the abstract fully conforms to the Statute.

APPEAL from *Nevada* Circuit Court.
Hon. J. K. YOUNG, Circuit Judge.

STATEMENT.

At the August term, 1881, of the Nevada Circuit Court, W. R. McClure was indicted for non-feasance in office, as follows:

"The grand jurors of the State of Arkansas, duly selected, empanneled, sworn and charged to inquire in and for the body of the county of Nevada, on their oath, present that one W. R. McClure, late of said county, on the first day of August, 1881, with force and arms, in the county aforesaid, then and there being a Justice of the Peace of Caney township, in said county, did, on or before said day, the same being the day fixed by law for the commencement of the Circuit Court of said county, for the present term thereof, and since hitherto has failed to file with the county clerk of said county an abstract of all misdemeanors tried before him, the said W. R. McClure, as said Justice of the Peace, since the last term of said court, giving the style of the case, the nature of the offense, how he obtained jurisdiction thereof, whether the offender was acquitted or convicted, and if convicted, the amount of the fine or punishment imposed.

"And the grand jurors aforesaid, on their oaths aforesaid, do say that the said W. R. McClure, a Justice of the Peace as aforesaid, is guilty of non-feasance in office, in manner and form aforesaid, contrary," etc.

The defendant demurred to the indictment; first, for want of sufficient facts to constitute an offense; second, want of jurisdiction in the Circuit Court; third, it did not allege that the defendant had tried any misdemeanors.

The demurrer was overruled, and the case was put to jury on the plea of not guilty.

On the trial the State proved that the defendant, on the fifth July, 1881, filed in the county clerk's office a list, as follows:

"The following is a list of judgments for fines obtained before the undersigned, a Justice of the Peace, in and for

the county of Nevada, from the first Monday in January, 1881, to the first Monday in July, 1881:

NAMES.	CRIME.	Fine.	Penalty.
Simon Peter Wheeler	Disturbing the peace	$5 00	$3 00
Sam Hicks.....	Assault and battery	2 00	3 00

W. R. McCLURE, J. P.,
Caney Township, Nevada county, Ark."

And that he had filed no other list. That on the first day of the present term the defendant came into the clerk's office and asked for the abstract he had filed, saying he wanted to make another copy of the abstract of misdemeanors tried by him since the last Circuit Court from it, to leave in the office for the Circuit Court. The witness (the deputy clerk) told him he had put it with the papers for the grand jury, and had given them to the grand jury.

The defendant proved, by a member of the grand jury who found the indictment, that during the second week of the court the defendant brought before the grand jury, for examination, his criminal docket, as Justice of the Peace. And on cross-examination the witness stated that he brought it in obedience to a *subpœna* served upon him for it.

Against the objections of the defendant the court gave for the State the following instructions to the jury:

1. "Justices of the Peace are presumed to know the law, and the neglect of a Justice of the Peace to discharge any duty imposed upon him by law is as criminal as the neglect of any duty imposed on any other citizen; and if the jury find, from the evidence in this case, that the defendant, being a Justice of the Peace, in Caney township, in this county, did, on or before the first day of August, 1881, and

since, up to the twelfth day of August, 1881, fail to file with the clerk of Nevada county an abstract of all misdemeanors tried before him since the last term of this court, giving the style of the case, the nature of the offense, how he obtained jurisdiction thereof, whether the defendant was convicted or acquitted, and if convicted, the amount of the fine or punishment imposed, they will find him guilty, as charged in the indictment."

2. "The style of a criminal case is: "The State of Arkansas against" (naming the party). The nature of the offense is the name of the offense charged. How jurisdiction was obtained is to show and state whether an affidavit was filed against the party charged with the offense, or that the constable or justice was a witness of the offense against the accused. And if the jury find, from the evidence, that the defendant failed to include such facts in his abstract, read in evidence, they will find him guilty, and assess his punishment at not less than twenty-five, nor over fifty dollars."

The defendant asked the following instructions, which the court refused:

"In order to constitute a criminal offense there must be a union or joint operation of act and intention or criminal negligence, and if the jury find from the evidence, that the defendant filed the abstract produced in evidence by the State, before the first day of the present term of this court, and since the last term of this court, with the county clerk of this county, and that in filing the same he honestly believed he was complying with, and intended to comply with the Statute, then there was no intention of violating the law nor any criminal negligence and the jury should acquit the defendant."

2. "If the jury believed, from the evidence, that the defendant filed said abstract on the fifth day of July, 1881,

before the first day of the present term of this court, and since the last term thereof with the county clerk, they will find the defendant not guilty, unless they find from the evidence, that the defendant had tried other misdemeanors, not embraced in said abstract."

The jury found defendant guilty of non-feasance in office as charged and assessed his fine at twenty-five dollars, and the court rendered judgment against him for the fine and cost and for ouster from office. After motion for new trial and in arrest of judgment overruled, he filed his bill of exceptions and appealed.

Smoote & McRae, for appellant:

1. The facts stated in the indictment do not constitute a public offense. The State was called on to prove that some one or more misdemeanors had been tried before appellant, within the time covered by the indictment. Whatever the State is called on to prove, she must allege. *State* v. *Emerick*, 35 *Ark.*, 324.

2. The offense not indictable under the Statute creating it. *Acts* 1874–5, *p.* 150. No indictment is provided for and no other remedy, except "by suit before a Justice of the Peace." Where a Statute creates a new offense and prescribes a penalty with *specific relief* for its violation, the punishment or remedy is confined to that given by Statute. *Sedgwick on Const. and Stat. Law*, *pp.* 76, 77 *and* 281; 1*st Russell on Crimes*, *pp.* 47–8–9. The term *sent* does not apply to criminal prosecutions. *Sedgwick Const. and Stat. Law*, *pp.* 371–2–3.

3. If appellant honestly believed he was complying with the law, and so intended, the jury should have been instructed to find for him, if they found facts that way. *Leonard* v. *State*, 35 *Ark.*, 438.

4. The offense was punishable by *fine* only. *Acts* 1874–5,

p. 150; *Acts* 1871, *p.* 64. The latter act does not mention or refer to the former, but leaves it in full force. The two Statutes should be construed together.

C. B. Moore, Attorney-General, for appellee:

1. The indictment is in the words of the Statute, and is sufficient. *Bell* v. *State*, 10 *Ark.*, 536; *State* v. *Moser*, 33 *Ark.*, 140.

2. The words of the Act could not oust the jurisdiction of the Circuit Court, and may be regarded as surplusage. *State* v. *Deevers*, 34 *Ark.*, 188.

3. Distinguishes this case from *Leeman* v. *State*, 35 *Ark.*, 438.

4. The judgment of ouster was right. *Secs.* 1 *and* 2, *Acts* 1877, *p.* 64.

OPINION.

Jurisdiction to punish J. P. for failing to file abstract of misdemeanors.

HARRISON, J. The first and third sections of the Act of February 11th, 1875, "prescribing and defining the duties of Justices of the Peace in certain cases," under which the appellant was indicted, are as follows:

"Section 1. That hereafter it shall be the duty of each Justice of the Peace in this State to file an abstract of all the misdemeanors tried before him with the clerk of his county on or before the first day of the succeeding term of the Circuit Court, giving the style of the case, the nature of the offense, how he obtained jurisdiction of the case; whether the defendant was acquitted or convicted, and if convicted, the amount of the fine or punishment imposed."

"Section 3. Any persons violating any of the provisions of this act, shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in any sum, not less than twenty-five nor more than fifty dollars, to be recovered by suit before a Justice of the Peace."

The appellant contends that the offense created by the act is only cognizable before a Justice of the Peace, and the offender is to be proceeded against, not by a criminal prosecution, but by suit or civil action.

Such a construction of the act is wholly untenable. The words "*to be recovered by suit before a Justice of the Peace,*" in the third section, are inaptly used. Their evident meaning is not such as they literally import, but from the subject matter of the act and the context, is that the prosecution for the offense shall be before a Justice of the Peace; and as thus interpreted, does not restrict the jurisdiction of the offense to Justices of the Peace.

Jurisdictions in misdemeanors concurrent.

The jurisdiction in criminal cases is fixed by the constitution, and in misdemeanors is concurrent in the Circuit Courts and Justices of the Peace, and it is not in the power of the legislature to deprive the Circuit Courts of such jurisdiction in any case. *The State* v. *Devers*, 34 *Ark.*, 184.

No particular objection to the indictment has been shown, It contains, we think, an averment of every fact necessary to constitute the offense, and with sufficient certainty and distinctness, and the demurrer to it was correctly overruled.

As the prosecution were necessarily in the name of the State, and the names of the persons tried before him were stated in the abstract of cases which he filed, the style of them was substantially given. There was also a substantial, if not a literal compliance, with the statute in every other particular, except as to how, or the manner in which, he obtained jurisdiction in the case, as to which the abstract was silent.

Except as provided by *Section* 2023, *Gantt's Digest*, where the prosecution before a Justice of the Peace is upon the complaint of some one other than an officer, a bond for the payment of the costs must be given. *Sections* 2020, 2022. Such information, having relation to the costs in the

case, was therefore deemed important by the Legislature, for the protection of the interests of the county, and the requirement of the Statute in that regard was as material as in any other of the matters named.

The abstract filed by the appellant was therefore not such as the statute required, and though he may not have wilfully or intentionally failed to file such, and have honestly thought that the imperfect one filed by him was sufficient, and in compliance with the statute, that would not excuse him, and he was nevertheless guilty of the offense with which he was charged. His duty was a plain one, and he might, with reasonable diligence and attention, have known and done it.

We find no error in the rulings of the court during the trial, or in refusing to grant a new trial.

Power of Circuit Court to remove officer.

A Circuit Court has power to remove a county or township officer from office, upon conviction of non-feasance in office. *Const. Art VII, Sec.* 27; *Act. of March* 9, 1877; *Allen* v. *The State*, 32 *Ark.*, 241.

The judgment is affirmed.

ALLEN V. THE STATE.

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1. CRIMINAL LAW: *Murder by poisoning punishable as murder in second degree.*

Under our Statute a person charged with murder in the first degree may be convicted of a lower degree of criminal homicide, though the charge be for murder in the first degree by poisoning.

APPEAL from *Desha* Circuit Court.
Hon. X. J. PINDALL, Circuit Judge.

L. A. Pindall, for appellant:

Argued upon the evidence and instructions. There was *no legal* evidence to connect appellant with the murder, and the verdict was against the evidence, and contrary to the instructions of the court.

The court erred in instructing the jury on the lower grades of homicide, and the jury were thereby misled.

There is but one punishment for murder by poison; there can be no degrees. *All* murder by poison is of the *first* degree. *Sec.* 1253 *Gantt's Digest;* and appellant was acquitted of that. To find one guilty of murder in the second degree, perpetrated by means of poison, is to *make* law, not to administer it.

C. B. Moore, Attorney-General, for the State.

English, C. J. In making out the transcript in this case, the clerk has needlessly copied into it eleven subpœnas, which have no relevancy to any question decided by the court below, and none to any question to be decided on this appeal. He has not endorsed his charge for making out the transcript; but whatever it may be, there must be deducted therefrom, and disallowed, the cost of transcribing these subpœnas.

On the twelfth of April, 1881, Catherine Allen and Cæsar Shine were jointly indicted for murder in the first degree, in the Circuit Court of Desha county, for the Arkansas City district. They severed; Shine obtained a change of venue, and after a demurrer to the indictment had been interposed by Catherine Allen, and overruled, she was tried on a plea of not guilty; the jury returned a verdict of guilty of murder in the second degree; motions for a new trial and in arrest of judgment were overruled, and she was sentenced to

the penitentiary for twenty-one years, in accordance with the verdict.

I. Appellant, Catharine Allen, was charged as principal, and Cæsar Shine as accessory before the fact. The murder was alleged to have been perpetrated by means of poison. There were two counts in the indictment. The first charged, in substance, that appellant murdered Tony Allen, on the seventh of January, 1881, in the Arkansas City district, Desha county, by administering to him three grains in weight of a deadly poison, called strychnine. The second count charged that she murdered him by putting strychnine into a tin cup or bucket, out of which he drank his coffee, etc. In each count Shine was charged as having advised and encouraged her to commit the murder. In both counts apt words are used to make a good charge of murder in the first degree, as defined by the Statute. The indictment follows, in substance, the common law form, adding the statutory words to designate the murder intended to be charged. The court did not err in overruling the demurrer to the indictment.

II. The motion in arrest of judgment was upon the ground that appellant being indicted for murder perpetrated by means of poison, which the Statute makes murder in the first degree, and punishable by death, no judgment could be rendered upon the verdict for murder in the second degree, and punishment by imprisonment in the penitentiary.

This is a question about which we have thought a great deal, and examined many authorities, with but little satisfaction.

The language of the Statute is that "All murder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of willful, deliberate, malicious and premeditated killing, or which shall be committed in the

perpetration of, or in the attempt to perpetrate, arson, rape, robbery, burglary or larceny, shall be deemed murder in the first degree." *Gantt's Digest, sec.* 1253.

"All other murder shall be deemed murder in the second degree." *Ib.*, 1254.

Under another section of the Statute, a person charged with murder in the first degree may be convicted of any lower degree of criminal homicide. *Ib.*, 1961.

The trouble is that a jury will sometimes return a verdict of a lower degree of homicide under an indictment for one of the specific statutory murders in the first degree, and the State has no remedy. No new trial can be granted for the State, and if the judgment be arrested, the verdict is nevertheless an acquittal of any degree higher than that for which the verdict is rendered.

Until the Legislature shall think proper to enact that upon a charge for murder perpetrated by means of poison, etc., the jury must find the accused guilty of murder in the first degree, or acquit him, we know of no remedy except that of appropriate charges to the juries by the Circuit Judges.

III. It is probable, from the facts disclosed in the bill of exceptions, that Tony Allen was poisoned by strychnine, but after a careful examination of all the evidence, we find none to warrant the conclusion of the jury, that appellant, his wife, had any criminal agency in the commission of the crime. The court below should, therefore, have sustained the motion for a new trial, on the ground that the verdict was contrary to the evidence.

Other minor questions were reserved, but we deem it of no importance to pass upon them.

Reversed, and remanded for a new trial.

GRIFFIN v. THE STATE.

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1. CRIMINAL LAW: *Liability of sheriff for permitting prisoner to go at large.* It is the duty of a sheriff, upon the conviction of a defendant for a misdemeanor who is present at the trial, to retain him in his custody; and if the fine and cost be not immediately paid, to hire him out as directed by the judgment, and if he voluntarily permit him to go at large, he is guilty of a misdemeanor.

2. EVIDENCE: *Record, only prima facie evidence as against strangers.* In a prosecution against a sheriff for permitting one convicted of a misdemeanor to go at large, the record of the judgment of conviction, is only *prima facie* evidence of its recitals and may be disproved.

APPEAL from *Conway* Circuit Court.
Hon. W. D. JACOWAY, Circuit Judge.

Ratcliff & Fletcher, for appellant:

The indictment does not show by what authority Burns was in custody. 1 *Bish. Cr. Pr., Sec.* 593; *Bass* v. *State*, 29 *Ark.*, 148; *Martin* v. *State*, 32 *Ark.*, 124, and cases cited. 2 *Bishop Cr. Pr.*, 943, *note* 1, *p.* 945. Nothing is to be left to intendment or implication in an indictment. *State* v. *Eldridge*, 12 *Ark.*, 610; *State* v. *Hand*, 6 *Ark.*, 165. It does not allege that the judgment of conviction directed that Burns be imprisoned until fine and costs be paid, nor that any process had issued thereon—imprisonment until so paid is discretionary with court. *Gantt's Digest, sec.* 1991, 2007.

Court erred in excluding testimony offered by appellant. He was not a party to the prosecution, nor privy thereto, and the recital in the record not binding on him. *Freeman on Judgments, Secs.* 159–162, *et seq.*, 318–319; *State use, etc.*, v. *Martin*, 20 *Ark.*, 629; *Thomas, et al.*, v. *Hinkle*, 35 *Ark.*, 450.

The mere conviction of Burns did not place him in custody; there must have been an *actual arrest and custody*, no constructive custody is sufficient. 2 *Bish. Cr. L.* (*6th Ed.*), *Secs.* 1093–4–5; *Roscoe Cr. Ev.*, 458–9–60; 2 *Bish. Cr. Pr.*, *Secs.* 943–5; *Bass* v. *State*, 29 *Ark.*, 142; *Martin* v. *State*, 32 *Ib.*, 124; 1 *Rees on Cr.*, 422–3; *Bishop, Cr. Pr.*, *Sec.* 889–891–894.

A voluntary escape is an *act done by design or intentention in violation of duty, malo animo*, with an intent to defeat the progress of justice. *Roscoe, Cr. Ev.*, 459 (*6th Ed.*, *p.* 423); 2 *Bishop, Cr. L.*, (*6th Ed.*), 1093–4–5; *Ib.* (*4th Ed.*), *Sec.* 1054–5.

Burns was *on bail*, and not in custody of the sheriff. *Crocker on Sheriffs*, *Sec.* 132; 2 *Hill*, 218; *Gantt's Digest*, *Sec.* 1739; *Redmond* v. *State*, 28 *Ind.*, 205.

C. B. Moore, Attorney-General, for the State:

The indictment follows the language of the Statute and is "direct," "certain" and "sufficient." *Secs.* 1780–1–2, *Gantt's Dig.*; *Leeman* v. *State*, 19 *Ark.*, 171; *State* v. *Collins*, *Ib.*, 587; *Medlock* v. *State*, 18 *Ib.*, 363. Appellant knew what he was called upon to answer. *Anderson* v. *State*, 5 *Ark.*, 445. The indictment is not for *an escape*, but for permitting Burns to go at large after conviction, and the evidence offered by appellant was *immaterial* and *irrevelant*.

Burns was convicted of a *misdemeanor*, and was constructively "in court," if not personally present. This was sufficient. Bentley's evidence was *hearsay*.

Argued upon the evidence, instructions and transcript.

English, C. J. Appellant, George W. Griffin, was indicted in the Circuit Court of Conway county, for malfeasance in office, the indictment charging in substance:

"That said George W. Griffin, on the tenth day of April, 1881, in the county aforesaid, being then the sheriff of said county, and having the lawful custody of one Bud Burns, who had been convicted in the Circuit Court within and for said county, at the March term, 1881, of said court, of the crime of Sabbath breaking, and adjudged to pay a fine of ten dollars, with cost of prosecution, and which said fine and cost on said tenth day of April, 1881, remained unpaid, unlawfully did voluntarily permit the said Bud Burns to go at large, contrary to the Statute," etc.

Appellant demurred to the indictment and the demurrer was overruled, and after trial and conviction, he moved in arrest of judgment, and for a new trial, and both motions were overruled.

I. The indictment was drawn under *section* 1487 *of Gantt's Digest*, which provides that: "If any officer or his under officer or deputy, having the lawful custody of any prisoner, for any cause whatever, shall voluntarily suffer or permit, or connive at the escape of such prisoner from his custody, or permit him to go at large, he shall upon conviction, be punished in the same manner, as if convicted of aiding or assisting such prisoner to escape." See for punishment, *Ib.*, *Section* 1481.

The objections taken to the indictment in the demurrer were:

First. That it did not state by what authority Burns was in custody of defendant.

Second. That it did not state that Burns was in custody of defendant by virtue of the conviction mentioned in the indictment, and

Third. That it did not set forth facts sufficient to constitute a public offense.

It is not directly alleged that Burns was in custody of appellant, as sheriff, under and by virtue of the judgment of

conviction for Sabbath-breaking, but such was doubtless the intention of the indictment, and it substantially advised him of the nature of the offense charged against him.

II. The bill of exceptions shows that, upon the trial, the State was permitted, against the objection of appellant, to read in evidence the indictment against Bud Burns for Sabbath-breaking, and the record entry of the trial, and judgment thereon as follows:

"IN THE CONWAY CIRCUIT COURT,
Tuesday, March 29, 1881.

STATE OF ARKANSAS,
v.
BUD BURNS.

On this day comes the State by her attorney, and the defendant, Bud Burns, in his own proper person, and by his attorney, and enters his plea of not guilty, and both parties announcing themselves ready for trial, come the following twelve jurors of the regular panel, to try the issue joined, to-wit: W. F. Stover, etc., who were examined on oath, found qualified and were selected and accepted, impanneled and sworn, according to law, etc., and the evidence being adduced, the instructions of the Court given, and the arguments of counsel had, the jury retired to consider of their verdict, and afterwards returned into Court here the following verdict: 'We, the jury, find the defendant guilty as charged, and assess his punishment at a fine of ten dollars,' etc. It is therefore considered and ordered that the plaintiff do have and recover of and from the defendant, the sum of ten dollars, together with all the costs in this behalf expended; and it is further ordered, that unless said fine and costs are immediately paid, the sheriff is ordered to hire out the said defendant, according to law, for any sum not to exceed one day for every seventy-five cents of said fine and costs."

The objection to the introduction of the indictment, and the record entry of the trial and judgment, was general, and we see no good reason why they should not have been admitted.

A clerk, skilled in entries, would have added the words "*by the Court*," after the word "*considered*," in the judgment entry. But the omission must be regarded as matter of form, and not of substance. *Ware et al.* v. *Pennington et al.*, 15 *Ark.*, 226.

So much of the judgment as ordered the sheriff to hire out Burns for the payment of the fine and costs, if they were not immediately paid, at not exceeeding one day for each seventy-five cents thereof, followed the last clause of *Section IV, of the Act of March* 10, 1877. *Acts of* 1877, *p.* 74.

The *Act of March* 22, 1881, (*Acts of* 1881, *p.* 148,) which provides that if any person, convicted of a misdemeanor in the Circuit Court, etc., shall fail to pay immediately, or secure to be paid within thirty days, to the satisfaction of the sheriff, etc., the fine and costs, such person shall be committed to the county jail, and by the jailor delivered to the contractor, who shall keep and work him at the rate of twenty-five cents per day, etc., though passed before the judgment against Burns was entered, manifestly applies to counties in which the County Courts have contracted for the keeping and working of persons committed for fines and costs.

It must be presumed that no such contract had been made in Conway County, at the time Burns was sentenced, as the Court, in rendering the judgment against him, followed the *Act of March* 10, 1877, instead of the *Act of March* 22, 1881.

Sheriff guilty of misdemeanor if he permit prisoner to go at large.

If Burns was present in Court at the trial, as recited in the judgment entry, it was the duty of appellant, as sheriff, to retain him in custody, and if the fine and costs were not immediately paid, to hire him out, as directed by the judgment; and if he voluntarily permitted him to go at large, he was guilty of an offense, under the statute above copied.

III. It was, in substance, proved on the trial, that Burns did not pay the fine and costs, that appellant, as sheriff, did not take him into custody, or restrain him of his liberty, or hire him out for the fine and costs; that he resided in Conway County, and went at large, attending to his business, etc.

Appellant offered to prove by Burns, who was examined as a witness, that he was not present at Court, at the time he was tried under the indictment for Sabbath-breaking, but was eleven miles away from Lewisburg, where the Court was held; which evidence the Court excluded, and this ruling of the Court, which was excepted to by appellant, was made ground of the motion for a new trial.

The statute provides that if the indictment is for a misdemeanor, the trial may be had in the absence of defendant, (*Gantt's Digest*, *Sec.* 1888,) and no doubt the Court has the discretion to permit the trial in his absence; but as a practice, it is not to be commended.

3. EVIDENCE: Record only *prima facie*, as against stranger.

The judgment entry recites that Burns was present in person at the trial, and the record was *prima facie* evidence of that fact; but appellant not being a party to the record, was not estopped thereby from disproving the fact so recited. *Snyder* v. *Greathouse et al.*, 16 *Ark.*, 72: *Bone as Admr.* v. *Torry*, *Ib.* 83; *Chipman* v. *Fambo*, *Ib.* 291; *Thomas et al.* v. *Hinkle*, 35 *Ib.* 453.

The State introduced no evidence but the judgment, to prove that Burns was in custody of appellant, as sheriff. If appellant had been permitted to prove, as he offered to

do, that Burns was not in fact present at the trial, it would have followed that the entry of the judgment, and the order that he be hired out for the fine and costs, if not immediately paid, would not have placed him in custody of appellant; and the State would have been obliged to go further, and prove that Burns was in custody of appellant, under execution issued upon the judgment, or surrender by bail, and afterwards voluntarily permitted him to go at large. *Redman* v. *The State*, 28 *Ind.*, 213.

For the error of the Court, in excluding the evidence offered by appellant, as above shown, the judgment must be reversed, and the cause remanded to the Court below for a new trial.

TREADAWAY V. THE STATE

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1. RECEIVING MONEY UNDER FALSE PRETENSE: *Indictment—Description of money.*

An indictment for receiving money under false personation of another must describe the money with the same particularity and certainty as an indictment for larceny.

APPEAL from *Conway* Circuit Court.
Hon. W. D. JACOWAY, Circuit Judge.

STATEMENT.

The sufficiency of the indictment is the only question made in this case. After the usual caption and commencement it charges "that the said Britt Treadaway, on the seventh day of March, 1881, in the county and State aforesaid, unlawfully, feloniously and falsely, did represent and personate one J. P. Alnutt, and in such assumed character,

unlawfully and feloniously did receive from one B. H. Montgomery, the sum of ten dollars, in money, of the value of ten dollars; and of the property and money of the said B. H. Montgomery, and which said money was then and there intended to be delivered to the said J. P. Alnutt, against the peace and dignity of the State of Arkansas."

Ratcliffe & Fletcher, for appellant.

The indictment should state the manner of personation, etc., and the circumstances attending it, etc., and that *by reason* of such personation, etc., the money was obtained with intent to defraud, etc. 2 *Bish. Cr. Pr.*, *sec.* 175; *State* v. *Eldridge*, 12 *Ark.*, 608; *Bell* v. *State*, 10 *Ark.*, 536; *Mckenzie* v. *State*, 11 *Ark.*, 594; *Burrow* v. *State*, 12 *Ark.*, 65; *Roscoe Cr. Ev.*, 445.

It should state what kind of money was received, whether U. S. currency, bank notes, coin, etc., with the same particularity as in larceny. *People* v. *Congers.*, 1 *Wheeler's Cr. Cases*, 448; *Smith* v *State*, 33 *Ind.*, 159; *Barton* v. *State*, 29 *Ark.*, 68.

C. B. Moore, *Attorney-General*, for the State:

Harrison, J. The indictment was bad. It contained no description of the money the defendant was alleged to have received from Montgomery by his false personation of Alnutt. It did not even state whether it was coin or paper. It should have been described with the same particularity and certainty as in an indictment for larceny. *Smith* v. *The State* 33 *Ind.*, 159.

"To describe the subject of the larceny," says Mr. Bishop, "as so many dollars in money, without further particularization, is by all deemed ill." 2 *Bish. Crim. Proceed.*, *sec.* 703, and *sec.* 273; *Barton* v. *State*, 29 *Ark.*. 68.

The demurrer to the indictment ought to have been sustained, and the judgment should have been arrested.

The judgment is therefore reversed, and the cause is remanded with instructions to arrest the judgment, and to hold the appellant to answer a new indictment, if found.

JAMISON v. THE STATE.

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1. OBTAINING MONEY UNDER FALSE PRETENSE: *Proof of offense.*
Proof that the defendant, by false pretenses, obtained the satisfaction of his debt to another, though sufficient to sustain an action by the defrauded party against him for money lent, is not sufficient to sustain an indictment for obtaining money under false pretenses. The money must have been actually, and not merely impliedly or constructively obtained, and must have come into the defendant's possession.

2. SAME: *Indictment for; description of money.*
An indictment for obtaining money under false pretenses must describe the money, with the same particularity and certainty as an indictment for larceny.

APPEAL from *Conway* Circuit Court.
Hon. W. D. JACOWAY, Circuit Judge.

STATEMENT.

Jamison was indicted in the Conway Circuit Court, at the October term, 1881, for obtaining money under false pretense. The indictment charged, in substance, that he applied to J. A. Mattingley to borrow sixty-five dollars, and to secure it, proposed to execute to him a mortgage on a certain mule and eight head of cattle, which he represented to Mattingley belonged to him, and were free from any lien,

by mortgage or otherwise; that, relying upon said representation, Mattingley loaned him the money and took the mortgage, but that said representation was false; said mule and cattle had been by the defendant previously mortgaged to one W. E. Dickson, for a valuable consideration, which mortgage was then wholly unsatisfied.

The indictment contained no description of the money.

Upon the trial the proof was that Jamison was indebted to one Thompson, and wanted the money from Mattingley to pay it. Thompson was indebted to Mattingley in about the same amount, and had the money in his pocket to pay it; but, by arrangement between the three, Mattingley satisfied Jamison's debt to Thompson by giving Thompson credit for the amount, and took the mortgage from Jamison to secure payment of the amount he had thus satisfied for him to Thompson. No money passed between them at all. At the same time there was a subsisting unsatisfied mortgage on the same stock which Jamison had a year before executed to one Dickson, to secure payment of a debt to him, and of which Mattingley was ignorant.

Among other instructions, the defendant asked the following, which the court refused:

"2. The State must prove that the defendant obtained money by false pretenses from Mattingley, or he cannot be convicted. If it is proven that he obtained property or credit only, and did not obtain money, he cannot be convicted."

The jury returned a verdict of guilty, and fixed the defendant's punishment at imprisonment in the penitentiary for one year. He filed a motion for a new trial, and also in arrest of judgment, which were overruled, and he filed his bill of exceptions and appealed.

Ridout, Coblentz and Shapard, for appellant:

There was a total failure of evidence to prove the receipt of any money by appellant. The evidence showed that appellant did not obtain money, but only got a credit on his note. *Bishop Cr. L., sec.* 480; *State* v. *Moore*, 15 *Iowa*, 412.

C. B. Moore, Attorney-General, for the State:

The money, though not actually, tangibly paid into appellant's hands, was, in effect, actually received—"*obtained*" by appellant by concealment and "false pretense."

Argued upon the evidence and instructions.

HARRISON, J. There was no evidence that the defendant obtained any money from Mattingley. Proof that by the false pretense alleged, he procured the satisfaction of his indebtedness to Thompson by him, though sufficient to sustain an action by Mattingley against him for money lent, was irrelevant to the charge in the indictment. The money must have been actually, and not merely impliedly or constructively obtained, and must have come into the defendant's possession.

Mr. Bishop says: "It is held that if the thing obtained is not money, or other article within the express words of the Statute, but merely a credit on account, which may bring money, the substantive offense is not committed." 2 *Bishop Crim. Law, sec.* 480.

The second instruction asked by the defendant, and refused by the court, was, therefore, correct; and the verdict was clearly against the evidence.

There was no description of the money in the indictment. It should have been described with as much particularity

and certainty as in an indictment for larceny. The indictment was, therefore, bad. *Treadway* v. *The State*, *ante*. *Barton* v. *The State*, 29 *Ark.*, 68; *Smith* v. *The State*, 33 *Ind.*, 159; 2 *Bish. Crim. Proceed.*, *secs.* 173, 703.

The judgment is reversed, and the cause remanded, with instructions to arrest the judgment.

THE STATE v. BARNES.

1. MISDEMEANORS: *Hiring out convict for fine and cost.*

Under the provisions of the 4th section of the Act of March 10, 1877, one convicted of a misdemeanor may be hired for as much as can be got for him—not less than seventy-five cents a day; but the Court can not *require* a greater hire per day than the *minimum* fixed by the statute, nor direct that the hiring be for a less number of days than one for every seventy-five cents of the fine and cost.

APPEAL from *Franklin* Circuit Court.
Hon. G. S. CUNNINGHAM, Special Judge.

STATEMENT.

In June, 1881, Dick Barnes was convicted, in the Franklin Circuit Court, of gaming, and fined ten dollars; for which, and the cost, judgment was rendered against him; and it was ordered by the Court that, in default of payment, the Sheriff hire him out at a sum not less than one dollar and fifty cents per day; and, in default of hiring, said fine and cost should be discharged by imprisonment for one day for each one dollar and fifty cents of said fine and cost. From this judgment the State appealed.

C. B. Moore, Attorney-General, for the State:

The first judgment, though perhaps not technically perfect in verbiage, was sufficient. The words "otherwise satisfied or discharged according to law," includes all the Statute requires in reference to *hiring out*, etc.

The second judgment was erroneous, in that it directed defendant to be hired out for a sum *not less than $1.50 per day*, or in default, be imprisoned *one day for each $1.50 of said fine and costs.*

HARRISON. J. When a person convicted of a misdemeanor is, under the provisions of the Act of March 10th, 1877, ordered to be hired out for the payment of the fine and costs, the term for which he may be hired out, as provided in the fourth section of the act, can not "exceed one day for each seventy-five cents of the fine and costs."

If the hirer shall agree to pay more than seventy-five cents a day, the term may be less, and it is the duty of the officer to get as much as he can. It does not, however, follow that the court can require a greater hire per day than the minimum fixed by the Statute, or direct that the hiring be for a less number of days than one for every seventy-five cents of the fine and costs. *Griffin* v. *The State, ante.*

It was error, therefore, to limit the term for which the defendant was to be hired, to one day for every dollar and a half of the fine and costs; and so much of the judgment is reversed, and the cause is remanded to the court below, with instructions to make such order in relation to the hiring as shall be in accordance with law, and as indicated in this opinion.

McCabe v. Payne.

1. Summons of Justice of the Peace: *To whom directed, and by whom served.*

By the Act of 1873, regulating proceedings before Justices of the Peace, a Justice's summons must be directed to a Constable, but may be served by any officer authorized to serve process; but if *directed* to the Coroner, it is only voidable, and not void, and if duly served by him, will support a verdict by default against the defendant.

2. Mistake: *Relief against judgment at law for.*

When a party comes into equity for relief against a judgment by default in a Justice's court, he must show not only that he has lost his appeal by mistake or accident, without laches, but also that he had a valid defense to the action.

APPEAL from *Pulaski* Chancery Court.
Hon. D. W. Carroll, Chancellor.

W. L. Terry, for appellant:

The township constable, and not the coroner, was the proper officer to execute the summons, and the original judgment was void for want of legal notice.

Appellant was precluded from perfecting his appeal by an accident, and Chancery has jurisdiction to grant relief. 7 *Cranch*, 332; 2 *J. J. Marshal*, 513.

The law only requires that reasonable degree of diligence that is ordinarily used by men in like circumstances.

Butler, when he seized the wagon, was merely deputy sheriff, under a special commission, and was not acting within the scope of his duty.

A. D. Jones, for appellee.

STATEMENT.

EAKIN, J. This is a bill by appellant to enjoin the execution of a judgment in replevin, which had been obtained against him by Payne before a Justice of the Peace upon default; a levy had been made upon the property of complainant, and the bill seeks to enjoin the sale, and other relief.

The cause was heard by the Chancellor upon the bill, the proceedings before the Justice, and upon affidavits. No answer was filed, and it comes up on a motion to dissolve the injunction, which had been made at the beginning of the suit. Upon the hearing the Chancellor held that the complainant had not shown sufficient diligence in prosecuting an appeal, and that no accident nor fraud had been shown to justify the interposition of equitable relief. The bill was dismissed, and complainant appeals.

OPINION.

This case is the same which was brought to our notice by the application of Payne for a *certiorari* to bring up and quash a subsequent order of the Chancellor at the same term, modifying the decree so as to continue the interlocutory injunction whilst the appeal might be pending here. (See opinion in case of *Payne* v. *McCabe*, *ante* 318.)

The modifying order does not appear in this transcript, as it was made after the appeal, and does not come properly before us on the present submission of the case on appeal, and no point is now made on it in argument. This supersedes the necessity of further remarks on the practice, than were made in the case cited.

1. SUMMONS OF J. P.: To whom directed, and by whom served.

The first point now made by the appellant is, that he was never properly summoned, nor did he enter any appearance in the suit before the justice, and that, therefore, the

judgment by default is void, and the levy not due process of law.

The summons was issued on the thirteenth day of March, 1880, directed to the coroner of the county, and made returnable on the twenty-fifth, upon which day judgment by default was rendered. Service was made by the coroner on the fifteenth, and certified by his return.

By the civil code (see *Gantt's Digest, sec.* 4835) any kind of process wherein the sheriff is a party, or is interested, shall be *directed* to the coroner; or, if he is interested, to some constable. In this case the defendant (complainant here) was the sheriff of the county. This was a general provision, applicable to all courts.

It had been provided by the Revised Statutes, (See *Gantt's Digest, Sec.* 877,) that the coroner should *execute and return* all processes, of whatever nature, where the sheriff is a party, etc. This also was general.

By a later Act, of April 29, 1873, (See *Gantt's Digest, Sec.* 3725,) regulating proceedings before Justices of the Peace, it was provided that summons should be *directed* to the constable, but might be *served* by any officer or person, authorized by law to serve process. The same Act, (*Sec.* 3727 *of Gantt's Digest,*) provided that all proceedings prescribed for Circuit Courts, and not therein changed, should be pursued in Justices' Courts, so far as the same should be applicable.

It may be remarked that the Civil Code provided by Section 59, (See *Gantt's Digest, Sec.* 4504,) that the summons shall be *directed* to the sheriff, and without any saving. It was never supposed, however, that this section was in conflict with the special provision in another part of the Code, (above cited as *Sec.* 4835 *of Gantt's Digest,*) that where the sheriff was a party, or interested, it should be directed to the coroner.

Upon a review of all the legislation, we are of opinion that the intention of the Act of 1873, regulating proceedings before justices, was to prescribe, for uniformity, that the summons should be directed to a constable, and perhaps, also, to relieve county officers from the obligation to consume their time in the service of the Courts of the Justices, but not to deprive them of the power to execute the process. In other respects the direction seems matter of form; for the summons need not go into the hands of a constable at all; but although directed to one, may be taken and executed by any officer authorized to serve process.

The rigidity of the older decisions, regarding writs and process, has been much relaxed by more recent decisions of this court, as they may be found cited in *Rose's Digest Title "Writs of Process," Sections* 36 *to* 41. The case of *Rudd* v. *Thompson*, 22 *Ark.*, 363, in which the opinion was delivered by the present Chief Justice, recognizes this change. In that case, however, there was nothing to show that the sheriff was an "interested party," and the writ, being directed to the sheriff, it was held that it could not be executed by the coroner. The case had not arisen, giving the coroner power to serve the process, however directed.

Conceding that the direction of the writ in this case was irregular in form, it might, on motion have been amended, or quashed, but it was not void. It was directed to an officer authorized to *serve* it, and served and returned by him. It seems that no objection was interposed to the summons, but the defendant came in and moved to set aside the judgment by default, for the purpose of making a defense. This being refused, he failed in time to prosecute his appeal. He was not afterwards, on account of a defect in the summons alone, entitled to equitable relief.

2. MISTAKE: Relief against judgment at law, for.

Another ground of the relief sought, is that complainant was prevented by accident from perfecting his appeal. No fraud is alleged.

The circumstances appear, in substance, as follows: After the refusal of the justice to set aside the judgment by default, complainant, through his attorney, caused to be prepared the proper affidavit, bond and notice for an appeal, and sent them within a day or two before the expiration of the time allowed to be filed with the justice. The agent bearing them, did not find the justice in, and left some papers in an envelope with a deputy constable who usually attended the justice's court, to be delivered to the justice when he should come in. Returning he met the justice in about two hundred yards of the office, informed him of what he had done, and went his way. The agent swears in his affidavit, that the envelope contained the affidavit for appeal, the bond and the notice. The deputy constable swears that he delivered the envelope, with its contents, to the justice on the same day, and the justice swears that when he opened it, the affidavit for appeal was not there, and the appeal was consequently not taken. The deputy does not appear to have been the clerk of the justice, but usually attended his court, to do the proper business of a constable.

The accident, if any, consists in what we may well suppose to have been a mistake on the part of the agent, in thinking, as he doubtless did, that the affidavit was in the envelope. He does not say certainly that he left the envelope with the constable on the same day he received it, to be taken and filed, but says it may have been on that day or the next day. There is not the same probability of mistake on the part of the constable, as to having soon afterwards handed the envelope to the justice, or on the part of the justice in failing to find the affidavit. There is no reason to doubt the veracity of any of the affiants.

With all this, however the mistake may have occurred, the plaintiff in the judgment had nothing to do. He is not chargeable with any misconduct, or action by which the defendant might have been thrown off his guard. We think it an unsafe precedent to cause him to lose the benefit of his judgment, from a mistake of this kind. The defendant in the judgment by himself, or his agent or attorney, should have seen to it, more closely, that the proper papers were actually filed; which might easily have been done by a walk of two hundred yards. The plaintiff in the judgment is not responsible for any press of business, which may have rendered it inconvenient. We concur with the chancellor in the opinion that the complainant did not show sufficient diligence to entitle him to invoke the aid of chancery.

As the summons was not absolutely void, and there was actual service in due time, it was further essential to the plaintiff's case to show, not only mistake or accident, without laches, but also to show that he had a valid defense to the action. This he does allege in general terms, and offers to submit to any decree of the court upon the merits, but he does not set forth the defense in any terms sufficient to enable the court to judge of it, nor did he ask leave to amend his bill to that end. That was not important, however, as it would not have been available, without a show of diligence as to the appeal, in which he failed.

We find no error in the decree. Let it be affirmed. The injunction will of course cease with the affirmance.

GRISE v. THE STATE.

1. INDICTMENT FOR CRUELTY TO ANIMALS: *Allegations of value or ownership.*

In an indictment under the Act of 1879, for needlessly killing or mutilating an animal, the value or ownership of the animal need not be alleged.

2. SAME: *Burden of proof as to character of the act.*

In an indictment for "needlessly killing an animal," the State must prove not only the killing, but that it was done under such circumstances as, unexplained, would authorize the jury to believe that it was needless, in the sense of the Statute.

3. STATUTES: *Construction of Act to Prevent Cruelty to Animals.*

The term "needlessly," in the Act of 1879, "For the Prevention of Cruelty to Animals," has no reference to the lawfulness or unlawfulness of the act of killing or mutilating, except as the Statute makes it unlawful *as* needless; nor is it to be construed as characterizing an act which might, by care, have been avoided. It simply means an act done without any useful motive, in a spirit of wanton cruelty, or for the mere pleasure of destruction.

APPEAL from *Logan* Circuit Court.
Hon. J. H. ROGERS, Circuit Judge.

C. B. Moore, Attorney-General, for the State.

The Opinion states the case.

1. INDICTMENT FOR CRUELTY TO ANIMALS: Allegations of value or ownership unnecessary.

EAKIN, J. The appellant was indicted, under an Act, approved March 11th, 1879, "For the prevention of cruelty to animals." The first section, *inter alia*, makes it a misdemeanor to "needlessly mutilate or kill" * * * "any living creature." The indictment simply charges that appellant did, unlawfully and needlessly, kill a hog, of the value of five dollars, being a living creature. No allegations of value, or of ownership, were essential.

The proof, on the part of the State, tended to show that appellant had killed a pig, belonging to a neighbor, by a blow on the head with a stick, producing sudden death. The pig was in a field belonging to appellant, in which corn and wheat were growing. It had, before that time, been in the habit of trespassing there with others, and the defendant had repeatedly applied to the owner, a lady, to pen her hogs, or keep them out of his field. This, for a while, she did. But they were again turned out, and the one in question being found again in appellant's field, he killed it on the spot—with no more circumstances of cruelty than would attend the taking of life at one blow.

On defendant's part, the proof—besides that the pig had been several times in the field, eating corn and wheat—tended further to show that it was a very small one, which could easily get between the rails of any ordinary country fence, and that there was around that field a very good fence.

There was proof, on both sides, as to the value, and some tending to show that appellant had paid the value to the owner—all of which was entirely irrelevant, save as it might, as part of the *res gestæ*, show the purpose, or motive, of the killing. Payment to the owner could not atone it, if it were *needless* in the sense of the Statute, nor would failure to make compensation aggravate the offense.

Upon the trial, defendant asked six instructions, which were refused throughout. In lieu thereof, the court gave two of its own motion—all against objection. The defendant was found guilty, and sentenced to a fine of two dollars. He moved for a new trial upon the grounds of error, in refusing the instructions asked; in giving those by the court of its own motion; and because the verdict was against law and evidence. The motion was refused, and he appealed.

This court is called for the first time to construe a new statute, belonging to a class which must ever be more or less vague in their meaning, and extremely difficult of administration. They are the outgrowth of modern sentiment, and are of comparatively recent origin. They attempt to transcend what had been thought, at common law, the practical limits of municipal government. They spring, originally, from tentative efforts of the New England colonists to enforce imperfect but well recognized moral obligations; a thing much more practical in small isolated communities than in populous governments. They first had in view only to compel benevolence and mercy to those useful animals, which being domesticated, and wasting their lives in man's service, were supposed to be entitled to his kind and humane consideration. Such statutes appealed strongly to the instincts of humanity. They were adopted in many of the States, and recently in England; and the impulse which favored them has endeavored to enlarge their beneficence, until, in our law they are made to embrace "all living creatures." It is obvious that laws of this class, pressed to this extreme limit, must be handled by the courts with great care, and we feel it due the Legislature to do so, to prevent their becoming dead letters. They must be rationally construed with reference to their true spirit and intention. It must be kept in mind that they are not directed at all to the usual objects of municipal law, as laid down by BLACKSTONE. For example: They are not made for the protection of the absolute or relative rights of persons, or the rights of men to the acquisition and enjoyment of property, or the peace of society. They seem to recognize and attempt to protect some abstract rights in all that animate creation, made subject to man by the creation, from the largest and noblest to the smallest and most insignificant. The rights of persons and the security of pro-

perty and the public peace, are all protected by other laws, with appropriate sanctions. The objects of the two classes should not be confounded. It will lead to hopeless confusion. The peculiar legislation we are now called to discuss must be considered wholly irrespective of property, or of the public peace, or of the inconveniences of nuisances. The misdemeanors attempted to be defined may be as well perpetrated upon a man's own property as another's, or upon creatures, the property of no one, and so far as one act is concerned, it is all the same whether the acts be done amongst refined men and women, whose sensibilities would be shocked, or in the solitude of closed rooms or secluded forests.

It is in this view that such acts are to be construed, to give them, if possible, some beneficent effect, without running into such absurdities as would, in the end, make them mere dead letters. A literal construction of them would have that effect. Society, for instance, could not long tolerate a system of laws, which might drag to the criminal bar, every lady who might impale a butterfly, or every man who might drown a litter of kittens, to answer there, and show that the act was needful. Such laws must be rationally considered, with reference to their objects, not as the means of preventing aggressions upon property, otherwise unlawful; nor so as to involve absurd consequences, which the Legislature cannot be supposed to have intended. So construed, this class of laws may be found useful in elevating humanity, by enlargement of its sympathy with all God's creatures, and thus society may be improved. Although results in other States and in England, have not, as we judge from the paucity of decisions, been such as to excite sanguine hopes, yet to a limited extent the objects of the laws may be practically obtained. It is the duty of the courts to co-operate to that end, so far as the rules of construction may warrant.

There are civil laws for the recovery of damages for trespass, and criminal laws for the punishment of malicious mischief, and trespass and injury to property. In a suit or indictment, under these, there are appropriate defenses, not applicable to an indictment for cruelty or for needless killing. They should, one or the other of them, have been resorted to by the individual, or the State, if the object had been to recover damages for the loss of the pig, or to protect society from violent aggressions on property. The law under which this indictment was framed has no such object, and cannot be made a substitute for the others. The issue was, did the defendant *needlessly* kill the pig. The burden of proof was upon the State to show not only the killing, but that it was done under such circumstances as, unexplained, would authorize the jury to believe that it was *needless* in the sense of the Statute. The controversy does not turn at all upon the lawfulness or unlawfulness of the act, except in so far as the Statute itself might make it unlawful *as* needless.

2. Burden of proof as to character of the act.

From the view we have taken of the nature and scope of this class of acts, it is obvious that the term "needless" cannot be reasonably construed as characterizing an act which might by care be avoided. It simply means an act done without any useful motive, in a spirit of wanton cruelty, or for the mere pleasure of destruction. Other portions of the act are directed to prevent undue torture, or suffering, which do not come here in question. However unlawful the act may be, and whatever penalties might be incurred under the Statutes, the defendant should not, under this indictment, have been convicted, if he had some useful object in the killing, such as the protection of his wheat and corn.

3. Construction of the statute. Meaning of "needlessly."

The provisions of different Statutes must be regarded; and acts really criminal, must be punished under *appropriate* indictments. Malicious mischief and needless killing are distinct.

The defendant, in effect, asked the court to instruct:

First. That the burden was on the State to show not only the killing but that it was needless, and that "needless" meant a killing in mere idle wantonness, without being in any sense whatever beneficial or useful to defendant.

Second. That it was for the jury to determine whether or not it was "needless," and that they might consider the facts, that the pig was found in the field where there was corn and wheat, that it had frequently been there before, and all other facts and circumstances in evidence.

Third. That the jury must find before conviction that there was no necessity or cause whatever for the defendant to kill the animal.

Fourth. That considering the circumstances, if the jury found that the animal was trespassing upon the defendant's crops and destroying them, and that he had up to the time of the killing used all reasonable means to prevent it, and that the act of killing did prevent it, they would be warranted in finding that it was not needless.

Fifth. That the word "needlessly," used in the Statute, relates to a wanton and cruel act, and not to one which is the result of necessity, or reasonable cause.

Sixth. That unless the defendant was guilty of wanton and needless acts of cruelty to the animal, resulting in unjustifiable physical pain, they should acquit.

We think that the spirit of all the foregoing instructions, except the last, was in harmony with the true intent and meaning of the Act—as nearly so as moral acts can be characterized by the formulas of language—at all times a difficult task. They are very nearly in accord with the views we take of the Statute. The last was erroneous. A needless killing could not be justified by an easy death. Cruelty was no part of the charge, although it is made criminal under the other sections.

The instructions given by the Court, of its own motion, were as follows:

First. That the proof of killing a *pig* would support the allegation of the killing of a hog.

This is unquestionably correct.

Second. "If the jury believe from the evidence that defendant, in this county," etc., * * * "needlessly killed the animal mentioned in the indictment, they should convict, notwithstanding it may have been trespassing within defendant's inclosure at the time it was killed. 'Needlessly' means without necessity, or unnecessarily, as where one kills a domesticated animal of another, either in mere wantonness or to satisfy a depraved disposition, or for sport or pastime, or to gratify one's anger, *or for any other unlawful purpose.*"

But for the last clause of this instruction, it would not be, in the abstract, subject to criticism, but it is, we think, erroneous in holding all killing *needless*, in the sense of the Statute, done for an unlawful purpose. For unlawful trespasses, other remedies are provided. There are other Statutes for their prohibition. All acts of killing are not "needless," in the meaning of the Statute, which are unlawful. A man, for instance, might kill his neighbor's sheep for food, which would be *unlawful*, and either a trespass or felony, according to the circumstances; but such killing could not, with any show of reason, come within the intention of the Act in question. The lawfulness, or unlawfulness, of the act, has really no bearing upon its character, as charged.

Lawfulness or unlawfulness of the act immaterial.

Had the last clause been omitted, in this instruction, it would not, however, have been sufficiently instructive, in all points, to have caused the refusal to give the defendant's first five instructions, in substance, as asked. He was en-

titled to have them particularly impressed upon the jury, in a matter which, being new, they might misapprehend.

The first of the English Statutes directed to the enforcement of benevolence and kindness to inferior animals, was passed in 1822. It was to prevent "cruel and improper treatment of cattle." It contained a provision that, "if the complaint should appear to the magistrate, on the hearing, to be frivolous, or vexatious, then the complainant was to be ordered to pay to defendant any sum of money, not exceeding the sum of twenty shillings, as compensation for the trouble and expense to which said party may have been put by such complaint."

This was a wise precaution. The case now before us, is strongly suggestive of the necessity of some such safeguard in the administration of a Statute of much wider scope, embracing all living creatures. This is a matter, however, for the legislative department. The power of the judiciary only extends to see that a Statute, so well intended, shall not be extended to absurd consequences, and brought into contempt by too literal a construction of language.

For error in overruling the motion for a new trial, reverse the judgment, and remand the cause for further proceedings, consistent with law, and this opinion.

WILLIAMS V. STATE, USE, FRANKLIN COUNTY.

1. INTEREST: *Statute Limitations. Whether suspended by the war.*

The statute of Limitations was suspended during the war, whether in actions between belligerents or between residents within the Confederate States; but the running of interest upon debts, between citizens of the same belligerent power, was not suspended by the war between the states.

2. ACTION: *On bonds to common school commissioner. Judicial notice.* Since the adoption of the Act of 23d of July, 1878, "to maintain a system of free common schools," the State can sue on bonds previously executed to the common school commissioner of a county, without any assignment of the bond, and without stating in her complaint how she acquired the right to sue. The statutes show this, and the Courts will take judicial notice of it.

APPEAL from *Franklin* Circuit Court.
Hon. W. D. JACOWAY, Circuit Judge.

Clark & Williams, for appellant.

There is no assignment of the note, and no allegation or evidence of the appellee's title. *Alsteen* v. *Heartman*, 2 *Ala.*, 699; *Moore* v. *Penn*, 5 *Ala.*, 135; *Chaplin* v. *Canada*, 8 *Com.*, 286. Plaintiff must show by what right he claims in order to maintain his action. *Montague* v. *Remeyer*, 11 *Iowa*, 503. See also 9 *Gray* (*Mass.*) 331; *Hempst*, 48; 6 *Blackf.* (*Ind.*) 154; 8 *B'Mon*, (*Ky.*) 474; 30 *Ala.*, 677; 2 *Stern and P.* (*Ala.*) 134; 2 *Minn.*, 219; 3 *Duer* (*N. Y.*) 615; 18 *Cal.* 390; 3 *Blackf.* (*Ind.*) 405; 11 *Iowa*, 503. And even if the State had a right to sue, by virtue of statute making her the successor of Nixon, she must state the facts constituting her title. *Parker* v. *Totten*, 10 *How.* (*N, Y.*) *Pr.* 233; *Mechanic's B'k* v. *Donnell*, *Mo.*, 373.

The suit in the name of the State, for use of school fund, is not authorized. *Acts* 1868, *p.* 163; *Acts* 1873, 392; *Acts* 1875, *p.* 54; *Acts* 1852–3, *p.* 143; *Acts* 1850, *p.* 114; *Acts* 1848, *p.* 87, *etc.*

The war did not suspend the statute of limitations, both parties being citizens of the same belligerent power. 3 *Cranch*, 454; 50 *Ill.*, 186; 20 *La.*, *An.*, 131; 2 *Nott & McCord* (*S. C.*) 498; 2 *Dall.*, 102–32; 1 *Des.*, 537; 4

Ran. (*Va.*) 264; 20 *La.*, *An.*, 284, 397, 422, 427; *Com. Penn. C. C't*, 496.

The decisions in *Hanger* v. *Abbott*, 6 *Wall*, 532; *Brown* v. *Sauerwin*, 10 *Ib.*, 218; *Semmes* v. *Ins. Co.*, 13 *Ib.*, 158; *Brown* v. *Hiatt's*, 15 *Ib.*, 177; were put upon the express grounds that the parties were enemies in the war, disabled to sue by non-intercourse, closing of courts, etc.

Ross v. *Jones*, 22 *Wall*, 576, was the first case in which the court abandoned its former decisions, and held that the statute was suspended during the war in the rebellious states, etc.; and the doctrine thus laid down and followed in subsequent decisions is repudiated in *Smith* v. *Ins. Co.*, 64 *Mo.*, 330; 41 *Ga.*, 231; 43 *Miss.*, 90, 268; 35 *Ind.*, 124; 6 *W. Va.*, 301; 11 *Bush* (*Ky.*) 191; 27 *Gratt* (*Va.*) 587; 9 *W. Va.*, 616; 40 *Wis.*, 622; 7 *Daly* (*N. Y.*) 249; 66 *Ill.*, 288.

The true doctrine in this State was held in *Bennett* v. *Worthington*, 24 *Ark.*, 287, and the subsequent cases of *Met. Bk.* v. *Gordon*, 28 *Ark.*, 115; *Eddins* v. *Grady*, *Ib.*, 500; *Hall* v. *Denckla*, *Ib.*, 506; *Mayo* v. *Cartright* 30 *Ib.*, 407; *Shinn* v. *Tucker*, 32 *Ib.*, 421, *etc.*, are utterly without authority to sustain them.

The question of the suspension of the Statute by the war is not before the court at all in this case. Defendant pleaded the Statute, and there was no reply. Where new matter relied on in avoidance is a departure from the original cause of action in the complaint, plaintiff should amend by setting up such new matter. *Ridgely* v. *Price*, 16 *B. Mon.*, 414.

Where limitation is suspended by war, interest is also suspended. 28 *Gratt* (*Va.*), 207; 15 *Wall.*, 177; 1 *Sawyer*, 401; 2 *Dall.*, 102, 132; 3 *Call.* (*Va.*), 22; 1 *Des.* (*S. C.*), 537; 1 *Hugh.*, 310; 4 *Rand.* (*Va.*), 264; 37 *Gro.*, 482.

ENGLISH, C. J. This suit was commenced in the Circuit Court of Franklin county, on the third of March, 1876, upon the following writing obligatory:

"Twelve months after date we, or either of us, promise to pay G. W. C. Nixon, Common School Commissioner of Franklin county, or his successor in office, the sum of eleven hundred and forty-five dollars and twenty-eight cents, with interest at eight per cent. per annum, payable semi-annually in advance, for value received. Witness our hands and seals this July the 1st, 1860.

"JOHN WILLIAMS. [SEAL.]
"MILES W. WILLIAMS. [SEAL.]"

The suit was brought in the name of the State, for the use of the School Fund of Franklin county, against both of the obligors, but was finally discontinued as to Miles W. Williams, who was not served with process.

I. The complaint alleged that the interest was paid up to July, 1861, after which no interest was paid.

The case was tried on plea of the Statute of Limitations of ten years, November 29th, 1878, and there was a verdict in favor of the State against appellant, John Williams, for two thousand three hundred and forty-one dollars and sixty-two cents ($2,341.62), and a new trial refused.

The interest was calculated by the jury at six per cent. from the maturity of the obligation to the date of the verdict, under an instruction by the court, there being upon the face of the instrument no contract for interest at eight per cent. beyond its maturity, for want of the words "until paid."

This instruction, which was objected to by appellant, will be referred to again below.

1. STATUTE LIMITATIONS: Suspended by the war.

II. The plea of appellant, on which the case was finally tried, was simply that the plaintiff's cause of action did not accrue within ten years next before the commencement of the suit.

The court instructed the jury, against the objection of appellant, "that if they believed, from the evidence, that the note was due on the first of July, 1861, and that the action was commenced on the third day of March, 1876, and that it was commenced within ten years, after deducting four years, ten months and twenty-six days, the time the Statute ceased to run, they would find for the plaintiff."

And the court refused to instruct the jury, in effect, as moved by appellant, that they must count the whole period from the maturity of the obligation to the commencement of the suit.

There was no replication to the plea of limitation setting up the war, and none is required or allowed to such plea by our Code practice. Nor did the plaintiff prove that there was any war between the maturity of the obligation and the commencement of the suit.

But the court properly took judicial notice of the public fact, as legally and historically established, that the civil war was flagrant in this State from the sixth of May, 1861, to the second of April, 1866, and followed the decisions of this court, that the Statutes of Limitation were suspended during that period. *Mayo et al* v. *Cartwright, ad., et al.*, 30 *Ark.*, 412; *Shinn* v. *Tucker*, 33 *Ib.*, 424; *Worthington's adm.* v. *DeBarlekin, ad., Ib.*, 656.

In fixing the length of the period of suspension at four years, ten months and twenty-six days, the court followed the computation of this court in *Shinn* v. *Tucker, sup.*

But the court erred in applying that computation in this case, because the obligation did not mature, and the Statute would not have commenced running, had there been no war, until the first of July, 1861. The time deducted in this case should have been from the maturity of the obligation to the second of April, 1866, a period of about four years,

nine months and one day. But appellant was not prejudiced by this error, because, from the maturity of the obligation to the third of March, 1876, when the suit was commenced, was a period of about fourteen years, eight months and two days; and deducting from that period four years, nine months and one day, it left about nine years, eleven months and one day. So the action was not barred when commenced, if the Statute ran against the State, a question not presented in this case.

In holding that the Statute of Limitations was suspended during the war, whether in suits between persons who had been belligerents, or in actions between persons who resided within the Confederate lines, this court followed the decisions of the Supreme Court of the United States, and the question must be regarded as settled.

III. The court refused to give the following instruction moved for appellant:

"That the amended complaint filed in this cause, changing the party plaintiff from that of Franklin county to that of the State of Arkansas, constituted the present proceeding a new and different action. And if the jury believe, from the evidence, that the cause of action on the obligation in suit did not accrue at any time within ten years next before the filing of said amended complaint, they must find for the defendant."

To understand this instruction, a brief statement of the pleadings, etc., in the case before the final trial, is necessary.

In the original complaint, which was in the name of the State, for the use of the school fund of Franklin county, the obligation sued on was described; a copy exhibited, payment of the interest to maturity admitted, and judgment prayed for principal and interest, which were alleged to be unpaid.

At the April Term, 1876, appellant, on whom the writ, corresponding with the complaint in the style of the suit, etc., had been served, demurred to the complaint on the following grounds, in substance:

First. That the State was not shown to be interested in the fund sought to be collected, and the obligation sued on was executed to Nixon, Common School Commissioner of Franklin county, or his successor in office.

Second. That the county of Franklin was a necessary party, but not made a party.

Third. That the collector of Franklin county was the successor of Nixon, and entitled to collect the obligation sued on, if any person was, but he was not made a party.

Before any decision was made on this demurrer, the plaintiff, at the same term, asked and obtained leave to file an amended complaint; and filed an amended complaint in the name of Franklin county, as plaintiff.

To this amended complaint appellant filed a demurrer, assigning causes not important to state. Nothing further appears to have been done in the cause at that time.

At the November Term, 1877, the plaintiff and appellant appeared by their attorneys, and the court, by consent of plaintiff, struck from the files the amended complaint theretofore filed. Whereupon, argument was heard on the demurrer to the original complaint, and the court sustained the demurrer as to the first cause assigned therein, and gave leave to amend the complaint.

On the next day (twenty-third of November, 1877,) an amended complaint was accordingly filed, in the name of the State for the use of the school fund of Franklin county, in which the obligation in suit was set out as in the original complaint, and the consideration for which it was executed stated, etc.; which will be more particularly noticed when we come to consider the proposition that this amended com-

plaint showed no right in the State to sue upon the obligation.

To this amended complaint the appellant pleaded that plaintiff's cause of action did not accrue within ten years next before the commencement of the suit; to which plaintiff demurred; the court sustained the demurrer; appellant rested, and judgment was rendered against him for the principal of the obligation, and interest from maturity at eight per cent. per annum.

On the next day this judgment was set aside, by consent of parties, and the cause continued, with leave to appellant to file a demurrer to the complaint at the next term, and also an answer in lieu of the answer theretofore filed.

At the May Term, 1878, appellant demurred to the amended complaint on the ground that it did not contain facts sufficient to constitute a cause of action.

He also filed an answer, in which he stated that the so-called amended complaint, changing the party plaintiff from that of Franklin county to that of the State of Arkansas, constituted the present proceeding a new and different action, and not the same action mentioned in prior proceedings. He further answered that the State had no right or title to the note sued on, and no right of action thereon. And, further, that the cause of action on said note, or obligation, did not accrue within ten years next before the filing of said new or so-called amended complaint; which, he averred, was the commencement of this action.

On the filing of the demurrer and answer, the plaintiff, by leave of the court, amended the complaint by interlineation, and, thereupon, the demurrer was overruled.

By leave of the court, the name of Miles W. Williams, as a defendant, was stricken out—he not having been served with process.

And plaintiff demurred to the answer of appellant (twenty-first of May, 1878,) on the grounds:

First. That the first paragraph did not constitute a sufficient answer to the complaint.

Second. That the second paragraph raised a question of law, which should have been presented by demurrer.

This demurrer to the answer was not decided by the court, but, on the twenty-fifth of May, 1878, appellant filed the answer, on which the case was finally tried, that the plaintiff's cause of action did not accrue within ten years next before the commencement of the suit.

The original suit, it is manifest from the whole record, was never dismissed, discontinued, or permanently abandoned; but was prosecuted to final trial and judgment. It is true, that when the original complaint was demurred to, the attorney for the State seemed to be in doubt as to whether the suit upon the obligation was properly brought in the name of the State, and filed an amended complaint, substituting Franklin county as plaintiff, which was afterwards struck from the files by his consent, the demurrer to the original complaint taken up, partially sustained, an amended complaint filed in the name of the State, on which, as further amended by interlineation, the suit progressed to final judgment in favor of the State. The instruction above copied was, therefore, rightly refused.

INTEREST: Not suspended by the war as between Confederates.

IV. We will now turn back to the instruction of the court, in which the jury were told, against the objection of appellant, to allow interest upon the obligation from its maturity to the time of the trial. It is submitted, for appellant, that no interest should have been allowed during the period of the suspension of the Statute of Limitation by the war.

The obligation sued on was executed in this State, and made payable to the Common School Commissioner of

Franklin county. Appellant did not, by any pleading, show that he was a citizen, or resident, of any State or Territory adhering to the Federal Government during the period of the war.

In *Brown* v. *Hyatt*, 15 *Wallace*, 177, Brown, a citizen of Virginia, in May, 1860, loaned Hyatt, a citizen of Kansas, money, and took a mortgage from him and his wife on land to secure the payment of the debt. After the war, a suit was brought to foreclose the mortgage, and the Supreme Court of the United States held that inasmuch as it was not lawful for Hyatt to pay the debt to Brown during the war, no interest should be allowed upon it during the period in which its payment was prohibited.

Though the same court has repeatedly held that the Statute of Limitation was suspended during the war, in suits between persons residing in the Southern States, on the theory that the courts were closed, or the administration of justice interrupted, it has decided in no case, that we are aware of, in such suits, that interest should not be allowed during that period.

In *Roberts, ad.*, v. *Cocke*, 28 *Grattan*, 207, the Supreme Court of Appeals of Virginia decided that an act passed by the Legislature of that State, requiring the courts to remit interest in suits on contracts entered into prior to the tenth of April, 1865, for a period during the civil war, was unconstitutional and void, as impairing the obligation of contracts. The suit was between Virginians, on contracts made in that State in 1860, and the act was passed on the second of April, 1873.

Justice Burks, who delivered the opinion of the court, said: "If, during the late war between the United States and the Confederate States, the defendants, Cocke and Carter, had resided within the territory under the dominion of one of the belligerent powers, and their creditor had

resided in the territory of the other of said powers, they would have been entitled, independent of the Statute in question, to an abatement of the interest during the time the war lasted. Such is the rule of the public law applicable to a war between independent nations, and at an early period after the termination of the late war between the States, it was applied by the courts to that war, etc., etc.

"If, therefore, Cocke and Carter (defendants in error) had been alien enemies in respect of their creditor, they would have been entitled to an abatement of the interest on their debt for the period covered by the war, and might have made their defense, certainly under a special plea, and perhaps, under the plea of payment, etc. But, as no such defense was made, it is to be presumed, if indeed, it may not be inferred, from the record, that the facts did not warrant the defense.

"The averment, which seems to be the gist of the third plea, that the principal money 'was not worth any interest to the defendants during the war,' was no bar to the plaintiff's right to recover. The defendants, by their bond, expressly stipulated for continuing interest on the debt without any exception of the period of the war, should one occur, and the law, as the general rule, makes no such exception, where the contracting parties make none. It may be true that the defendants derived no benefit from the use of the principal money during the war. This may have been their fault, or their misfortune; but whether the one or the other, the contract was not affected by it. They were at liberty, under the contract, to discharge the obligation at any time by payment, according to its terms, of the principal sum and accrued interest. They neither paid, nor offered to pay, any part of either, and while they withheld another's money, it does not lie in their mouths to say that they derived no benefit from it, and, therefore, should not

be required to pay for the use of it that compensation which they had agreed to pay."

The opinion, after holding that interest laws existing at the time contracts are made, enter into and form part of them, says further:

"In the case of *McCall* v. *Turner*, 1 *Call.*, 133, there are expressions in the opinions of several of the judges which might indicate that, under the law as it then stood, they thought that juries were invested with discretion to abate interest in all cases during war. But these expressions are mere *dicta*, and have no controlling influence as authority. The case decided was a controversy between parties who were considered as occupying the relation to each other of alien enemies during the revolutionary war, and the interest during the war was, therefore, properly abated.

"*Ambler's Ex'rs* v. *Macon, etc.*, 4 *Call*, 605, decided in 1803, contains a *dictum* of Judge Pendleton, that interest during the war ought not in justice and equity to have been allowed on debts due to domestic creditors no more than to foreign, but since it has not been attended to, either in practice or judicial decisions, until so much business has been otherwise adjusted, it would be unjust at this late era to introduce it in a particular case, unless in one attended with particular circumstances,"

"Afterwards in 1804, came on the case *Hawkins' Ex'rs.* v. *Minor, etc.*,. 5 *Call* 118, which was an appeal from a decree pronounced by Chancellor WYTHE in the High Court of Chancery. One of the errors assigned on the appeal was, that the chancellor had disallowed interest for the period of the revolutionary war, in a case where both creditor and debtor resided during the war in Virginia; and the court unanimously held that the disallowance by the chancellor of the interest for said period was erroneous."

"In the case of *Crenshaw* v. *Siegfried*, 24 *Gratt*, 274,

one of the questions decided by this court was, that it was error in the court below to deduct interest during the war on a bond given before the war for the payment of a sum of money with interest from date. As the decree by which this deduction was made was pronounced prior to the passage of the Act of the Legislature, the validity of which is drawn in question in the case now before us, this court did not in that case, pass upon the validity of said Act. But Judge MONCURE, in delivering the opinion of the court, said: "Certainly the use of the money is a valuable and legal consideration for a promise to pay legal interest thereon, and even an Act of the Legislature passed to annul or impair such promise would be unconstitutional and void. Of course a decree declaring such a promise to be void, even in the absence of such an act, must therefore be erroneous." After deciding the act in question to be unconstitutional, the court proceeds to say: "And we are further of opinion, that the mere existence of the late war between the United States and the Confederate States does not, alone, furnish any legal ground for the abatement of interest on debts upon contracts during the time such war lasted. We do not mean to say, however, that there may not be special cases, attended with circumstances connected with or growing out of the war, which would furnish legal cause for abatement of interest. When such cases arise, they must be decided according to the law applicable to the peculiar facts and circumstances of each case. We can only lay down the general rule."

In this case appellant pleaded no facts to show that he had any just claim to an abatement of interest during the period of the war.

V. We will now consider the question whether the State had any right of action on the obligation in suit.

ACTION, on bonds to Common School Commissioner. Judicial notice.

The complaint as finally amended, in addition to the allegations above noticed, alleged, in substance, that the obliga-

tion in suit was executed by the defendants (John and Miles Williams) to Nixon as Common School Commissioner of Franklin county, for money borrowed by them of him in his official capacity, and which belonged to him as such commissioner, as funds set apart by the laws and statutes of the State for the purposes of education, and that the principal and accrued interest upon the obligation were now due and owing to the plaintiff, the State of Arkansas, for educational purposes, etc.

How the State became the owner of the obligation, and entitled to sue thereon for the debt and interest, is not alleged in the complaint, and if by reason of public legislative enactments, it was not necessary to plead them, for the court would take judicial notice of them. *Davis* v. *Calvert*, 17 *Ark.*, 88.

By the Act of July 23d, 1868, to establish and maintain a system of free common schools for the State (*Acts of* 1868, *p.* 163) the office of common school commissioner as previously provided for (*See Gould's Dig.*, *p.* 985, *etc.*), was impliedly abolished, and has never been re-established. So when this suit was commenced, Nixon, to whom the obligation sued on was made payable, officially, was not Common School Commissioner of Franklin county, nor had he then any successor in office, for the office did not exist.

By provisions of the Act of twenty-third of July, 1868, all monies, bonds, etc., etc., then belonging to any fund for purposes of education, were made the common school fund of the State, and the common property of the State, and were required to be paid directly into the State Treasury, and if not paid, might be recovered by action to be prosecuted by the Attorney-General of the State, or a District Attorney, when directed by the State Board of Commissioners of the Common School fund provided for in the Act. *See Secs.* 1–8. These provisions were carried into

the subsequent Common School Acts, with an exception which will be presently noticed.

The amended complaint alleged that the obligation in suit was executed to the commissioner for money borrowed of him by the obligors, which had been set apart by the laws of the State for purposes of education; and no doubt the obligation vested in the State for common school purposes by the provisions of the Act of twenty-third of July, 1868.

No assignment by the commissioner of the obligation to the State was requisite to enable the State to sue upon it. The statute transferred the title. Moreover the State could sue under the code as the real party in interest, having control of the fund. *Gantt's Digest, Sec.* 4469.

In the Common School Act of Dec. 7th, 1875, the proceeds arising from the sale or lease of sixteenth sections are excepted out of the Common School Fund of the State. *Sec.* 1.

The counsel for appellant assume that the obligation in suit was for money derived from the sale of sixteenth sections, because they say this court judicially knows that the county commissioners had no other funds to loan, and had no authority to loan any other.

With all due respect to the learned counsel, this court does not judicially know any such thing. On the contrary by the Statute in force when the obligation was executed, the County Commissioners were the custodians of proceeds of the sales of seminary and saline lands, and of monies arising from escheats, fines, forfeitures, etc., which were devoted to educational purposes, and they were authorized to make loans out of the school funds in their hands, and devote the interest to school purposes. *See Gould's Dig., Chap.* 154, *Secs.* 26, 28.

If the obligation was in fact executed for a loan of money arising from sales of sixteenth sections, and if such fact

would have defeated the right of the State to sue on the obligation, it should have been pleaded. Appellant demurred to the complaint, and after the demurrer was overruled, finally went to trial on no other plea than the statute of limitation.

The judgment of the court below must be affirmed.

FRIZZELL v. WILLARD.

1. PRACTICE BEFORE JUSTICE OF THE PEACE: *Setting aside default judgment; Notice of.*

No notice to the plaintiff of an application by the defendant to set aside a default judgment before a Justice of the Peace is necessary.

2. GARNISHMENTS: *Allegations and interrogatories must correspond with writ.*

In garnishments the allegations and interrogatories should conform to the writ. If that be against a single individual, allegations addressed to him and another, alleging a joint indebtedness to the defendant, and interrogatories pursuant to them, are demurrable.

3. SAME: *When effects of defendant in hands of several.*

When the effects of a defendant are in the hands of several, who are jointly liable to him for them, and which are not under the exclusive control of either of them, all must be joined as garnishees before interrogatories can be filed against either.

APPEAL from *Sebastian* Circuit Court.
Hon. J. H. ROGERS, Circuit Judge.

U. M. Rose, for appellant:

Motion to dismiss should have been sustained. *Gantt's Digest*, 3760; *Nelson* v. *Hubbard*, 13 *Ark.*, 253.

Garnishee gave no notice, as required by *Sec.* 3761 *Gantt's Digest.*

The ruling of the court sustaining the demurrer, and dismissing proceedings, was exceedingly technical, and cannot be sustained. *Curry* v. *Woodman*, 53 *Ala.*, 371.

Clendenning & Sandels, for appellees.

EAKIN, J. Frizzell had recovered a judgment against Willard, before a Justice of the Peace, upon which he sued out a writ of garnishment against Hodgins, summoning him individually to appear and answer as required by the Statute. Interrogatories were filed in due time by the plaintiff. The garnishee failed to appear and answer; and, upon the twentieth of June, 1878, the third day after the time fixed for answer, judgment by default was rendered against him for the whole debt.

Within ten days thereafter he appeared before the justice, moved to set aside the default, and made affidavit to the effect that he had been misled by the plaintiff's attorney, to suffer it. The language of the affidavit is, that the said attorney, "well knowing that your said garnishee was not indebted to said defendant, Willard, told said garnishee that it would not be necessary for him to appear at the time specified in the writ; and that he (the said attorney for plaintiff) being satisfied that said garnishee was not indebted to said defendant, would prepare the answer for said garnishee, and send it to him to Greenwood to sign, etc., and thus save him, the said garnishee, of the trouble of appearing at the return day of the writ;" and that, therefore, he failed to appear. He swears further, that before having this understanding with the attorney, he went to the office of the justice, and found that interrogatories had not been filed.

The motion to set aside the default was refused, and the garnishee appealed, giving notice to plaintiff of the appeal, on the eigteenth of July, 1878.

In the Circuit Court the plaintiff moved to dismiss the appeal, because no notice had been given to him of the *motion for a new trial;* and, amongst other things not insisted upon, that the appellant to the Circuit Court "assigns no meritorious reason for the granting a new trial in the court below, nor does he assign any reason for his appeal herein, as required by law."

This motion was refused, and the refusal is one of the grounds of error insisted upon by the plaintiff in the garnishment, who is the appellant here.

1. PRACTICE BEFORE J. P. Setting aside default judgment. Notice of.

The motion made before the justice was not for a new trial or rehearing, under *Sec.* 3761 *of Gantt's Digest*, which required notice to the opposite party. There never had been any trial. It was, in effect, a motion, under section 3760, *to set aside a default*, and required no notice until a new day should be fixed for trial. It did require, however, that a *satisfactory excuse* should be shown for the default, and a meritorious defense.

The excuse shown was certainly sufficient. The meritorious defense is not set forth in positive and affirmative terms, but we think it sufficiently implied that the garnishee meant to assert that he owed the defendant in the judgment nothing, and had no effects in his hands. This much he did swear, positively, in the answer, which the court subsequently struck out. The motion to dismiss the appeal was properly refused by the Circuit Judge. A liberal and common sense view of pleadings and entries before justices, and in other inferior courts, must be taken, or justice will be lost in technicalities, which justices, not learned in the law, cannot be expected to comprehend. The justice ought to

have set aside the default, on what was substantially implied by the affidavit, and the appeal was properly taken.

In the Circuit Court the garnishee filed his answer, denying all indebtedness to the defendant in the judgment, or the control of any of his goods, chattels, effects, etc. This answer, for reasons not very obvious to us, was struck out by the court, as not having been filed in time. The garnishee, however, is not appellant here, and we will not consider this.

He then demurred to the allegations and interrogatories filed by the plaintiff, the same being, in effect, as follows:

1. That the garnishee *and Samuel McLoud* were indebted to Willard in the sum of $125; and

2. That they, at and after the service of the garnishment, had in their hands and possession goods, chattels, etc., belonging to defendant, of the value of $125. The interrogatories, in pursuance of these allegations, and to elicit answers as to their truth, were addressed to the garnishee and McLoud jointly.

The court sustained the demurrer, or objections, to the allegations and interrogatories, and gave plaintiff leave to amend, and defendant to answer them as amended. Plaintiff declined to amend, and the court dismissed the suit. From this judgment Frizzell appeals.

2. GARNISHMENTS: Allegations and interrogatories must conform to writ.

The allegations and interrogatories should have been framed in accordance with the writ of garnishment. That was against Hodgins individually. If he had been, with others, jointly and severally indebted to defendant, Willard, such interrogatories would have been amply sufficient to elicit a response on account of his several indebtedness. It was not necessary to join McLoud in the interrogatories, who had not been garnished, nor necessary to question Hodgins as to any obligation of McLoud, with him, to pay

3. SAME: When effects of defendant in hands several.

Willard money. On the other hand, as to property, effects, etc., which they may jointly have had in their hands, for which they were jointly accountable to Willard, and which was under the exclusive control of neither, if any such there were, it was essential that they should have been joined in the garnishment, before interrogatories could be properly filed against either.

It is the most correct practice to require the allegations and interrogatories to follow the advice in the writ, as to what the garnishee will be called upon and expected to answer, and not require him to answer as to the liability of others not garnished, or as to his joint liability with them, unless it be also several. It is very true that the technicality should not be pressed to defeat apparent rights, revealed by the whole case, and the court very fairly offered leave to plaintiff to amend, which would have let in defendant's answer again; and substantial justice would have been done in the end. He refused to amend, and his case was dismissed.

Allegations amendable.

In the cultivation and perfection of good practice in the Circuit Courts, for the dispatch of business and speedy administration of justice, it is important that the judges should have a fair discretion in matters not substantially affecting the rights of litigants; and it is the duty of attorneys to conform to all fair regulations and reasonable directions. The plaintiff should have amended, and the court had no recourse against refusal but to dismiss the case.

After a successful motion to strike out so meritorious an answer as was put in by the garnishee, we do not think the plaintiff is in position gracefully to complain of undue technicality, in being required to amend his allegations so as to conform to the writ.

Affirm the judgment.

GANS V. HOLLAND, ADM'R. ETC.

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1. PRACTICE: *Transcript from Circuit Court on second appeal.*

On a second appeal to this Court it is not necessary that the transcript contain any of the proceedings previous to the first appeal. They are already here upon the former transcript, and the Court takes notice of them.

2. SALE: *Delivery; what sufficient.*

In a contract for the sale and delivery of cotton, it is not always necessary that the cotton be weighed and the exact number of pounds be set apart, to make a transfer of title. Any agreement to receive on one side, and abandon control on the other, will be sufficient.

APPEAL from *White* Circuit Court.
Hon. J. N. CYPERT Circuit Judge.

STATEMENT.

This suit was originally brought in the Probate Court of White County, in 1867, by Gans against Gist, as administrator of Thomas, on the following instrument:

"STONY POINT, April 25, 1862.

"$895 25.

"Due Leon Gans, eight hundred and ninety-five and 25-100 dollars borrowed money and payment for a mule, for which I promise to deliver cotton at Des Arc, at eight cents per pound, when called on. JOHN F. THOMAS."

The case went to the Circuit Court, on appeal of Gans, and from there to this court, on appeal of the administrator. The principal defense of the administrator was a special plea of *non est factum*, that the words "when called on" were fraudulently added to the instrument by Gans, or his procurement, after it was executed by Thomas, and without his knowledge or consent. Here it was reversed

and remanded, (See *Gist, Adm'r*, v. *Gans*, 30 *Ark.*, 285,) and on its return to the Circuit Court, further pleading and proceedings were had, as set forth in the opinion, resulting in verdict and judgment for the administrator, and appeal by Gans to this court.

W. R. Coody for appellant:

If a party elects to plead in Probate Court, he is bound by all the rules of pleading. *Bellows* v. *Cheek*, 20 *Ark.*, 424.

Appellant states positively that the note was not altered by him, or by his procurement, and there was no evidence which even tends to overthrow his evidence. *Reed* v. *Sothern*, 20 *Ark.*, 454; *Rose's Digest*, *p.* 559–60

As to what is *delivery*, see *Story on Sales*, *Sec.* 305 *to* 310; *Benjamin on Sales*, 221 *to* 240; 9 *Ark.*, 365; 25 *Ib.*, 545; 23 *Ib.*, 244; 19 *Ib.*, 567; 24 *Ib.*, 545; 21 *Ib.*, 563 30 *Ib.*, 505; 4 *Ib.*, 450.

The third instruction for defendant was erroneous, because it left the jury to decide a matter of law. *Bertrand* v. *Byrd*, 5 *Ark.*, 651; 11 *Ark.*, 139; 16 *Ark.*, 569.

The fourth is also erroneous. *Buzzell* v. *Booker*, 16 *Ark.*, 309.

A contract to sell and deliver cotton is not performed, when the weight and value have not been ascertained. *Storey on Sales Sec.* 296, and authorities: *Dennis* v. *Alexander*, 3 *Barr. Rep.* 50, must be *weighed* with the *concurrence* or *acquiescence* of the vendee. 25 *Ark.*, 337; 23 *Ark.*, 245.

A tender must be of the exact amount, and made at the *time* and *place* agreed upon. 4 *Ark.*, 450; 30 *Ib.*, 505; *Benj. on Sales*, 528–9.

J. M. Moore, for appellee.

A case reversed here, upon return to the Circuit Court,

stands precisely as if that Court had never tried it at all. *Harrison* v. *Trader and Wife*, 29 *Ark.*, 85.

This Court will presume, in the absence of omitted evidence, that the verdict was right. *Taylor* v. *Spears*, 8 *Ark.*, 429; *Mitchell* v. *Bird*, 7 *Ark.*, 408.

A delivery need not be to a vendee in person, but may be to an authorized agent. *Crumbacker* v. *Tucker*, 9 *Ark.*, 371. The cases cited by attorney for appellant as to delivery and weighing are not applicable.

As to weighing and delivery, see *Kaufman* v. *Stone*, 25 *Ark.*, 336; *Burr* v. *Williams*, 23 *Ark.*, 244; *Means* v. *Williamson*, 37 *Maine*, 556; *Henning* v. *Powell*, 33 *Mo.*; *Williams* v. *Adams*, 3 *Sneed*, 359; *Bradford* v. *Marbury*, 12 *Ala.*, 520.

Separation and actual setting apart not necessary, when facts show an executed contract and intention to transfer the property to buyer. *Russell* v. *Carrington*, 42 *N. Y.*, 118; 19 *N. Y.*, 330; 14 *Allen*, 376; 2 *Gray*, 195.

The delivery of too much cotton was no cause of complaint, and was not objected to by appellant.

OPINION.

EAKIN, J. This is the same cause which was before the Court under the style of *Gist, Adm'r* v. *Gans*, reported in 30 *Ark.*, 285. Upon this appeal, the transcript only of subsequent proceedings in the Court below, is brought up; but the former transcript is still before us, and the Court takes notice of its contents.

1. PRACTICE: Transcript on second appeal.

Upon the return of the cause to the White Circuit Court, the defendant, Gist, for a *further* defense, pleaded that on a day in the year 1862, "after the making of said contract in its original form," his intestate, Thomas, had performed the obligation by delivering to plaintiff, at the town of

Des Arc, the full amount of cotton. Gist was afterwards discharged from the administration, and Holland, as administrator *de bonis non*, substituted as defendant.

The cause was submitted to a jury upon the issues made, and a verdict was found for defendant. A motion for a new trial was overruled, and judgment accordingly—from which plaintiff appealed.

The note had been duly verified by affidavit and presented to the Probate Court, in the beginning. It was again introduced in evidence.

The plaintiff testified that no alteration had been made in the note, which was in his own handwriting. He explained its appearance by saying that "there was a difference in the color of the ink in the words 'when called on,' and the 'l' in the word April; and accounted for it by saying, that often, whilst writing, he would be interrupted and called away; and, when he would return to his desk, would take up a different pen to finish the writing upon which he had been engaged." He did not swear that it had happened in this particular instance, but that it might have happened. He denied, positively, that he had altered the note, or procured it to be done. He denied that he had ever received any part of the cotton, by himself or by agent.

Gist, the former administrator, testified that, in the Spring of 1862, at the request of Thomas, he went to Des Arc, with some cotton for Gans, which he deposited at the warehouse of "the Stewarts," which was a general depository of cotton, but did not remember stating for whom the cotton was left. It was not weighed. He says that other loads of cotton were carried to Des Arc, although he, himself, accompanied only one. Bales weighed, ordinarily, 450 to 500 lbs.

With regard to the alteration of the note, his memory, he says, is distinct; that when he saw it in 1867, the ink of

the words, "when called on," was fresher in appearance than now. It seemed brighter then, and the difference between those words and others in the instrument was greater.

Duncan Jackson testified that, in the year 1862, Gans told him he had to go to Des Arc to see about his "Thomas cotton," and other business, and requested witness to see to his business until his return. He went, and, on his return, made no complaint about not getting the cotton; made no mention of it at all. Never heard him speak of it again until about three weeks before the trial. He then said he had never received it—that it was burned, and that the whole thing was lost (using quite emphatic language) with the Confederacy. This witness testified, also, as to the difference in the writing in the instrument, and made the same explanation as that made by Gans, as to how it might probably have happened.

Washington Jackson testified that, in 1862, he hauled four or five loads of Thomas' cotton to Des Arc, taking six bales at a load—with one of which Gist went. The cotton was delivered to the person in charge of Stewart's warehouse, who seemed to understand for whom it was intended.

This, with the original note, which was submitted to the inspection of the jury, constitute, substantially, all the testimony.

When this case was formerly before this court, the insertion of the words "when called on," was treated as material, and such as would vitiate the note, or contract, if unauthorized. It has been so treated by the court and counsel in the further progress of the case, and may be considered the law of the case, without further discussion.

It will be found most convenient to take up *seriatim* the grounds of the motion for a new trial. The first is the refusal of the first instruction asked by plaintiff. It does not appear that this instruction was supported by evidence,

and as its refusal is not urged by counsel as matter of complaint, it may be passed *sub silentio*. The court did, very fairly, instruct the jury, on plaintiff's behalf, that the writing sued on was a valid contract, unless they should find that it had been altered by plaintiff, or some person for him, after its execution; and that, in determining whether or not such alteration had been made, they might be governed by an inspection of the note, in connection with all of the evidence bearing on the question; and, further, that if they found the words "when called on" were written before the execution of the instrument, it would be binding. On the question of payment, the jury, on plaintiff's request, were instructed that, before finding for defendant, they must find that the cotton was delivered to the plaintiff or his agent at Des Arc; or that there had been an offer to make such delivery. By these two instructions, the plaintiff's case was fairly presented.

The first instruction complained of, for defendant, as given by the court, is this: That if the jury, from the appearance of the note, or other evidence, find on it a suspicious alteration, they should find for the defendant, unless they should find, also, that the alteration was made with the knowledge and consent of the maker.

Confining this instruction to *material* alterations, as intended (and there was no question of any other), it does not appear at all inconsistent with the principle laid down by this court, when the case was here before. Of course, it is left to the jury to determine, first, what is "suspicious"—and it is not every erasure or interlineation which will be. The jurors bring their common sense, and experience of daily affairs, and their knowledge of the ordinary habits of mankind, to bear upon all such considerations, and are generally shrewd enough to detect, at once, any circumstances of suspicion, as distinct from the ordinary clerical

mistakes, and corrections, of unskilled draughtsmen. The rule in this instruction is laid down, substantially, as it was in the case of *Huntingdon et al.* v. *Finch*, 3 *Ohio St. Rep.*, 445, and approved by this court.

The court, for defendant, instructed the jury that if they believed that Thomas delivered the cotton, or caused it to be delivered, at Des Arc, according to the contract, they should find for the defendant. The criticism is upon the words "according to the contract," which, it is said, submits a matter of *law* to the jury. It does not seem so. The writing, if valid, was plain and the jury might determine very well, as a matter of fact, whether there had been a delivery of cotton. As to what in law would constitute a delivery, was a matter, which, if the plaintiff had supposed it doubtful, he might have asked the court to define.

The seventh instruction given for defendant—passing over the fifth, upon which no point was made, is as follows:

"The jury are also instructed that if they find that there was no alteration of the note; then if they further find that Thomas carried the cotton to Des Arc; and Gans, at or afterwards went there to receive or see about it, saying 'he was going to see about his Thomas cotton,' these are facts *to be considered by the jury*, as evidence that the cotton was carried to Des Arc at Gans' request, and if they so believe, they will find for the defendant."

2. SALE OF COTTON: Delivery, what sufficient.

The evidence was that Thomas had had cotton hauled for Gans, to Stewart's warehouse, in Des Arc, as much as four or five loads of bales, weighing from 450 to 500 lbs., and six bales to the load, which had been received there by the warehousemen, without question, as if they understood the matter. The cotton was more than enough to discharge the obligation; and if taken by Gans in discharge, even with an implied obligation to account for the excess, would have

Weighing and setting apart, not always necessary.

passed to Gans as his property, without any weighing or other designation. It is not true that cotton must be always weighed and the exact number of pounds set apart to make a transfer. It is generally done before property is received, but it is not at all essential. Any agreement to receive on one side and abandon control on the other, of property, is sufficient to transfer title.

It must be confessed that the evidence of the delivery and transfer of the cotton to Gans, in this case, is very meagre and unsatisfactory, but it was *competent* evidence, nevertheless, so far as it went; and considering the lapse of time and the disturbed state of the country, and the better acquaintance of the jury with the circumstances of their particular locality, and the modes of business prevalent at the time in the community, if it is satisfied, then we do not feel authorized to disturb the verdict. We cannot say there was no evidence of a substantial nature to sustain the verdict on the ground of payment.

The jury came into court after retirement to ask an explanation of instructions. The court told them orally, "that if they believed the cotton was taken by Thomas to Des Arc, and left there at the request of the plaintiff, it was a delivery within the terms of the contract." It is always understood in these off-hand instructions, that the belief must arise *from the evidence*, and if either party desires to have this impressed on the jury, it may easily be done. The oral instruction is not amenable to criticism.

There are less important objections to the verdict, not useful to notice. We have no legal means of knowing whether it was rendered upon the ground of payment, or the invalidity of the note, resulting from the alteration. There was evidence on both points, and we think the matter was fairly left to the jury. We cannot say that a verdict for the plaintiff would have been more satisfactory.

Affirm the judgment.

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HAGLIN & POPE v. ROGERS, CIRCUIT JUDGE.

1. CHANGE OF VENUE IN CIVIL CASES: *Payment of fees in fifteen days not necessary to transfer.*

A fair construction of the statute for the change of venue in civil cases is to allow the clerk, after the expiration of the fifteen days allowed for the payment of the fees, to waive their non-payment, and transmit the papers, if so disposed, although he cannot be compelled to do so; and to make the jurisdiction of the Court, to which the venue is taken, to depend not at all upon the payment of the fees to the clerk, but upon the reception of the papers, accompanied by the record, under seal of the order of the Court transferring the cause. ENGLISH, C. J., dissenting; holding that payment of fees within the fifteen days was prerequisite to jurisdiction.

For the facts of this case, see the dissenting opinion of Chief Justice ENGLISH, page 500, where they are fully stated, and are, therefore, omitted here. REP.

Wm. Walker, for petitioners.

Mandamus the proper remedy. 7 *Peters*, 634; *Green's Plead, and Practice*, 1178–1187; *People* v. *Sup. Court*, 10 *Wend.*, 285. The general rule that a mandamus will not lie, when party has another remedy, must be understood to refer to some *specific* remedy, which will place the party in the same situation in which he was before the act complained of. *Etheridge* v. *Hall*, 7 *Porter*, 47; *People* v. *Supervisors*, 12 *Barber*, 217; 17 *Ala.*, 527; 13 *Penn.*, *St.* 72; 2 *Nash*, 1306.

When it is the manifest intent of a statute to give protection to individuals who are *sui juris*, the act prohibited is voidable only by proceedings by the person intended to be protected. *State* v. *Richmond*, 26 *N. H.*, 232; *Green* v. *Kemp*, 13 *Mass.*, 515; *Rix* v. *Hipwell*, 8 *B. & C.*, 466, 470; *St. Nicholas* v. *St. Peter*, *Stra.*, 1066; *Terrell* v.

Auchanen, 14 *Ohio*, 80; *Beecher* v. *Marquette, etc. Mill Co.*, *Reporter, Vol. XI, No.* 15, *Apl.* 13, 1881.

After change of venue made and case transferred, the court cannot dismiss because of omission to pay costs. 20 *Mo.*, 159; *Snow Ex-Parte*, 28 *Ark.*, 471.

F. W. Compton, for petitioners.

I. The court has jurisdiction. See cases cited by Mr. Walker, and *Beecher* v. *Marquette, etc., supra.*

II. Mandamus proper remedy. *Ex-Parte Bradstreet*, 6 *Peters*, (*U. S.*) 647; *Saunders* v. *Nelson*, *Ct. Ct.*, *Hardin's Rep.* (*Ky.*) 17, (precisely in point); *Kemp* v. *Porter*, 6 *Ala.*, 172; 7 *Ib.*, 459; 4 *Ib.*, 569; 34 *Ib.*, 446; 46 *Ib.*, 384; 5 *Ib.*, 130; 4 *Ib.*, 339; 9 *Ark.*, 240; 14 *Ark.*, 368; 10 *Ark.*, 243.

M. H. Sandels, for respondent.

I. The act was the exercise of a judicial discretion.

II. The construction given the Act Jan. 23d, 1875, was a correct one.

Mandamus should not be awarded when court has discretion. 3 *Black. Com.*, 110; 2 *Strange*, 881; 19 *Johnson*, 260; 5 *Wendell*, 122; 34 *Ark.*, 394; 18 *B. Mon.*, 426.

The Act mandatory, not directory. *Dwarris on Statutes*; 9 *Porter* (*Ala.*) 268, 269; 34 *Ark.*, 491.

It is only where the meaning of the Legislature is obscure, and cannot be educed from the Act, that the courts can construe it. *Sedgwick Stat. and Con. Law*, 379.

Provision not for benefit of clerk, but of adverse party.

As to construction of statute, see 4 *Nebraska*, 336; 7 *Nevada*, 108; 13 *Wallace*, 511 (*First paragraph*); 60 *Penn. St.*, 464, 466.

EAKIN, J. By Act of January 23, 1875, any party to a suit, upon his own verified petition, supported by the affidavits of two credible witnesses, may obtain an order for a change of venue. The order may be made in term time, at the calling of the case, or by the judge, at any time, on due notice to the adverse party or his attorney.

Section 4 of the Act provides that in all cases where such order may be made, the clerk shall make a certified copy of all the orders in the case, and "*upon the payment of the transmission fees, hereinafter provided,*" shall transmit the papers in the case to the clerk of the court to which the venue is changed, for which he shall receive ten cents a mile both ways, to be paid by the party obtaining the order.

Sec. 5 is, in full, as follows: "If the above mentioned fee is not paid, or arranged with the clerk, within fifteen days from the granting of said order, the order shall be null and void. *Provided*, That the judge granting the order may extend the time of making such payment, which shall be stated in the order. *Provided* further, That the adverse party, if he chooses, may make such payment. But one order for a change of venue shall be granted to the same party in the same action."

By Section 6, it is provided that the action shall stand for trial in the court to which the change is made, at the first term commencing more than ten days from the filing of the papers in its office.

In this case the papers were transmitted to, and filed in the office of the Crawford Circuit Court, more than ten days before the commencement of its next term after the order had been made, but the fees were not paid nor arranged, as the affidavit states, within fifteen days after the order. The only question is, upon the construction of the 5th section.

Is it imperative that the fee should be paid or arranged within the time, or the order shall be as if never made? Or is it allowable to the clerk to transmit the papers within a reasonable time upon payment of the fee, or without any payment of the fees at all?

1st. As to the propriety of the writ of mandamus.

The law never presumes nor admits its own uncertainty. Acts may be difficult to construe; principles hard to discover. They may require of the judges patient thought, laborious investigation of authorities, and the aid of learned counsel. But when constructions are made, or principles cleared, the courts *adjudge* the law. They do not create or determine it by discretion. It is announced as what it was, and is. If a law be indeed mandatory, leaving in the judge no discretion as to obedience, it is none the less so, because he may at first mistake its meaning, or find it difficult of discovery. The duty to construe, does not destroy the obligation of obedience, nor make that a matter of judicial discretion, which, if more clearly expressed, would at first have been seen to be mandatory.

The Hon. Circuit Judge construed the law to be, in accordance with the plain import and strict construction of the *language* of the Act, and made the efficacy of the order for removal to depend alone upon the *fact* of payment, or arrangement; holding that to transfer the jurisdiction, the fee must not only have been paid to, or arranged with, the clerk, but also that it must have been done within fifteen days from the time of making the order; holding further, that the failure was a matter which might be shown by affidavit.

Statutes are to be construed according to the *intention* of the Legislature, of which the *language* of the Act is ordinarily the test, but not always the conclusive indication. Cases sometimes arise in which the courts, to reach the *true* intention, must disregard the ordinary significance of

the language. Neither grammar nor etymology are parts of the Common or Statutory Law. They constitute its "context," in which, according to the quaint old English writers, it is not well to stick. They but clothe the Legislative intent, which makes the *equity* of Statute, and is more potent than language. After the intention is *discovered*, then the courts have nothing to do with its policy, but must enforce it, if constitutional.

Mr. Sedgwick, in his work on *Const. and Statutory Law*, *p.* 254, 2*d Ed.*, supporting the remark by full citations, says: that it "has been repeatedly asserted and practiced upon by the highest authority" that in construing a Statute, "the judges have a right to decide, in some cases, even in *direct contravention* of its language." The remark has been approvingly quoted by Mr. Hammond in his notes to *Siebers* "*Legal and Political Hermenentics*," *appendix*, *p.* 285; and the digests of the several American States show its universal adoption. Let us be content for the present to notice some decisions to the same effect, of our own, as follows: *Reynolds* v. *Holland*, 35 *Ark.*, 56; *Haney* v. *The State*, 34 *Ib.*, 263; *Wassell* v. *Tunnah*, 25 *Ib.*, 101; *McKenzie* v. *Murphy*, 24 *Ib.*, 155.

In *Woodruff* v. *State*, 3 *Id.*, 285, it was held, that when the intention of a Statute should be discovered, it ought to be followed, although it might seem contrary to the letter.

In *Wilson* v. *Biscoe*, 11 *Ib.*, 44, it was considered that, if from a view of the whole Act, the *intent* is different from the literal import of some of its terms, then the intent should prevail.

By *Sec.* 2 *of Chap.* 101 of the *Revised Statutes*, it was provided that "every mortgage, whether for real or personal property, shall be a lien on the mortgaged property from the time the same is filed in the recorder's office for record *and not before*." No language could be stronger,

more express or explicit to convey the idea, that a mortgage should be no lien at all, before that time. Yet this court in *Main et al.*, v. *Alexander*, 9 *Ib.*, 112, held and has ever since rigidly adhered to the position that every mortgage *was* a lien between the parties, from the time of its execution, whether recorded or not. Chief Justice Johnson, in delivering the opinion, conceded that the language of the Act was exceedingly broad and comprehensive, and, if taken in a literal sense, would forbid the creation of a lien by an unrecorded mortgage. Yet the court would not conceive that the Legislature *really intended* so unreasonable a thing as to prevent parties from making such contracts between themselves, where third persons could not be injured; although there was nothing in the law, beyond the reason of it, to show that the Legislature meant any thing else than it had said. A stronger case of the utter disregard of language, subordinating it wholly to intention, in the absence of all constitutional objections, cannot be found. The propriety of this decision, in this respect, has never been questioned.

With these views we will return to the case in judgment.

The Act is strictly remedial, and to be construed liberally, to meet the evil intended to be alleviated, and to advance the remedy. "Everything is to be done in advancement of the remedy that can be given, consistently with any construction that can be put upon it." *Sedgwick on St. and Const. Law*, *p.* 309. The evil to be avoided was the hardship of compelling suitors to go to trial in any county, where there might be against them, or their cause, an undue prejudice. Every citizen instinctively feels the injustice of being compelled to submit to this, and a change of venue is almost necessary, to preserve confidence in the impartiality of the courts. This policy of changing the venue is to be advanced, and not embarrassed nor retarded, and those con-

structions which have the latter effect are to be avoided, if any others can be found consistent with the intent.

A secondary policy is also manifest, with the evil it is intended to remedy. The expense of transmitting the transcript between the counties, if made to fall upon the clerk, would be oppressive—even if he were only required to advance them, to be ultimately repaid. They would, in each case, be certain, being twenty cents for each mile of distance. It was a plain, sensible, and obvious provision to require that the sum requisite for the purpose should, at an early day, be deposited with the clerk; and, as an incentive to prompt payment, to provide that unless that were done, the order made upon him, though peremptory in its terms, should have no binding force. He need not obey it, even if payment should be afterwards tendered. As to himself, he might consider its efficacy gone—"null and void." But there is nothing within the Act which rigidly requires him, in any case, to send over the papers within any definite time. They ought, if reasonably possible, to be at their destination full ten days before the term of the court to which the venue may be changed; but he might not be able to do that in fifteen days—even if the fee had been paid to him the day after the order; and there is nothing apparent, in the reason of things, which would seem to preclude him from sending them with or without any tender, or payment, or arrangement for the fee, at all. Upon the other hand, it is suggested very plausibly, and the suggestion has received the grave consideration it deserves, that the clause of the proviso is *not* wholly, nor even principally, for the benefit of the clerk; but that it is the policy of the Act to require payment in the limited time to stand as notice to the opposite party that the removal has been perfected, and the order converted from a conditional to a positive nature. If this were the design, the

clerk could not receive the fee after the time, nor transmit the papers so as to have any effect.

There is nothing in the language of the Act to indicate any intention other than that of protecting the clerk. In the first place, such notice as is supposed does not seem highly essential. The order for the change is made either in open court, with the knowledge of all parties; or in vacation, on express notice. The opposite party knows where to follow the case; and, if the papers are not transmitted ten days before the next term, he knows that he need not attend. The Circuit Court business is done through attorneys, whose easy access to, and familiarity with, the clerks, render it easy, at all times, to keep watch of the case. But, above all, we feel sure that if the Legislature had meant to provide that the opposite party should know, definitely, in fifteen days, to which court he was to resort thereafter, or had had that in view, in framing the Act, it would have adopted some apter mode, than to require that knowledge to be ascertained from something done privately between the petitioner and the clerk—or something which need not be done at all, but only in some vague fashion arranged; and concerning which the clerk need make no public entry, nor, so far as the law is concerned, tell a human being. Such an intention is not reasonably to be presumed from anything in the language of the Act. It is ingeniously reasoned out, but, after all, it is a mere speculation as to intent. The Legislature might have effected the policy indicated, very easily, by directing that the order for change of venue should be provisional, on the subsequent performance of some act in the clerk's office within a certain time, to be noted of record, which would be notice to both courts, and to the parties in the suit, of the precise time when the jurisdiction had shifted. It did not do that, nor intimate an intention of accomplishing such an object.

Many inconveniences, with much confusion and uncertainty of jurisdiction, would surely arise from adopting the construction of the respondent. Neither court might, for a long time, know where the jurisdiction really was, and much work might be idly done. For, if the objection be good at all, it would, in local causes, remain good after years of litigation and enormous expense. It might, then, be insisted for the first time, by one party or the other, that the fee had not been really paid within fifteen days, but in sixteen, or some other time; and the clerk had concealed the fact. Or, if the papers had not been transmitted, and the cause had proceeded in the original court, it might transpire that the fee actually had been paid in the fifteen days, and, for some cause, or change of purpose, the papers had not been sent. In either case, the whole proceedings might be void; in the first, because jurisdiction had never been acquired; in the last, because it had been irrevocably divested. Besides, it does not comport with the respect and confidence due the records of Superior Courts, to make the validity or invalidity of orders positive on their face, depend upon the occurrence or non-occurrence of trivial facts *en pais*, between individuals. We will not readily attribute to the Legislature such intent.

A fair construction of the Statute—the one attended with the fewest inconveniences, and absurdities, is to allow the clerk, after the fifteen days, to waive the non-payment of the fees, and to transmit the papers, if so disposed, although he can not be compelled to do so, and to make the jurisdiction of the court, to which a change of venue may be taken, depend, not at all upon the small matter of the payment or arrangement of a few dollars with the clerk, but upon the reception of the necessary papers, accompanied by the record, under seal, of the solemn order of the court transferring the cause.

We think the response to the alternative writ insufficient, and direct that it be made peremptory.

ENGLISH, C. J., dissenting. Differing with my brother Judges in this case, I will state my reasons for dissenting.

The facts are briefly as follows:

In a civil suit pending in the Circuit Court of Sebastian county, for the Fort Smith district, in which Haglin & Pope were plaintiffs, and Falconer and others were defendants, an order was made by the court, upon the application of the plaintiffs, on the fifth of January, 1881, for change of venue to the Circuit Court of Crawford county.

The papers in the suit, and a transcript of the record entries, were filed in the office of the clerk of the Circuit Court of Crawford county, on the first of April, 1881, and the next term of that court commenced on the eleventh of the same month.

At that term of the Crawford Circuit Court the defendants in the suit filed a motion to strike the cause from the docket, for want of jurisdiction, because the transmission fees had not been paid to, or arranged with, the clerk of the Circuit Court of Sebastian county for the Fort Smith district, within fifteen days from the date of the order made by that court for the change of venue, as required by the Statute.

In support of the motion, the affidavit of J. C. Stalcup was filed, in which he states, in substance, that he was the deputy Circuit Clerk of Sebastian county, for the Fort Smith district. That his principal, W. J. Fleming, was in charge of the office in the town of Greenwood, in the Greenwood district of said county; and that affiant had charge of the office at Fort Smith, in the Fort Smith district, and attended to all the business of the office. That no one else

transacted any of the business. That Fleming occasionally visited the office at Fort Smith, but did not perform any of its duties, nor did he receive any fees, or arrange for them. Affiant remembered the order for change of venue, in the case of *Haglin & Pope* v. *Falconer*, and others made on the fifth of January, 1881. The fees required by law to be paid him were not paid or arranged with him within fifteen days from the date of the order for change of venue. Something was said to him about making out the transcript about three months before he made it, and he was then told that the fees would be ready when the transcript was made. The fees were paid on the twenty-sixth of March, 1881.

On the hearing of the motion the court found, as matter of fact, that the order for the change of venue was made fifth of January, 1881, and that neither the plaintiffs nor defendants had paid or made arrangements with the clerk of the Circuit Court of Sebastian county for the Fort Smith district for the fees allowed him by law for transmitting the papers in said case to the clerk of the Crawford Circuit Court until the twenty-sixth March, 1881, which was more than fifteen days from the date of the order changing the venue; and the court declared, as matter of law, that the fifth section of the *Act of January* 23, 1875, requiring the transmission fees to be paid or arranged within fifteen days, etc., was mandatory, and the failure to do so rendered the order for change of venue null and void. Wherefore, the court sustained the motion, and ordered the cause stricken from the docket and files of the court for want of jurisdiction.

The plaintiff filed a motion to vacate this order, and to reinstate the cause upon the docket, and to proceed to the trial thereof, which motion the court overruled, and plaintiff took a bill of exceptions, setting out the facts.

Afterwards the plaintiff applied to this court for a mandamus, to compel the Hon. John H. Rogers, as Judge of

the Crawford Circuit Court, to reinstate the cause on the docket, and to proceed to the trial thereof. An alternative writ was awarded, in response to which his Honor, the Circuit Judge, stated no facts, other than such as are shown by the transcript of the record accompanying the petition for mandamus, but adhered to his opinion, that the Statute in question was mandatory.

The order of the court, striking the cause from the docket and from the files, for want of jurisdiction, whether rightfully or wrongfully there, was in the nature of a final order disposing of the case, which might be reviewed on appeal or writ of error.

It was the judgment of the Circuit Judge that the order changing the venue was null and void, by reason of the failure of the relators to comply with the condition, in legal effect, on which it was made, under the Statute, and it is submitted, with all due respect for the views of my brother Judges, that the purpose of this case is to control his judgment by mandamus.

Passing over this question of appellate practice, however, and proceeding to the principal question in the case, the first, second and third sections of the Act of 23d January, 1875, provide that any party to a civil action, triable by jury, may obtain a change of venue in the manner, and for the causes indicated, in term time or in vacation. Section 4 provides that in all cases where an order for a change of venue is granted, the clerk shall make and file with the papers a certified copy of all orders in the case, and upon the payment of the transmission fees, hereinafter provided, shall transmit the papers in the case to the clerk of the court to which the venue is changed, by any safe and convenient mode which he may select, he being responsible for the same, for which he shall receive ten cents per mile to

and from said clerk's office, to be paid by the party obtaining the order, and to be taxed in the costs."

Section 5 provides in plain and unambiguous language, that "if the above-mentioned fee is not paid or arranged with the clerk within fifteen days from the granting of said order, *the order shall be null and void, provided*, that the judge granting the order may extend the time of making such payment, which shall be stated in the order; *provided* further, that the adverse party, if he chooses, may make such payment. But one order for change of venue shall be granted to the same party in the same action."

It cannot be supposed that the lawmakers did not understand the meaning of the plain words used in the 5th section: "The order shall be *null and void*," and there is nothing in the whole Act from which it may be inferred that they were intended to be used in a different sense from that which they express.

A party to a civil action has no constitutional right to a change of venue. It is a favor which the Legislature may grant or withhold at its pleasure; and it may be granted on such terms and conditions, and under such regulations as the Legislature may think proper to prescribe.

There is nothing hard or unreasonable in the provision of the Act, that the party obtaining the order for change of venue shall pay to, or arrange with, the clerk, the transmission fee within fifteen days from the granting of the order, or it shall be null and void. If he thinks, when he obtains the order, that he will not be able, or it will not be convenient for him to pay the cost of transmission within the fifteen days, the court is authorized to extend the time, on his application. The amount to be paid will be easily ascertained when the court names the county to which the venue is to be changed. If he does not ask for extension, and neglects to pay or arrange the fee with the clerk, within

the time prescribed by the Act, as in this case, it is his own fault that he forfeits the benefit of the order.

Whether it was wise or unwise for the Legislature to declare that the order should be null and void, upon such failure, is not a question for the courts. It is not their province to make or alter the law, but to administer it as written; nor can they resort to strained constructions to avoid what they may regard as an inexpedient or rigid provision of an Act.

The rule is well established, that where a law is plain and unambiguous, whether it be expressed in general or limited terms, the Legislature must be intended to mean what it has plainly expressed; and, consequently, no room is left for construction, *Eason* v. *State*, 11 *Ark.*, 495.

The fittest course, (says Mr. DWARRIS,) in all cases where the intention of the Legislature is brought in question, is to adhere to the words of the statute, construing them according to their nature and import, in the order in which they stand in the Act of Parliament. The judges are not to presume the intentions of the Legislature, but to collect them from the words of the Act, and they have nothing to do with the policy of the laws, etc. *Ib.*

If the Legislature had merely declared that the transmission fee should be paid or arranged within fifteen days, and said nothing more, this might have been treated as directory. But the Act goes further, and declares what shall be the consequence, or penalty, for failure to comply with its requirements; and that is, that the order changing the venue shall be null and void; and this is the test that it was intended to be mandatory. *Falconer* v. *Shores*, *ante* 386.

In *Main et al.* v. *Alexander*, 9 *Ark.*, 116, the words of the statute, providing for the registration of mortgages, being plain, the court did not resort to construction, but

followed them. Registration was unknown to the common law. The object of the registration statutes was the protection of subsequent purchasers and creditors. The statute plainly provided that a mortgage properly acknowledged should be a lien on the mortgaged property, from the time it was filed in the recorder's office, and not before, and so the court said, But, of course, between the parties, the unregistered mortgage was valid, as at common law.

It is true, that where it is necessary to resort to construction, and the intention of the Legislature is clearly manifested by the scope of the Act, particular words may be made to yield to that intention, and some of the cases cited by Brother EAKIN illustrate that rule. But, in the section of the Act in question, the lawmakers have plainly said that if the transmission fee be not paid or arranged within the time prescribed, the order changing the venue shall be null and void, and there is nothing in the whole act from which it may be inferred that they did not mean what they said.

Courts would have saved much trouble and prevented litigation if they had followed the plain words of Statutes, and administered them as written, instead of resorting to strained construction, as they have frequently done, to get rid of provisions which seemed to them rigid or unwise.

It is conceded by my brother Judges that if the fee is not paid or arranged within the time limited by the act, the clerk cannot be compelled thereafter, on tender, to make out and transmit the transcript and papers. And why not, if the act is merely directory, and the order changing the venue does not become null and void on the failure?

If not null and void on such failure, when does it become so? If some other time or contingency be named, it is not in the Act; the Legislature having prescribed no other event on which the order is to become null and void.

In this case the clerk was not paid the fee, and did not

transmit the papers to the Crawford Circuit Court until nearly three months after the order was made. If such neglect and delay did not avoid the order, why should neglect and delay for six months or a year avoid it? If the Statute is to be treated as directory and not mandatory, then it should be left to the sound discretion of the Circuit Court to determine what measure of neglect should deprive the party obtaining the order for change of venue of the benefit of it, and such discretion, unless abused, would not be overruled on appeal or writ of error, and certainly not on mandamus.

The clerk is not alone concerned in a compliance with the Statute. On the expiration of the fifteen days the party against whom the order for change of venue is made has the right to inquire of and be informed by the clerk whether the Statute has been complied with. If not, he may regard the order as avoided, and make no preparation for the trial of the case in the court, to which the venue is changed. If after that the clerk may at any time accept the fee, and transmit the papers, the party relying upon the Statute may be surprised and put to disadvantage.

Under the view of my brother judges, the order may be void or valid, at the will and pleasure of the clerk, where the fee has not been paid or arranged within the time fixed by the Act. The law is not so written.

In my judgment a peremptory mandamus should not be awarded against the Circuit Judge in this case.

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BOWEN, TRUSTEE, v. FASSETT.

1 MORTGAGE: *Filing, with directions not to record.*

A mortgage filed in the recorder's office, with directions not to record it, is not filed *for record,* within the meaning of the Statute, and is no lien upon the property as against strangers to it.

APPEAL from *Mississippi* Circuit Court.
Hon. L. L. MACK, Circuit Judge.

O. P. Syles, for appellant:

The trust deed was notice to the world, and was a lien from May 21, 1875. The deposit with the clerk is the filing; the endorsement simply a memorandum of time of filing. *Oats* v. *Walls*, 28 *Ark.*, 244; 2 *Washburn Real Property*, *top page* 591. See also *Gantt's Digest*, *secs.* 5024, 5025.

ENGLISH, C. J. This was a code action, in the nature of trover at common law, brought in the Circuit Court of Mississippi county, by W. J. Bowen, as trustee for the use of Driver & Jones, against Joseph Fassett, for the value of five bales of cotton.

Plaintiff claimed the cotton by virtue of a deed of trust executed to him, as trustee, on the twenty-first of May, 1875, by Esau Trust, for the use of Driver & Jones.

The deed was upon the then growing cotton crop of Trust, and was executed by him as security for $150 advanced by Driver & Jones, to enable him to make his crop.

Defendant claimed the five bales of cotton in controversy, under a written contract made between him and Trust, Dec. 1, 1874, by which he leased to Trust fifty acres of land, at

$10 per acre, for the year 1875, and agreed to furnish and sell to him feed, team and tools, so far as necessary, for cultivating the land; and Trust bound himself to turn over to defendant the cotton crop as fast as gathered and prepared for market, until all his indebtedness was paid.

The contract was not acknowledged or recorded.

The evidence introduced on the trial conduced to prove that defendant got into his possession the whole of the cotton crop of Trust, and sufficient to pay the rent, for which he had a landlord's lien, without the five bales of cotton in controversy, but not enough, including them, to pay the rent and other indebtedness of Trust.

Plaintiff claimed that after the rent was paid he was entitled to the remaining five bales of cotton, under the trust deed, and his theory was, that the trust deed was filed for record in the recorder's office on the twenty-first of May, 1875, the day it was executed and acknowledged. The contention of defendant was that the deed of trust was not filed for record until the thirtieth of November, 1875, and that before then he had obtained possession of the five bales of cotton on account of Trust's indebtedness to him.

The whole case really turned upon this question, and though others were raised at the trial, none other has been argued here.

MORTGAGE: Filing, with directions not to record.

The court instructed the jury that: "The filing of the plaintiff's deed of trust in the recorder's office, with instructions to the recorder not to enter the same of record, is not a filing of the same for record, as contemplated by the Statute."

Instructions moved for plaintiff, and refused by the court, assumed that the deed of trust was filed for record when it was deposited with the recorder, twenty-first of May, 1875.

The verdict and judgment were for defendant; a new trial was refused plaintiff, and he appealed.

In the transcript before us the deed of trust is copied, then the certificate of acknowledgment, then two certificates of registration, as follows:

FIRST CERTIFICATE.

"STATE OF ARKANSAS, }
COUNTY OF MISSISSIPPI. }

"I, J. K. P. Hale, Clerk of the Circuit Court, and ex-officio Recorder for the county of Mississippi, do hereby certify that the within and foregoing instrument of writing was filed in my office on the twenty-first day of May, A. D., 1875, and is now duly recorded in Deed Record 6, pages 292 and 293.

"In testimony whereof, I have hereto set my hand
[L. S.] and affixed the seal of said court, on this, the twenty-first of May, 1875.

"J. K. P. HALE, *Clerk.*"

"STATE OF ARKANSAS, }
COUNTY OF MISSISSIPPI. }

"I, J. K. P. Hale, Clerk of the Circuit Court, and ex-officio Recorder for the county aforesaid, do hereby certify that the annexed and foregoing instrument of writing was filed *for record* in my office on the *thirtieth day of November, 1875*, and the same now duly recorded in Record Book, vol. 6, pages 292 and 293.

"In testimony whereof, I have hereto set my hand
[L. S.] and affixed the seal of said court, on this thirtieth day of November, 1875.

"J. K. P. HALE, *Clerk.*"

The only evidence introduced on the trial to explain these two certificates, set out in the bill of exceptions, was as follows:

"J. K. P. Hale introduced (by defendant) and sworn, testified: When Mr. Driver brought me the deed of trust (deed of trust shown him, introduced by plaintiff, executed between Trust and plaintiff), in May, 1875, he told me he did not want it recorded, but merely to remain in the office, as he did not wish to pay the fees. Accordingly, I filled up the certificate on the outside of said deed, erasing the words, '*for record.*' When the deed was afterwards recorded in November, I completed the certificate by stating the book, page, etc. On the thirtieth of November, 1875, Driver came to me and instructed me to put the deed on record, which I did, and made the certificate appended to the inside of said deed."

This testimony was given without objection.

By Statute, every mortgage on real or personal property, properly acknowledged, is a lien on the property mortgaged, "from the time the same is *filed for record* in the recorder's office, and not before." *Gantt's Digest, Sec.* 4288. And the Statute applies to deeds of trust. *Hannah* v. *Carrington*, 18 *Ark.*, 86.

And by *Sec.* 860, *Gantt's Digest*, a properly acknowledged deed, etc., is made constructive notice to all persons, "from the time the same is *filed for record* in the recorder's office," etc., and it is made the duty of the recorder "to endorse on every such deed, bond, or instrument, the precise time when the same is *filed for record* in his office."

The first certificate of the recorder made upon the deed of trust in question, and above copied, was not in compliance with the Statute, for a reason which he was permitted, without objection, to state.

The second certificate was in conformity with the Statute.

The recorder should have made no indorsement upon the deed when it was left with him by Driver, one of the beneficiaries, with instructions not to record it, because he did

not wish to pay the fees. It was not then filed for record within the meaning of the Statute.

This case is unlike *Oates* v. *Walls*, 28 *Ark.*, 244, relied on by counsel for appellant. In that case the mortgagee filed the deed for record, and paid the fees, and it was properly endorsed, but afterwards withdrawn by mistake before it was recorded.

The court did not err in giving the instruction above copied, nor in refusing such of appellant's instructions as were based upon the theory that the deed was filed for record on the twenty-first of May, 1875.

As to other questions, the charge of the court to the jury is not complained of here, and the evidence warranted the verdict.

Affirmed.

TALIEFERRO EX'R., V. BARNETT.

1. TITLE: CLOUD UPON. *Test of. Injunction.*

When a sheriff's deed would contain such *prima facia* evidence of title in the purchaser, that, to avoid it, proof of extraneous facts by the owner of the land would be necessary, it would be a cloud upon the title; and if the court, to remove such cloud, would set aside the deed if made, it will interpose to prevent the sale that would result in making such deed.

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2. LIEN: *Created by recital in deed.*

The recital in a deed that the "land is held bound for the payment of the notes" given for it, creates a valid express lien upon the land for payment of the notes.

3. SAME: *Created by agreement, by and against whom enforced.*

A lien created on real or personal estate by the express agreement of the owner will be enforced in equity not only against him, but also, against any one afterward acquiring the estate with notice of

the agreement. Such lien is in the nature of a trust which equity will compel the holder of the legal title to perform. And in equity it passes by assignment of the debt it was created to secure. The cases of *Shepherd* v. *Thompson*, 26 *Ark.*, 617, and *Jones* v. *Doss*, 27 *Ark.*, 518, overruled.

4. PLEADING. *Parties, who necessary.*

It is a general rule that all persons materially interested in the subject matter of the litigation should be made parties to the suit, either as plaintiff or defendants.

APPEAL from *Dorsey* Circuit Court in Chancery. Hon. W. D. JOHNSON, Special Judge.

STATEMENT.

In November, 1874, Barnett filed in the Circuit Court of Dorsey county, his complaint in equity against M. T. McGehee, alleging in substance, that on the sixteenth day of December, 1871, he purchased from W. L. Pauley and his wife Susan, the following lands in that county, to-wit: the southeast of northeast quarter and northeast of southeast quarter, of section 34, and southwest of northwest quarter and northwest southwest quarter, section 35, in township 9 south, range 9 west, for $340, which he paid; and they, by their deed of that date, conveyed the same to him. The deed is exhibited. That since said purchase he has learned that said Pauley and one H. J. Glover had executed to one A. D. Stewart two promissory notes, stated to be for the purchase money for said lands, but the said Stewart never owned or pretended to own said lands, nor at any time attempted to convey them to any one. The second of said notes was dated on the twenty-ninth day of December, 1869, due and payable to said Stewart for the sum of one hundred and seventy-five dollars on or before the first day of January, 1872; and was, about the twenty-seventh day of December, 1869, transferred by said Stewart to the defendant

McGehee, who had obtained judgment on it against said Pauley and Glover before a Justice of the Peace, and caused a copy of the judgment to be filed in the office of the Circuit Court clerk, and an execution to be issued on it by said clerk, and to be levied by the sheriff of the county upon said lands, who had advertised and was threatening to sell them.

The plaintiff further alleges that he had no notice of the existence of the note until long after his purchase; that the proceedings of McGehee are a fraud upon his rights; that the judgement is no lien upon his lands, and McGehee's action is calculated to throw a cloud upon his title and do him great injury. He further charges that Stewart, by transferring the note to McGehee, lost his lien on said lands, if he ever had any, and that McGehee had not thereby acquired any lien. Prayer for an injunction to restrain the sheriff from selling said lands and for general relief.

A temporary restraining order was issued by the County Judge—the Circuit Judge being absent from the county.

At the following term the defendant answered, alleging in substance, that the lands had before belonged to one Eliza Comer, who, on the twenty-seventh of December, 1869, sold and conveyed them to said W. J. Panley and H. J. Glover for a certain consideration agreed on between them, a part of which was said note set forth in the plaintiff's complaint. A deed of Eliza Comer to Panley is exhibited. It conveys the land and improvements to Panley in consideration of the note above described and another for the same amount executed by Panley and Glover to said Stewart and due the first day of January, 1871; and recites that "said land and improvements are held bound for the payment of said two notes."

The answer then alleges that by the terms of the deed there was a lien reserved for payment of the note, which

was afterwards, with the note, transferred by Stewart to the defendant McGehee. Afterwards Pauley and wife conveyed the lands to the plaintiff, but before the conveyance the plaintiff Barnett had seen the deed from Comer to Panley and was well aware of the recitals of the same, and knew that the purchase money was secured thereby as a lien upon the land and had not been paid. That Glover has never transferred his interest in the land to any one. That the plaintiff is in exclusive possession of the land. Stewart, Pauley and Glover are all insolvent.

He admits the recovery of the judgment, the levy of the execution, and his intention to sell the land to satisfy it. And repeating the statements in the answer, makes them his cross-complaint against the plaintiff, "and if necessary against said Panley and Glover," whom he asks may be required to answer thereto; and prays that the note be declared a lien upon the lands and they be sold to satisfy it, that the rights and equities of Barnett, and, if necessary, of Panley and Glover, be barred, and for general relief.

The note and transfer are exhibited and made part of the answer.

To this answer and cross-complaint a demurrer was sustained, and the defendant declining to plead further, his cross-complaint was dismissed and the injunction was made perpetual, and he appealed.

Since the appeal the appellant has died and the cause has been revived here in the name of Talieferro as his executor.

Met. L. Jones, for appellant:

The note was part of the original purchase money for the land, and is the very essence of a lien, no matter to whom payable. Cites *Sugden on Vonders*, 413; *Washburn on Real Estate*, 218.

Martin & Martin for appellant:

Barnett is a purchaser, with full notice of the lien. *Swan* v. *Benson*, 31 *Ark.*,728; *Lavender* v. *Abbott*, 30 *Ark.*, 177. Lien assignable by Act 1873. *Gantt's Digest*, *Sec.* 564, and was not lost by taking note and personal security. *Story Eq.*, 1226; 30 *Ark.*, 181. Waiver not presumed. *Shepherd* v. *Thomas*, 26 *Ark.*, 638; 2 *Ohio*, 386; *Tendle* v. *Jones*, 43 *Miss.*

D. H. Rousseau, for appellee:

Vendor's lien is personal and not assignable. *Cail* v. *Moore & Andrews*, 14 *Ark.*, 635; *Shall* v. *Biscoe*, 18 *Ark.*, 162; 27 *Ark.*, 617; 2 *Washburn on Real Property*, 91. See also *Scaggs* v. *Nelson*, 25 *Miss.*, 88, directly in point. Stewart never paid one cent of the purchase money, and the note was not given him for a valid consideration, and there was no privity of estate between Panley and Stewart, and no lien. *Ib.* The taking of security raises a strong presumption that Mrs. Comer intended to waive her lien. 2 *Wash. on R. P.*, 91; 13 *Ohio*, 148; 27 *Ill.*, 137; 37 *Ill.*, 181.

1. TITLE: Cloud upon.

HARRISON, J. A purchaser at the sale under the execution, which the plaintiff by his complaint sought to enjoin, would as well as the plaintiff claim title from Panley; and as the sheriff's deed to him would contain such *prima facie* evidence of title in him, that, to avoid it, proof of extraneous facts would be required, it would necessarily have the effect to cast a cloud upon the plaintiff's title. *McCullough* v. *Hollingsworth*, 27 *Ind.*, 115; *Pixley* v. *Huggins*, 15 *Cal.*, 127; *England* v. *Lewis*, 25 *Cal.*, 337; *Downing* v. *Mann*, 43 *Ala.*, 266; *Key City Gas Light Co.* v. *Munsell*, 19 *Iowa*, 305; *Freeman on Executions*, *Sec.* 438.

Test of.

"The true test, as we conceive," say the Supreme Court of California, in the case of *Bixley* v. *Huggins*, *supra*, "by which the question whether a deed would cast a cloud upon the title of plaintiff may be determined, is this: Would the owner of the property, in an action of ejectment brought by the adverse party, founded upon the deed, be required to offer evidence to defeat a recovery? If such proof would be necessary, the cloud would exist; if the proof would be unnecessary, no shade would be cast by the presence of the deed."

Injunction.

And so as the court would, to remove the cloud it cast, have set aside the deed which the sheriff might have made to the purchaser, it will interpose to prevent the sale from which a conveyance creating such a cloud must result. *Bixley* v. *Huggins*, *supra*; *Pettit* v. *Shepherd*; 5 *Paige* 501; *Bisp. Equity*, *Sec.* 425.

The sale was therefore very properly enjoined.

2. LIEN: Recital in the deed good.

But as to the validity of the lien reserved in the deed from Mrs. Comer to Panley, for the payment of the notes given in the purchase of the land from her, there can be no question. It is well settled that a lien may, by the express agreement of the owner, be created on real or personal estate, which equity will enforce, not only against him, but also against any one who afterwards takes the estate with notice of it. Such a lien is in the nature of a trust which equity will compel the holder of the legal title to perform. *Pinch* v. *Anthony*, 8 *Allen*, 536; *Champion* v. *Brown*, 6 *John.*, *Ch.* 398; 2 *Sto. Eq. Juris.*, *Sec.* 1231.

3. LIEN: By and against whom enforced.

And such a lien, according to the well settled doctrine of equity, passes by an assignment of the debt it was created to secure. *Section* 564 *of Gantt's Digest*, which was enacted since the execution of the notes, is but an affirmance of the doctrine.

CHIEF JUSTICE WAITE, in delivering the opinion of the Supreme Court of the United States in the case of *Ober* v. *Gallagher*, 3 *Otto*, 199, which went up to that court from the Circuit Court of the United States for the Eastern District of Arkansas, says:

"It is undoubtedly true, that in many of the States, the implied lien which equity raises in favor of the vendor of real property to secure the payment of the purchase money, does not pass by an assignment of the debt; but here the lien was not left to implication; it was expressly reserved. In fact, it is more than a lien. In equity it is a mortgage, so made by express contract. The acceptance by Thompson of the deed, containing the reservation, amounts to an express agreement on his part that the land should be held as security for the payment of what he owed on account of the purchase money. This created an equitable mortgage; and such a security passes by assignment of the debt it secures."

Sheppard v. Thomas, 26th Ark.; and Jones v. Doss, 27 Ib., overruled.

The cases of *Sheppard* v. *Thomas*, 26 *Ark.*, 617, and *Jones* v. *Doss*, 27 *Ark.*, 518, both decided by a divided court, in which the assignability of such a lien was denied, were, in our opinion, not correctly decided, and were virtually, if not directly and expressly, overruled in *Campbell* v. *Rankin*, 28 *Ark.*, 401.

As the plaintiff derived his title from Panley, he had, when he purchased, constructive notice at least of the lien; but it was alleged in the answer that he had actual notice. Such facts were, therefore, stated in the answer as showed a right in the defendant, had all necessary parties been before the court, to the relief prayed against the plaintiff.

Necessary parties.

But it is a general rule that all persons who are materially interested in the subject matter of the litigation should be made parties, either plaintiffs or defendants. *Mayes* v.

Hendry, 33 *Ark.*, 240; *Brodie* v. *Skelton*, 11 *Ark.*, 120; *Porter* v. *Clements*, 3 *Ark.*, 364; *Sto. Eq. Plead.*, 72.

It was not shown that the other note given in the purchase of the land, and secured by the lien reserved, had been paid, and though overdue, we are not at liberty to presume such to have been the case. If paid, the answer should have so stated, or if still unpaid, the holder of it, who was equally with the defendant interested in the security, should have been made a party.

Pauley, who was personally bound and primarily liable for the debt, and against whom, in case a sale of the land was decreed, the defendant would also be entitled to a decree, would also have been a proper party for that purpose, though not a necessary or indispensable one, for the foreclosure. But the holder of the other note was a necessary party, without whose presence before the court there could be no determination of the controversy between those who were before it, or a full and complete decree touching their rights, be rendered.

As, however, a proper case was made in the answer for relief, and the want of parties was not one of the grounds of the demurrer to it, the demurrer should have been overruled; but the answer should have been amended, and the proper parties brought in.

The decree, so far as respects the complaint, and perpetually enjoins the sale of the land under defendant's judgment, is affirmed. But as to the dismissal of the defendant's counter-claim, it is reversed, and the cause is remanded to the court below, with instructions to overrule the demurrer to the answer, and to allow the defendants, if so advised, to amend the same, and make proper parties thereto, as above indicated, and for further proceedings.

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ST. LOUIS, I. M. AND S. R. R. CO. v. CANTRELL.

1. RAILROADS: *Cars must stop at depot platforms.*

It is the duty of the conductor of a railroad train to stop the cars at the depot platforms for the safe landing of passengers.

2. NEGLIGENCE: *Alighting from moving train under direction of conductor.*

A passenger who alights from a slowly moving train at the instance or direction of the conductor, or other agent in management of the train, on whose opinion or judgment in the matter he has the right to rely, and when the risk or danger is not apparent, is not chargeable with negligence.

3. DAMAGES: *For injury from negligent running of railroad train.*

A passenger on a railroad train, who is injured by the negligent running of the train, or, on account of an insufficient platform at which he is landed, is entitled, as damages, to compensation for the bodily injury sustained, the pain suffered, the effect of the injury on his health, according to its degree and probable duration, the expenses of his sickness resulting from the injury, and of attempting to effect a cure, and the pecuniary loss sustained by reason of inability to attend to his business, or profession.

4. SAME: *Platforms.*

A railroad company is bound to provide safe and sufficient platforms for the landing of passengers, of sufficient length to afford safe egress to passengers from an ordinary train.

5, VERDICT: *Not impeachable by juror except, etc.*

The court should not allow an affidavit of a juror impeaching his verdict to be filed, except to show that it was made by lot.

APPEAL from *Clay* Circuit Court.
Hon. L. L. MACK, Circuit Judge.

STATEMENT.

This was an action by the appellee against the appellant for damages for a personal injury sustained, through the negligence and misconduct of the defendant's train conduc-

tor, in causing him to alight from the train while it was in motion. The defendant denied the negligence, and averred that the injury resulted from the plaintiff 's own negligence.

The plaintiff was a passenger from Little Rock to Knoble Station, in Clay county, and testified that the train arrived at the station about ten o'clock at night. The conductor went to him and shook him, and told him that was his station—to "hurry, and get off." The conductor passed on to the forward end of the coach—the plaintiff to the rear end—and there met a brakeman, who called out the name of the station, and said to the plaintiff, "hurry, and get off, we are in a hurry." Witness stepped out upon the platform of the coach and saw the depot platform by the light from the car windows, and then stepped out upon the depot platform on his right foot, and fell forward and sidewise about seven feet to the ground. When he stepped off the car, he didn't know for certain that the train was moving, but, after he fell, he looked up and saw it was still in motion, and the rear of the coach next behind the one he stepped off was then opposite him. He procured assistance, and was carried to a house near the depot, where he remained confined, and under treatment of a physician, about five days. Was then hauled home, near Boydsville, where he was confined for a long time, and disabled from practicing his profession for three months. He was a practicing physician, with a practice of a hundred dollars a month. His injury was in his hip. He suffered great pains from the injury, and lost his health, and was greatly reduced in flesh. His bill for board at Knoble, and for transportation home, was $20. Medical treatment there, $7.50.

James Welsh, a witness for the plaintiff, testified that he carried the plaintiff from the north end of the depot, where he was injured, to Gilchrist's house, at Knoble Station.

Waited on him while he was there, and he suffered a great deal. The depot platform there, is all of seven feet above the ground where the plaintiff fell. He assisted Gilchrist in hauling the plaintiff home. He suffered a great deal. Knoble is a small place, in low, muddy country. The platform is about forty or fifty feet long.

James Johnson, for the plaintiff, testified that the plaintiff lived at his house. When brought home he was suffering very much; could not walk for three weeks, and then only on crutches for about two months, and after that, for some time, with a stick. He was a physician, and got good average practice. Had frequent calls, during the injury, which he could not attend.

There was other testimony of the extent of the injury.

The conductor of the train testified, for the defendant, that when the whistle sounded for Knoble Station he went into the coach where the plaintiff was, tapped him upon the shoulder, and told him that was his station, and then went on to the platform of the next car to wait for the train to stop, and was looking out for plaintiff, when he saw him jump from the car, while it was moving, and strike the north end of the platform and fall to the ground. The train passed on about fifteen or twenty feet, after the plaintiff jumped off, before it stopped. It was moving very slowly when the plaintiff jumped off. Any man of common activity might have jumped off with safety at the speed it was moving. The platform there is about eighty-five feet long.

For the plaintiff, the court gave to the jury the following instructions:

1. "If the jury find from the evidence that the plaintiff was a passenger on defendant's train for Knoble Station, and, on arriving there, the conductor or agent called out the name of the station, and directed the plaintiff to get off

said train, without first stopping it, and that the platform at that station is unsafe, and of insufficient length for the safe landing of passengers, and that the plaintiff got off the train under the directions of the defendant's conductor, agent or employee, and, in doing so, was injured, on account of not stopping said train in time, or on account of such unsafe or insufficient platform, the defendant is liable.

2. "If the jury find from the evidence that the plaintiff was ordered, or directed, by the conductor or agent of the defendant to get off the train, he had a right to rely upon such advice, or directions; provided, he took no more risk in getting off the train than a prudent man would have taken under the same circumstances.

3. "If the jury find that the plaintiff took no more risk than a prudent man would, under the same circumstances, he was not guilty of contributory negligence.

4. "If the jury find that the plaintiff was ordered, or directed, by the defendant's conductor or employees, to get off the train, and told to hurry up, and such orders and directions would cause a man of ordinary reason to believe that he must leave the train, or submit to the inconvenience of being carried past his station, and that the plaintiff, in getting off the train, was injured, the defendant is liable; provided that they find that the act of getting off the train was a careful and prudent act, and not a rash and careless exposure to peril and hazard."

5. "If the jury find for the plaintiff, they will assess his damages at a sum that will compensate him for the bodily injury sustained, the pain suffered, the effect of the injury on his health, according to its degree and probable duration, the expense of his sickness resulting from the injury, and of attempting to effect a cure, and the pecuniary loss sustained by reason of inability to attend to his business or profession."

6. "The defendant is bound to provide safe and sufficient platforms for the landing of passengers, of sufficient length to afford safe egress to passengers from an ordinary train."

For the defendant, the court instructed the jury that:

1. "If they find that the plaintiff could, by ordinary care and prudence, have prevented the injury, they will find for the defendant, and refused the

2. "If the jury find that the plaintiff's own careless and negligent conduct caused or contributed to cause the injury, they will find for the defendant."

And the court, of its own motion, instructed as follows:

1. "Both the plaintiff and defendant are held to ordinary prudence."

2. "Before the jury can find for the plaintiff, on the ground that the agent or other employee of the defendant directed or advised the plaintiff to get off the train, they must find from the evidence that such directions or advice were given at a time and in a manner that would have induced the belief in the mind of a man of ordinary reason that such agent meant and intended that he should get off at the time and under the circumstances existing at the time he did get off."

3. "If the jury find that the plaintiff's own careless and negligent conduct caused or contributed to cause the injury, they will find for the defendant."

After the jury had retired for some time, they returned and reported that they could not agree upon the amount of their verdict. The court told them that it was important to the parties that they should agree, and they should not let a hundred or two dollars hang them. They then again retired, and returned with a verdict for the plaintiff, assessing his damages at $800.

The defendant filed a motion for a new trial, assigning as cause, among others, error of the court in its advice to the

jury as to the damages; and also filed the affidavit of one of the jurors, stating that he was induced by that advice to agree to the verdict. He had before, been in favor of giving the plaintiff only $500.

The motion was overruled, and defendant filed a bill of exceptions and appealed.

Geo. H. Benton and Dodge & Johnson for appellant:

Carriers are not *insurers* of the *lives and safety* of passengers, but are bound to take all precautions which wisdom and foresight can suggest to protect and safely deliver them. They are therefore liable for slight negligence, but limited by the duty of passengers *to protect and take care of themselves*. A passenger is bound to exercise ordinary care, and a failure constitutes *contributory negligence*, which bars a recovery. *Sherman & Redfield on Negligence, Secs.* 25 *to* 35 *and Sec.* 265; *Wharton on Negligence, Secs.* 300, 626; *Railway Co.* v. *Hendricks*, 26 *Ind.*, 228. Appellee must show that the injury was a *result* of the negligence, and that he could not have avoided its consequences by the *exercise of ordinary care*. *S. & R. on Neg., Sec.* 39.

"Getting on or off a vehicle, while in motion, is a familiar instance of negligence in the plaintiff, almost always fatal to a recovery for an injury in part, from the negligence of the carriers at the same time." *Nelson* v. *R. R. Co.*, 68 *Mo.*, 593; *S & R. on Neg*, *Sec.* 283; *Railway Co.* v. *Whitfield*, 44 *Miss.*, 486; *Railway Co.* v. *Hazzard*, 26 *Ill.*, 384. These cases show that the action of plaintiff, in leaving the train while in motion, is excused only where he acted under a controlling necessity, a "*vis major*," or was deprived of "*responsible volition*" by the *wrongful acts of the carrier*; "and where there was no responsible volition, there was no damnifying negligence." *S. & R. on Neg., Secs.* 25, 35, 282,

283; *Wharton on Neg.*, 353–371; 2 *Red. Law Railway, Sec.* 177; 16 *Gray*, 502–6–7; 54 *Ill.*, 133; 66 *N. C.*, 499; 106 *Mass.*, 464; 49 *N. Y.*, 47; 23 *Penn.*, 149–150; 32 *Penn.*, 296; 20 *Barb.*, 282; 56 *N. Y.*, 305; 44 *Ill.*, 463; 44 *Miss.*, 466.

If the car, on which appellee was, overshot the platform, he had the *right* to have the train stop long enough to pass through the next car, etc., or to have the train backed, and if he availed himself of neither right, but recklessly jumped off while the train was in motion, he cannot complain. *S. & R. on Neg., Sec.* 277; 28 *Ind.*, 447; 24 *Wis.*, 585; *Siner's Case, 3 Exch. R.*, 150.

Instructions calculated to mislead the jury as to the *weight* to be given to evidence, or that are asked without *any evidence* on which they can be based, should be refused. *Worthington* v. *Curd*, 15 *Ark.*, 492; *State Bk.* v. *Williams*, 6 *Ark.*, 161; and when a verdict is greatly against the weight of evidence, a new trial should be granted. *Jordan* v. *Foster*, 11 *Ark.*, 139.

Plaintiff's first instruction is abstract, and not appropriate. There is no proof that plaintiff got off the train *while in motion*, under directions of defendant. *Armstead* v. *Brooks*, 18 *Ark.*, 521.

The second instruction for defendant was the correct law. Instead of it, the fourth given by the court, inserting the word "materially" after "contributed," was error. *S. & R. on Neg., sec.* 34. "*Nullus commodum capere potest de injuria sua propria.*"

The instructions given by the court, upon its own motion, erroneous. *Dickinson* v. *Johnson*, 24 *Ark.*, 251, 540.

W. R. Coody, for appellee:

1. A reversal cannot be had upon the weight of evidence. 23 *Ark.*, 51, 112.

2. The instructions were fair and favorable to appellant; the matter fairly submitted, and this court will not reverse. 21 *Ark.*, 357; *McNutt* v. *Arnold*, 22 *Ib.*, 477.

3. This court will not control the discretion of Circuit Courts in management of cases. 10 *Ark.*, 428, and unless an instruction *misstates the law to the prejudice* of a party, this court will not interfere with the verdict. 19 *Ark.*, 534.

4. The affidavit of I. M. Smith not admissible. *Gantt's Digest, sec.* 1971.

HARRISON, J. It was clearly the duty of those in charge of the defendant's train, upon its arrival at Knobel, to stop the same opposite the platform, that the plaintiff might get off.

On the other hand, it may, as a general proposition, be said, that it is imprudent, and a want of proper care, to alight from a train while it is in motion; but whether it was so in a particular case must depend upon the circumstances under which the attempt was made. *Crissey* v. *Passenger Railway Co.*, 75 *Penn. St.*, 83. It would not be so if the train was moving so slowly that no damage could be reasonably apprehended.

But though, in fact, it may be hazardous, a passenger who does so at the instance or direction of the conductor or other employee in the management of the train, on whose opinion or judgment in the matter he has the right to rely, and where the risk or danger was not apparent, cannot be chargeable with negligence. *Filer* v. *The New York Central R. R Co.*, 49 *N. Y.*, 47; *Lambeth* v. *North Car. R. R. Co.*, 66 *N. C.*, 499; *Whart. on Neg., sec.* 371.

It would seem that the train, when the plaintiff attempted to jump upon the platform, was moving very slowly, as the conductor testified that after he fell, it moved only fifteen

or twenty feet before it stopped; and that the direct or immediate cause of the accident was that it had too far passed the platform when he leaped from the car for him to reach it.

There was no evidence that he knew that there was any risk or hazard in the attempt to get off, or of any want of care in him, or of any negligence on his part which contributed to the accident; but it was proved that he was told by the conductor and brakesman "to hurry and get off," the latter telling him also that they were in a hurry, and that he was urged by their impatience to make the attempt.

We can see no objection to any of the instructions the court gave the jury. Those in relation to the question of negligence are in strict accordance with the views above expressed.

That the damages assessed by the jury were excessive, was not assigned as a ground of the motion for a new trial, and the appellant cannot be heard to complain of the fifth, or that in regard to the measure of the damages. It was, however, clearly correct. *Peoria Bridge Association* v. *Loomis*, 20 *Ill.*, 235; *Ransom* v. *New York and Erie R. R. Co.*, 15 *N. Y.*, 415; *Sedgw. on Damages*, 699, *note* (2).

The court having already instructed the jury to the same effect as asked by the defendant in his second instruction, it was, for that reason, very properly refused.

As the damages are not complained of as excessive, we have no occasion to consider the defendant's objection to the remark of the court to the jury that it was important to the parties that they should return a verdict, and they should not let one or two hundred dollars prevent them; and we will merely say, we think it was not calculated to influence the jury to the defendant's prejudice.

The affidavit of the juror should not, however, have been

allowed to be filed, as the Statute expressly declares that:—"A juror cannot be examined to establish a ground for a new trial, except it be to establish, as a ground for a new trial, that the verdict was made by lot." *Sec.* 1971 *Gantt's Digest.*

The judgment is affirmed.

TURNER v. COLLIER & DAVIS.

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1. BILL OF EXCEPTIONS: *Must be signed by judge.*
A paper purporting to be a bill of exceptions, but not signed by the judge, is no bill of exceptions and will not be noticed by the Supreme Court.

2. SAME: *When none, judgment presumed right.*
In the absence of a bill of exceptions no error can be presumed of the judgment.

3. ATTACHMENT: *Interpleader's bond. Statutory judgment on.*
The appraisement of attached property, when claimed by a third person, as provided by the Statute (*Gantt's Digest, Section* 469), is the foundation to the statutory proceedings against the obligors on the interpleader's bond: and if no such appraisement be made and shown by the officer's return, the statutory judgment on the bond does not accrue. Nor does it accrue then, until the officer *shows by his return* or the *fieri facias* issued against the defendant in the original action, the failure of the obligors to deliver the property according to the conditions of the bond.

APPEAL from *Jefferson* Circuit Court.
Hon. X. J. PINDALL, Circuit Judge.

Met. L. Jones, Martin & Martin, for appellant:

The judgment for $1,000 against appellant is erroneous. *Gantt's Digest, Secs.* 469, 470–1–2.

EAKIN, J. This transcript shows, that Collier & Davis, sued R. J. Turner in a common law action, and recovered against him, a judgment for the sum of $499.65 principal, and $14.58 damages.

Upon the institution of the suit, a writ of attachment had been issued against the defendant's property, and levied upon twenty-one bales of cotton supposed to belong to him. This cotton was claimed by McAllister & Wheeless, who gave bond, in the terms required by Statute, in the sum of $1,000, that they would interplead for the cotton at the next term, and prosecute their claim, and that if the plaintiffs should recover judgment against defendant, they would deliver said property to the sheriff, when demanded, after execution should come to his hands to be levied thereon. This bond was signed by R. J. Turner, the defendant in the suit, and by G. Meyer, and the firm of McAllister & Wheeless, and returned with the writ.

Why the sum of $1,000 was fixed as the penalty of the bond does not appear by the sheriff's return or otherwise. It seems to have been intended to cover double the amount of the debt, which (lacking only a few cents) was $500.

In court the defendant pleaded to the action unsuccessfully, and the interpleaders set up a claim to the property attached, which was tried by a jury. They found, upon the last named issue, that the cotton in controversy did not belong to the interpleaders.

Judgment, on both issues, was rendered on the same day. That in the original suit, upon trial by the court, was in effect to sustain the attachment, and in plaintiff's favor against R. J. Turner for the sum of $499.65 debt, and $14.48 damages. The judgment proceeds to recite the levy of the attachment upon the twenty-one bales of cotton, the bonding of the same by McAllister & Wheeless, with Turner and Meyer as securities, and the verdict of the jury against the interpleaders.

Whereupon it was "ordered, considered and adjudged" that the plaintiffs, Davis & Collier, "have execution against the twenty-one bales of cotton, attached in this suit; and if the same is not delivered to the sheriff of Jefferson county, by said interpleaders on demand, that execution issue on return of the facts on *fieri facias* by the sheriff, against *G. Meyer and R. J. Turner*, securities on the interpleaders' bond, for the sum of *one thousand dollars*, or so much thereof as will be sufficient to satisfy the said debt, damages and costs as aforesaid."

A motion for a new trial filed *by the defendant* was overruled and he prayed an appeal. There is no bill of exceptions, although the transcript is encumbered with what the clerk supposed to be one. It is not signed by the judge and cannot be noticed. Nor is there any evidence of an appeal by McAllister & Wheeless, although the cause seems to be prosecuted here in their name and on their behalf.

1. BILL OF EXCEPTIONS must be signed by the judge.

It is apparent that R. J. Turner, the appellant, is not only the defendant in the original suit, but one of the sureties in the bond given by the interpleaders to obtain possession of the property. The appeal presents to us only this question: Was the judgment against him, in either character, such as the court could properly render under any proof whatever?

There can be no question as to the debt, and damages. *Quoad hoc*, in the absence of a bill of exceptions, no error can be presumed. It is only left to consider whether the Statute authorized such a judgment as was rendered against Turner as security on the retaining bond.

It provides (*See Gantt's Digest, Sections* 469 to 473) that when property attached is claimed under oath by a third person, it may be delivered to him by the sheriff, if he will execute to the plaintiff a bond in a sum *double the value of the property attached*, "which value shall be ascertained by the

oaths of two citizens of the county where the writ is levied, to be chosen by the sheriff," conditioned amongst other things, that if the plaintiff should recover judgment, and the property be found to belong to defendant, it should be delivered to the sheriff "after execution upon such judgment comes to his hands to be levied thereon." If such delivery be not made, then it is provided that the "bond shall have the force and effect of a judgment *for the appraised value of such property* and the costs of the interplea, if such appraised value be less than the amount of the judgment rendered in the original case; and if more, for the amount of said judgment and costs, on which judgment, execution against all the obligors may issue."

2. When statutory judgment accrues on appraisement bond.

It is made the duty of the sheriff to return the bond with the writ. The person who thus bonds and retains, or obtains the property, is not bound to deliver it up to the sheriff until a *fieri facias* be issued on the original judgment; only then, upon such failure, it is made the duty of the sheriff to state such fact in the return made by him to the writ of *fieri facias*, and it is only on the *showing made by such return*, of the breach of the condition, that the bond becomes forfeited, and not, until such return and showing, is there any power of the clerk to issue any execution whatever against the obligors, even if the amount were ascertained by appraisement. Certainly there is no power, in any case, to render judgment against the sureties in the bond for its full amount in the statutory proceeding.

Appraisement, foundation of, statutory proceeding.

It is very plain that the appraisement of the property under the directions of the sheriff, is an indispensable foundation, and basis of the whole statutory proceeding. That should be shown by his return, and thus made part of the record. The courts cannot safely presume the appraised value of the property to have been actually made; less can they presume that it was actually *half* the amount of the bond.

The parties might have been willing to give, and the sheriff would certainly be authorized to take a bond for ten times the value of the property; still without the specific guide afforded by the valuation the courts cannot proceed to direct the clerks to enforce the statutory regulations.

The judgment in the original cause against Turner, so far as it fixes his debt, and directs execution therefor, is correct, but upon appeal we must hold that so much of it as is against the appellants, Turner and Meyers jointly, as sureties upon the retaining bond of McAllister & Wheeless, is void and of no effect and must be reversed.

Execution may well enough issue against Turner for the amount found in the original suit, but to fix the liability of the parties to the bond, if there be any, a common law action would be necessary.

Reverse so much of the judgment as is against Turner and Meyers, as sureties of McAllister & Wheeless as interpleaders, at the cost of appellees.

Affirm otherwise.

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STATE, USE IZARD COUNTY, v. HINKLE.

1. COUNTY COURT: *Allowances by, how reviewed.*

An order of allowance by the County Court may be reviewed, or opened—

First. By appeal to the Circuit Court.

Second. By *certiorari*, where it appears, upon the face of the record, that the claim allowed was not, by law, a charge against the county, and the court had no authority, or discretion, to allow it upon any evidence that could be adduced.

Third. The County Court is authorized to call in its warrants for review, etc., once in three years, and can then reject any warrants founded upon claims illegally or fraudulently allowed.

Fourth. In chancery, for fraud, accident, or mistake.

APPEAL from *Izard* County.
Hon. J. L. ABERNETHY, Special Judge.

U. M. Rose, for appellant.

"An action for moneys fraudulently obtained, although at different times, and by divers frauds, is held to embrace but one cause of action." *Bliss on Code Pleading, Sec.* 118.

The County Court, when engaged in passing upon claims presented before it, acts merely as the financial agent of the county, and, by such proceedings, it can create no estoppel. *Shirk* v. *Pulaski County*, 4 *Dillon*, 209; *Campbell* v. *Polk*, 3 *Iowa*, 467; *Washington County* v. *Parlier*, 10 *Ills.* (5 *Gill.*), 232.

The allowances were illegal. *Sec.* 604, *Gantt's Digest; Fee Bill*, 1875, *Dec.* 7; *Sec.* 2847, *Gantt's Digest.*

STATEMENT.

This action was brought in the Circuit Court of Izard county, in the name of the State for the use of Izard county, against John M. Hinkle, late sheriff thereof.

The object of the suit was to recover of Hinkle the aggregate amount of certain fees, which had been paid him as sheriff, by issuing warrants upon the county treasurer, under orders of allowance, made at different times by the County Court, and which, it was alleged, he was not, by law, entitled to.

In the complaint, as originally filed, there were nine Code paragraphs, each one setting out the items in an account claimed to have been improperly allowed Hinkle, making, in all of the accounts, twenty-four items—amounting to $355.70, for which judgment was prayed.

I. In the first paragraph it was alleged, in substance, that Hinkle, on the fifth of January, 1875, filed with the county clerk an account for services claimed to have been rendered by him as sheriff, amounting to $190.10, in which the following items, not allowed by law, were charged against said county:

1. Summons alt. petit jury, November term..... $ 7 50
2. " grand " " " 7 50
3. Mileage, summoning juries..... 12 00
4. Waiting on grand jury, per Wm. Jones, bailiff, five days..... 15 00
5. Opening and adjourning court, Nov. term..... 2 25
6. Cash paid for lodging of three guards and four horses..... 3 50
7. To J. Hinkle for lodging guards..... 3 75

The above items, the complaint alleged, amounting to $51.50, being other fees than were allowed by law, were charged, demanded and received by defendant from said county.

II. In the second paragraph it was alleged, in substance, that defendant, on the sixth of April, 1876, filed with the clerk an account for services, claimed by him to have been rendered as sheriff, amounting to $55.75, in which the following item, not allowed by law, was charged and received by him:

8. To advertising collector's notices in fourteen townships, $2..... $28 00

III. The third paragraph alleged, in substance, that, on the fourth of October, 1876, defendant filed with the clerk an account for services claimed to have been rendered by him as sheriff, for $123.50, in which the following item was charged:

9. To delivering notice to forty judges of election, at seventy-five cents each..... $30 00

And it was alleged that the poll-books were notices to the judges, for which the defendant was entitled to $2.00, and that the above item was not allowed by law, but that the defendant charged, demanded and received it from said county.

IV. In the fourth paragraph it was alleged, in substance, that on the third of January, 1877, defendant filed with the clerk an account for $205.86, for services claimed to have been rendered by him as sheriff, in which the following items, not allowed by law, were charged:

10.–11. To mileage; summons grand and petit jury.....$12 00
12. Waiting on grand jury by S. R. Smith, six days, 18 00
13. Summoning witnesses before the grand jury.. 41 60

Which said amount of *fifty-eight dollars and ten cents* (as is alleged), so charged as aforesaid, was afterwards demanded and received by defendant from said county.

V. In the fifth paragraph it was alleged, in substance, that on the twenty-ninth of March, 1877, defendant filed with the clerk an account for $142.75, in which the following item, not allowed by law, was charged against said county:

14, Posting up collector's notices in eleven townships.....$22 00

Which sum of $22 defendant afterwards received from said county, and was ordered by the County Court to refund the same, but had failed to do so.

VI. In the sixth paragraph it was alleged, in substance, that on the sixteenth of July, 1877, defendant filed with the clerk an account for $169.75, in which the following items, not allowed by law, were charged against said county:

15. To mileage summoning grand and petit jury..$12 00
15*a*. To summoning twenty-four witnesses before the grand jury, excess for mileage..... 40 75
16. To J. F. Landers, as bailiff of grand jury, six days, $3.00..... ..... 18 00
17. Services of John Kerr at Circuit Court..... 2 00
18. Services of J. D. Simpson as deputy sheriff, four days, at $3.00..... 12 00

Which, amounting to $74.75, so charged, defendant afterwards received from said county.

VII. In the seventh paragraph it was alleged, in substance, that on the eighth of January, 1878, defendant filed with the clerk an account for services claimed to have been rendered by him as sheriff, for $108.95, in which the following items, not allowed by law, were charged:

19. To mileage, summoning grand and petit jury. $11 50
20. S. R. Smith, as bailiff of grand jury, six days, three dollars..... 18 00

Which, amounting to $28.50, so charged, was afterwards received by defendant of said county.

VIII. In the eighth paragraph it was alleged, in substance, that defendant, on the first of July, 1878, filed with the clerk an account for $119.65, in which the following items, not allowed by law, were charged:

21. To mileage, summoning juries..... $12 00
22. Serving twelve subpœnas for witnesses before the grand jury..... 24 55
23. Service of bailiff for grand jury, six days, three dollars..... 18 00

Which, amounting to $48.55, so charged, was afterwards received by defendant of said county.

IX. In the ninth paragraph it was alleged, in substance, that on the ninth of October, 1878, defendant filed with

the clerk an account for services, in which was the following item:

24. To serving notices on thirty-three judges of election, at seventy-five cents each..... $24 75

And it was alleged that delivering the poll books was notice to the judges of election, for which defendant was allowed a fee of $2, and that said charge of $24.75, though for fees not allowed by law, was afterwards received by defendant of said county.

The complaint concluded by alleging that the above facts would appear by the original accounts on file in the office of the county clerk, and that defendant having therein charged and received from the county the twenty-four items above specified, and not allowed by law, amounting in the aggregate to $355.70, an action had accrued to the plaintiff for the same, etc.

The defendant filed a motion to require the plaintiff to make the complaint more specific, which was sustained by the court, and thereupon plaintiff filed an mendment to the complaint, in substance, as follows:

That the several and various accounts or demands which plaintiff charged defendant with having filed with the clerk against said county, as stated in the original complaint, were duly and regularly presented to the County Court, in term time, and the several items therein charged were allowed by said court, and an order made and entered of record by the court that the clerk issue his warrants upon the treasurer of the county for the payment of the same; and that afterwards defendant received said several warrants from the clerk for the said sums so ordered by the court to be paid.

That said accounts were presented to, and allowed by, the County Court at the several terms of the court held

immediately following the filing of said claims with the clerk as aforesaid, and that said claims were allowed by the court under a misapprehension of the law governing the fees of officers at the time said allowances were made.

That the account referred to in the fifth paragraph of the original complaint, embracing the following item, number 14, to-wit: "Posting up collectors' notices in eleven townships, $22.00," was allowed by the court at the April term, 1877, and the warrant therefor was issued to defendant by the clerk; and during the same term the court, after having notified defendant that said item of $22.00 was illegal, rescinded said order of allowance as to said item of $22.00, and made an order requiring said defendant to return into court so much of said warrant or scrip as amounted to the said $22.00, which order said defendant refused to obey and comply with, and still refuses so to do.

That item, No. 13, in the account referred to in paragraph IV. of the original complaint—"Summoning wit ness before the grand jury, $41.60"—was composed of of the following specified items, as stated in said account, to-wit:

Serving	eight	grand	jury	subpœnas.....		$ 6 60
"	one	"	"	"	J. F. Landers.	1 30
"	"	"	"	"	Montgomery ..	1 25
"	"	"	"	"	E. G. Landers.	1 35
"	three	"	"	"	J. H. Miller..	9 00
"	five	"	"	"	A. L. Sablett..	11 50
"	eight	"	"	"	G. R. Landers.	10 60

Which sums, so charged, it was alleged, were in the aggregate $28.10 in excess of the fees allowed by law for such services.

That the sum of $40.75, as stated as cause of action

in paragraph VI. of the original complaint, item No. 15*a* was composed of the following specified items, as stated in the account referred to in said paragraph, to-wit: "To serving twenty-four grand jury subpœnas by deputies, $52.75," which sum was $40.75 in excess of the fees allowed by law for such services.

That item No. 22, paragraph VIII. of the original complaint, to-wit: "To serving twelve subpœnas for witnesses before grand jury, $24.55," was $18.55 in excess of the fees allowed by law for such services.

Defendant demurred to each paragraph of the complaint as amended, on the following grounds:

1. That the court had no jurisdiction of the several and separate causes of action set forth in the several paragraphs of the complaint, or any one of them.

2. That said several and separate paragraphs, nor any one of them, stated facts sufficient to constitute a cause of action against defendant.

The court sustained the first cause of demurrer as to the fifth paragraph, and the second cause of demurrer as to each of the other paragraphs; and the plaintiff resting, the complaint was dismissed at plaintiff's cost.

OPINION.

ENGLISH, C. J. This action was commenced 26th November, 1879, and was brought in the name of the State, for the use of Izard County, as provided by the Act of 27th February, 1879. (*Acts of* 1879, *p.* 13.)

The court below no doubt sustained the first cause of demurrer, (want of jurisdiction,) to the fifth paragraph of the complaint, because though the order of allowance, set forth in that paragraph, had been rescinded by the County Court, at the term at which it was made, and when under

its control, yet the sum claimed in the paragraph, being but $22, was not within the jurisdiction of the Circuit Court.

And the court doubtless sustained the second cause of demurrer to each and all of the other eight paragraphs of the complaint, because it was unwilling to treat the orders of allowance therein set forth, when questioned collaterally, as not having the solemnity and conclusiveness of judgments.

This court has treated orders of the County Courts, allowing claims against counties, as well as orders of the Probate Courts, allowing claims against estates of deceased persons, as in the nature of judgments. *Rieff et al.* v. *Conner et al.*, 10 *Ark.*, 241; *Desha Co.* v. *Newman*, 33 *Ib.*, 783; *Carnall* v. *Crawford County*, 11 *Ib.*, 604; *Borden* v. *State*, *Ib.*, 519.

Allowances of County Court, how reviewed.

An order of allowance, made by the County Court, may be reviewed or opened in several modes:

First. By appeal to the Circuit Court.

Second. It may be quashed on *Certiorari* by the Circuit Court, where it appears from the face of the record that the claim allowed was not, by law, a charge against the county, and the court had no authority or discretion to allow it upon any evidence that might have been introduced. *Jefferson County* v. *Hudson*, *Sheriff*, 22 *Ark.*, 595.

Third. The statute empowers the County Courts, as often as once in three years, to call in all outstanding warrants, to examine and cause them to be renewed, if legally issued, and, if not, to reject them. Thus the Legislature has empowered County Courts to review allowances made at previous terms, and, if made without authority of law, to reject warrants issued upon them, and also to reject war-

rants otherwise illegally or fraudulently issued, as held in *Desha County* v. *Newman*, *Sup.*

Fourth. An order of allowance may be opened in Chancery, as any other judgment, for fraud, accident or mistake, on a proper case made.

In *Shirk* v. *Pulaski County*, 4 *Dillon*, 209; the suit was upon warrants issued upon allowances made for five and ten times the value of the claims, in violation of law, and in fraud of the public; and the court upon equitable principles, cut down the warrants so as to make them represent the value of the claims on which they were issued.

In this case it is alleged in this complaint that the items in the several accounts objected to were allowed by the County Court under a misapprehension of the law governing the fees of officers, at the time the allowances were made, but no fraud is alleged.

To treat the orders of allowance as null and void in this suit, to strip them of all solemnity and conclusiveness as judgments, questioned as they are, collaterally, would be going a length which this court has never sanctioned; and there is no necessity for it when other remedies, as above shown, are provided. But there is a further trouble in this case. It is in the nature of the common law action for money had and received by appellee, at different times, for the use of Izard County. The complaint, taken as a whole, alleges in substance, that at each of the nine terms of the County Court, an account was allowed in favor of appellee for a sum named, and a warrant ordered and issued by the clerk upon the treasurer for the amount, and that in each of the accounts there was one or more items for fees not allowed by law; but it is not alleged that any of these warrants were paid by the treasurer, or that appellee obtained any money upon them.

For anything that appeared in the complaint as amended,

these warrants may all have been in the hands of appellee when the suit was brought, part of each warrant, according to the theory of complaint, being for fees not allowed by law.

See *Abbott's Trial Evidence, pp.* 277, 275, etc.

RICHARDSON v. WILLIAMS.

1. EXHIBITS: *Of title deeds no part of the pleadings or evidence.*
Copies of title deeds filed as exhibits with the pleadings are no part of the pleadings, nor of the evidence. The deeds themselves, or the next best evidence, if they can't be produced, must be read to the jury.

2. PRACTICE IN CIRCUIT COURT: *When part of complaint not answered.*
When an answer to a complaint for several tracts of land is entirely silent as to one tract, the plaintiff is entitled to judgment for it for want of an answer.

APPEAL from *Mississippi* Circuit Court.
HON. L. L. MACK, Circuit Judge.

STATEMENT.

The appellant, Jane G. Richardson, sued the appellee in ejectment, in the Circuit Court of Mississippi county, for Sec. 19, T. 16, N. R. 13 E; the S. fl. 1-2 Sec. 25; the N. W. 1-4 Sec. 24, and S. E. fl. 1-4 Sec. 25 in T. 16, N. R. 12 E., alleging that she was the owner and entitled to immediate possession, and that the defendant was in possession without right. The defendant denied her title and right of possession to the first three tracts, asserted title and possession in the first two in himself, disclaimed as to the

third, and asserted title to it in a third party, and said nothing in his answer as to the last tract, the S. E. fl. 1-4, Sec. 25. Both parties filed as exhibits with their pleadings, copies of their title deeds. There was verdict and judgment for the defendant, and appeal by the plaintiff to this court. The opinion of the court renders a statement of the instruction and evidence unnecessary.

O. P. Syles, for appellant.

The verdict was contrary to the law and evidence, *Pierce* v. *Lyman et al*, 28 *Ark.*, 550.

John C. Palmer, for appellee.

There being no error of law, and the verdict being sustained by the evidence, the judgment must be affirmed.

OPINION.

HARRISON, J. As shown by the bill of exceptions, which purports to contain all the evidence in the case, the only evidence adduced to prove title in the plaintiff, was the testimony of Long.

The deed to her from him, which she relied upon as a part of her chain of title, and a copy of which was exhibited with the complaint was not, it seems, read to the jury, and no mention is made of it in the bill of exceptions.

The copies of deeds, which either party in an action for the recovery of lands relies upon as evidence of his title, and which the act of March 5th, 1875, requires to be filed as exhibits with his complaint or answer, are no part of the pleadings. *Jacks* v. *Chaffin et al.*, 34 *Ark.*, 554.

The deeds themselves must, upon the trial when it can be done, be produced and read to the jury, if not, the next best evidence must be produced.

The evidence being manifestly insufficient to show title

in plaintiff to the parcels of land the defendant claimed in his answer, or to entitle her to a verdict, we have no occasion to notice the instructions. The motion for a new trial was properly overruled.

But it is a general rule of pleading, and it is so expressly provided by section 4608 *Gantt's Digest*, that every material allegation of the complaint not specifically controverted by the answer must be taken as true. The plaintiff should, therefore, have had judgment for the quarter section as to which the answer was silent and the action undefended. She is as clearly entitled to judgment for that parcel as if she had recovered it by verdict, and according to the proper and established practice should have taken judgment by default for it. *Thompson* v. *Kirkpatrick*, 18 *Ark.*, 580; *Desha's executors* v. *Robinson, adm'r.*, 17 *Ark.*, 228; *Wheat* v. *Dotson*, 12 *Ark.*, 699.

Except as to the quarter section, as to which no defense was made by the defendant—the judgment is affirmed; and as to that it is reversed, and the cause is remanded to the court below, with instructions to render judgment in favor of the plaintiff therefor.

HANF v. FORD.

1. AMENDMENT: *Affidavit in replevin amendable.*

An affidavit in replevin may be amended in the Circuit Court on appeal from a Justice's Court, so as to enlarge the damages claimed.

2. REPLEVIN: *Verdict in solido for value of several articles, wrong. How corrected*

If, in an action of replevin for several distinct articles of property, the jury assess their value *in solido*, they should be sent back for a

verdict assessing the separate value of each article. The defendant who retains several distinct articles may return any one of them, or its value; and is entitled, for this purpose, to have the value fixed by the jury, and an alternative judgment accordingly. If this be not done, he may have a *venire de novo,* which is the only mode of correcting the error, except by new trial.

3. SAME: *Judgment in, must be in the alternative.*

Unless a judgment in replevin against the defendant be in the alternative, for the property, *or* its value, the Supreme Court will reverse it without a motion for new trial in the Circuit Court.

APPEAL from *Jefferson* Circuit Court.
Hon. X. J. PINDALL, Circuit Judge.

Martin & Taylor, for appellant.

I. It was error to allow plaintiff to amend his affidavit so as to increase his claim for damages. It presented an issue entirely different from the one presented before the justice of the peace—in fact, one above the jurisdiction of a justice of the peace. The object of allowing an appeal is to bring before the Circuit Court the matter in controversy in the Justice of the Peace Court. *Ball* v. *Kuykendall*, 2 *Ark.*, 195.

II. The damages were excessive; evidence being allowed to go to the jury showing remote and speculative damages. See, as to the measure of damages, 34 *Ark.*, 184; 36 *Ark.*, 260; *Baker* v. *Drake*, 53 *N. Y.*, 212; *Bonested* v. *Arvis*, 23 *Wis.*, 524; 15 *Ills.*, 490; *Wells on Replevin*, *sec.* 572, and cases cited.

III. The jury should have found the value of the articles separately. *Nolen* v. *Leech*, 10 *Ark.*, 504. The error could only be cured by *venire de novo*. 2 *Call.*, 313; 2 *Num.*, 539.

IV. The final judgment was not in the *alternative*. *Gantt's Digest*, *Sec.* 4718–4682; *Wells on Replevin*, *Secs.*

768, 772, 774, 778, and cases cited; *Bennis* v. *Wylie*, 19 *Wis.*, 319; *Bates* v. *Wilbur*, 10 *Wis.*, 416; *Anderson* v. *Tyson*, 6 *S. & M.* (*Miss.*), 337; *Jelton & Farris* v. *Smead*, 29 *Ark.*, 383; *Rowark* v. *Lee*, 14 *Ark.*, 425.

An error will lie to a judgment refusing a return. *Williamson ex parte*, 8 *Ark.*, 424; *Badgett* v. *Jordan*, 32 *Ark.*, 154.

Martin & Martin, for appellee.

There was abundant evidence to support the verdict, and this court will not disturb it, if there is any evidence to support it. *Frieber* v. *Anderson*, 31 *Ark.*, 163.

The amendment was "in furtherance of justice," and proper. *Gantt's Digest, Sec.* 4616.

The exception to testimony of Ford too general—and was not made ground for new trial. *Thomas* v. *Hutchinson*, 25 *Ark.*, 558; *Seifrath* v. *State*, 35 *Ark.*, 412.

The measure of damages properly defined. *Altemus* v *Kelly*, 34 *Ark.*, 189; *Minkwitz* v. *Steen*, 36 *Ark.*, 260.

The verdict was in proper form. *Gantt's Digest. Sec.* 4680. The *final* judgment for the value, as alleged in the complaint, proper. *Ward* v. *Masterdon*, 10 *Kansas*.

There was no motion to set aside the *final* judgment. *Gantt's Digest, Sec.* 1100; *Note D, to Sec.* 1055, *Ib.*, and authorities cited; and even if, under *Sec.* 4718, *Ib.*, it was wrong, because not in the alternative, the remedy was by motion in lower court, and not by appeal. *Young* v. *Atwood*, 5 *Hum.* (*N. Y.*), 234.

A judgment for value, and damages, is valid, though not in proper form. *Fitzhugh* v. *Wyman*, 5 *Seeden*, 559; *Seaman* v. *Luce*, 23 *Barb.*, 240; *Ward* v. *Orser*, 25 *N. Y.*, 348; *Gallorote* v. *Orser*, 4 *Bosw.*, 94. Plaintiff may elect to take judgment for value, as in trover. *Bigelow* v. *Doolittle*, 35 *Wis.*—and see *Bailey* v. *Griswold*, 20 *Wall.*,

486, where the Act construed is substantially the same as *Sec.* 4718, *Gantt's Digest.*

STATEMENT.

EAKIN, J. Ford brought an action of replevin against Hanf, before a Justice of the Peace, to recover a horse, a mule, and a two-horse wagon and gear. The value of each was set forth in his affidavit, which was made to answer the purpose of a complaint. The property was bonded by defendant and retained. Upon trial, judgment was rendered against the plaintiff, who appealed to the Circuit Court. He was there, against the objection of the defendant, allowed to amend his affidavit so as to increase the amount of damages claimed. Upon a trial in the Circuit Court the jury found for the plaintiff, fixing the value of the property, *in solido*, at $250, and assessing damages at $100. Whereupon, the court rendered judgment that he recover of the defendant, the horse, mule, and wagon, and harness, or their value—$250—and $100 damages, and costs.

The defendant moved for a new trial, upon the grounds that the jury had found the value of the property above the value alleged in the plaintiff's affidavit, and that the verdict was without evidence to support it, and contrary to the evidence and instructions of the court. Whereupon the plaintiff offered to remit the excess of the value found over that set forth in the affidavit. The motion for a new trial was then considered and overruled, but the court set aside and held for naught the judgment which had been entered, and declared another in its place, adopting the remittitur, and considering "that the plaintiff have and recover of the defendant $205, for the value of the property and the damages, besides all the costs of this suit, and that he have execution therefor." The defendant appealed.

OPINION.

1. AFFIDAVIT, in Replevin before J.P. amendable in Circuit Court.

There was no error in permitting the amendment as to the amount of damages. (*See Gantt's Digest*, *sec.* 4616). It did not substantially change the nature of the claim or defense, and was certainly "in furtherance of justice." The original claim for damages was made in a proceeding before a justice, in which the plaintiff, but for the retaining bond, might have had immediate re-delivery, and it might be reasonably supposed, sufficient to cover any damages then incurred, or even those which might be sustained in the usual time required for proceedings before a justice. The defendant, however, continued to retain the plaintiff's property, by means of his bond, not only during the progress of the suit before the justice, but during its pendency on the appeal. During all this time the damages were increasing, and there would have been a failure of justice, if the plaintiff had not been allowed so to amend as to recover the whole damage sustained.

2. Verdict, *in solido* in Replevin, for value of several articles, wrong.

The verdict of the jury was erroneous, and should not have been received by the court, if any objection had been made thereto at the time of its rendition; or the court might, on its own motion, have declined to receive it, and have sent the jury back, with instructions to find separately the value of each separate and distinct piece of property claimed in the affidavit. It has been so held by this court in *Noland* v. *Leech*, *Ex'r.*, 10 *Ark.*, 504, under *Sec.* 39, *Chap.* 136, *of English's Digest of the Statutes*, from which the present provisions of the Code do not materially differ. The defendant who retains several distinct articles involved in one replevin suit, has the right to return *any* of them, or its value, and is entitled to have its value fixed for this purpose by the jury, and an alternative judgment accordingly. If this is not done, before the jury are dis-

How corrected.

charged, he may move for a *venire de novo*. But, except by new trial, there is no other mode of correcting such an error. (See case cited).

The case above cited came up on writ of error, and this court, without any motion shown in the court below to correct the error, of itself reversed the judgment. The case settles the law as to the nature of the verdict, and the mode of its correction, and would be a precedent as to the practice, for ordering the new trial on motion first made here, save for a subsequent enactment of the Code (*Gantt's Digest*, *sec.* 1100), which provides that "a judgment or final order shall not be reversed for an error, which can be corrected on motion in the inferior courts, until such motion has been made there and overruled." This is decisive. A motion for a new trial was not only permissible in the court below, but proper. Only by a new trial can any relief be afforded. No motion *on that ground* was made, and this case comes not only within the letter, but the spirit and intention of the Code provision. It was passed to avoid that delay and expense which result from the practice of allowing errors, easily corrected on the spot, to be passed *sub silentio* by those affected, in the expectation that, other points failing, they may have them corrected at some future day, through an appeal or writ of error. The verdict is such an one as a judgment in the alternative might be rendered upon, and was; and if that judgment had been allowed to stand, corrected only as to the true excess, in accordance with the remittitur, it would not have been reversed on this appeal.

As to the verdict being without evidence, we may say that there was enough before the jury to justify them, in accordance with their ordinary knowledge of human affairs, in finding that the property had not been properly obtained from

the plaintiff, and that it and the damages for detention were of the values found.

3. Judgment in Replevin must be in the alternative.

It remains to consider the final judgment, and only one left standing below. It is not in the alternative, and was not authorized by any Statute, nor by the verdict. It was a simple money judgment, with award of execution. It should have been for the delivery of the property, *or* for the value thereof, etc. *Gantt's Digest*, *sec.* 4718; *Jetton & Farris* v. *Smead*, 29 *Ark.*, 383; *Rowark* v. *Lee*, 14 *Ark.*, 425.

Motion for new trial not necessary to correct errors of law.

This was an error of law, committed by the court itself, and appearing from the record. To correct it no motion for a new trial was necessary. Such a motion would not have been appropriate. It is not required of suitors to importune the courts to reconsider their judgments as to law, rendered upon the record, save as to misprisions, and some immaterial irregularities. See *Badgett* v. *Jordan*, 32 *Ark.*, 154.

The first ground of motion for a new trial was cured by the remittitur, and the others were not well taken. The court committed no error in overruling it. The verdict, modified by the remittitur, must stand, as no objection was made to it in proper time, upon tenable grounds.

For error in the judgment, it must be reversed, at cost of appellee.

Remand the cause, with directions to the court below to render an alternative judgment, in accordance with the verdict as diminished by the remittitur, to bear interest from the date of the first judgment entered.

WEBB v. DAVIS AND WIFE.

37 551
77 7

1. HOMESTEAD: *Mortgage of, under Constitution of 1868. Estoppel.*

A declaration by a mortgagor in a mortgage of real estate, made during the Constitution of 1868, that the mortgaged property was not his homestead, will not estop him to deny the truth of the declaration and assert his homestead right against the mortgage.

2. PLEADING: *Amending complaint; when not necessary.*

When the defects in an imperfect complaint are supplied by the answer to it, an amendment of the complaint is not necessary. The cause is at issue by the filing of the answer.

3. HOMESTEAD: *Plea of, against mortgage under Constitution of 1868, must be proved.*

If in an action to enforce a mortgage executed during the life of the Constitution of 1868, the defendant pleads that the mortgaged property was his homestead, the burden of proof is upon him.

APPEAL from *Pulaski* Chancery Court.
Hon. J. R. EAKIN, Chancellor.

W. G. Whipple, for appellant:

I. The privilege of homestead may be waived. *In re Cross*, 2 *Dillon*, 320; *Babcock* v. *Hoey*, 11 *Iowa*, 375; *Chamberlain* v. *Lyell*, 3 *Mich.*, 448; *Sampson* v. *Williamson*, 6 *Tex.*, 115; *Drake* v. *Root*, 2 *Col.*, 689; *Simmons* v. *Anderson*, 56 *Georg.*, 53; *Crout* v. *Sauter*, 13 *Bush*, *Ky.*

Husband and wife may alien homestead absolutely, under *Con.* 1868. *Norris* v. *Kidd*, 28 *Ark.*; *Jackson* v. *Allen*, 30 *Ark.*, 117; *Chambers* v. *Sallie*, 29 *Ark.*, 407; and power to mortgage is generally co-extensive with power to sell. *Thompson on Homestead*, *Sec.* 456 *and C. C.*

Children possess no estate during life of parents, and the homestead is wholly subject to parent's control; and whatever concluded the latter, concluded the former. *Thomp.*

on Home., *Secs.* 43 *and* 570; *Brown* v. *Coon*, 36 *Ill.*, 244; *Clupp* v. *Wise*, 64 *Ill.*, 160.

Ownership and occupation do not alone establish the character of homestead; it is a question of intention and fact. *Intention* is an essential ingredient, and a waiver eliminates the element of intention, extinguishes it. This view is sustained by *Norris* v. *Kidd*, 28 *Ark.* See *p.* 491, as to the necessity of *selection.* No waiver could be more explicit and deliberate than that in this mortgage. Does this mortgage antagonize public policy? *Sec.* 2, *Art.* 12, is to be strictly construed, and applied to cases only clearly within its terms. See *Himmelman* v. *Schmidt*, 23 *Cal.*, 120. It is aimed at *passive* liens, or incumbrances; the restriction not directly upon the acts of owner.

"The law * * * neither in spirit nor letter confers power or opportunity for fraud." *Taliaferro* v. *Pry*, 41 *Ga.*, 622. Webb was certainly defrauded.

II. Appellees estopped by recitals in the mortgage. Recitals in deeds forever estop parties thereto. *Washburn on Real Property*, *Vol.* 3, *p.* 106; *Denn* v. *Brewer*, *N. L. J. S.* (*Coxe*) *p.* 172; *Inskeep* v. *Shields*, 4 *Harr. Del.*, 345; *Redman* v. *Bellamy*, 4 *Cal*, 247; *LaJoye* v. *Primm*, 3 *Mo.*, 368. "A party who has executed a deed is thereby estopped from denying, not only the deed itself, but *every fact it recites* and *every covenant it contains.*" *Foss* v. *Stracher*, 42 *N. H.*, 40–46.

Statutes creating homestead exemption do not restrain alienation unless so expressed. *Thomp. on Homesteads*, *Sec.* 452. A void conveyance may be validated. *Ib. Sec.* 483 *and C. C.*, *and* 484–5–6, 488. See also *Stewart* v. *Mackey*, 16 *Tex.*, 56.

III. The constitutional inhibition was temporary; and the restriction afterwards withdrawn, the policy changed,

and the mortgage validated, from the date of the overthrow of the old policy. *Jordan* v. *Goodman*, 19 *Tex.*, 273; *Brown* v. *Coon*, 36 *Ill.*, 243; *McDonald* v. *Crandall*, 43 *Ill.*, 231; *Hewitt* v, *Templeton*, 48 *Ib.*, 367; *Vasey* v. *Trustees*, 59 *Ib.*, 188; *Hall* v. *Fullerton*, 69 *Ib.*, 448. *Norris* v. *Kidd*, *Sup.*, is in harmony with these.

B. B. Battle, Special Judge. This is an action to foreclose a mortgage on lots four, five, six, seven, eight and nine, in block three hundred and one, in the city of Little Rock, executed on the 14th day of June, 1871, by the appellees, Davis and wife. The mortgage was given to secure the payment of a note, bearing even date with the mortgage, executed by said appellees to appellant for one thousand dollars, borrowed money, and interest thereon; and contains tho following clause: "And we the said George A. Davis and Mary A. Davis, wife to said George A. Davis, do hereby forever renounce all claims to the above conveyed property as a homestead, and we do fully agree and covenant with the said James P. Webb, that said property is not our homestead, and forms no part thereof, and we do not claim it as such."

Appellees, Davis and wife, who were defendants in the court below, answered, admitting the execution of the note and mortgage—confessing the complaint—and saying substantially and in effect, that they had, before the execution of the mortgage, purchased lots seven, eight and nine, but had never paid the purchase money, and that afterwards, under a decree in a suit instituted by the vendor against them to foreclose a vendor's lien for unpaid purchase money, said lots were sold to Cora F. Faust; that appellee, George A. Davis, was at the time of the execution of the mortgage, and still is a resident of this State, and the head of a family; that they were the owners of lots four, five and six, at the

time of the execution of the mortgage, and still are the owners thereof; that the same were, at the time of the execution of the mortgage, and still are used and occupied by them as their homestead, and were then and are now their homestead and residence, and, with the improvements thereon, do not exceed in value the sum of five thousand dollars; that they have no other home or place of residence in this State, and claiming the same as their homestead.

To this answer, appellant filed a general demurrer which was overruled.

No question as to the sufficiency of the complaint was raised, but the defects in the same were considered by the court below, in a written opinion delivered and filed by the chancellor, as supplied by the answer.

The action was finally dismissed by an order of the court in the words following: "Plaintiff declines to amend. Wherefore this cause is dismissed for want of equity, at the cost of plaintiff."

1. HOMESTEAD: Mortgage of, under constitution of 1868.

According to the answer, lots four, five and six were the homestead of defendants at the time of the execution of the mortgage and still are such homestead; and as to them the mortgage was null and void. *Fritz* v. *Fritz*, 32 *Ark.*, 327; *Sentell* v. *Armor*, 35 *Ark.*, 49; *Klink* v. *Knoble*, decided at the present term, and *Wassell* v. *Tunnah*. 25 *Ark.*, 101.

Estoppel.

Appellant insists that the clause in the mortgage copied in this opinion estops appellees from claiming any of the afore described lots as a homestead. Has it that effect? We think not. The Constitution of 1868, which was in force at the time of the execution of the mortgage, expressly declares that "the homestead of any resident of this State, who is a married man or head of a family, shall not be encumbered *in any manner* while owned by him," except with liens for taxes, and with laborer's, mechanic's and vendor's liens. Lots four, five and six were the homestead of appellees at

the time of the execution of the mortgage sued on; and the mortgage, if anything, was an effort to encumber the homestead, and is in that respect void because it violated the Constitution of 1868.

The fact that any of these lots were or were not the homestead of appellees depended not upon any recitals, statements, stipulations or covenants contained in the mortgage. The actual use and occupation as a home and residence constituted the homestead, and could only be shown by extrinsic evidence. To assert and maintain the right of homestead the appellees must necessarily be permitted to plead and prove this fact. This follows as an inseparable and necessary incident to the rights of homestead guaranteed to them by the Constitution. Any recitals, statements, stipulations or covenants incorporated in the mortgage to prevent the pleading or proving this fact, or having that effect, if any, according to the legal construction thereof, were in violation of the Constitution in force at the time of its execution and against its policy, and are void. *Klink* v. *Knoble*, *supra*.

The facts stated in the answer are sufficient to constitute a defense, and the demurrer to the same was properly overruled.

2. PLEADING: Amending complaint, when not necessary.

The court below erred in dismissing the action at the cost of plaintiff, because he refused to amend. The defects in the complaint, if any, having been supplied by the answer, there was no necessity for amending. The cause was at issue upon the filing of the answer; the burden of proof was on the defendants, and the court should have proceeded to a hearing, which does not appear from the transcript to have been done, unless the plaintiff failed or refused to prosecute his action.

3. *Onus Probandi.*

The order dismissing the action is reversed, and this cause is remanded for further proceedings not inconsistent with this opinion.

The Hon. J. R. Eakin did not sit in this case.

TURNER v. STROUD.

1. ACTION: *Right of, in holder of promissory note.*
The holder of a promissory note may sue on it whether he holds it as collateral or in his own absolute right.

2. PRACTICE IN CIRCUIT COURT: *Entering judgment without disposing of plea.*
It is error to render judgment for a plaintiff without disposing of the defendant's plea. But if the plea presents no defense, the judgment will not be reversed in the Supreme Court.

APPEAL from *Bradley* Circuit Court.
Hon. T. F. SORRELLS, Circuit Judge.

Dodge & Johnson, for appellant.

STATEMENT.

ENGLISH, C. J. James Stroud sued Samuel H. Turner, in the Circuit Court of Bradley county, on two promissory notes, for $300 each. The complaint follows:

"The plaintiff, James Stroud, states that he is the holder of two promissory notes, as collaterals, made payable to him, dated the nineteenth of April, 1876, and payable respectively January 1, 1877, and January 1, 1878, for $300 each, bearing interest at ten per cent. from date until paid, and executed by defendant, S. H. Turner, no part of either of which, as to interest or principal, has been paid, but are now due and owing, and both of said notes are hereto attached, as exhibits A and B. Plaintiff prays judgment for both of said notes," etc.

Both of the notes filed with the complaint are payable to James Stroud or bearer.

Defendant filed a motion, stating that the complaint was defective, by reason of uncertainty in this: That it stated that the plaintiff was the holder of two promissory notes, as *collaterals*, made payable to himself, and praying the court to compel plaintiff to make his complaint more certain and definite, as to whether he was the owner of said two notes, or whether he held them as collateral security, and if so, for what he so held them.

Defendant, at the same time, and before the court had taken any action on this motion, filed an answer, with five paragraphs.

In the first paragraph he alleged that it was not true, as stated in the complaint, that plaintiff held the two notes sued on as collaterals.

In the second paragraph it was alleged, in substance, that defendant did not owe the two notes sued on, because at the time, and before the execution and delivery of said notes, one John Walker and Jephtha Oliver were indebted to plaintiff in the sum of about $600, and plaintiff contracted with defendant that if defendant would execute and deliver to the plaintiff two promissory notes for $300 each, he would release said debt due him from said Walker and Oliver. That in accordance with said agreement, defendant executed and delivered to plaintiff the two notes sued on. That the only and sole consideration for said notes was the release of said Walker and Oliver from said debt. That plaintiff, in disregard of said contract, did not release them from said indebtedness to him, but on the contrary, had, since the delivery of said two notes to him, endeavored, and still was endeavoring, to enforce the collection of the same.

The third paragraph was a plea of set-off for a smutter, of the value of $40, alleged to have been sold by defendant to plaintiff.

The fourth paragraph was also a plea of set-off for $17.51, for a bill of lumber, alleged to have been sold by defendant to plaintiff.

Defendant prayed judgment for $57.51, the aggregate amount of the two demands pleaded in the third and fourth paragraphs as off-sets.

Plaintiff demurred to the first paragraph of the answer, on the ground that it was not, in law, a sufficient defense to the complaint. The court sustained the demurrer, and defendant rested, declining to answer further, and plaintiff admitted the off-sets for $57.51, and asked judgment for the balance due on the two notes, which was, by the court, granted and entered, and defendant appealed.

OPINION.

1. ACTION: Right of, in holder of promissory note.

I. The court did not err in sustaining the demurrer to the first paragraph of the answer. The notes sued on were made payable to appellee, and he was the holder of them, and he could sue on them, whether he held them as collaterals or in his own absolute right.

2. PRACTICE: Rendering judgment without disposing of a plea.

II. But the court rendered judgment against appellant without making any disposition whatever of the second paragraph of the answer. If it was deemed not to state facts sufficient to constitute a defense, it should have been met by demurrer, otherwise it stood for trial. It is error to enter judgment without disposing of a plea. *Jordan* v. *Mewborn*, 8 *Ark.*, 502. If the plea presents no defense, however, the judgment should not be reversed, and the cause remanded merely to get rid of a bad plea. *Briarly* v. *Peay, Receiver*, 23 *Ark.*, 172.

The second paragraph of the answer seems to have been intended as a plea of failure of consideration—that the notes in suit were executed to appellee upon the sole consideration that he would release Walker and Oliver from a debt

which they owed him, and that he did not release them as agreed, but in disregard of his contract, had been, and was endeavoring to enforce the collection of the debt.

Whether this presented a good defense, or might have been made good by the statement of additional facts, had a demurrer been interposed, sustained, and leave given to amend, we do not deem it proper to decide on this appeal.

III. It may be remarked that but little attention was paid by the pleaders in this case, to the Code requirements as to paragraphing.

When the complaint contains more than one cause of action, each should be distinctly stated in a separate paragraph [count at common law] and numbered. *Gantt's Digest*, *sec.* 4563.

In this case the two notes sued on were put into one paragraph of the complaint.

In the answer defendant may set forth as many grounds of defense, counter-claim and set-off, whether legal or equitable, as he may have. Each must be distinctly stated in a separate paragraph and numbered. *Ib.*, 4569.

Here, in pleading appellant's set-off, an open account of various items, the *smutter* was put in one paragraph, and the bill for lumber in another. The aggregate sum claimed in the two paragraphs was below the jurisdiction of the court, but appellee consented to allow it as a credit on the notes.

For the error in entering judgment against appellant without making any disposition of the second paragraph of his answer, the judgment must be reversed, and the cause remanded for further proceedings.

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SHERRILL v. BENCH & BRO.

1. ATTACHMENT: *Affidavit amendable after appeal from Justice to Circuit Court.*

An affidavit for attachment in a Justice of the Peace Court may be amended after appeal in the Circuit Court, if the amendment contains no cause for attachment not existing at the commencement of the suit.

2. SAME: *Conveyance to defraud one creditor ground for attachment by others.*

A sale or conveyance by a debtor to cheat, hinder or delay any one creditor, or his removal from the county of his residence to avoid the service of summons by any one creditor, will justify an attachment of his property by any other creditor.

APPEAL from *Johnson* Circuit Court.
Hon. W. D. JACOWAY, Circuit Judge.

I. L. Fielder, for appellant:

Before a creditor can resort to attachment, it must appear that there was an intent to cheat, hinder, or delay the attaching creditor, or a general intent to defraud creditors indiscriminately. The *intent* to do so, or such conduct as will have the effect to cheat, etc., must exist.

The property sold to Dennis was not subject to levy and sale for appellee's debt, and they were in no wise prejudiced. Cites 31 *Ark.*, 554.

ENGLISH, C. J. Bench & Bro. commenced this suit against Sherrill by attachment on a promissory note, before a Justice of the Peace of Johnson county. Defendant did not dispute the debt, but controverted the grounds of attachment. Plaintiffs obtained judgment, defendant appealed, and on a trial *de novo* in the Circuit Court, the

verdict and judgment were in favor of plaintiffs. Defendant filed motions in arrest of judgment, and for a new trial, which were overruled, and he took a bill of exceptions, and appealed to this court.

I. The motion in arrest of judgment was upon the ground that there was no affidavit, as required by law, as the foundation for the proceeding by attachment.

1. ATTACHMENT: Affidavit for, amendable in Circuit Court after appeal from J. P.

The affidavit filed before the Justice was defective, but the court rightly permitted it to be amended during the trial, (*Gantt's Dig.*, *Sec.* 394; *Rogers* v. *Cooper*, 33 *Ark.*. 411,) no ground of attachment being stated in the amendment that did not exist at the commencement of the suit.

2. Conveyance to defraud one creditor ground for attachment by others.

II. There were two grounds of attachment stated in the affidavit:

1st. That defendant had left the county of his residence to avoid the service of a summons; and

2d. That he had sold or otherwise disposed of his property with the fraudulent intent to cheat, hinder or delay his creditors.

The court charged the jury, against the objection of appellant, that:

"If the jury believe from the evidence that defendant left the county of his residence to avoid the service of a summons; or that he had sold, conveyed, or otherwise disposed of his property, with the fraudulent intent to cheat, hinder, or delay his creditors, they will find for the plaintiffs.

"It need not appear that the defendant had disposed of his property with the fraudulent intent to cheat, hinder or delay the plaintiffs; but if it appear from the evidence that the defendant had sold or otherwise disposed of his property, with the fraudulent intent to cheat, hinder or delay any one of his creditors, this will be sufficient."

There was evidence conducing to prove that appellant made a pretended sale of part of his property, and left

Johnson county, where he resided, in the night time, with his family and effects, and went into Sebastian county.

The theory of his defense was that he had had much sickness in his family and become indebted to a doctor of Roseville, who had made an unjust bill against him, and that his purpose in making a sham sale of part of his property and leaving the county clandestinely, was to avoid process at the suit of the doctor. That his purpose was not to avoid the payment of the debt he owed appellees, which he admitted to be just and had made arrangements for the payment of part of it.

The seventh ground of attachment, provided for in *Sec.* 388, *Gantt's Digest*, is where the debtor "has sold, conveyed, or otherwise disposed of his property, or suffered or permitted it to be sold, with the fraudulent intent to cheat, hinder or delay his creditors."

If a debtor makes a fraudulent disposition of his property, to avoid the demand of one creditor, its effect might be to cheat, hinder or delay any other creditor.

So, if a debtor leaves the county of his residence to avoid the service of a summons by one creditor, it would avoid service at the suit of another.

His Honor, the Circuit Judge, correctly charged the jury, and the weight of evidence was a question for them.

Affirmed.

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L. R. & F. S. Railway Co. v. Finley.

I. Trespass: *Stock going upon unenclosed land of another.*

The doctrine of the common law, that if the owner permits his stock to run at large, and they enter upon the land of another, though unenclosed, he becomes a trespasser, is inapplicable to the condition and circumstances of our people, and has never been recognized in this State.

2 NEGLIGENCE: *Permitting stock to go at large near railroad.*

Although one may not be altogether free from negligence in permitting his stock to go at large in the immediate vicinity of a railroad, yet, in doing so, he assumes only the risk of an accident which might not be avoided by ordinary care and watchfulness of the agents and employees of the railroad company.

3. SAME: *Diligence required of railroad engineers to avoid injury to stock.*

It is the duty of an engineer of a railroad train to keep a constant and careful look-out for stock upon the track; and, although stock be wrongfully there, yet he must use ordinary care and diligence to discover it and avoid injury to it, or the company will be liable for the injury done to it.

4. SAME: *Presumed, from killing of stock on railroad track.*

The killing of stock upon a railroad track being shown, the presumption is that it was negligently done by the train; but the presumption may be repelled by proof.

5. PRACTICE IN CIRCUIT COURT: *Discretion in admitting testimony.*

The admission of further testimony after closing the instructions in a case, is within the sound discretion of the Circuit Court.

APPEAL from *Pope* Circuit Court.
Hon. R. C. BULLACH, Special Judge.

STATEMENT.

Finley recovered judgment against the appellant, before a Justice of the Peace of Faulkner county, for seventy dollars damages, for killing a mule by the negligent running of its train. The appellant appealed to the Circuit Court.

Upon the trial there, the plaintiff testified that he lived about fifty yards from the Cadron platform, which was on defendant's road, and right opposite his house. He owned a horse and mule. About dark, on the evening of the eleventh of July, 1879, he put a bell on the horse, and turned it and the mule out, at the house. A train passed late that night. Witness was asleep, but the noise of the train waked him. It seemed from the noise to be running rapidly. Next morning he found the mule between a quarter

and half a mile from Cadron Station, in the direction the train had gone. It was standing on the track, on three legs; the right hind leg was crushed, and dangling by the skin. The skin was not broken much. It was not bleeding much. There was some blood, where it was standing, on the track. Some skin was knocked off the side of the mule. There was blood on the left-hand rail, and on the left-hand side, near the track, was a wallowed place, like the mule had been thrown down there, or had been lying there, and struggled to get up. Some blood there. He died two days afterwards. Was worth seventy-five dollars. There were some tracks of the mule on the railroad, running in the direction the train went. Saw these tracks for ten or twenty steps. The train passed at an unusual hour. Heard no whistle or bell as the train passed.

Manuel Finley, son of the plaintiff, corroborated his father as to the injury to the mule, and circumstances thereof.

S. O. Coombs testified that the mule's right hind-leg was crushed, and it had some flesh wounds. He saw it about a hundred yards from the railroad, and about a quarter of a mile from the station. It was worth seventy dollars. He appraised it.

G. W. Bush, for defendant: Was the engineer on the train. The engine and cars belonged to the Iron Mountain road, and had the officials of that road on board. He was in the defendant's employ, and was instructed to run carefully, especially at platforms, as the cars were wider than the Fort Smith Railroad cars, and might strike the platform. Never run over twenty miles an hour, and not over ten, in half mile of a platform. Saw no stock on the track. When he came to Cadron platform, slowed-up, and came nearly to a stop. Saw some horses and mules there on each side of the track, just beyond the platform. They

did not get on the track, as he saw. The train had a splendid head-light, and he kept a good look-out. Owing to its being a train of another company, and the passengers on it, he run with unusual care.

On cross-examination, he stated that the mule might have been struck by the bumper, or dead-wood, after the engine passed it, as the cars extended about two feet over the rails on each side. The pumper might have struck it and knocked it down. He was certain the engine did not strike it, for when he got to the next station he examined to see if there was any blood or hair on the cow-catcher, or pilot, or engine, and found none. He made this examination because he thought he might have touched them, though he did not think he had, and knew, by that fact, that he had not. They were not near enough to be struck by the bumper after the engine passed them. When stock is run over there is great danger of ditching the engine, and destroying it and the train, and killing the engineer.

Among others, the defendant asked the following instruction:

1. "That the rail bed and track of the defendant is private property, and any person and stock upon said track, at any place, except at public highways, streets, or crossings, is a trespasser, and the defendant is not bound to keep an extraordinary look-out for stock, except at such places, and the defendant is only bound to proper care and diligence, after the mule was discovered to be in danger, and not before."

The court refused this instruction, as asked, but added to it the words, "Provided, the defendant used ordinary care and diligence in keeping such look-out;" and then gave it, as modified.

The court then read to the jury the 1st, 4th and 8th sections of the Act of February, 3, 1875, entitled "An Act

requiring railroad companies to pay damages to persons and property and for other purposes," and at the same time instructed them as follows:

"By the common law rule, a party, to recover, had not only to show that the injury was done, but the burden of proof was on him to show that there was negligence in the defendant in committing the injury complained of. This rule is so far changed by this Statute, that if you find the mule was killed on the road, the burden is on the defendant company to show that its agents were, at the time, exercising ordinary care and diligence to guard against such an injury; and where all the evidence is before you, it is for you to say whether that was done. The question for the jury to settle is this: Was the injury in this case such as would not have occurred if the defendant company and her agents had exercised, under all the circumstances, ordinary care and diligence to guard against such injury? If you should so find, you should render your verdict for plaintiff, and give him the amount of damage he has suffered by reason of the injury to his property. If, on the other hand, you believe the company, through her agents, was exercising such care and diligence as might reasonably be expected of them, under all circumstances—such care as a man of ordinary good business habits would, under all the circumstances, be likely to exercise to protect his own property—then you should find for defendant. Ordinary care and diligence is that care which a man of ordinary good business habits would be likely to exercise, under the particular circumstances, to protect his own property. The court cannot lay down any general rule to cover each particular case. It is for the jury to consider all the circumstances, and say whether, in this case, proper care and caution has been used. If not, the company will be responsible."

After the instructions were closed, the court, against the objections of the defendant, permitted the plaintiff to prove that the injury occurred in Faulkner county.

The jury found for the plaintiff the sum of seventy dollars.

The defendant moved for a new trial, which was overruled, and it filed its bill of exceptions and appealed.

Clark & Williams, for appellant:

There was no evidence against the defendant, and the court should have directed the jury to find for the defendant, or should have set aside the verdict, and should have given no instructions inconsistent with this view. Where there is no evidence of negligence, there is no case for the jury, although the injury and damage be completely proved. There is no evidence that the animal was injured on the track or by the train. The case of *L. R. & F. S. Rw'y. Co.* v. *Payne*, 33 *Ark.*, 816, cannot be construed to mean that when a railroad runs through any county the Statute requires that it shall be presumed to be the cause of the killing or injury which may happen to any or all stock running at large in the county. Such a ruling is a palpable fraud upon the bill of rights, and no Legislature can authorize a violation of the bill of rights, any more by juries than by the courts. *Sedgwick Stat. and Const., Law, ch.* 5, *pp.* 142, 147, 155 *and note* 168, *et seq.*, 174 and cases cited.

Appellee was guilty of contributory negligence, in turning his mule loose in the close vicinity of the track, and this will bar recovery. 1 *Thomp. on Neg., pp.* 497, 498, 499, 500, 501; *Chicago R. Co.* v. *Patchen*, 16 *Ills.*, 198; *Illinois R. Co.* v. *Phelps*, 29 *Ills.*, 447; *Chicago R. Co.* v. *Cauffman*, 28 *Ill.*, 513; *N. O. R. Co.* v. *Field*, 46 *Miss.*, 573; *Cranston*, v. *Cin. R. Co.*, 1 *Handy*, 193; *Marsh* v. *N. Y. R. Co.*, 14 *Barb.*, 364; *Halloran* v. *N. Y. R. Co.*, 2

E. D. Smith (*N. Y.*), 257; *Louisville R. Co.* v. *Ballard*, 2 *Metc.* (*Ky.*), 257; *Mich. R. Co.* v. *Fisher*, 27 *Ind.*, 97; *Clark* v. *Syracuse R. Co.*, 11 *Barb.*, 112; *Bennett* v. *Chicago R. Co.*, 19 *Wis.*, 145; *Treewhacker* v. *Cleveland R. Co.*, 3 *Ohio St.*, 185.

There was no case here to go to a jury, for the evidence negatived all negligence, and it was error to submit the case to the jury. *Macon, etc., R. Co.*, v. *Vaughan*, 48 *Ga.*, 464; *Morgan* v. *Duffie*, 69 *Mo.*, 469; *Parks* v. *Ross*, 11 *How.*, 362; *Van Schnick* v. *Hudson, R. Co.*, 43 *N. Y.*, 427; *Hickman* v. *Jones*, 9 *Wall.*, 197.

If the mule was on the track it was a trespasser, and the company would be liable only for negligence in not avoiding the injury *after the mule was seen on the track.*

Compton, Battle & Compton, for appellee.

1. TRESPASS: Stock going upon uninclosed land of another is not.

HARRISON, J. The doctrine of the Common Law that the owner of domestic animals is bound to keep them within his own enclosure, or on his own land, and that if he permits them to run at large and they go upon the land of another, though uninclosed, he becomes a trespasser, has never been recognized in this State. Such a rule is inapplicable to the condition and circumstances of our people. It would be, or would have been in the early settlement of the country, where there was so much land lying waste and uninclosed, most oppressive and unwise, and from the first settlement of the State to the present time, all kinds of stock have been allowed to go at large on uninclosed lands.

And it is shown, not only by the common understanding and custom of the people, but by the Statutes in relation to inclosures, estrays, and the marking and branding of stock, that the doctrine or rule was never considered as having any force or existence in Arkansas.

2. NEGLIGENCE: Permitting stock to go at large near railroad.

A very prudent person might not, perhaps, allow his stock to go at large in the immediate vicinity of a railroad, and one who does so may not be altogether free from negligence, yet he assumes only the risk of an accident which might not be avoided by ordinary care and watchfulness of the agents or employes of the railroad company. *Kerwhacker*, v. *The Cleveland, Columbus and Cincinnati R. R. Co.*, 3 *Ohio St.*, 172; *Trow* v. *The Vermont Cen. R. R. Co.*, 24 *Verm.*, 487; *The Chicago & Alton R. R. Co.* v. *Gretzner*, 46 *Ill.*, 74; *Raiford* v. *Miss. Cen. R. R. Co.*, 43 *Miss.*, 233; *Davies* v. *Mann*, 10 *Mee. & Wel.*, 545.

In *Davis* v. *Mann*, *supra.*, the plaintiff fettered the fore-feet of his ass and turned him into the public highway, and whilst it was grazing on the off-side of the road (which was about eight yards wide), and unable to get out of the way, the defendant's wagon, with a team of three horses, coming down a slight descent, at what the witness termed a smartish pace, the driver being some little distance behind the horses, ran against the ass and killed it.

The judge (Erskine) who tried the case at the assizes, told the jury that though the act of the plaintiff in leaving the ass on the highway, so fettered as to prevent his getting out of the way of carriages traveling along it, might be illegal, still, if the proximate cause of the injury was attributable to the want of proper conduct on the part of the driver of the wagon, the action was maintainable against the defendant; and he directed them, if they thought the accident might have been avoided by the exercise of ordinary care on the part of the driver, to find for the plaintiff. The jury having found a verdict for the plaintiff, on a motion for a new trial, PARKE, B., said:

"The judge simply told the jury that the mere fact of negligence on the part of the plaintiff in leaving his donkey on the public highway was no answer to the action, unless

the donkey's being there was the immediate cause of the injury; and that if they were of opinion that it was caused by the fault of the defendant's servant, in driving too fast, or, which is the same thing, at a smartish pace, the mere fact of putting the ass upon the road would not bar the plaintiff of his action. All that is perfectly correct, for although the ass may have been wrongfully there, still the defendant was bound to go along the road at such a pace as would be likely to prevent mischief. Were this not so, a man might justify the driving over goods left on a public highway, or even over a man lying asleep there; or the purposely running against a carriage going on the wrong side of the road."

And LORD ABINGER, C. B., said:

"The defendant has not denied that the ass was lawfully in the highway; and, therefore, we must assume it to have been lawfully there; but even were it otherwise, it would have made no difference, for, as the defendant might, by proper care, have avoided injuring the animal, and did not, he is liable for the consequences of his negligence, though the animal may have been improperly there."

3. Diligence required of engineer to avoid injury to stock.

Although the mule was wrongfully on the defendant's track when he received the injury of which he died, and was not seen by the engineer, yet, if by the exercise of ordinary care and watchfulness, he might have seen him in time to have averted the danger, the defendant was liable for the injury that resulted from the accident. It was certainly the duty of the engineer to keep a constant and careful lookout and watch for stock which might be upon the track.

The defendant's first instruction, as it was asked by him, was, therefore, not correct, but as modified by the court, was properly given to the jury.

The construction by the court of the Act of February 3, 1875, for the recovery of damages for injuries by railroads, in the first instruction given on its own motion, was in accordance with the ruling in the case of *L. R. & F. S. R'y*, v. *Payne*, 33 *Ark.*, 816.

4. NEGLIGENCE: Presumed from killing of stock on R. R. track

We held in that case that the killing of the animal on the track being shown or admitted, the presumption is that it was done by the train, and resulted from want of due care, but that the presumption may be repelled by proof; and we see no reason to doubt the correctness of the ruling then made. There was, therefore, no error in that instruction, and the others complained of being in harmony with the view we have above expressed, they were all properly given.

The objection that the plaintiff was permitted, after the evidence was closed, and the court had instructed the jury, to call a witness and prove that the mule was killed in Faulkner county, has not been insisted on here by appellant's counsel. It was a matter within the sound discretion of the court, and there was no abuse of its discretion in allowing it to be done. *Turner* v. *Tapscott*, 30 *Ark.*, 312; *Lovells* v. *The State*, 32 *Ark.*, 585.

5. PRACTICE IN CIRCUIT COURT: Discretion in admitting testimony

As to the sufficiency of the evidence to warrant the verdict, we think there can be no question; of its weight and the credibility of the witnesses, it was the province of the jury to judge.

Finding no error, the judgment is affirmed.

STEPHENS V. ANTHONY, ET AL.

1. VENDOR'S LIEN: *When apparent on deed, passes to assignee of purchase note.*

When it appears upon the face of a deed that the land was sold on time, and notes were given for the purchase money, the vendor's lien will pass to his assignee of the notes; and subsequent purchasers of the land are charged with notice of the lien.

APPEAL from *Jackson* Circuit Court in Equity.
Hon. RICHARD H. POWELL, Circuit Judge.

STATEMENT.

Stephens filed his complaint in equity in the Jackson Circuit Court, against the appellees, showing that Mitchell and Felix Crump, in 1875, sold to Samuel Anthony a two-third interest in a certain described tract of land in Jackson county, for four thousand dollars, for which he executed to them his notes payable at future dates, and they executed to him a deed for the land, reciting that they sold and conveyed it "for the sum of four thousand dollars, payable as follows, to-wit: $1000 the 25th December, 1876; $1000 the 25th December, 1877; $1000 the 25th December, 1878, and $1000 the 25th December, 1879, for which sums he had executed to them his promissory notes, payable as aforesaid."

That afterwards the said Anthony paid the first of said notes, and the other three had been transferred by the vendors for value to the plaintiff. That Anthony had sold and conveyed the land to James B. Anthony, and he had sold and conveyed a part of it to Henry E. Malone and his wife, Sarah; and that James Anthony and Malone and wife all had notice at the time of their purchases that said notes were unpaid.

Prayer for a sale of the land for payment of the notes.

The defendants demurred to the complaint, claiming that the vendor's lien upon the land did not pass to the plaintiff by the assignment of the notes. The demurrer was sustained. The plaintiff rested, and his complaint was dismissed, and he excepted and appealed.

Clark & Williams, for appellant:

Cites and comments upon *Moore & Cail* v. *Andrews*, 14

Ark.; *Shall* v. *Biscoe*, 18 *Ark.*, 142; *Scott* v. *Orbison*, 21 *Ark.* 202; *Williams* v. *Christian*, 23 *Ark.*, 255; *Bernays* v. *Field & Dolley*, *Ark.*; *Nichols* v. *Dunn*, 25 *Ark.*, 129; *Simpson* v. *Montgomery*, *Ib.* 365; *Hutton* v. *Moore*, 26 *Ark.*, 382; *Sheppard* v. *Thomas*, *Ib.* 617; *Jones* v. *Doss*, 27 *Ark.*, 618.

When a deed is made, which *shows upon its face* that the purchase money remains unpaid, and the vendor assigns the purchase notes, (although no lien is *expressly* reserved by the deed,) the lien inures to the benefit of the assignee, and he may enforce it. *Gantt's Dig.*, *Sec.* 564; *Hecht* v. *Spears*, 27 *Ark.*, 229; *Campbell* v. *Rankin*, 28 *Ib.*, 401; *Richardson & May* v. *Hamlett*, 33 *Ark.*, 238.

J. W. Butler, for appellees:

Vendor's lien is personal, and does not pass by assignment of the debt. *Rogers* v. *James*, 33 *Ark.*, 77; *Garrett* v. *Williams*, 31 *Ib.*, 250; *Hecht* v. *Spears*, 27 *Ib.*, 231.

The case does not come within the terms of *Sec.* 564, *Gantt's Digest*; the lien *is not expressed*, nor does it appear from the face of the deed, nor was there any lien, by contract, or reserved in any manner. The vendor parted with the title absolutely, trusting to his legal remedies against the purchaser; the assignee has his legal remedy against both purchaser and assignor, but none in equity.

HARRISON, J. It is expressly declared by *Section* 564, *Gantt's Digest*, (*Act of April* 24, 1873,) that "the lien or equity held or possessed by the vendor of real estate, when the same is expressed upon, or appears from, the face of the deed or conveyance, shall inure to the benefit of the assignee of the note or obligation given for the purchase money of such real estate, and may be enforced by such assignee."

This case appears to be within the very language of the Statute. If a lien had been in terms reserved in the deed, no question could possibly arise as to its passing with the assignment of the notes, and as it plainly appears from the face of the deed that the purchase money had not been paid, and that the notes were given for it, there is as little room for controversy, it seems to us, as to the existence of the equitable or implied lien.

Most assuredly, if Samuel Anthony still owned the land, and the notes had not been assigned, the recital in the deed, that the price had not been paid, or, in other words, that the notes were given for it, would, in a suit by the vendor for foreclosure, be sufficient and cogent proof that it had not been paid, and of the existence of the lien; and it is equally clear that the recital was notice to the subsequent purchasers. *Deason* v. *Taylor*, 53 *Miss.*, 697; *Honore's Ex'r* v. *Bakewell*, 6 *B. Mon.*, 67; *Thornton* v. *Knox's Ex'r*, *Ib.*, 74; *Croskey* v. *Chapman*, 26 *Ind.*, 333; *LeNeve* v. *LeNeve*, 2 *Leading Cases in Equity*, 168.

The decree is reversed, and the cause remanded to the court below, with instructions to overrule the demurrer to the complaint, and for further proceedings.

DAVIES ET AL. ADM., v. HUNT.

1. LANDS—REAL ESTATE BANK: *Redemption of, from State.*
   Under the Act of December 15, 1875, only owners of the equity of redemption in the Real Estate Bank lands sold to the State, can redeem them from the State.

2. REAL ESTATE BANK: *History of, etc., within judicial cognizance.*
   All matters connected with the organization, history and dissolution of the Real Estate Bank are within judicial cognizance.

APPEAL from *Chicot* Circuit Court in Chancery.
Hon. T. F. SORRELLS, Circuit Judge.

U. M. & G. B. Rose, for appellants.

The amended answer, stating a substantial ground of defense, is not demurrable. Plaintiff should have moved to make it more definite and certain. *C. & F. R. R.* v. *Parks*, 32 *Ark.*, 131; *Ball* v. *Fulton Co.*, 31 *Ib.*, 379; *Busby* v. *Reynolds*, *Ib.*, 662; *Hoback* v. *Hoback*, 33 *Ib.*, 405.

Appellants purchased the land under *Sections* 3959 *to* 3961, *Gantt's Digest*, amended by *Acts of* 1874–5, *p.* 219, and *Acts of* 1875, *p.* 179. *Prima facie* their title was valid. *Omnia presumuntur rite et solemniter esse acta.*

Gaines claimed adversely to Smith, and had a right to purchase the superior outstanding title, and set it up in defense of the suit.

This court will take judicial cognizance, as a matter of public history, that the mortgage to the Real Estate Bank was prior to the one under which appellee claims.

Mark Valentine, for appellee:

The answer of appellants was defective and demurrable. In it they claim the benefit of the Act of December 15, 1875—*Acts of* 1875, *p.* 179—and set up their deed; but they do not state that they were the *owners of the equity of redemption* in the lands, when they received the deed, or when the lands were purchased by the State. They could not so state, because this court, in 33 *Ark.*, 267, decided that appellee was the owner of such equity; and he, alone, had the right to purchase from the State, under *Sec.* 3946, *Gantt's Digest*, and the Act of December 15, 1875, *supra.*

Appellants, at the utmost, (Gaines having redeemed

appellee's land from the State, as an outsider,) acquired only a right to reimbursement for money paid out in our behalf.

EAKIN, J. After this cause was remanded, under the opinion of this court, in 33 *Ark.*, 267, administrations, original and *de bonis non*, having been, since the appeal, granted on the estate of Abner L. Gaines—the appellants appeared in the Circuit Court, and were allowed to file an amended answer, showing:

That, on the nineteenth of July, 1877, and during the pendency of the appeal here, the original administrator of Gaines redeemed from the State of Arkansas a portion of the lands included in the deed of trust, or second mortgage; to-wit, the east half, and northwest quarter of section thirty-four, in township fifteen south, range one west.

They allege that the redemption was made under an Act of the General Assembly, approved December 15, 1875, "To regulate the sale of lands belonging to the State, in certain cases;" and that he received from the Commissioner of State Lands a certificate of said redemption, upon which the appellants, as administrators *de bonis non*, afterwards—on the nineteenth of August, 1879—obtained a deed from the Governor, which they file as part of their answer.

They say, the purchase money of said lands has been fully paid, and claim that the title, so acquired, vests in the estate a good and valid title to said land—clear of all incumbrances whatever. They pray that those lands, also, may be decreed to them, as well as those embraced in the first lien against Smith and Adams, and for general relief.

The deed exhibited has for its caption, "Redemption Deed for Real Estate Bank Lands," and recites that it was executed upon the certificate of the State Land Commissioner, under said Act; that the purchase money had been

paid, on account of lands mortgaged to the Real Estate Bank. It included many tracts besides the one in question, being for nearly 3,000 acres; and states the purchase money of the whole together, to be $1,570.40.

To this answer a general demurrer was sustained, and, declining to amend, the respondents appealed. The court then proceeded to decree a foreclosure of the deed of trust as to all the lands in the original bill not embraced in the first lien.

The decree, however, recites that, it appears, the defendants, as administrators, had expended funds of the estate in redeeming said lands from the State of Arkansas, which sum is a charge upon the said lands, and orders that the same be repaid, with six per cent. interest from the time of its expenditure.

A like recital and order is made with regard to taxes upon the lands, paid by defendants.

The decree further recites that the lands had been in possession of the said Abner L. in his lifetime, and of his legal representatives since.

The Master was directed to determine the amounts paid for such redemption, and upon such taxes, the time, kind of funds, etc., their actual value, etc., and, further, to ascertain the fair rental value of the said premises, whilst so in possession of said Abner L. and his legal representatives.

1. REAL ESTATE BANK LANDS: Redemption of, from State

2. History of, within Judicial cognizance.

The Act of December 15, 1875, under which the purchase was claimed was passed wholly for the benefit of the owners of the equity of redemption, and one must have been such owner in order to be competent to avail himself of its privileges. What is meant in this State by the equity of redemption in Real Estate Bank Lands is well undesrtood by our courts and people. Indeed all matters connected with the organization, history and dissolution of the Real Estate Bank, have been so much discussed, and made so much the sub-

ject of Legislatlon, and judicial controversy, as to come within the proper range of judicial cognizance. It is historical. The court knows that the State claims for her indemnity the benefit of mortgages executed to the Bank, and that all these mortgages are of date long anterior to any of the liens now under discussion. She has, for her convenience, her special fiscal court for their foreclosure, and all lands purchased in by her under such foreclosure, would, but for her own grace, vest in her, clear of all subsequent liens, and would pass, thus unincumbered, to her next grantees. There were laws in existence providing for their resale, when the Act in question was passed out of tenderness to the owners of the equity of redemption, or those who would have been such but for the foreclosure. It gave those who were such at the time of the purchase by the State, ninety days after a certain period, to come in and redeem, and meanwhile the sales were suspended. It fixed also, liberal terms of redemption.

The particular lands in the answer were, as appears by the transcript of the cause remaining here, a part of those included in the second lien or trust deed, under which plaintiff claims, and also a part of those purchased by Gaines under the judgment in attachment. It is the law of this case (*see former opinion*) that the attachment lien was junior to that of the trust deed; and the real ownership of the equity of redemption was in the trustees, for the purposes of the trust. There was also a secondary or subordinate ownership in the estate of Gaines which will sustain the purchase from the State, and entitle the administrators to be repaid advances for the exoneration of the property, but they stood in such relation to the superior owners of the equity, as would not allow them to purchase to their exclusion. Evidently Smith could not have done so, and the estate of Gaines, as to this special tract, cannot take greater rights than Smith had.

The answer was also, in effect and purpose, a cross complaint praying general relief. It sought on the facts stated, to have the title of the estate to the lands, vested and confirmed against all parties. In so far, it was bad. But it brought matter to the court, which entitled defendants to appropriate relief under the general prayer, which would be reimbursement out of the property, for such moneys as it had been necessary to use in the redemption of this particular tract, or the cash value of scrips and bonds, with six per cent. interest. The demurrer was general and should have been overruled. The answer might have been made more specific as to amount advanced for this tract.

The error in sustaining it was, however, merely formal. The decree recognizes the rights of defendants, as above indicated, to their full extent, and the directions to the Master contemplate their determination and enforcement. If this be done, there will be no injury, and in the view of the case we take, this appeal seems to have become unnecessary, after the decree. The proceedings of the court will not at this stage be interrupted.

I observe an account ordered as to rents and profits. For what purpose his honor, the Chancellor, desires to be informed as to these, by the Master, is not quite obvious, but they may, as to some of the lands, be necessary. The court will not anticipate his action, but it may not be amiss to say, *obiter*, that neither a mortgagor in possession, nor his assignee is reliable for rents and profits before foreclosure, or possession taken by the mortgagee or trustee. If the *corpus* of the property be an insufficient security, the mortgagee may have a receiver. On the other hand, it is the duty of the mortgagor or those claiming under him to keep down current taxes, without reimbursement. Those, however, who claim under the mortgagor and who are not the debtors, may be reimbursed out of the property for all sums advanced

to exonerate it from liens superior to those of all parties whether arising from past due taxes or otherwise.

Affirm the decree and remand the cause for further proceedings in accordance with this opinion, and the principles and practice in equity.

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SHINN V. TUCKER.

1. PRACTICE IN CIRCUIT COURT: *Verifying pleadings from Justice's Court.*
It is not necessary to verify pleadings in a Justice's Court, either oral or written; nor, when amended, on appeal, in the Circuit Court.

2. EVIDENCE: *Of payment by services, etc., without plea of set-off.*
When the nature of the defense to an action on a note is, that the defendant had rendered services for the plaintiff and given him orders for money, with a mutual view to a settlement of the notes, evidence of the services and orders is admissible, without pleading them as set-off.

3. NEW TRIAL: *Disqualification of juror concealed on voire dire; Affidavit.*
An affidavit of the plaintiff that he is informed since the trial, and believes, that one of the jurors was related to the defendant in the fourth degree, both by blood and affinity, and that he did not disclose the fact on his examination on the *voire dire*, without stating what the relationship was, and without proof of it, will not sustain a motion for new trial.

4. INSTRUCTIONS: *To find according to "weight" or "preponderance" of testimony.*
Where there is a conflict of testimony upon a plea of payment, an instruction to the jury that the defendant is entitled to a verdict, if, upon the whole tes imony in the cause, his plea appears to be sustained by the "*weight*" of evidence, should not be given. The word "weight" is not synonymous with "preponderance."

5. PRACTICE: *Verdict should be on preponderance of evidence.*
In a civil action it is the duty of a jury to find a verdict in accordance with the preponderance of the testimony; but they need not be satisfied of its truth, in the sense of resting upon it confidently. That principle belongs to criminal law.

6. INSTRUCTIONS: *Applicable only to the particular case; Admissions*
Instructions are not intended to settle abstract principles of law. They are

given for the guidance of juries in the particular case with reference to the testimony, and it is dangerous to rely upon them as abstract and immutable principles, applicable in all cases.

(The instructions as to admissions in *Frazier, Ad.*, v. *Prater and wife*, 11 *Ark.*, 267, criticised).

7. SAME. AS TO ADMISSIONS: *Strength or weakness of evidence.*

Since the adoption of the Constitution of 1874 (Art. VII., Sec. 23), it is the exclusive province of the jury to judge of the strength or weakness of any facts to support an issue, and the court should not instruct them as to the force of evidence.

8. ADMISSIONS: *The jury, the judge of their weight.*

Statements in the nature of, or tending to prove admissions, are always admissible, and should be considered and given such weight by the jury as they may think them entitled to, without any advice of the court as to their force.

APPEAL from *Pope* Circuit Court.
Hon. W. D. JACOWAY, Circuit Judge.

W. C. Ford, for appellant: (Prepared by himself).

1. Pleadings under the Code must be verified; *Gantt's Dig.*, *sec.* 4591; excepting immaterial and other amendments named, may not be. *Ib.*, 4624. A rule asked was refused, requiring defendant to verify, not *an amendment to an answer*, but an *amended answer*, filed in Circuit Court after appeal taken from Justices' Court. Must not parties now, as before Code pleadings were adopted, if they elect to plead in writing, be governed by the rules of pleading when in Circuit Court? *Pennington* v. *Gibbons*, 1 *Eng.*, 447.

2. The verdict of the jury was contrary to the preponderance or weight of evidence, as instructed by instruction number one, given for plaintiff, and number three, given for defendant. *Davis and others* v. *Sams*, 28 *Ark.*

Defendant offered no testimony but his own, and no rebutting testimony whatever to that of plaintiff and his

witnesses. 1 *Green. Ev., sec.* 197, *and sec.* 13*a; Yarborough* v. *Arnold et al*, 20 *Ark.*

When a new trial will or will not be granted upon insufficiency of supporting evidence—5 *Ark.*, 514; 21 *Ib.*, 278; *Tupp & Son* v. *Dowell et al*, 33 *Ib.*, 811; *Walworth* v. *Finnegin*, *Ib.*,751—puts a limitation on the rule, that verdict will not be set aside, if any evidence to support it. When parties testify as to matters within the knowledge of both, and material evidence of one party is not denied by the other, it is presumed to be true. *Matthews* v. *Lanier*, 33 *Ark.*, 91. New trial should be granted on insufficient evidence, when. See *Proffat on New Trial, sec.* 471–2, and authorities there cited, especially *Hicks* v. *Manees*, 19 *Ark.*, 701; *Nichol* v. *Williamson*, 44 *Ill.*, 48; 41 *Ill.*, 314, saying, "in actions *ex contractu*, where verdict is *against preponderance* of evidence, new trial should be granted."

3. Matters of defense in the nature of set-off not admissible in proof under simple plea of payment. *Hill* v. *Austin*, 19 *Ark.*, 230. Could only be admitted where plea contained also special averments, that it had been mutually agreed that the special items of indebtedness pleaded by defendant were to be received in payment by plaintiff.

What is payment, and how proven under common law plea, as in this case? 2 *Bouv., sec.* 1, 311; *Same, Plead. and Ev.*, 612; *Wait on Ac. and Def., Cal.* 7, 473, defines plea of payment generally, and also set-off, under Code practice. *Ib.*, 7 *vol., sec.* 2, *p.* 475. How set-off pleaded under Code. *New. Plead. and Prac.*, 580; *Robinson* v. *Mace*, 16 *Ark.*, 97; 2 *Estes' Code Plead.*, 775. Does not Code pleading require plea of payment to state *how* and *in what way payment was made*, to carry out object and intention of our Code practice? *Sec.* 4569, *par.* 1, 2, 3 *and* 4; *Sec.* 4599 *Gantt's Digest.*

4. Court erred in refusing instruction five, asked by

plaintiff, and in giving instruction four, asked by defendant, and in giving instruction six, in lieu of five, refused. Those given are not only abstract, and do not fit the evidence, but go beyond the authority of the court, and characterize certain evidence of plaintiff as "weak in itself." *Con.* 1874, *Art.* 7, *Sec.* 23, as construed in *Randolph et al* v. *McCain*, 34 *Ark.*, 703.

F. W. Compton, also for appellant:

1. The evidence insufficient to sustain verdict. As to what *must be proved* to show payment in such cases, see *Armisted* v. *Brooks*, 18 *Ark.*, 521.

2. The first and second instructions for defendant, taken together, confused and misled the jury; the jury did not understand "*preponderance of evidence*," in the first, and "*weight of testimony*," in the second, as meaning one and the same thing. A misunderstanding by the jury of the rulings of the court is good grounds for new trial. *Sumner* v. *State*, 5 *Blackf.*, 579; *Fain* v. *Cornett*, 25 *Ga.*, 184; *Haskins* v. *Haskins*, 9 *Gray*, 390; see also *Wood* v. *Steamboat*, 19 *Mo.*, 529; *Armisted* v. *Brooks*, 18 *Ark.*, 521; *Boullemet* v. *State*, 28 *Ala.*, 83; *Ferguson* v. *Fox*, 1 *Met.*, *Ky.*, 83; *Clark* v. *McElvy*, 11 *Cal.* 154.

3. The fourth instruction abstract and misleading. *Hopkins* v. *Fowler*, 39 *Maine*, 568; *Harrison* v. *Thompson*, 9 *Ga.*, 310; *Dunlap* v. *Robinson*, 28 *Ala.*, 100; *Haney* v. *Marshall*, 9 *Md.*, 194; *Armisted* v. *Brooks*, 18 *Ark.*, 521.

W. W. Mansfield, for appellee.

1. The evidence was conflicting, and new trial will not be granted on any opinion as to its preponderance. The bill of exceptions discloses no "plain, palpable mistake," and no finding without evidence, by the jury. There was no abuse of discretion in refusing to set aside the verdict.

McGatrick v. *Wason*, 4 *Oh. St.*, 566; *Remington* v. *Harrington*, 8 *O. R.*, 507; *Isham* v. *Fox*, 7 *O. St.*, 320; *Danville, etc., T. R. Co.* v. *Stewart*, 2 *Met.*, 132; 2 *Nash. P. & P.* (*4th Ed.*), *pp.* 1043–4; *Lindsay* v. *Wayland*, 17 *Ark.*, 385; 24 *Ark.*, 183; 23 *Ark.*, 32; *Id.*, 61; 33 *Ark.*, 757; 34 *Ark.*, 632.

2. The objection that the evidence of defendant tended to prove a set-off, rather than payment, is without weight after judgment. "Substantial justice is not, under our practice, to give way to mere form." *Gantt's Digest, Section* 4619; *Washington et al.* v *Love*, 34 *Ark.*, 93. And this case originated in a Justice's Court, where the pleadings may be oral, and are hardly expected to be formal.

But the objection to the evidence, for want of relevancy, was not well taken, and there was no error in overruling it. Proof of the delivery of property, or the performance of labor, accepted as a payment, will support a plea of payment. *McDonald* v. *Faulkner*, 2 *Ark.*, 477–8; 2 *Greenleaf's Ev.* (*3d Ed.*), *Sections* 516–519; *Farmers' and Citizens' Bank, etc.* v. *Sherman, N. Y.*, 69; *Boyd* v. *Meeks*, 2 *Den.*, 322: 2 *Estes Pleading*, 453.

3. There was no error, to the prejudice of the plaintiff, in giving or refusing instructions. 1 *Greenleaf's Ev.*, *Sec.* 200; *Prater* v. *Frazier and Wife*, 11 *Ark.*, 251.

4. The Statute does not require the answer to be verified, in Justice's Courts, and no verification of the amended answer was necessary on appeal. But want of verification is no ground for a new trial.

5. The evidence of Russell and Munday could have been discovered and produced at the trial by reasonable diligence. Their evidence, however, is clearly cumulative, and its discovery furnishes no ground for new trial. *Burriss* v. *Wise*, 2 *Ark.*, 33; *Olmstead* v. *Hill*, *Id.*, 346; *Bourland* v. *Skinner*, 11 *Ark.*, 671; *Kirkpatrick* v.

Wolfe, 17 *Ark.*, 96; *Berry* v. *Elliott*, 25 *Ark.*, 89; *Robins* v. *Fowler*, 2 *Ark.*, 133.

6. The Code expressly provides against the ninth ground of the motion for a new trial. *Gantt's Digest*, *Sec.* 3657; *Whitehead* v. *Wells*, 29 *Ark.*, 99.

EAKIN, J. Upon the remand of this cause to the Circuit Court, under the opinion in 33 *Ark.*, 421, it was there tried by a jury upon the issue of payment alone, in which trial the verdict was for the defendant. After motion for a new trial, overruled, the plaintiff again appealed.

1. PRACTICE IN CIRCUIT COURT: Verifying pleadings from J. P's court.

After the remand, the plaintiff moved for a rule upon defendant to verify his amended answer. This answer was before this court on the former appeal, and treated as good. Any objection to it was closed by the decision then rendered. It is still insisted upon by counsel in argument, and, as it was passed *sub silentio* before, it may not be amiss to say, now, that pleadings before justices, whether written or oral, may be without verification; and when the transcript is removed to the Circuit Court, on appeal, there can be no objection to allowing amendments on the same terms, under the sound discretion of the Circuit Judge.

2. EVIDENCE, of payment by services, etc., without plea of set-off.

As to payment, the evidence on trial was conflicting The defendant, assuming the burden, introduced some tending to show that, by mutual understanding, he had, at divers times, rendered services, and given an order for money, to plaintiff, to be applied in payment of the notes, to an amount sufficient to cover those sued upon. Upon the other hand, the plaintiff introduced some to show other proper appropriations of the services and order; and that nothing had, in fact, gone to the notes in suit, beyond the amounts thereon credited. In the course of the trial the plaintiff objected to any evidence at all being given by

defendant, of subsequent services rendered, or moneys furnished, by defendant, without a plea of set-off. The objection was overruled, and it is made one of the grounds for a new trial. The nature of the defense was that the services and order had been rendered and given with a mutual view to the settlement of the notes. Proof of them was essential to the defense; although it was further necessary to show the mutual understanding. There was no error in admitting the proof, primarily; and the jury were, as we shall hereafter see, properly instructed as to the effect of it, if not connected with proof of acceptance of the services, etc., by plaintiff, as payment.

Upon all the evidence, we would not feel authorized to disturb the verdict merely upon a comparison of its weight. This rule, of course, has its limits, and must not be construed to give juries unlimited license to render shocking and unreasonable verdicts, in gratification of predelictions, or prompted by passion or prejudice, merely by availing themselves of some dim show of evidence. No more definite rule can be formulated than this; and each case must always depend upon its own circumstances. Whilst judges can not wholly ignore their own reason, and the common sense of mankind, in considering of verdicts, they will, nevertheless, in deference to the peculiar province of juries in our system, concede to them the power of determining for themselves the weight of evidence, under proper instructions as to the law, and without any appearance of undue influence, passion, or prejudice. The practical application of the rule may be in some cases difficult, in which cases it were best to leave verdicts undisturbed. This case does not present any such appearances, at least so manifestly as to annul the verdict. It must be determined on the instructions. Before proceeding to discuss them, we will first dispose of

some of the other grounds set forth in the motion for a new trial.

One of them was on account of newly discovered evidence. Without going into detail, it is sufficient to say that the motion does not satisfactorily show due diligence, nor does it appear, from the circumstances, that the matters were of such a nature as might not have, by ordinary diligence, been discovered. A considerable portion of it was cumulative; and, altogether, it does not appear that the Circuit Judge abused his discretion in the refusal.

The principles governing the practice in new trials have been often discussed, and as this case presents nothing new with regard to them, it is not expedient to swell this opinion, upon this point, beyond the mere announcement that we have examined the points, and concur with the ruling of the Circuit Judge.

3. NEW TRIAL: Disqualification of juror concealed on his *voire dire*.

It is alleged, as ground for new trial, that one of the jurors was related to the defendant, both by blood and affinity, within the fourth degree, and failed to disclose the same upon his examination on *voir dire*. The motion is supported by the affidavit of plaintiff alone, who merely says in general terms, that since the trial he has been informed and believes that the juror was related to the defendant in the fourth degree, without stating what the relationship was.

Affidavit.

It would be very unjust to the juror to subject him to the moral imputation of perjury, upon such an affidavit.

The information may not have been correct, and the juror may have had a different opinion of the relationship.

Besides, the objection came too late. There was no showing of fraud intended or wrong done, or collusion on the part of defendant. See *Daniels* v. *Guy et al.*, 23 *Ark.*, 50; *Fain* v. *Goodwin*, 35 *Ib.*, 109.

Recurring to the instructions, it is necessary further to

premise that the plaintiff had introduced divers witnesses, who testified that the defendant had, before the commencement of the suit, and since, admitted his indebtedness to plaintiff, and had offered a tract of land in satisfaction.

4. INSTRUCTIONS: To find according to "*weight*" or "*preponderance*" of testimony

The court, on defendant's motion, substantially instructed the jury, against plaintiff's objections, that the burden of proof, under the issue of payment, being on the defendant, it must, to justify a verdict in his favor, appear, from *a preponderance of evidence*, "that he paid to the plaintiff the whole amount due on the notes sued upon, and that the payment, if not made in money, was made by the delivery of property, or performance of labor, which was accepted by the plaintiff as payment."

But "it is not necessary that he should support his answer by such evidence of payment as leaves no doubt upon the minds of the jury. He is entitled to a verdict if, upon the whole testimony in the cause, his answer appears to be sustained by the *weight* of testimony, however slight such *weight* may be."

But for the change of expression from "*preponderance*" in the first instruction to "*weight*" in the second, the two together would have contained a full, complete, and well formulated statement of the law applicable to the evidence. *Preponderance* is something more than weight. It is a *superiority* of weight, *outweighing*. The words are not synonymous, but substantially different. There is generally a *weight* of evidence on each side in case of contested facts. But juries cannot properly act upon the weight of evidence, in favor of the one having the onus, unless it overbear, in some degree, the weight upon the other, in their opinion. Doubtless, His Honor meant weight in its comparative sense; and so persons, used to discriminate the exact import of words, would understand him, in connection with the first instruction; but the mass of even intelligent men seize

upon the general import of words and particular phrases, without construing them as qualified by others. It can hardly be said, however, that the charge was erroneous. It was good, taken altogether, but the plaintiff, on his part, had the right to have any obscurity concerning it so cleared as to prevent the jury from being misled.

This he first attempted by asking the court to instruct the jury that the defendant "must establish by a preponderance of evidence such payment, *to the satisfaction of the jury.*"

5. VERDICT: Should be on preponderance of evidence.

This might have thrown the jury upon Scylla in avoiding Charybdis. It is never necessary in a civil case that a jury should be satisfied of the truth of their verdict, in the sense of resting upon it confidently. That principle belongs to criminal law. Civil verdicts should be given on preponderance alone for the party whose evidence, considered altogether, *outweighs* that of the other as to the fact in issue; or against the one having the onus, if, on the whole, the weight seems balanced. The modification asked might have led the jury to suppose it necessary for the defendant to prove payment beyond a reasonable doubt. It was properly refused.

But by another instruction, (the 5th,) the plaintiff asked the court to instruct the jury that the burden was on the defendant to prove the payment by a preponderance of testimony; "and unless the jury believe that such preponderance of testimony exists, taking into consideration all the testimony in the cause, they will find for the plaintiff."

This instruction was good, and necessary in connection with those given for defendant. The court refused it, and we think committed an error. The instructions given for defendant, if they had not been obscured by the change of language, would have superseded it; but the plaintiff, as it was, had the right to his also.

6. INSTRUCTIONS: Applicable only to particular case—Admissions.

Upon the subject of admissions, the court charged for defendant, against the objections of plaintiff, that they should be received with caution; and if they should believe that the statements of defendant, relied on as admissions, were made, if at all, long after the execution of the notes sued on, and in casual conversation, and without reflection, they were in themselves "weak evidence." "But," continued the court, "it is for the jury to consider such statements with all the facts and circumstances of the cause, and so form their opinion of the weight to be attached to them."

The court refused to instruct for the plaintiff that admissions made by a party against his interest, as to indebtedness, are to be taken against the party making, and that if the jury believe that defendant admitted that he owed all or any part of the defendant's claim, by offering to pay said claim in property or otherwise, they will find for the plaintiff. In lieu thereof, the court, of its own motion, and against objections, instructed the jury that if they believed that the defendant admitted his indebtedness to the plaintiff, and proffered to pay such indebtedness in property, or otherwise, but did not do so, such admissions, "if made fully and fairly, and on occasions to call out the truth, and upon reflection, may be considered by the jury as evidence tending to establish such indebtedness."

The instruction upon this point, asked by plaintiff, is somewhat objectionable in its phraseology. An offer to pay a debt in property or otherwise, may go to a jury as evidence to be considered by them, of an implied admission that it was just and unpaid. It is not in itself, however, conclusive or binding. It may have been made to buy peace, or by way of compromise. Or a conscientious debtor might, as often happens, make such an offer in an uncertain condition of his own mind, as to whether the debt had been paid or

not. Such an offer is rather evidence tending to show an admission, than the means of making a binding admission. It is for the jury to say. The instruction requested seems amenable to this criticism, that it might convey to the jury the impression that an offer to settle was in itself an admission, upon finding which, it would be their duty to find for the creditor. The refusal of this instruction could not be held erroneous.

The instruction given on this point, at the request of defendant, that the admissions should be received with caution, etc., and that the statements, under certain hypothetical conditions, were weak evidence, is based upon an instruction given in *Prater, ad.* v. *Frazer and wife* approved by this court in 11 *Ark.*, 267. Instructions are not intended to settle abstract principles of law. They are given for the guidance of juries in the particular case, with reference to the testimony, and it is dangerous to rely upon them as abstract and immutable principles applicable and proper in all cases. That case was one in which the title to slaves was contested, which title was claimed to have originated long before the suit in another State. The statements of defendant, relied on as admissions, were made five or six years before the trial. Under the circumstances the court sustained the instructions to the jury, that statements so made, were "the weakest possible evidence admitted in courts of justice." The opinion is based upon the old case of *Myers* v. *Baker*, *Hardin* 549, which was not, at all, a case involving the propriety of instructions to a jury, It was a case in chancery, and the remarks were made by the judge, delivering the opinion, *arguendo*, in estimating the evidence. There is certainly no objection to the reasoning, and intelligent jurors would be apt to pursue the same train. It is not necessary, however, now to question the propriety of the decision in 11 *Ark.* (*supra*), to the effect that the court might characterize the

Instructions to be confined to particular case.

ADMISSIONS: Strength or weakness of, as evidence.

evidence in instructions to the jury, as *weak or strong*. Whatever evils may have resulted from the practice have been since precluded by the present Constitution, which in seeming jealousy of the influence of the bench, provides (*Art. VII, Sec.* 23) that "judges shall not charge juries with regard to matters of fact, but shall declare the law." It is the exclusive province of the jury, now, to judge, in the first instance, of the strength or weakness of any facts to support an issue. In accordance with the spirit of the Constitution this court held in *Randolph et al.*, v. *McCain, ad.*, 34 *Ark.*, 703, that it was improper in a judge to indicate to a jury that the remedy by attachment was a harsh one, as tending to prejudice their feelings. There is equal mischief to be apprehended from the practice of instructing the jury as to the force of the evidence.

Jury to judge of their weight.

Even if such a cautionary instruction were at some times allowable, we find nothing in this case to justify it. The evidence does not seem to raise the suspicion that the statements of the defendant, relied upon to prove admissions, were made under such circumstances, as to call for such a cautionary charge. The instruction should have left it entirely with the jury to judge of the effect of the statements as it did in the conclusion, but *without* the preliminary expression of the court regarding its weakness. There was error in giving it as asked for defendant.

We think also that the instruction given, on this point, by the court of its own motion was too severely qualified.

Statements in the nature of or tending to prove admissions, are always admissible to be considered by the jury, and should be considered, and have such weight as the jury may consider proper, in leading their minds to a conclusion. Juries reasoning for themselves, with their knowledge of human nature, and human motives, and ordinary human conduct, can estimate their force under the circumstances.

The instruction given by the court of its own motion, seems to impose upon the plaintiff the onus of showing that the statements were full and fair, and on occasions to call forth the truth, and upon reflection, before they could be considered at all by the jury.

The true rule applicable to this case is, that admissions of defendant, are competent proof for the plaintiff that the debt was due in whole or in part, but not conclusive, and it must be left to the jury to determine from the evidence whether the statements amounted to admissions, which they will do upon consideration of the time, place, manner and circumstances of the statements; and whether there be any rebutting circumstances to show that the admissions, if made were untrue. And these should be left to them without advice of the court as to the force of the testimony.

On account of the mistaken instructions of the court, as above indicated, and their tendency to mislead the jury to the prejudice of the plaintiff, we think a new trial should have been granted, and that the court erred in refusing it.

Reverse and remand for further proceedings.

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L. R. AND F. S. RAILWAY CO. v. TROTTER.

1. NEGLIGENCE: *Duty of engineer on discovery of stock on railroad track.* It is not always necessary that the engineer on a railroad train should stop it, or slacken its speed, on discovering stock on the track. Ordinary prudence requires him to promptly endeavor to drive them off by sounding the whistle, but does not require him to stop, or slacken the speed of the train, when he may reasonably believe that they will leave the track in time, and there is no cause or reason to suppose there is any risk or danger.

2. INSTRUCTIONS: *Abstract, not to be given.*

An instruction which is calculated to mislead the jury by leading them to infer that the evidence tends to establish the fact it hypothetically states, though abstractly correct, should not be given.

APPEAL from *Franklin* Circuit Court.
Hon. W. D. JACOWAY, Circuit Judge.

STATEMENT.

Trotter recovered judgment against the Little Rock and Fort Smith Railway Company before a Justice of the Peace, for an injury to his horse, and the Company appealed to the Circuit Court, where the case was tried *de novo* on the following evidence:

The plaintiff and two other witnesses were present at the time of the injury, a short distance from the horse. This horse and another were on the side of the road next to the river, and the road ran between the place where the horses were and the stable and house. The horses were in the field of plaintiff, five miles west of Ozark, and were quietly feeding on the grass at the time the train going east, came in sight, around a curve in the road, and while thus grazing—between forty feet, as stated by one witness, and forty or fifty yards, as stated by another, and sixty yards by another, from the road, and while the horses were not going towards the road, the whistle of the engine commenced blowing; which frightened the horses, and they attempted to cross the road by a farm-road which crosses the track, to get to the house, but the train cut them off from that way of escape, and they then started down the track, the engineer blowing his whistle all the while, and so continued until the horses were run into a culvert, where plaintiff's horse was badly injured. The witnesses could see the train, and could notice no slackening of the speed from the time the engine

whistled, up to the time the horses went into the culvert. If the engineer made any attempt to check before that time, it was not visible to them, although he might have done so. The horse was worth seventy-five dollars, and he was damaged fifty dollars; and, because of the injury, the plaintiff was deprived of the use of the horse on his farm for five or six months. He had not worked him in harness afterwards. Neither the engine nor cars of defendant struck the horse, but the injury was sustained by reason of his fall through the culvert. The train came to a full stop about thirty feet before it reached the culvert.

Andrew Southard, witness for the defendant, was the engineer on the passenger train going east at the time of the injury, about the twentieth of March, 1878. He was running on regular schedule time, and, as he turned the curve at plaintiff's farm, he discovered three horses, apparently near, and going towards, the track. He immediately sounded the stock-alarm whistle; the horses made no halt, but ran upon, and down, and along, the track ahead of the train. He continued to sound the alarm whistle. When the horses struck the track he immediately called for brakes, reversed his engine, and stopped the train as soon as possible. The horses came to a culvert; one jumped over it, and the other two fell in, scrambled out and ran off. He saw them for some time after they got out. The engine had come to a full stop, twenty yards before reaching the culvert. After the horses got out, he went on. No part of the train struck the animal. He did not know whose stock it was, nor who lived there, and he did not think the horses were injured, by the way they ran off. He had no desire or intention of hurting the horses, and did all he could to avoid it. He blew the whistle for no other purpose than to frighten them away.

Upon cross-examination, he stated that at the speed he

was then running he could bring his engine and train to a full stop within one hundred yards; that when the horses first got upon the track they were seventy-five or one hundred yards ahead of the engine, and that they ran upon the track one hundred and fifty or two hundred yards, and that his engine was twenty yards behind them when they reached the culvert.

Among others, the court gave to the jury the following instructions, against the appellant's objections:

5. "If the jury believe from the evidence that, after the horse got upon the track of the defendant, the engineer did not put on breaks, and stop the engine in a reasonable and possible distance, but willfully ran the horse down and caused him to fall into the culvert, they will find for the plaintiff.

6. "The court charges the jury that it is not necessary to sustain this action, for the plaintiff to prove that the engine or cars of the defendant actually struck the horse before he was injured; but if they believe from the evidence that there was no occasion for the engineer to have blown his whistle at the beginning, or that he did not slacken up speed, and did not use due care and diligence to avoid the injury before the horse ran into the culvert, they will find for the plaintiff."

Verdict for the plaintiff. Motion for new trial overruled. Bill of exceptions filed, and appeal by defendant to this court.

Clark & Wiltiams, for appellant:

There was no evidence of negligence. All that law or reason required was, that when the stock was seen the engineer should slow down in time not to come into collision with it; this was done. Evidence upon the question whether the train might not have been stopped sooner, was wholly

immaterial. The instructions were based on evidence wholly immaterial. Cites *Indianapolis R. Co.* v. *McBrown*, 46 *Ind.*, 229. The jury found, and the court authorized them to find, on wholly immaterial evidence, when he should have directed them to find for defendant, for want of evidence.

L. L. Wittich, for appellee:

Appellant guilty of negligence. 1. Because there was no necessity of sounding alarm at the beginning, as the horses were in no danger of being run over, and would not have run on the track had he not sounded the whistle.

2. Because he did not use due diligence in checking train, but on the contrary, constantly sounded his alarm, and did not decrease his speed until injury was done.

Cites *Acts February* 23, 1875, *p.* 133; *Acts* 1874–5.

HARRISON, J. There was no evidence tending to prove that the train was not stopped in a reasonable time after the horses ran upon the track, or that the engineer wilfully ran the horse down, as was assumed in the fifth instruction given for the plaintiff.

The great public interests subserved by railroads require and demand dispatch in their business, and that trains be run on time, and prompt and punctual connections made; and to stop or delay a train unnecessarily, would be to fail in the company's duty to the public.

It cannot for a moment be supposed that a train should always be stopped, or its speed slackened, so soon as stock are discovered to be upon the track.

Ordinary prudence and caution require the engineer to promptly endeavor, by blowing the whistle, to drive them off, but do not require that the train should be stopped, or

its speed slackened, where he may reasonably believe that they will leave the track in time, and there is no cause or reason to suppose there is any risk or danger. 1 *Thompson Neg.*, 505, 507; *Hot Springs Railroad Company* v. *Newman*, 36 *Ark.*, 607; *Cen. Ohio R. R. Co* v. *Lawrence*, 13 *Ohio St.*, 66; *Chicago & Miss. R. R. Co.* v. *Patchin*, 16 *Ill.*, 198; *T. W. & W. Ry. Co.* v. *Barlow*, 71 *Ill.*, 640; *Brother* v. *Railroad Co.*, 5 *Rich.*, 55.

Had such facts been shown as that the track, between where the horses got on it and the culvert, runs on an embankment, or through a cut, from which it might have appeared they could not safely or easily, or would not likely have left the track, the evidence in connection therewith would have tended to prove negligence in the engineer; but alone and without such proof there was nothing to show that the conduct of the engineer was not consistent with the exercise of due and proper care.

Though abstract, the instruction was calculated to mislead the jury, by leading them to infer that the evidence tended to establish the facts it hypothetically stated, and should not have given.

It was, as stated in the sixth instruction, to sustain the action, not necessary to prove that the engine or cars actually struck the horse; but this instruction, for the same reason as the other, was also abstract and misleading.

The verdict was, we think, not only without evidence to warrant it, but clearly and manifestly against the evidence.

The judgment is reversed, and the cause remanded.

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TYNER v. HAYS.

1. PLEADING: *Denials; Non detinet in Replevin. General issue, evidence under.*

Non detinet, or words to that effect, is no answer to an action for personal property. General denials, under our Code practice, are inadmissable. They must be special to each allegation of fact; but to deny that one *unlawfully* detains property, responds to no fact. But when parties accept general issues as sufficient, and go to trial upon them, it is too late afterwards to hold them void, though they might have been struck out on motion; but the evidence should be confined to the simple and obvious issues which they make, so as not to dispense with pleading specially, matters of which notice should have been given to the opposite party.

2. PRACTICE: *Damages: Judgment for more than claimed in the pleadings.*

It is an error to render judgment for more damages than is claimed in the complaint, and the error is not cured by an offer to remit the excess.

APPEAL from *Benton* Circuit Court.
Hon. J. H. BERRY, Circuit Judge.

E. P. Watson, for appellant:

I. The State has a lien for fine and costs on property of defendant, from time of arrest. *Sec.* 2013 *Gantt's Digest*; *Johnson* v. *Ashley*, 5 *Ark.*, 168; *Wells on Replevin*, *Sec.* 123.

II. No matter how informal the execution, if not absolutely void, it cannot be questioned in a collateral proceeding. Nor can appellee recover possession until she releases the liens upon it. *Wells on Replevin*, *Sec.* 123.

III. McClinton's evidence admissable. A general denial, or general issue, sufficient plea. *Ib. Sec.* 713; *Patterson* v. *Fowler*, 22 *Ark.*, 396; *Pomeroy on Rems.*, *Sec.* 685; *Curd* v. *Wunder*, 5 *O. St.*, 92; *Williams* v. *West*, 2 *O. St.*, 92; *Kelly* v. *Blakely*, 2 *Wes. Law Monthly*, 151;

Shur v. *Slater*, 1 *Ib.*, 317. *Non detinet* puts in issue plaintiff's title, and he must prove *wrongful* detention, and right to immediate possession. *Wells on Rep.*, *Sec.* 713 and cases cited.

IV. The damages are *excessive* and *vindictive*. Appellee only claimed $5, and was entited to no more, without amending her complaint. *Ib. Secs.* 530, 611; *O'Neal* v. *Wade*, 3 *Ind.*, 410. Vindictive damages are never given against an officer in the *bona fide* discharge of duty, though the process is void. *Wells on Rep.*, *Sec.* 628–9 *and C. C.*; *Ib. Sec.* 528–9–30.

E. S. McDaniel, for appellee:

I. The execution was void. *Freeman on Executions*, *Sec.* 43; *Herman on Ex.*, *Sec.* 55, *p.* 42; *Bain & Wright* v. *Chrisman*, 27 *Mo.*, 293.

II. McClinton's evidence properly excluded, as it would support a defense not set up in defendant's answer. *Irwin* v. *Childs*, 28 *Mo.*, 377; *Cowden* v. *Cairns*, *Ib.* 471. Nor could defendant amend answer so as to change substantially his defense. *Gantt's Digest*, *Sec.* 4616.

STATEMENT.

EAKIN, J. Martha Hays, a married woman, sued Tyner, a constable, in replevin, before a Justice, to recover a mare valued at $40, and damages, alleged in the complaint and affidavit at $5.

The defendant answered in writing:

Ist. That the property was in the possession, when taken, of the plaintiff's husband; that the same was levied upon and taken as his property, by virtue of executions against him in defendant's hands, issued by a Justice of the Peace, in favor of the State.

2d. That he does not unlawfully and wrongfully withhold plaintiff's property, as described, to her damage, in any sum.

Plaintiff recovered before the Justice, and again on appeal on a trial *de novo*, in the Circuit Court, by the Judge sitting as a jury, judgment was rendered in her favor against defendant and his sureties in his appeal bond, for the mare or its value at $40, and for $45 damages, of which plaintiff offered to remit $6. Defendant appealed, after due motion for a new trial, and bill of exceptions.

The evidence on the part of the plaintiff showed that the property was given to her by her husband, at the time of her marriage in September, 1878, and had ever since been recognized as hers, and had been in her possession, until taken by defendant. She also introduced the defendant Tyner, who testified that he had levied on the property in pursuance of an execution, issued by a certain Justice of the Peace, on the first of October, 1879, to pay off two fines imposed on the husband by a former Justice. He disclaimed having made any other levy, or having any other authority to hold the property, than by said levy. She proved also, by the County Treasurer and the County Judge, that the fines imposed by the Justice had been paid before the levy.

Defendant, on his part, showed by the testimony of the justice issuing the execution, and by the transcript, that upon the docket of his predecessor there were two judgments, or entries intended as such, for fines against the husband; one of the twenty-eighth of August, 1878, for $3, with $2.10 as costs; and another of the twenty-ninth August, 1878, for $1, with $9 costs, making in all $15. The present justice, upon these judgments, reciting them, issued one execution for $16, which was that under which the levy was made. There was proof also that *all* the *costs* of these

suits had not been paid, but that there was still a balance due of three or four dollars.

Defendant further offered, but was not allowed, to prove by the sheriff of the county that before the commencement of this suit said sheriff had in his hands an execution from the Circuit Court against the husband, issued for fine and costs adjudged against him in said court, in October, 1877, which had been levied on the property in question, and which property had been committed to the custody of defendant as the sheriff's bailee, and that, therefore, he was entitled to retain possession. This evidence was excluded by the court, as inadmissible under the issues.

The court held the execution under which the levy had been made, to be void, and rendered judgment as above.

OPINION.

No question is made of the validity of the gift of the mare from the husband to the wife, in September, 1878, nor is it contended that it was not her separate property. It is only claimed that it was subject to the lien of judgments rendered before the gift, in favor of the State, against her husband, for misdemeanors. The execution was subsequent.

We are not called upon to decide whether or not the court erred in finding the execution void. It was a matter depending on proof, and the finding on this point is not made one of the grounds of the motion for a new trial. As the matter was brought to our notice, we may at least say that it was irregular, unauthorized by law, and such as should have been quashed, upon proper application. Whether so wholly void, however, as to vitiate all proceedings under it, is a question we need not now decide.

1. PLEADING: Denials: *Non detinet* in Replevin.

Non detinet, or words to that effect, is not a good plea under the Code, in an action for personal property. Our

system is in some respects more rigid, with regard to answers, than that of most of the States which have adopted the modern new procedures. It does not admit of "general" denials. They must be special to each allegation, and *allegations* mean statements of facts, not propositions of law. They refer to things to be pleaded, not matters to be argued. To deny that one *unlawfully* detains property responds to no fact. It may be based upon the respondent's view of his legal rights. Either the property in plaintiff should be denied, or the fact of the detention; or, both being admitted, the special matter should be set up which shows the detention to be lawful. Otherwise there is no issue of fact, but a mixed issue of law or fact, inviting that wide range of evidence, which it is the express design of the Code to limit. Old habit and some recalcitration against the Code, amongst a very respectable class of attorneys, has kept up a tendency to the use of the general issues, as well as the other common law forms. When such pleas are accepted as making an issue, and parties go to trial upon them, it is too late to hold them null and void, although they might have been struck out on motion. But as to the evidence admissible under them, it should be confined to the simple and obvious issues which they make, so as not to dispense with pleading specially matters of which notice should have been given to the opposite party. This is illustrated by Mr. NEWMAN, in case of a simple denial of title. He says, *p.* 523 of his work on *Pleading and Practice*, that under such an answer, defendant might show adverse possession, or any other facts to defeat plaintiff's title. "But," continues the author, "if the defendant intends to rely upon the fact that the property was pawned to him, or that he holds it under a lien, or any other defense, which admits the title in the plaintiff, and possession in himself, he must set forth the facts of the defense in his answer."

General issue.

Evidence under.

The court did not err in excluding testimony regarding the judgment of the Circuit Court. It is not apparent how the defendant could have been injured by its exclusion, if admissible, as he had himself expressly and positively disclaimed the taking and detention of the mare upon any other right or authority than that of the execution from the justice.

Lest misapprehension should arise, I will not pass in silence a point assumed by appellant, and which seems to be conceded by appellee. It is that a judgment before a justice, in a criminal proceeding for a misdemeanor, is a lien upon all the property of defendant, real and personal, from the time of his arrest.

At the time of the Revised Statutes, when the law was passed which now stands as *Sec.* 2013 *of Gantt's Digest*, justices had no criminal jurisdiction whatever. The act applied to prosecutions by indictment in courts of record. It might have very disastrous consequences to apply this act to the proceedings before Justices of the Peace. Their judgments are not usually clothed with the dignity of liens, especially such liens as are not limited to townships, or even counties. How far, or whether or not they are liens, are questions suggested by this case and may become involved in its decision, if the execution from the justice be held only voidable, and not void.

2. DAMAGES: Verdict should not exceed the amount claimed.

There was error in finding damages beyond the amount claimed. This practice might lead to surprise and abuse. The complaint or affidavit is always, before trial, amendable as to amount of damages, in the discretion of the court, and parties should amend, if they desire more than originally claimed. This error was not cured by the offer to remit, and a new trial should have been granted.

It is not necessary to decide whether the proof supported the amount of damages found, diminished by the remittitur.

There were other grounds for a new trial, but as the case must be remanded, it is not deemed important to notice them. They show no error.

Reverse the judgment and remand, for error in overrul- the motion for a new trial, with the usual directions as to further proceedings.

PATTON v. GARRETT.

1. LANDLORD'S ATTACHMENT: *Measure of damages on discharge of.*

On the discharge of an attachment of corn for rent, the presumption is, in the absence of evidence to the contrary, that the corn is returned to the defendant; and his measure of damages, in such case, is, the injury sustained by the detention of the corn and any deterioration of value resulting from the attachment.

2. SAME: *Attachment for removing crop.*

A removal, by the tenant, of any considerable portion of the crop from the field where it grows, to another place rented from the same landlord, without his consent, and there consuming it, will justify him in attaching the crop. A removal of part of the crop from the premises, without his consent, even for honest purposes, will support an attachment.

3. LANDLORD AND TENANT: *Measure of rent when in kind.*

When land is rented for a portion of the crop produced on it, and nothing is stipulated about the manner of cultivation, the landlord can claim only the agreed portion of the crop actually produced without regard to the manner of cultivation.

4. SAME: *Rights and liabilities of landlord when attachment fails.*

When the grounds of a landlord's attachment prove untrue, he is subjected to damages; but he has the right, even in the case of a premature suit, to recover what he may be justly entitled to, including money value of rents not paid in kind.

5. DAMAGES: *Attorney's fees not recoverable on discharge of attachment.*

Upon the discharge of an attachment, only such damages can be recovered by the defendant as are actual, and the natural and direct consequences of the attachment. And these do not include attorney's fees.

APPEAL from *Washington* Circuit Court.
Hon. JAMES H. BERRY, Circuit Judge.

B. R. Davidson, for appellant.

The court erred in instructing the jury that only one-third of the crop "actually produced," without regard to manner of cultivation, could be recovered. *Sec.* 4098, *Gantt's Digest*, gives a lien for "rent," and not simply for a certain part of such crop as "might be raised." Landlord has a lien for his portion of a crop *which should be raised by proper cultivation*, and it extends to the *whole crop*.

Attorneys fees not allowable—only when the suit is vindictive, malicious, or vexatious—as damages. *Platt* v. *Brown*, 30 *Conn.*, 336; *Dibble* v. *Morris*, 26 *Ib.*, 416; *Roberts* v. *Mason*, 10 *Ohio St.*, 277; *Stephenson* v. *Railroad*, 1 *Wall., Jr., U. S.*, 164; *Schooner Margaret* v. *Steamboat Connestogo*, 2 *Wall., Jr., U. S.*, 116; *Arcambel* v. *Wise*, 3 *Dallas*, 306; *Heath et al.* v. *Leut, adm., et al.*, 1 *Cal.*, 410; *Plumb* v. *Woodmansee*, 31 *Iowa*, 116.

STATEMENT.

EAKIN, J. This is an action under the Statute, by a landlord, before a Justice, for rent payable in kind. The action was brought before the end of the year, for the value of that portion of the crop which was payable to the landlord. An attachment issued, based upon the affidavit of Patton, the landlord, setting forth his lien on the crop, that the rent was due, that he ought to recover $98 therefor, and that "the defendant has removed a part of the crop from the premises, without his consent." It was levied upon a crop of corn in the field. An account for the rent was filed with the affidavit.

Defendant Garrett appeared, and, by written answer, under oath, denied that he was indebted for rent, and, also, that he had removed any part of the crop from the premises without the consent of plaintiff. He also set up, as a counter-claim, a charge for damages, caused by plaintiff, in attaching the crop, "and one horse," and for expenses incurred by himself in recovering the horse, and for the trespass in taking the horse, and for damage to the crop in preventing its being gathered. The horse, however, and the counter-claim disappear afterwards from the proceedings, except in so far as damages under the Statute may be claimed for improperly suing out the attachment.

The cause was tried before a Justice upon the two issues together, made by the answer, and a verdict was rendered for defendant. Upon appeal to the Circuit Court, the cause was there again submitted on the same issues, with like result. The jury found for defendant, and assessed his damages at $81.66 2-3. Whereupon, the attachment was discharged, and judgment for the amount was rendered against the plaintiff, and his surety in the attachment and the appeal bonds. Plaintiff moved for a new trial, which being refused, he filed a bill of exceptions, and appealed. Pending the suit, as appears from the evidence, the corn attached had been gathered by the constable's directions, and cribbed on the plaintiff's land.

OPINION.

This cause was tried below before the publication of *Holiday Bro's.* v. *Cohen*, 34 *Ark.*, 707, which was intended to fix the practice under an Act of tenth of November, 1875, providing for the recovery, in the same action, of damages by defendant, in case of a discharge of an attachment. The Act is somewhat obscure, and the practice before that time was unsettled. We therefore deem it expedient to waive all

notice of the practice in this case, as being at variance with that prescribed in the case cited, and to look only at the substantial merits

1. LANDLORD'S ATTACHMENT: Measure of damages on discharge of.

The first two grounds of the motion for a new trial are, that the verdict is contrary to law, and unsustained by evidence. The evidence showed that the renting was for a third of the crop. The land was to be cultivated in corn, with the exception of two acres which defendant agreed to plant in tobacco, and with the further exception that the defendant might sow four acres in oats, paying corn rent for the same as if cultivated in corn, to be estimated by the product of the contiguous land. The jury seems to have adopted the plan of charging plaintiff with two-thirds the value of the corn attached, allowing him the other third for his rent, in place of finding a verdict for him for rent, and charging him with the whole crop as damages. Substantial justice would be attained that way, with a further allowance in his favor for the oat land, and the corn used by the tenant (which probably they also intended), if in fact the plaintiff got the corn attached. But there does not seem to be sufficient evidence of that. It was *cribbed* on plaintiff's land, but that would naturally be done, for convenience, and to avoid the expense of hauling. It was, from all that appears, and still is, in the custody of the law, and the plaintiff under the evidence, even if the property had been improperly attached, could only be charged for the detention, and any deterioration in value resulting from the attachment. Upon the discharge of the attachment, the right to possession of the corn reverted to defendant, and the presumption is he got it all back. Perhaps the evidence, though not preponderating that way, might support the *value* of defendant's share, if it had been shown that he lost it entirely, but the evidence does not authorize the mode of adjustment adopted.

2. SAME: Removing crop.

Besides, the evidence does show beyond question, that the defendant had, without the landlord's consent, taken off a considerable part of the corn from the field to his house, a quarter of a mile away, and consumed it for his private purposes. This was unfair to the landlord, as prejudicial to his rights to a fair division. It was within the mischief which the Statute intended to avert, in making it a ground of of attachment, if the tenant should remove the crop, or any portion of it, from the premises, without the landlord's consent. To take it from the field where it grows, to another place rented from the same landlord, and there consume it, is within the spirit and equity of the Statute, as well as fairly within its letter. The crop should be kept on the premises until the rents are adjusted. If the necessities of the tenant should require him to take any considerable portion, before division, it should be by consent of the landlord, who would thus be enabled to protect his interests, by keeping an estimate of the amount consumed. A removal of part of the crop even for honest purposes, without the landlord's consent, will support an attachment. *See Randolph* v. *McCain*, 34 *Ark.*, 696.

The verdict of the jury in finding for defendant on the second issue, and assessing damages against plaintiff, was contrary to the evidence. The first two grounds of the motion were well taken.

The remaining grounds concern instructions. Those given against plaintiff's objections, after fairly stating to the jury the two issues before them, proceed to advise them, that if they find for the defendant, on the second, they must assess his damages for the false attachment, and should arrive at the amount by ascertaining the value of the corn *that belonged to the defendant* at the time it was taken, and a reasonable attorney's fee for defending the suit.

II. That if the defendant rented the land for one-third

of the crop, plaintiff could only recover a third of that actually produced, without regard to the manner of cultivation.

III. That if they should find against the grounds of the attachment, then the plaintiff should not recover the value of his third in money, until after the time had passed for the delivery of one-third of the crop, and failure to do so.

The court refused, on plaintiff's motion, to instruct the jury as follows:

"If you find the defendant had removed the crop, or any portion thereof, from the premises, without the consent of plaintiff, you should find for plaintiff in the attachment issue."

3. LANDLORD AND TENANT: Measure of rent when in kind.

It is obvious, for reasons already given, that the first instruction on the part of defendant, as to the measure of damages regarding the crop, was erroneous. So much of it as regards attorney's fees will be taken up hereafter. The court also erred in refusing the instruction asked by plaintiff. *Randolph* v. *McCain* (*supra*).

The second instruction for defendant is unobjectionable. It would give rise to interminable litigation, if landlords, leasing on shares, could claim all that would have inured to their benefit, if the tenant had exercised ordinary industry, and judgment in the cultivation of the crops. The amicable adjustments of rents would be almost exceptional. The landlord chooses his tenant, and must judge of his skill and fidelity in husbandry, or if he desires assurance on these points, should make special stipulations, or have money rent secured.

4. ——: Rights and liabilities of landlord when attachment fails.

The third instruction given for defendant seems obscure. The time had already passed for the payment of rent. So far as it might impress the jury with the idea, that the plaintiff could recover no money in this action, as the value of his portion of the crop, because he had begun it by false attachment, before default on the part of defendant to

deliver a portion of the crop, it does not present a safe rule of practice. Where the landlord has a lien, our Statute authorizes a suit by attachment, whether the rent be due or not, in two cases: First, when the tenant is *about* to remove the crop, without paying the rent, and second, when he *has* done so, without the landlord's consent. It would seem to result that, these conditions failing, such a suit would be without authority, and should be dismissed. (See *Gantt's Digest, Sec.* 4101.) This result, however, is precluded by *Section* 4104, which provides for staying the trial until the rent be due, and for the dissolution of the attachment in the manner *then* prescribed by law, and for the progress of the cause, as an ordinary suit. This Act was passed in 1860. It was not then allowable to controvert the truth of the sworn grounds of attachment, and it could not be shown, therefore, that the case had not arisen for the application of the remedy. It has since been allowed, and it is a question, not without difficulty, whether that being shown, the suit should not be dismissed, as unauthorized, precipitate and vexatious.

The Act was in force, however, when, by the Code, another mode was provided for dissolving attachments; that is, by questioning the truth of the grounds. In these cases the law provides that suits shall nevertheless proceed upon their merits. The Code is general, with no reference to suits by landlords. No provision is made for their dismissal in cases of premature suits, where the grounds of attachment have been found to be false. By the Code, also, as amended in 1871, (See *Gantt's Digest, secs.* 437 *and* 438,) all creditors were allowed, in certain contingencies, to bring suits with an attachment before the debts become due, and there is nowhere any express provision for the dismissal of suits, in case the grounds of attachment should not be sustained. The law contemplates the dissolution of

the attachment, with a liability of the plaintiff and his sureties, for damages; and that the suit upon the debt be retained to be tried upon its merits.

Upon a review of our legislation, we think the landlord, in case the grounds of his attachment be found untrue, is subjected to damages, but has the right, however, even in a case of a premature suit, to recover that to which he may be justly entitled, including money value of rents not paid in kind.

5. ATTORNEYS' FEES: Not recoverable as damages on discharge of attachment.

With regard to the attorneys' fee, it has been held that in cases like this, there is no mode of putting in issue fraud, imposition, malice, or any other tortuous or oppressive design on the part of plaintiff. The issue is only upon the dry ground of the truth or falsity of the grounds stated, and there is no room for damages of a punitory, vindictive, or exemplary nature. Only such can be recovered as are actual, and the natural and direct consequences of the attachment. Do attorneys' fees, incurred in the defense of the suit, or in procuring a dissolution of the attachment, come fairly within the scope of proper and direct, actual damages?

In England, attorneys' fees are taxed as costs in the suit, and allowable in other actions as damages, wherever full costs of a suit may be. In America, generally, the compensation of attorneys is matter of contract between attorney and client, and in no sense costs of the suit. They are proper expenses, and of course allowable in all cases where punitory or exemplary damages may come in. But as to whether they are necessary and direct damages in ordinary cases, the American authorities are in conflict. The difference of opinion has arisen principally in suits by vendees, under covenants of warranty, seeking to recover damages for eviction by suit, claiming attorneys' fees as part of the

expenses incurred from breach of warranty. Some of the courts have held them to be recoverable, and some not. (See the matter discussed, and the cases cited in *Turner* v. *Miller*, 42 *Tex.*, 418; *S. C.* 19*th*, *Am. Rept's*, *p.* 47.) We acknowledge the difficulty of seizing upon any clear principle upon which the mind can unhesitatingly rest, to determine the question either way.

We think, however, that the weight of authority and the better reason is in favor of discarding such claims, as the proper, natural and direct consequences of a suit improperly prosecuted, but without malice or on improper motive. Laws which give remedial rights should not too greatly imperil those who honestly seek them. The occasional necessity for the payment of attorneys' fees may be a misfortune, but it is one of the risks which citizens assume as the price of a government by law, instead of one by violence and caprice, or none at all; and as in case of other burdens, it is better that each should assume the risk for himself than to cast it upon those who honestly, though mistakingly, appeal to the courts for a vindication of their supposed rights. There is also an inconvenience, with danger of injustice, in applying a different rule to the case of a false attachment. The same attorney usually defends the suit upon its merits, and the suit may be properly brought. How much of the attorney's compensation results from opposing the attachment, as distinct from the suit, is not easily apportionable, and that portion is the utmost to which the defendant can be entitled. He certainly cannot throw upon the plaintiff the whole cost of defending a meritorious suit, because the plaintiff had made a mistake in seeking an ancillary remedy. In harmony with these views, this court has heretofore held in the case of *Oliphint* v. *Mansfield*, 36 *Ark.*, 191, that counsel fees are not allowable on the dissolution of an injunction.

We do not think, therefore, that the attorney's fees of defendant should, in the same action under the statutory proceeding, be acknowledged as damages; and that the court erred in its instructions.

Because of the instructions erroneously given and refused, and because the verdict was not sustained by evidence, the court erred in overruling the motion for a new trial.

Reversed and remanded for further proceedings, with the usual order.

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BOATWRIGHT ET AL. v. STEWART.

1. ATTACHMENT: *Measure of damage, when wrongfully sued out.*

When an attachment is discharged, and the attached property restored to the defendant, then, in a suit upon the attachment bond, upon showing that the attachment was wrongfully sued out, the measure of damages is the actual loss from being deprived of the the use of the property, the injury to it, and the expenses incurred in defending the attachment proceedings. But when the attached property is totally lost by means of a wrongful attachment, and only then, the measure of damages is the value of the property when attached.

2. SAME: *Liability for waste of attached property.*

When an attachment is wrongfully sued out, the plaintiff and his surety on the attachment bond are liable for any waste occurring to the attached property in the hands of the officer levying the attachment, and for all damages resulting from the seizure.

3. ATTACHMENTS: *Wrongful, evidence of, in actions on attachment bond.*

If the affidavit for attachment be controverted, and the issue be determined in favor of the defendant, and the attachment be thereupon discharged, the judgment will be conclusive in an action against the plaintiff and his surety on the attachment bond, that the writ was wrongfully issued. But if the judgment of discharge be for informality of the affidavit, and not its falsity, then it will not be sufficient proof that the order was wrongfully sued out.

4. SAME: *Action on attachment bond for damages.*

It is not necessary to the recovery of damages, by an action on an attachment bond, that the judgment in the original action, discharging the attachment, should fix the amount of the damages.

APPEAL from *Arkansas* Circuit Court.
Hon. ROBERT H. CROCKET, Special Judge.

B. C. Brown, for appellants:

1. The *onus* was on appellee to show a "*wrongful*" suing out or obtainment of the attachment. The attachment was dissolved for informalities in the affidavit and proceedings before a justice, and the dissolution of an attachment for informality is not proof that it was wrongfully sued out. *Sharp* v. *Hunter*, 16 *Ala.*, 765; *Pettit* v. *Mercer*, 8 *B. Mon.*, 51; *Smith* v. *Story*, 4 *Humph.*, 169; *Tiller* v. *Shearer*, 20 *Ala.*, 527; *Kirkland* v. *Cox*, 1 *Jones, N. C. L.*, 428; *Winchester* v. *Cox*, 4 *Greene, Iowa*, 121; *White* v. *Dingle*, 4 *Mass.*, 433; *Lindsay* v. *Larned*, 17 *Mass.*, 190; *Vandusor* v. *Linderman*, 10 *Johns.*, 106; *Cooper* v. *Hill*, 3 *Bush.*, 219; *Drake on Attach.*, *sec.* 170.

2. Defendants not liable for injuries to property while in custody of the officer. *Drake on Attachment*, *chap.* 12.

3. It was error to charge the jury that in "actions of this character" the damages were the value of the property seized, without regard to what became of it.

4. The fifth instruction for plaintiff was erroneous, as it left no question for the jury but the one whether the suit was brought within five years, and to ascertain the value of the property received.

ENGLISH, C. J. This was a suit upon an attachment bond. The history of the attachment suit, as stated in

Mears et al v. *Stewart*, 31 *Ark.*, 17, is briefly as follows:

On the fourteenth October, 1873, Mears & Boatwright sued George W. Stewart, on an open account, for $215, before a Justice of the Peace of Arkansas county. They filed with the account an affidavit, and Code form of bond for attachment, which seems to have been issued, and not returned by the constable. On the twenty-seventh of October, 1873, defendant appeared; there was a trial by jury, and verdict and judgment in favor of plaintiffs for $191.25, and defendant appealed to the Circuit Court. In that court defendant moved to quash the attachment, on the ground of informality of the affidavit on which it was issued by the Justice of the Peace. Plaintiffs filed an amendment to the affidavit, but the court sustained the motion of the defendant, dissolved the attachment, ordered an inquest of damages, which were assessed by a jury at $240, and rendered judgment upon the verdict. The original cause of action on which the appeal was taken was then tried, and verdict and judgment were rendered in favor of plaintiffs (sixth April, 1875,) for $125. The plaintiffs brought error to the judgment against them for damages, and this court reversed it, because there was no Statute in force at the time the judgment was rendered, authorizing the damages of the defendant to be assessed in the attachment suit, on the dissolution of the attachment. The court said that if the attachment was wrongfully sued out, and defendant damaged thereby, he had the right to resort to a common law action, or a suit upon the Code bond to recover damages.

The present action upon the attachment bond was commenced in the Circuit Court of Arkansas county, on the seventeenth of November, 1879, by George W. Stewart, the defendant in the attachment suit, against Green W. Boat-

wright, one of the principals in the bond, and Henry Young, the surety.

The complaint alleges, in substance, that on the fourteenth of October, 1873, Mears & Boatwright commenced an action by attachment against plaintiff, before W. F. Newton, a Justice of the Peace, etc. That in accordance with law, they executed a bond, with Henry Young as surety, conditioned that they would pay this plaintiff all damages he might sustain by reason of the action if the order of attachment was wrongfully obtained; which bond is set out as follows:

"We undertake and are bound to defendant for all damages he may sustain by reason of this action, if the order therefor is wrongfully obtained."

Plaintiff further alleges that after Mears & Boatwright "had filed the affidavit as required by law, and given the bond, of which the foregoing is a true copy," an attachment was issued by said justice, directed to the constable, etc., who levied it upon three thousand pounds of seed cotton, fifteen acres of cotton in the field, and a bay horse, the property of the plaintiff.

That the suit was tried before the justice on the thirtieth of October, 1873, and judgment rendered against this plaintiff, from which he prayed and obtained an appeal, in accordance with, and within the time prescribed by law.

"That said Justice of the Peace ordered the property attached to be sold, on account of its liability to waste, and that the proceeds be held subject to the final disposition of the case."

That "on the trial of said case" in the Circuit Court, at the spring term, 1875, on appeal, the attachment was set aside, dissolved and held for naught, and judgment was rendered for this plaintiff for $240, as damages he had sustained by reason of the issuance of said attachment; from

which judgment Mears & Boatwright "took an appeal to the Supreme Court," and at its May term, 1876, the judgment was reversed, the court deciding that there was no law at that time authorizing a writ of inquiry to assess damages, and that suit should have been brought on the attachment bond.

Plaintiff further alleges that after Mears & Boatright had "taken an appeal," and given a supersedeas bond, they obtained an order from the Circuit Court requiring the constable to pay over to them the proceeds of the sale of the property attached, and that the same were paid to them, and no part thereof has been paid to plaintiff.

That plaintiff had been damaged in the sum of $700.00, by reason of said suit, and the wrongful suing out of said attachment, and neither Mears & Boatright, nor Henry Young, had paid plaintiff said damages, and that Mears had become a non-resident; wherefore, he prayed judgment against defendants Boatright and Young for $700.00.

After demurrer to the complaint had been interposed, and overruled, defendants filed an answer with two paragraphs. In the first they denied that said order of attachment was wrongfully obtained; and, in the second, they alleged that the said supposed cause of action, in the complaint mentioned, did not accrue to plaintiff at any time within five years next before the commencement of the suit.

The issues were submitted to a jury, and, upon the evidence and instructions of the court, hereafter noticed, a verdict was returned, and judgment rendered in favor of plaintiff for $500.00 damages; a motion for a new trial was overruled, bill of exceptions taken, and defendants appealed to this court.

I. The court charged the jury, against the objections of appellants, that all of the material allegations and state-

ments of the complaint, not denied by their answer, were admitted to be true.

The giving of this instruction was not made a ground of the motion for a new trial; but, it may be remarked, that the Code rule is, that "every material allegation of the complaint, not specifically controverted by the answer, etc., etc., must, for the purpose of the action, be taken as true. * * * Allegations of value, or of amount of damage, shall not be considered as true by the failure to controvert them." *Gantt's Dig., Sec.* 4608.

II. In the second, third and sixth instructions, moved for appellee, and given, against the objection of appellants, the court charged the jury, in effect, that if the action on the bond was commenced within five years from the time of the dissolution of the attachment, it was not barred by the Statute of Limitation.

It is not insisted by counsel for appellants that this ruling was an error.

Appellee read in evidence, from the record, the order dissolving the attachment, which was made at the March term (perhaps the sixth of April), 1875, not "on the trial of the case," as alleged in the complaint, but on his motion. This suit was commenced, seventeenth of November, 1879, hence five years had not transpired between the dissolution of the attachment and the bringing of this action, and it was not barred by the Statute of Limitation.

1. ATTACHMENTS: Measure of damages for wrongful suing out.

III. The fifth instruction moved for appellee, and given by the court, against the objection of appellants, was that: "The measure of damages in an action of this nature, is the value of the property at the time of the seizure of the same under the order of attachment."

The giving of this instruction (erroneous as it is as a general proposition,) was not made a ground of the motion for a new trial; but the sixth instruction moved for appellee,

and given by the court, against the objection of appellants, and the giving of which was made ground of the motion for a new trial, follows:

"If the jury believe from the evidence that the attachment, etc., was dissolved within five years next before the commencement of this suit, they will find for the plaintiff, etc., the value of the property attached in said attachment suit at the time of the seizure under said attachment, and render a verdict for the amount that the evidence shows the property was worth, with interest at the rate of six per cent. per annum from the date of the seizure under the attachment."

Mr. SEDGWICK says: In suits on statutory undertakings and bonds given to secure a defendant against damages and costs resulting from an attachment, etc., wrongfully issued, the measure of damages is substantially indicated by the terms of the instrument as authorized by the Statute, and is the actual expenses and loss occasioned by the writ, or order, excluding remote damages. *Sedgwick on Damages, 6th Ed., p.* 488, *in note* 2.

In *Holliday Bros.* v. *Cohen*, 34 *Ark.*, 707, a storehouse and goods were attached, and, in a few days, released; ten bales of cotton were also attached, and, in four days, bonded by defendant. Defendant controverted the truth of the affidavit for the attachment, and there was a verdict in his favor, and his damages assessed (under the Act of tenth of November, 1875,) at $4,000. On appeal, the judgment was reversed on several grounds, and among them that the damages were excessive. The court said: "In such cases, the 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 term of its stoppage. Injury to credit, and loss of pros-

pective 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."

In this case, if the cotton and horse attached had remained in custody of the officer until the attachment was dissolved, they would have been restored to appellee, as he did not bond them. *Gantt's Digest, Sec.* 424. Then in a suit upon the attachment bond, upon a showing that the attachment was wrongfully sued out, the measure of damages would have been the actual loss from deprivation of the use of the property, injury to it, and expenses incurred by him in defending the attachment proceedings. *Drake on Attachments* (*5th Ed.*), *Sec.* 175.

The complaint alleges that the Justice of the Peace ordered the property attached to be sold, on account of its liability to waste, and that the proceeds be held subject to the final disposition of the case.

When this order was made, whether a sale was made under it, and, if so, when and what sum of money the property was sold for, is not alleged in the complaint.

It is alleged, further on in the complaint, that, after the plaintiffs in the attachment "had taken an appeal," from the judgment on the inquest of damages, they obtained an order of the Circuit Court requiring the constable to pay over to them the proceeds of sale of the property attached, and the same was paid to them, and no part thereof to plaintiff in this suit.

Taking this to be true, the proceeds of sale must have been applied, by the order of the Circuit Court, upon the judgment which the plaintiffs in the attachment suit had obtained in that court against appellee for their debt, etc., and so, in that way, he got the benefit of the proceeds of the sale of the property attached.

It was, therefore, an error for the court to direct the jury to assess appellee's damages at the value of the property when attached, with interest, making no deduction for the proceeds of the sale, which had been applied to the judgment against him. It could only be where the property is totally lost by means of a wrongful attachment, that its value, when seized, would be the measure of damages. *Drake on Attachment (5th Ed.), Sec.*175.

On the trial, appellee introduced in evidence an execution issued by the Justice of the Peace, thirty-first of October, 1873, upon the judgment rendered by him in favor of the plaintiffs in the attachment suit, and it appears from an endorsement made upon it by the constable, that the attached property was sold at a public sale, made under the execution, for $119.64. It was, perhaps, the proceeds of the sale that the Circuit Court ordered to be applied to the judgment recovered by the plaintiffs in the attachment suit on the appeal from the judgment of the Justice.

The allegations of the complaint are vague and inaccurate as to the attachment proceedings, but it has not been insisted here that the court below erred in overruling the demurrer to it.

2. ——: Liability for waste of attached property.

IV. The court refused all of the instructions moved for appellants, the fifth of which was, in substance: "If the jury believe from the evidence that the property seized under the attachment, was wasted in the hands of the officer levying the attachment, the defendants in this suit are not, nor were they, responsible for such waste.

The property attached was in custody of the constable from the time of its seizure, about the middle of October, to the time of the sale, which occurred some time in December. There was evidence conducing to prove that, during that period, the cotton in the field was damaged, and that the seed cotton, which was in a house when attached, was

removed to a pen, and also damaged, and that both brought less at the sale than their value when attached.

But for the attachment appellee might seasonably have gathered, housed and prepared for market the cotton in the field, and taken care of the seed cotton, but he was deprived of the management during the time they were in custody of the officer, under the attachment.

We have shown above, that in a suit upon an attachment bond when the attachment is wrongfully sued out, the plaintiff may recover actual damages. "On general principles," says Mr. DRAKE, "it must be the natural, proximate, legal result or consequence of the wrongful act. * * * Actual damage may be comprehended under two heads: 1st. Expense and losses incurred by the party in making his defense to the attachment proceedings; and 2d, The loss occasioned by his being deprived of the use of the property during the pendency of the attachment, or by an illegal sale of it, *or by injury thereto, or loss or destruction thereof.*" *Drake on Attachment* (6 *Ed.*), *Sec.* 175.

Whatever may be the liability of the officer for negligence or want of proper care of the property while in his custody under an attachment, no doubt the plaintiff, and his surety on the bond, are responsible for such damage to the property attached, as may be the result of the seizure, when the writ is wrongfully sued out.

The court did not therefore, err in refusing the fifth instruction moved for appellants.

3. ATTACHMENTS, WRONGFUL: Evidence of, in actions on attachment bonds.

V. Before considering the further and only additional point made here upon the other instructions moved for appellants, and refused by the court, it is necessary to refer again to the pleadings and evidence.

The Statute prescribes the grounds on which an attachment may be obtained (*Gantt's Dig.*, *Sec.* 388), and that an

order of attachment may be made on an affidavit showing the nature of the claim, that it is just, the amount, etc., and the existence in the action of some one of the grounds prescribed, etc. *Ib.* 389. The order for attachment is not to be issued until a bond is executed, conditioned that "plaintiff shall pay defendant all damages which he may sustain by reason of the attachment, if the order is wrongfully obtained." *Ib.* 391.

The complaint alleges that the plaintiffs in the attachment suit filed the affidavit required by law, and gave the bond sued on. The affidavit is not set out in the complaint, nor was it introduced as evidence on the trial, nor was it alleged or proven that any ground for attachment stated in it was untrue, nor was its truth controverted in the Circuit Court on appeal, nor does it appear to have been controverted before the justice.

The complaint alleges in general terms that plaintiff had been damaged by the wrongful suing out of the attachment.

The answer denied that the order of attachment was wrongfully obtained. This made the material issue in the case.

Had appellee controverted the affidavit, as he might have done if he deemed any of its material statements false, (*Ib.*, *Sec.* 457) and had such issue been determined in his favor, and the attachment thereupon dissolved, the judgment would have been conclusive in this suit upon the bond, that the order of attachment was wrongfully obtained. *Drake on Attachment* (6 *Ed.*), *Sec.* 173; *Mitchell* v. *Mattingly*, 1 *Metcalf* (*Ky.*), 237.

Under the issue made, some proof was required of appellee that the order of attachment was wrongfully obtained. *Drake on Attachments*, 6 *Ed.*, *Sec.* 173; *Burrows et al.* v. *Lehndorf*, 8 *Iowa*, 105; *Vietts* v. *Hagge*, *Ib.*, 193.

The order of the court dissolving the attachment, on his motion, was the only evidence introduced by appellee to

prove that the order of attachment was wrongfully obtained. Appellants read in evidence the motion upon which the order was made.

No doubt, as was said in *Mears et al.* v. *Stewart*, 31 *Ark.*, 17, the motion was sustained on the grounds of some informality in the affidavit. There was nothing else in the motion on which the court would probably, or should have sustained it.

The first ground of the motion questioned the sufficiency of the affidavit.

The second was that there was no writ of attachment. If none issued, there was none to quash. It appears that the writ had been lost, which was no cause of quashal.

The third was that defendant (appellee here) had not been served with a summons, or notice of attachment. These he waived by appearance.

And the fourth was that he filed an affidavit before the justice for a change of venue, which was overruled.

This was no cause for dissolving the attachment in the Circuit Court on appeal. The case stood for trial *de novo* there.

The objection to the affidavit was matter in abatement of the attachment.

The order dissolving the attachment for informality in the affidavit, which may have been the fault of the justice in drafting it, was not sufficient proof that it was wrongfully sued out—that there were no grounds for it.

Bishop v. *Bradford*, 16 *Ala.*, 769; *Drake on Attachments* (6 *Ed.*), *Sec.* 170, *etc.*; *Pettit et al.* v. *Mercer*, 8 *B. Monroe*, 51; *Winchester et al.* v. *Cox et al*, *G. Green*, *Iowa*, 4, 121. See also *Vorge* v. *Phillips*, 37 *Iowa*, 429; *Cooper et al.* v. *Hill*, *ad.*, 3 *Bush. Ky.*, 219; *Kirkham* v. *Coe et al.*, 1 *Jones*, *N. C. L.*, 429.

The first and second instructions moved for appellant were substantially in accordance with the above rule.

The third related to limitation and was properly refused, because it proposed to submit to the jury the legality of the judgment dissolving the attachment.

4. Action on bond for damages.

The fourth was also properly refused, because it asserted the erroneous proposition, that no damage could be recovered in this action on the bond, unless there had been a judgment in the original attachment suit fixing the amount of damage.

The judgment is reversed, and the cause remanded for a new trial.

GILMORE v. HAMBLIN.

37 626
68 548

1. MISTAKE: *In deeds of conveyance. Relief in Equity—Rescission.*
If a vendor by mistake convey a tract of land which does not belong to him, instead of the tract sold and intended to be conveyed, equity will not restore to the vendee the purchase money, but will compel him to accept a deed for the proper land.

2. SAME: *Same: Successive vendees subject to correction of.*
A vendee of land from one who holds by deed indefinitely describing it, will be charged with notice of the uncertainty, and be subject to its correction.

APPEAL from *Pope* Circuit Court in Chancery.
Hon. W. D. JACOWAY, Circuit Judge.

F. W. Compton, for appellant.

D. B. Granger, contra.

EAKIN, J. The appellee, Hamblin, sued Gilmore in an action at law, with an attachment against him as a non-resident. The complaint is in effect for money paid with-

out consideration, of which the prayer seeks recovery or specific relief. The alleged grounds are that plaintiff had purchased of defendant a tract of land, and paid therefor the sum of $375, and taken a deed with covenants of title, good right to convey, etc., and that defendant had no title, and plaintiff never obtained possession. The complaint might stand, also, by being made a little more definite, as an old action of covenant upon the deed, but in either aspect, the decision of this case would be the same.

The defendant answered, confessing that he had no title whatever to the lands described in the deed, and saying that he never meant to convey them, nor plaintiff to buy them; that there was simply a mistake in the numbers. He offers, and brings into court, a deed for the lands which he says he intended to convey, and which were the lands really purchased, and concerning which there is no question of title. He says further that he had previously sold a large tract to one Ludwick, including the land afterwards purchased by plaintiff; and that before the execution of any writing to Ludwick, plaintiff agreed with Ludwick to take the land intended, and to pay Ludwick $3 per acre more than Ludwick was to pay defendant, and that by direction and consent of all parties, he executed to plaintiff a deed intending to describe the land selected; the plaintiff, instead of Ludwick, paying him for that portion. He describes the land intended to be conveyed, and which was really purchased by plaintiff as *the S. W. corner of the N. E. quarter* and part of the S. E. corner of the N. W. ¼ of sec. 29, T. 6, R. 19, making in all twenty-five acres. He simply seeks his discharge and costs, and makes no counter claim, although there is a prayer for general relief.

A demurrer to the answer having been overruled, the plaintiff, unnecessarily, made a reply. This is not Code practice. New matter in an answer not constituting a

counter claim, or set-off, is put in issue by the Code without a reply, and the onus is on the party pleading it. The allegations and explanations of the reply will be passed without comment. This we can more safely do, as the plaintiff gave his testimony. By consent the cause was heard in equity.

1. Mistake in deed of conveyance, Relief in equity.

The evidence leaves no doubt that Gilmore was the owner of the whole northern fraction of section 29, in T. 6, North of Range 19, West, which consisted of the N. W. $\frac{1}{4}$ of the section in full, and a small fraction of the S. W. part of the N. E. $\frac{1}{4}$ of about ten acres, which lay between the N. W. $\frac{1}{4}$ and the Arkansas river. He had verbally agreed to sell it to Ludwick for $15 an acre. Then plaintiff agreed with Ludwick to take twenty-five acres of it and to pay Ludwick $3 per acre beyond the purchase money. They went to Gilmore together, and plaintiff paid him for twenty-five acres of the land he had agreed to sell Ludwick the sum of $375, being at the rate of $15 per acre. The $3 extra he afterwards paid either to Ludwick or for his benefit. The part of the land plaintiff was to take, had been agreed upon between him and Ludwick; and Gilmore was honestly endeavoring to carry out their intentions. No fraud appears anywhere.

When the money was paid, Gilmore gave plaintiff a receipt, expressing that it was in full "for twenty-five acres off the S. E. corner of the S. E. $\frac{1}{4}$" of the section. An obvious mistake. No such piece was in the body of land sold to Ludwick. Afterwards Gilmore, still in good faith endeavoring to carry out the mutual understanding, executed to plaintiff a deed for twenty-five acres in N. E. corner of the S. W. $\frac{1}{4}$ of the section, which was just as wide of the mark as the receipt, and for the same reason. This is the deed upon the covenants of which the complaint is partly founded. To seek to enforce them is

simply absurd. If the plaintiff knew of the mistake when he accepted the deed, and took it for the purpose of getting his purchase money back through the covenants, he would not appear in court with clean hands. If he did not, then the mistake was mutual, and the equitable defense should never have become necessary. Upon its discovery the plaintiff should have returned the deed and sought its correction, which if not made voluntarily, he might have obtained at defendant's cost. The real question is, can plaintiff have return of his purchase money, as paid without consideration; or, if not, can he have any appropriate relief in equity?

Pursuing our view of the evidence, it appears that plaintiff acknowleges and insists in his evidence, that the portion which he really agreed to take, although deceived as to its value, was twenty-five acres out of the *S. E. corner of the N. W.* $\frac{1}{4}$ *of the section*, and he says that Ludwick agreed to give him, in addition, the fraction between that and the river, already spoken of as comprised in the S. W. corner of the N. E. $\frac{1}{4}$, and which seems to have been of less value.

The deed tendered in court by defendant conveys that fraction and enough more out of the S. E. corner of the N. W. $\frac{1}{4}$ to make out twenty-five acres. This is all the real difference between the parties, as to facts, concerning which there is a conflict of evidence. In a letter written by plaintiff to defendant, and which he himself introduces, he says that he really wanted the S. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$, and was still willing to take that; but does not offer the take a deed for the S. E of the N. W. The letter is rather an appeal for a return of the money, as it belonged to orphans, and because the plaintiff had mistaken the value of the land he had agreed to take. There is no proof of any special request on his part for a deed for the twenty-five acres out of the S. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$.

The chancellor found, generally, that the allegations of plaintiff's complaint and reply were sustained by the proof, and rendered judgment for the full amount of the claim against the defendant and his sureties, in a bond which had been given to dissolve the attachment.

We cannot concur in the view taken by the chancellor, of the equities of the parties. The defendant had sold his land *in solido*, for so much per acre. If there had been no interference on the part of the plaintiff, no trouble would have arisen. The defendant, to accommodate plaintiff and Ludwick, in a division of the purchase, agreed to make them separate deeds, according to agreements. He could have had no possible interest in giving any particular part to one more than the other. He assumes an extra trouble, without compensation, conveys all his land to the two parties between them, and gets precisely the price bargained. More than that, he seems honestly to have endeavored, and still stands ready, to correct any error in the conveyances, and is before the court to do what may be required. Upon what principle of equity he can be compelled to refund a large portion of the purchase money, pay the costs of the suit, and go out, retaining a part of his land which may be unsalable, when he meant to sell the whole, and should have been allowed to do so without interference, is not clear.

Upon the other hand, plaintiff interfered in a purchase already agreed upon; sought to enjoy its advantages, without any additional advantage to the vendor; was present when all the transactions were had; agreed to accept a portion for his share, which he afterwards finds to be a bad bargain; has an equal opportunity to correct all mistakes; stands equally within the range of laches for not doing so; accepts papers of different sorts with misdescriptions, and now seeks to make these mistakes the

ground of asking a Court of Equity to assist him in ruing a bargain of which he is tired; and, in doing that, seeks to put defendant in a worse position than he found him. There is not a suspicion of fraud in the conduct of defendant throughout.

The chancellor should have done justice as nearly as possible with the means at hand; should have determined from preponderance of testimony, if it could not be done certainly, what tract plaintiff agreed to take, and which, at the time of the payment, defendant intended to convey; and compelled him to take it if the deed accorded therewith, dismissing defendant, with or without cost, as the chancellor might deem him more or less guilty of laches. If the presence of Ludwick was necessary to a settlement of the litigation, he might have been, and may yet, easily be brought in, so that the true boundaries may be decreed between him and plaintiff, if the court should direct any change in defendant's deed as tendered.

As the cause must be remanded, we forbear to express an opinion as to the weight of the evidence with regard to the precise tract which plaintiff was to have, or its boundaries. It is a matter rather between plaintiff and Ludwick, than one which concerns the defendant. He has denuded himself of all title to the whole, and got only his fair price. He had nothing to do with the determination of the boundaries on partition; and, save as to such costs as the chancellor may see fit to impose on him, may very properly be discharged from the suit.

The deed which he tendered in court seems, from the evidence, to have been drawn with reference to a marked plat which the parties had before them, but it does not refer to the plat, nor describe the lands with such precision as to enable a surveyor certainly to lay off the boundaries. No objection is made to it on that account, and it may be that

it is sufficiently definite to suit the purposes of plaintiff and Ludwick, if it be found in accordance with the agreement. If not, or if for any purpose, or on any account, a readjustment of boundaries may be necessary, Ludwick must be brought in, so that the court, by decree, may bind both him and plaintiff, and give plaintiff his twenty-five acres just where he ought to have it, according to the best opinion the chancellor may be able to form. The defendant cannot be placed in *statu quo*, and it would not be equitable to cancel any part of his sale. He got the purchase money honestly, and may equitably keep the whole. This may well be done, for it does not appear that any portion of the land has been sold by Ludwick to an innocent party, and if it has, the purchaser, through Ludwick's deed from Gilmore, would have notice of the indefinite nature of the boundaries, and would hold subject to their correction.

1. MISTAKE: Successive vendees subject to correction of.

Reverse the decree, and remand the cause for such further proceedings as may be had in accordance with this opinion, and the principles and practice in equity.

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37 632
84 525

MEMPHIS & L. R. R. R. CO. AS RE-ORGANIZED v. THE STATE.

1. MORTGAGE: *To State, when good without registering.*

When a loan is made by the State and a mortgage taken to secure it in pursuance to the provisions of a public Statute, all persons are chargeable with notice of it, and the State will not be prejudiced by the neglect of her agents to have the mortgage recorded.

2. SAME: *Foreclosing. Subsequent mortgagees should be parties.*

A second mortgagee, who is not a party to a suit to foreclose a first mortgage, is not bound by the decree rendered in the suit, but may foreclose and sell the equity of redemption, and the purchaser in that sale will be entitled to possession and to redeem from the first mortgage.

APPEAL from *Pulaski* Chancery Court.
Hon. D. W. CARROLL, Chancellor.

B. C. Brown and *U. M. & G. P. Rose*, for appellants.

C. B. Moore, Attorney-General, and *F. W. Compton, contra.*

Hon. W. W. SMITH, Special Judge. The Memphis & Little Rock Railroad Company by its deed, dated May 1, 1860, conveyed its road, rolling stock, charter, franchises and all its property to R. C. Brinkley, Sam. Tate and Geo. C. Watkins, in trust to secure payment of principal and accruing semi-annual interest on its thirteen hundred bonds of that date, each for one thousand dollars, maturing May 1, 1890, and bearing interest at eight per cent., payable semi-annually, for which interest coupons were attached to the bonds. The deed provided for sale upon certain defaults, but there was in it no provision that upon any default in payment of interest the principal should become due. This deed was duly recorded in all the counties through which the road ran and in which any of the property conveyed was situate, within a short time after its execution and before the first day of September, 1860.

By an Act, approved January 3, 1861, entitled "An Act to encourage internal improvements," the Legislature of the State of Arkansas appropriated one hundred thousand dollars of the five per cent. fund and lent it to the same railroad company for ten years at the rate of eight per cent. per annum interest, to be paid annually. On January 10, 1861, the railroad company executed and delivered to the State its promissory note for that sum, and on the same day the company executed and delivered to the State a mortgage by which it conveyed to the State its road and rolling stock

to secure payment of the sum so lent and the accruing interest. This deed was never recorded. On March 11, 1867, the General Assembly, by an Act approved on that day, remitted all interest that had then accrued upon said loan.

On March 1, 1871, the railroad company executed and issued its certain other bonds, one thousand in number, each for one thousand dollars, payable January 1, 1901, bearing seven per cent. interest, payable semi-annually, for which coupons were attached, and to secure payment of the principal and accruing interest, by its deed of that date, conveyed its charter, road, franchises and all its other property to Henry F. Vail in trust to convey, upon the default therein mentioned. This deed was duly recorded in all the counties in which any part of the conveyed property was situate within less than a month after its execution.

This conveyance was made expressly subject to the first deed above recited by which the property was conveyed to Brinkley, Tate and Watkins.

It was also provided that if default in payment of interest or of any of the coupons was made for sixty days, that the trustee might sell sufficient to pay the amount due; but that "if a majority in number and value of the holders of the coupons which may remain due and unpaid shall elect to do so they may postpone the sale of the property hereby conveyed for the payment of the said coupons so due and unpaid for the period of twelve months, and at the expiration of the said period the said Henry F. Vail, shall, upon request in writing of a majority in number and value of the holders of the bonds and coupons hereby secured, offer for sale and sell all the property hereby conveyed to him."

The default in payment occurred; the holders of the unpaid coupons postponed the sale for the time provided. and at its expiration a majority in number and value of the holders of the bonds and coupons secured by this deed, requested a sale

of the whole conveyed property. The trustee thereupon gave notice according to the provisions of the deed that he would sell the whole property conveyed to the highest bidder at Hopefield, Arkansas, on March 17, 1873, subject to the lien of the deed to Brinkley, Watkins and Tate and of the bonds thereby secured and "furthermore, subject to all liens of the State of Arkansas, upon said property or any part thereof, previously to the lien arising under said second mortgage deed of said company."

On the day named, the trustee sold the property to Stillman Witt, who purchased for himself and his associates, and the trustee, by his deed dated March 17, 1873, conveyed the whole property to Witt.

On March 29, 1873, Witt, by his deed or declaration, declared that he had purchased for himself, J. H. Wade, John J. Astor, Robert Lennox Kennedy, A. A. Lo, George T. Adee, William B. Greenlaw, Hu. L. Brinkley and Sam. Tate, holders of the second mortgage bonds of the company secured by the deed to Vail and conveyed to himself and the others named to hold in the proportions of their ownership of such bonds, the proportion being stated in the deed. These parties afterwards organized the Memphis & Little Rock Railway Company and conveyed the property to that company.

That company afterwards made a proposition to the holders of the first mortgage bonds of the company, which was, by part of them conditionally accepted. The proposition and acceptance were in these words:

[PROPOSTION.]

The Memphis & Little Rock Railway Company propose to the first mortgage bondholders of the Memphis and Little Rock Railroad Company to:

Issue first mortgage 8-100 currency, thirty-year bond	$ 2,600,000
Issue second mortgage 6-100 currency, twenty-five-year bond	1,000,000
Issue income 7-100 currency, twenty-year bond	1,000,000
Issue stock	5,000,000

It is proposed:

1. "To place in the hands of the trustees for distribution as hereinafter provided for, the following securities:

$2,400,000, first mortgage bonds;
300,000, second mortgage bonds;
500,000, income bonds;
300,000, stock.

2. "To authorize said trustees to issue to the old first mortgage (i. e. bondholders), new first mortgage 8-100 bonds for the principal, coupons and funded interest bonds and coupons thereon, with interest on said coupons, and to hold said old securities for the specific benefit of the new bonds issued therefor until all legal questions are removed or settled satisfactory to said trustees; but said bonds are to be so printed across or defaced as not to be a marketable bond, if said trustees deem it expedient.

3. "To authorize said trustees to use, either in settlement of rolling stock debt which is a lien on the property, or to return to the company pro rata, as they pay any part of said debt, $2.000,000 of said first mortgage eight per cent. bonds.

4. "To authorize said trustees to issue to the holders of Arkansas State bonds, issued to the Memphis and Little Rock Railroad Company, for each bond of $1,000, $250 of first mortgage eight per cent. bonds; $250 second mortgage six per cent. bonds; $250 income bonds, and $250 for stock their face; and for the mature and maturing coupons, up to and including April 1, 1875, income bonds for their

face; provided, said specified issues of Arkansas State bonds shall be presented on or before the first day of March, 1874, or at any other date the trustees may deem expedient. If said bonds should not be presented by that time, said trustees are authorized to issue up to the limit of $1,200,000 Arkansas bonds for any other bonds of the State issued to said railroad, such amounts of any of said new securities in payment therefor, as they may deem fit, not exceeding the pro rata; all such Arkansas bonds to be held in trust by said trustees for the purpose of paying the debt due by the Memphis and Little Rock Railroad Company to the State of Arkansas.

5. "To authorize said trustees to use the coupons on said Arkansas bonds to pay the interest on the bonds due to the State of Arkansas, that were issued to the Memphis and Little Rock Railroad Company, as it may become due.

6. "To authorize the said trustees, in case the State of Arkansas shall donate to the railway any State bonds, or other things, on condition of said company retiring the original $1,200,000 State bonds, to give to the parties who may have surrendered State bonds issued to the Memphis and Little Rock Railroad Company, a pro rata proportion of such new donated bonds, upon their returning to the trustees, for the use of the Railway Company, the income bonds and stock received by them on account of the principal of such surrendered bonds in equal proportions and amount.

7. "The company agree with the trustees that they will reserve $3,000,000 of stock, subject to their order, to be used in exchange for stock of the Memphis and Little Rock Railroad Company; said stock to be transferred to the Memphis and Little Rock Railway Company, or exchanged, and not to be exchanged at above par for the face of said stock in new stock at its par or face value.

8. "The first mortgage bondholders to fund their inter-

est on their bonds, and funded interest bonds, up to July 1, 1874, in first mortgage, eight per cent. bonds at par; the new first mortgage bonds to bear interest from first of July, 1874, and first coupons to be paid first of January, 1875. The second mortgage bonds to bear interest from the first of April, 1875, and the first coupons to be paid first of October, 1875; and both classes of bonds to have semi-annual coupons attached, for the interest thereon, payable semi-annually, beginning with the dates aforesaid.

9. "The expenses of executing this proposition to be borne by the Railway Company."

[ACCEPTANCE.]

"NEW YORK, October 18, 1873,

"We, whose names are hereto subscribed, holders of first mortgage bonds of the Memphis and Little Rock Railroad Company, and funded interest bonds of said company, for the amount of said bonds set opposite our names, do hereby accept the above and foregoing proposition of the Memphis and Little Rock Railway Company, and assent to the securities proposed, and agree to surrender our bonds and coupons to the trustees, in accordance with said proposition, hereby modifying, to that extent, all former agreements made on the subject, with the purchasers of said road under the second mortgage, only to the extent named in the foregoing proposition; *provided, that nothing contained in our assent to this proposition, shall be construed to deprive us of our rights and security, or as an acknowledgment of satisfaction for the old securities, in such case to be surrendered to the trustees, until all questions, legal or equitable, shall be fully settled as to the legality of the new issue of bonds, and the mortgage securing the same, as being a first lien.* This agreement is to be executed, so far

as the issuance and delivery to the trustees of the securities received, by the first day of January, next.

"*We hereby name and appoint as trustees in the foregoing proposition, James Tinker, of the City of New York; Wm. S. Pierson, of Windsor, Connecticut; R. K. Dow, of Claremont, New Hampshire; with full power to receive the securities named therein, and to act as trustees in this agreement, with the usual powers of trustees in such cases.* The said company shall not be entitled to issue and retain the said $200,000 first mortgage bonds until the said $2,400,000 first mortgage bonds shall be delivered to the trustees, and, also, $275,000 of Arkansas State bonds, indorsed by the Memphis and Little Rock Railroad Company have been surrendered to the trustees for exchange on the terms specified.

[SIGNED IN DUPLICATE.]

S. M SWINSON, $81,000, first mortgage bonds;
S. M. SWINSON, $45,500, interest bonds;
C. W. LAMPSON & Co., $180,000, first mortgage bonds;
C. W. LAMPSON & Co., $28,560, interest bonds;
JAMES TINKER, $2,000, interest bonds;
F. H. COSSITT, $100,000, first mortgage bonds;
F. H. COSSITT, $17,000, interest bonds;
J. N. PHELPS, $20,000, first mortgage bonds;
C. DOW, for R. K. DOW, $15,000, first mortgage bonds;
R. K. DOW, $10,000, first mortgage bonds;
EDWARD MATTHEWS, $322,000, first mortgage bonds;
EDWARD MATTHEWS, $84,180, interest funded bonds."

In compliance with this proposition. the railway company, by its deed, dated December 1, 1873, conveyed all the said road, franchises and property to the New York Guaranty and Indemnity Company, to secure payment of two million,

six hundred thousand dollars of its "first" mortgage bonds, due January, 1904, bearing seven per cent. interest, payable semi-annually, for which coupons were attached. This deed provided that if default was made in payment of the coupons, or any of them, and continued for six months, that the principal should become due, and that sale might be made of the property. It also provided that the Indemnity Company might resign, and, in that case, William S. Pierson, Watson Matthews and R. K. Dow should become trustees of the deed, with all powers and rights.

Upon this deed being executed, those of the holders of the first mortgage bonds of the railroad company, secured by the deed to Brinkley, Tate and Watkins, who had accepted the proposition, surrendered their bonds—not to the railway company, nor to the railroad company (neither of which, as is shown, ever received or had possession of them); but to the trustees named in the acceptance of the proposition—James S. Tinker, William S. Pierson, and R. K. Dow, the survivors of whom still hold them.

Default having been made, and continued for six months, the Indemnity Company resigned, and, thereupon, the substituted trustees, on the twenty-ninth day of June, 1875, exhibited their bill in the Circuit Court of the United States for the Eastern District of Arkansas, praying foreclosure of the mortgage executed by the railway company.

Afterwards, on November 21, 1876, Brinkley and Tate, surviving trustees of the deed of the railroad company, of May 1, 1860, intervened in that cause and were, on their request made parties complainants, and, by their bill, prayed foreclosure of the deed of May 1, 1860.

The court decreed foreclosure of both mortgages, both being kept distinct in the decree, the amount due on each being separately ascertained, and ordered sale of the property, first, under the deed of May 1, 1860, and, second,

under the mortgage of the railway company. Separate sales were had, at each the property was purchased by William S. Pierson, Watson Matthews and R. K. Dow, separate sums being bid. The sales were reported to the court and confirmed, and, by order of court, the commissioners conveyed the whole property to the purchasers, in trust, that they should convey it to a new company to be formed by the holders of the bonds.

The bondholders, under the provisions of the charter of the Memphis and Little Rock Railroad Company, organized a new company, called the "Memphis and Little Rock Railroad Company as Re-organized," and, on the thirtieth day of April, 1877, the purchasers conveyed the whole property of every kind and description, including the charter, and all franchises and privileges, the road, rolling srock, and all appurtenances, to this company; which entered on and took, and has since had and kept, possession thereof, and is now operating the road.

On March 27th, 1875, the State of Arkansas filed her bill in the Chancery Court of Pulaski county, making the Memphis and Little Rock Railroad Company, Sam Tate and R. C. Brinkley, surviving trustees of the deed of May 1st, 1860, some persons whom she alleged were holders of bonds secured by that deed, and others whom she alleged were holders of the second mortgage bonds of the old railroad company, parties, praying a foreclosure of her mortgage, and that it be declared a prior lien.

After the purchase of the property by the present defendant, the Memphis and Little Rock Railroad Company as Re-organized, that company intervened in this cause, was made a defendant, and filed its answer, setting up all the above facts—the purchase of the property by that company, its possession, etc., and contended that the mortgage of the old railroad company, dated May 1st, 1860,

was a prior lien upon the property to the mortgage held by the State; that so far as the State was concerned, nothing that had been done between the railroad company and the holders of bonds secured by that deed, affected the lien of the deed of May 1st, 1860, and that consequently the State was a second incumbrancer, and held nothing but a mortgage of the equity of redemption; that she was only entitled to redeem, etc., etc.

The cause was heard, and the chancellor held that the effect of the transaction and agreement of October 18th, 1873, between the railway company and the holders of the bonds secured by the deed of 1860, as to all bondholders who had surrendered their bonds under that agreement, was a novation, and extinguished the surrendered bonds; that as against all bonds so surrendered, the State had the prior lien; found the debt to be $202,133 32-100, and ordered sale subject to the lien of the bonds of 1860 not surrendered.

From this decree the defendant, the Memphis and Little Rock Railroad Company as Re-organized, appealed to this court.

1. MORTGAGE TO THE STATE When good without registering.

It is conceded by the company's counsel that, notwithstanding the mortgage, to foreclose which this suit was brought, was never filed for record, it is yet a lien upon the equity of redemption, which remained in the original company after the execution of the first, or Brinkley mortgage. This is upon the principle that the loan and stipulated security were in pursuance of a public Statute, of which all persons were required, at their peril, to take notice, and the State must not be prejudiced by the neglect of her agents.

The State's counsel concede that the chancellor erred in holding that only $100,000 of the first mortgage bonds are now outstanding, and the only prior lien to that of

the State. This relieves us of the necessity of inquiry whether the transaction of October 18th, 1873, was a novation, by which the holders of that series of bonds lost the priority which they once undoubtedly held over the State, a junior incumbrancer.

2. Mortgage: Foreclosing: Subsequent mortgees should be parties.

Not having been a party to the foreclosure suit in the Federal Court, the interests of the State are in nowise affected by the decree rendered in that proceeding. On the contrary, she may foreclose and sell the equity of redemption, and the purchaser at that sale will be entitled to be let into possession, and to redeem the first mortgage.

The decree below will be reversed, as upon a concession of error, and a decree will be entered here for a sale of the property, subject to the lien of the deed of May 1st, 1860. The clerk of this court will be charged with the execution of this decree, and if any surplus is produced by that sale, after defraying the costs of the suit below, expenses of sale, and the debt due the State, it will belong to the Memphis and Little Rock Railroad Company as re-organized, the purchaser under the decree of foreclosure in the Federal Court. The costs of this appeal must be adjudged against the State.

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

LAWRENCE v. ZIMPLEMAN.

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f90 423

1. CHANCERY: *Removing cloud upon title.*

A party who sues in equity to remove a cloud upon his title to land, must be in possession when he brings his suit, unless his title be an equitable one.

2. SAME: *Same.*

A court of equity will not interpose to remove a cloud upon title, unless the beclouding title be good upon its face, and a resort to

extrinsic evidence be necessary to establish its invalidity. A deed worthless upon its face casts no cloud upon the owner's title.

3. SAME: *Same: Plaintiff must show title.*

The plaintiff in a bill to remove a cloud upon his title, must himself have a reasonably clear title. He must proceed upon the strength of his own title, and not the weakness of the defendant's

4. TAX DEEDS: *Recitals.*

A tax deed for land sold under the revenue law contained in *Gould's Digest*, is evidence only of its own recitals; and if it fails to show that the sheriff filed in the clerk's office his assessment list, or that the County Court corrected or adjusted the assessment, or that the clerk made out a tax book, or attached a warrant thereto and delivered it to the sheriff, it shows no valid sale and no title.

APPEAL from *Garland* Circuit Court.
Hon. J. M. SMITH, Circuit Judge.

Clark & Williams, for appellant:

I. The patent to Dupas was void for uncertainty, there being no proof to identify the land. Nor was there any proof of Dupas' death, and if dead, his widow could convey nothing but dower, and that only to the party holding the fee. 21 *Ark.*, 347. The tax deeds were no part of the record. *Acts, March* 5, 1875; *Acts* 1874–5, *p.* 229.

II. The burden of proof was on appellee to prove possession, without which his case becomes an ejectment bill, and the court had no jurisdiction. 27 *Ark.*, 233; *Ib.*, 77.

III. The tax deed to Kempner is void on its face. *Gould's Digest, Ch.* 148, *Secs.* 34–50, 130; 13 *Ark.*, 242; *Pillow* v. *Roberts*, 13 *Howard, S. C.*, 476; 7 *Eng.* 822; 27 *Ark.*, 226; 28 *Ark.*, 299.

IV. Being out of possession appellee must prevail, if at all, upon the strength of his own title. Appellant being in possession, it makes no difference as against appellant or any other stranger whether he has title or not.

V. The Chicago Dutchman had no right to translate the power of attorney, it should have been recorded, if properly executed, in Dutch. But it was defective, as were also the acknowledgments to the subsequent attempted conveyances.

U. M. Rose, for appellee:

I. The tax deed to Lawrence void, because the taxes were paid. 21 *Ark.*, 145; 22 *Ib.*, 178; 19 *Ib.*, 139; Two tracts sold *en masse*. 29 *Ark.*, 476; *Ib.*, 489; 31 *Ib.*, 314; *Ib.*, 491. Sold on 9th June, 1873, a day not authorized by law. 33 *Ib.*, 748.

II. Though a deed is void on its face, a bill to quiet title may be maintained. 31 *Ark.*, 683; *Hamilton* v. *Cummings*, 1 *Johnson Chy.*, 517; *Hays* v. *Hays*, 2 *Ind.*, 28. No objection having been made below, none can be made here. 30 *Ark.*, 91; 4 *Paige*, 77; 2 *Ib.*, 509; 2 *John. Chy.*, 369.

1. Removing cloud from title.

W. W. Smith, Special Judge. Zimpleman filed this bill to remove a cloud from his title to a tract of land, cast by a tax sale made June 9, 1873, for the taxes of 1872, at which Lawrence became the purchaser. He alleges, somewhat indistinctly, that he is in possession of the premises, but this is denied by the answer, and it is averred that Lawrence has had peaceable possession ever since the year 1875. There is not a particle of proof in the record to show with whom the possession is, or whether the land is wild and unoccupied.

Who entitled to relief.

To obtain the relief sought, the plaintiff must be in possession when he brings the suit, unless his title be an equitable one. A Court of Chancery is not the appropriate forum to try a purely legal title. The defendant, if he is in actual possession, is entitled to a trial by jury, unless there are peculiar circumstances bringing his case under

some one of the recognized heads of equity jurisdiction. The case of *Shell* v. *Martin*, 19 *Ark.*, 139, which holds to the contrary of this, was disapproved by Mr. Justice FAIRCHILD, in *Apperson* v. *Ford*, 23 *Ark.*, 746, and has been discredited by the later decisions. *Branch* v. *Mitchell*, 24 *Ark.*, 431; *Byers* v. *Danley*, 27 *Id.*, 77; *Miller* v. *Neiman*, 27 *Id.*, 233; *Chaplin* v. *Holmes*, 27 *Id.*, 414; *Sale* v. *McLean*, 29 *Id.*, 612; *Crane* v. *Randolph*, 30 *Id.*, 579.

We cannot presume in favor of the plaintiff's possession, since an issue upon this point was tendered by the answer, and he failed to meet it by proof. It was a jurisdictional fact.

The beclouding title must be good on its face.

If, however, Lawrence is not in possession (in which case Zimpleman could not, of course, bring ejectment against him), still this bill cannot be maintained. The rule is that before a court of equity will interfere to remove a cloud, the title of the adverse claimant must be good upon its face, and it must be necessary to resort to extrinsic evidence to establish its invalidity. *Chaplin* v. *Holmes*, *supra*; *Allen* v. *City of Buffalo*, 39 *N. Y.*, 390; *Marsh* v. *City of Brooklyn*, 59 *Id.*, 282; *Moore* v. *Cord*, 14 *Wis.*, 213.

Now, although Lawrence's tax deed is assailed, upon the grounds that the taxes had been paid before sale, and the illegality of the sale for that reason depends upon an external fact, yet it also appears from the deed exhibited that his title is worthless, and that any attempt to assert it by action would fall by its own weight, without proof in rebuttal. All of the tax sales made in the year 1873, for the taxes of 1872, are void, as held in *Vernon* v. *Nelson*, 33 *Ark.*, 748. Moreover, it appears from the recitals of the tax-deed that two tracts of land were sold together, for the taxes due on the whole. Such a deed casts no cloud upon the owner's title. *Crane* v. *Randolph*, *supra*; *Pettus* v. *Wallace*, 29 *Ark.*,

Worthless deed casts no cloud.

476; *Pack* v. *Crawford*, 29 *Ark.*, 489; *Montgomery* v. *Birge*, 31 *Ark.*, 491; *Walker* v. *Moore*, 2 *Dillon*, 256.

The case of *Hamilton* v. *Cummings*, 1 *Johnson's Ch'y.*, 517, cited by Zimpleman's counsel, in support of the proposition that equity will decree the cancellation of a deed void upon its face, is no longer law in the State of New York, having been overruled by *Cox* v. *Clift*, 2 *Comstock*, 118; *Scott* v. *Onderdonk*, 14 *N. Y.*, 14; *Ward* v. *Dewey*, 16 *Id.*, 529; *Crook* v. *Andrews*. 40 *N. Y.*, 547; *Guest* v. *City of Brooklyn*, 69 *N. Y.*, 513.

3. Plaintiff must show title.

Besides, there are gaps in Zimpleman's title, which we cannot overlook. It is true that only those whose titles are beclouded need the relief that is here sought, and the act of filing the bill presupposes some obscurity of the title. But it ought to appear that if the cloud raised by the defendant's unfounded claim were removed, the plaintiff would then have a reasonably clear title. Zimpleman must succeed, if at all, upon the strength of his own title, and cannot rely upon the weakness of his adversary's.

He exhibits two chains of title. The links of the first chain are, a patent deed of the United States to John Dupas, of Hot Spring county, in Arkansas, issued in 1855; a letter of attorney, from Marie Kaufman, of Alsace, in Germany, who claimed to have been the widow of John Baptist Dupas, and the guardian of his minor children, authorizing Victor Lasaque to sell and convey real estate of the said Marie Kaufman and the said infants. This power, executed in 1875, in the German language, was acknowledged before a notary in Strasbourg and appears in the transcript as translated by a notary in Chicago. Under it Lasaque conveyed to Hanna and Chase, they to Howard, and Howard to Zimpleman.

Passing over imperfections in the acknowledgment of these instruments, there is no allegation or proof of the

death of the original patentee, or that Marie Kaufman and her children are his widow and heirs, or that she is the legal guardian of those heirs. Assuming all of these things to be true, she had no interest in the land except her dower, and even this she could not convey to a stranger before allotment. *Carnall* v. *Wilson*, 21 *Ark.*, 62; *Jacoway* v. *McGarrah*, 21 *Ark.*, 347; *Jacks* v. *Dyer*, 31 *Ark.*, 334. Nor had she any right to sell the lands of her wards without license from a court of competent jurisdiction.

Widow can not convey dower before allotment.

The head of the second chain of title is a collector's deed to Jacob Kempner, pursuant to a tax sale of March 9th, 1868, for the taxes of the three preceding years. And this followed by sundry mesne conveyances, connecting Zimpleman with this source of title.

4. Tax Deeds, recitals.

This tax sale was had under the provisions of the revenue law contained in *Gould's Digest*, *chapter* 148; by virtue of which the collector's deed was only evidence of the truth of its own recitals. No attempt was made to supplement the deficiencies of the deed by proof *aliunde*.

Now there is no recital that the sheriff filed in the clerk's office his assessment list for either of those years, or that the County Court ever corrected or adjusted said assessment, or that the clerk ever made out a tax-book, or attached a warrant thereto, or delivered it to the sheriff. For vices like some of these, the tax-deed was overruled in *Haney* v. *Cole*, 28 *Ark.*, 299.

The judgment of the court below is reversed and the bill is dismissed.

COPE, COUNTY JUDGE, ET AL. V. COLLINS, ADM'R.

1. TAXES: *Extent of County Court's power to levy.*

When the County Court levies a tax of five mills to pay indebtedness existing at the time of the adoption of the Constitution of 1874, it exhausts its power, under the Constitution, to levy for that purpose, and cannot make an additional levy for a particular debt.

2. COUNTY COURT: *Its allowance of a claim unimpeachable, collaterally.*

An order of allowance by the County Court is in the nature of a judgment, and cannot be impeached, collaterally, by proof that the debt had been paid before the order was made.

3. MANDAMUS *Plea of payment by withholding funds.*

To a petition for mandamus, to compel the County Court to levy a tax for the payment of the petitioner's debt, allowed against the county, the County Judge and justices answered that at the time the allowance was made, and the warrant on it was issued, the petitioner was County Treasurer, and had in his hands a large sum belonging to the fund out of which said warrant was payable, and that he retained out of said sum the amount of said warrant, and afterwards held said warrant as treasurer as a voucher for the payment to himself, individually, and had never accounted for the funds in his hands. *Held:* A good defense to the petition

4. MANDAMUS: *Plea of set-off.*

To a petition for mandamus, to compel the County Court to levy a tax to pay a particular debt, an answer in the nature of a set-off, which opens too wide a field for inquiry by the Circuit Court in such case, in matters within the peculiar original jurisdiction of the County Court, is bad.

5. COUNTY WARRANT: *Barred by failure to present for reissue; Pleading.*

When a county warrant is not presented for reissue at the time required by an order of the County Court, properly made and published, it is barred; and in a suit on the warrant it is not necessary to aver in the answer setting up the bar that it was provided in the order of the court that claims not presented should be barred. The Statute makes that provision, and it is unnecessary in the order.

APPEAL from *Franklin* Circuit Court.
Hon. W. D. JACOWAY, Circuit Judge.

U. M. Rose, for appellant:

1. The County Court having levied a tax of five mills, could levy no further tax. *Sec.* 9, *Art.* XVI., *Constitution; Graham* v. *Parham*, 32 *Ark.*, 676.

2. The petitioner having been previously paid, procuring the issue of the warrant, was a fraud, and as a county cannot appeal from a judgment of its own County Court—*Chicot Co.* v. *Tilghman*, 26 *Ark.*,461—it can defend against such a judgment, on the ground of fraud. The County Court, in issuing warrants, is not an independant tribunal, with power to determine judicially vested rights, but merely the financial agent of the county, and its acts may be questioned, and avoided for fraud, etc. *Shirk* v. *Pulaski Co.*, 4 *Dill.*, 209; *Campbell* v. *Polk*, 3 *Iowa*, 467; *Washington Co.* v. *Parlin*, 10 *Ill.*, (5 *Gilm.*) 232.

3. If, as treasurer, Collins retained sufficient to pay the debt, it was satisfied.

4. Collins was indebted to the county as treasurer; this was a case of mutual account, and if, on final settlement, a balance be found against him, he had no debt to sue on.

5. The warrant was barred. *Secs.* 614, 615, 616 *Gantt's Digest;* 25 *Ark.*, 261.

W. W. Mansfield, for appellee:

1. The facts were sufficent to entitle appellee to the writ—*Dillon on Mu. Bonds*, *sec.* 28, *note* 67; *Shirk* v. *Pulaski Co.*, 4 *Dill.*, 213, *and note; High on Ext. Rem.*, *secs.*, 365, 370 *and* 377—in connection with third proposition of note cited in 4 *Dill.;* also *sec.* 382; *Nash. Pl. and Pr.*, *vol.* 2, *p.* 1271.

2. The answer not responsive to the writ, and contains no valid defense. The county was concluded by the judg-

ment of allowance. *High on Ex. Rem.*, *sec.* 380; *Freeman on Judg.*, *sec.* 159, 178. The allowance was a *judgment*, and cannot be collaterally attacked. 33 *Ark.*, 788; 22 *Ark.*, 595.

3. The county is estopped from pleading the third defense, by its finding of record. If the *county* could assail its own settlements of record collaterally, appellant cannot. *High Ex. Rem.*, *sec.* 380.

4. *Set-off* cannot be pleaded to mandamus; even if it could, the proper parties were not before the court, and the matters set up not available. *Ib.*, *sec.* 382, *and note*. The Circuit Court had no jurisdiction to settle treasurer's accounts.

5. It was not stated that any order barring scrip or warrants was ever made, etc., etc.

English, C. J. On the ninth of May, 1879, Warren Collins, administrator of Wilson W. Collins, presented to the Circuit Court of Franklin county a petition for mandamus, alleging, in substance:

That at an adjourned session of the October term, 1872, of the County Court of said county, Wilson W. Collins was allowed a claim against the county for $3,164.19, with interest at ten per cent. from date of allowance, for balance due to him for furnishing materials and erecting a court-house. That to pay for the court-house, there had theretofore been, from time to time, levied and collected taxes, to create what was known as "the court-house or public building fund." That in accordance with the order of allowance, the clerk issued a warrant upon the County Treasurer, payable out of said fund, for the sum allowed.

That soon after the date of the warrant, all of said fund then levied or collected was appropriated by the County Court to various purposes, and no part of it paid on the

warrant, and that no further levy of taxes had ever been made to supply the deficiency in the building fund caused by the appropriation thereof to purposes other than that for which it was originally created; and the County Court had refused to make any appropriation or levy any tax to pay said warrant.

That at the October term, 1878, of the County Court, before any levy or appropriation had been made for any other purpose, petitioner applied to the court to levy and appropriate a sum sufficient to pay said warrant, which was refused.

Prayer for mandamus to compel Alford E. Cope, presiding judge, and the justices of the peace, composing the County Court, for the levy and appropriation of taxes, to levy and appropriate at the next annual term, a sum sufficient to pay said warrant.

An alternative writ was awarded on the petition, to which a response was made at the November term, 1879, which was held insufficient, and a peremptory mandamus ordered to compel a levy and appropriation sufficient to pay the warrant and interest, to be made by the presiding judge and justices of the County Court at the October term, 1880.

Defendants appealed from the judgment awarding the mandamus.

I. The response contained four paragraphs, the first in substance as follows:

1. TAXES: Extent of County Court's power to levy.

That the relator filed a motion in the County Court at October term, 1878, asking the court to levy and appropriate a sufficient amount upon the taxable property of the county to pay his said claim, which motion was by said court overruled for good and sufficient cause then and there appearing. And the court did at said term, levy a tax of five mills on the dollar on the taxable property of the county for the payment of county indebtedness contracted and accruing

prior to the adoption of the Constitution of 1874. That the decision of the court overruling said motion, and the order making said levy of five mills to pay the indebtedness aforesaid, remain in full force, &c.

That at the October term, 1879, said County Court levied five mills on the taxable property of the county, and appropriated the same to the payment of the debts of the county existing prior to the adoption of the present Constitution, and also the further sum of five mills, and appropriated the same for all purposes of said county other than the payment of the debts aforesaid.

It appears from this paragraph that the County Court did refuse, at the October term, 1878, to make a special levy and appropriation to pay the warrant held by the relator, but did levy five mills to pay debts generally existing at the time of the adoption of the present Constitution.

The relator sought by the petition to compel, by mandamus, such special levy and appropriation to be made at the October term, 1879, but that term had transpired when the response was made. The first paragraph of the response shows, however, that at that term the court had levied and appropriated five mills to pay debts existing at the adoption of the Constitution, but it is not shown that any special levy and appropriation were made to pay the warrant held by the relator; and the court awarded the peremtory mandamus to compel such levy and appropriation to be made at the October term, 1880.

When the County Court levied a tax of five mills to pay indebtedness existing at the time of the ratification of the Constitution, it exhausted its levying power for that purpose under the Constitution. *Constitution of* 1874, *Art.* 16, *Sec.* 9; *Graham* v. *Parham* 32 *Ark.* 685; *Brodie et al.* v. *McCabe, Collector*, 33 *Ib.*, 696.

The warrant held by the relator was issued to his intestate

before the adoption of the present Constitution, and why the relator insisted on a special levy and appropriation to pay it, does not appear from the relation.

It is not alleged that Wilson W. Collins furnished materials and built the court-house under a contract made under some statute which authorized a special levy of taxes for its payment, and which statute entered into and became part of the contract, and placed its obligation under the protection of the Constitution of the United States, and that the warrant in question was issued upon such contract. The court below must have regarded the warrant as on the footing of the general indebtedness of the county, existing at the adoption of the Constitution, because in the order for the peremptory mandamus directing a special levy and appropriation to pay the warrant, it was provided that the tax levied for that purpose might be paid in county warrants or scrip issued before the adoption of the Constitution, or in State scrip or Auditor's warrants issued before that time, or in United States currency. See *English* v. *Oliver, Collector*, 28 *Ark.*, 317; *City of Helena* v. *Turner et al.*, 36 *Ark.*, 577.

2. COUNTY COURT: Its allowances unimpeachable collaterally.

II. The second paragraph of the response stated, in substance, that it appeared from the certified copy of the County Court record, made *Exhibit A* to the petition, that said warrant was issued in alleged payment of the balance due Wilson W. Collins on his contract for building the court-house for said county, but respondents alleged the truth to be, that there was in fact no amount or balance whatever, then remaining due and unpaid to him on said contract. That on the 16th of August, 1869, said Wilson W. Collins entered into a written contract with W. J. Montague, then commissioner of public buildings for said county, whereby he agreed and bound himself to erect and build a court-house for said county for the consideration of

$9,700.00, and respondents aver that said sum, long prior to the order of allowance under which said order was issued, had been fully paid off and discharged.

This paragraph was a collateral attack upon the order of allowance, which was in the nature of a judgment, and falls within the ruling of this court in *State, use, etc.*, v. *Hinkle*, *ante* 532.

3. MANDAMUS: Plea of payment by withholding county funds.

III. The third paragraph alleged, in substance, that before the making of said contract, said Wilson W. Collins was treasurer of said county, and at the time the allowance was made and the warrant issued, there was in his hands, as such treasurer, the sum of $14,000, belonging to the public building fund of said county, which had never been accounted for by him, and yet remained unaccounted for. That in his capacity as treasurer, he retained out of said sum the amount of said warrant and accrued interest, and afterwards held the warrant, in his capacity as treasurer, as a voucher for the payment to himself in his individual capacity.

This, if true, was a good defense. The object of the relator in applying for the mandamus was to compel a levy of taxes, and an appropriation to pay the warrant, and if his intestate had in fact obtained payment, in the mode stated in the paragraph, the mandamus should not have been awarded.

It is submitted by counsel for the relator that the respondents were estopped from setting up this defense by the record entry of the order of allowance, etc., a transcript of which was made (*Exhibit "A"*) to the petition for mandamus.

It appears from the *Exhibit A* that at an adjourned term of the County Court, held on the second Monday of November, 1872, the following order, in substance, was made:

"*In the matter of the public buildings of Franklin county and treasurer's commissions:*

"Now, on this day, comes Wilson W. Collins, contractor for the erection of a court-house in, and treasurer of, said county, together with Theodore Potts, commissioner of public buildings, etc., and state to the court that Collins has completed said building as specified in the original contract, etc., and asked the court to allow said Collins $3,870, as balance due him for building and completing said court-house, and for commissions as treasurer, etc., on moneys belonging to the public building fund, etc., together with the sum of $499.49, as interest on the amount here claimed as due for building said court-house, and to discharge said Collins from said original contract. Whereupon, upon an examination by the court, had of the subject matter in this cause, it is found that said Collins has in every way fully and completely erected and finished said court-house, according to the specifications and articles of said contract; that the sum of $3,870.19 is actually due said Wilson W. Collins for building said house, and for commissions as aforesaid. Therefore, it is by the court here considered, adjudged and ordered that said Wilson W. Collins be allowed the sum of $3,870.19, out of any public building fund in the county treasury not otherwise appropriated; and further, in consideration of there being now, at this date, the sum of $1,006 in the county treasury of said fund, it is ordered that the same be paid said Collins, and deducted from said allowance, and the clerk of this court to draw a warrant upon the county treasurer in favor of said Collins for the remainder of said allowance, out of said public building fund, and that said amount bear interest from this, November 16, 1872, until fully paid, at the rate of ten per cent. per annum, and that said Collins be and he is hereby

discharged fully and completely from said contracts, as asked for."

There is a transcript of a further order of the court embraced in *Exhibit A*, without date, as follows:

"*W. W. Collins*
v.
"*Franklin County.* } *Claim, $3,164.19.*

"Ordered that an order heretofore made, to-wit, on the fifteenth of November, allowing W. W. Collins the sum of $2,864.19, be amended so as to allow him the sum of $300 additional, as interest upon said amount from April, 1871, to the present, and that the clerk issue a warrant upon the public building fund of said county for the entire sum of $3,164.19, drawing interest at the rate of ten per cent. from date."

This warrant, which was made *Exhibit B* to the petition; and dated sixteenth November, 1872, was for the sum named in the last order.

No doubt the court, in considering the sufficiency of the answer, looked at *Exhibit A* to the petition, which was matter of evidence only, and by treating the third paragraph as insufficient, as if upon demurrer, precluded respondents, if it was in their power to do so, from offering evidence to prove that the warrant had in fact been paid in the manner stated in that paragraph.

The death of Wilson W. Collins, and the grant of letters of administration upon his estate to the relator, were not alleged in the petition, as they should have been, to show his title. Whether Wilson W. Collins ever made any final settlement as County Treasurer, or whether the relator had made any for him, as his administrator, and if so, whether his accounts were balanced, does not appear.

The second entries, embraced in *Exhibit A* to the petition,

were evidence of an adjudication by the County Court that Wilson W. Collins had completed the courthouse, according to his contracts; that a certain sum of money was due to him, as unpaid balance, on the contracts; that he then had in his hands, as County Treasurer, $1,006 of the public building fund; and this amount was appropriated upon his claim, as contractor, and a warrant ordered to be issued to him for the balance—payable out of that fund. This may be treated as a final adjudication and settlement with him, as contractor; but there is nothing on the face of the record entries to show that it was intended to be, or, in fact, was, a final and conclusive settlement and adjudication of his accounts as County Treasurer, generally, or as official custodian of the public building funds.

The orders and entries were made at an adjourned term of the County Court, in November, 1872, which was not the time prescribed by law for him to make his annual settlement as Treasurer; nor do the entries show that he had been ordered by the court to make a settlement at that time (*Gantt's Dig., Sec.* 1034), or that he had filed any account—general or special—for the court to adjudicate upon, and render a judgment that might be treated as an estoppel.

If, therefore, he had in his hands, at the time the warrant was issued, or afterwards, while he continued to be Treasurer, sufficient funds, belonging to the public building fund, to pay the warrant, and did so appropriate the funds, and afterwards held the warrant as a voucher against the funds so used, there was nothing in the record entries, embraced in *Exhibit A*, to estop respondents from proving such payment of the warrant, under the allegations of the third paragraph of their answer; and the paragraph should have stood for hearing, on evidence, instead of being held insuf-

ficent, as if on demurrer. *Burke* v. *Coolidge et al., Ex'rs*, 35 *Ark.*, 180.

4. MANDAMUS: Plea of set-off.

IV. In the fourth paragraph of the response it was alleged, in substance, that, at the time of the issuance of the warrant, there was in the possession and custody of Wilson W. Collins, as such Treasurer, the sum of $11,000, belonging to the school fund of said county, in addition to the aforesaid $14,000, belonging to the public building; and that said sums of money, and said warrant, and other claims, and other allowances, held by said Collins, were matters of mutual account between said county and said Collins, as Treasurer; and said account remained unsettled and unadjusted, and that said warrant ought not to be paid, unless, upon a final adjudication and settlement of the accounts of said Collins, as Treasurer, the same should appear to be due.

This paragraph was in the nature of a plea of set-off, and proposed to open too wide a field for inquiry, by the Circuit Court, on application for mandamus, into matters within the peculiar original jurisdiction of the County Court.

5. COUNTY WARRANT: Barred by failure to present for re-issue.

V. The fifth paragraph alleged, in substance, "that at the —— term, of 187—, of the County Court, it was decreed and adjudged, by said court, to be expedient to call in the then outstanding county warrants of said county, in order to cancel and re-issue the same; and the said County Court then and there made an order for that purpose, fixing the time for the presentation of such warrants three months from the date of said order. That the clerk of said court did furnish the sheriff of said county with a copy of said order, within ten days after the adjournment of said court; whereupon, the sheriff proceeded to notify, and did notify, the holders of said county warrants to present the same to said County Court at the time and place fixed by said order, as aforesaid, for cancellation and re-issuance of the same, by

putting up, at the court house door, and at the election precincts in each township, in said county, thirty days before the time appointed by the order aforesaid for the presentation of said warrants, a true copy of the order of said County Court in the premises, and by publishing the same in newspapers, printed and published in the State of Arkansas, for two weeks in succession, the last insertion being thirty days before the time fixed by the said court for the presentation of said warrants; and that the said relator neglected and refused to present his said warrant, as required by the order of said court, and the notice aforesaid, although he was the holder of said warrant; and respondents aver and claim that, by his said neglect and refusal, he is forever debarred from deriving any benefit from his said alleged claim."

This paragarph was drawn under *sections* 614–16 *Gantt's Digest*, and shows a compliance with the statute in making the order calling in the county warrants, and in giving the notice to holders in the modes prescribed by the Act.

If the paragraph had been treated as pleading a valid defense, and set down for hearing upon evidence, and if the respondents had proved the order and notice as alleged, the defense would have been established. No mandamus could be awarded to compel a levy and appropriation to pay a warrant barred by a call and failure to present it. The Statute makes such failure an absolute bar, and as to warrants issued after the passage of the act, it has been repeatedly held to be as valid as any other statute of limitation. *Parsel* v. *Barnes & Bro.* 25 *Ark.*, 261; *Fry, Collector*, v. *Reynolds*, 33 *Ib.*, 450; *Allen* v. *Bankston, Collector, Ib.*, 740; *Desha County* v. *Newman Ib.*, 793.

Pleading. It is true that it is not alleged in the fifth paragraph of the response that it was declared in the calling order that

warrants not presented within the time fixed should be barred, but this was not requisite.

If the calling order was made, and the notice given as alleged the Statute declares the consequence of a failure to present the warrants—that is, that the delinquent holders "shall thereafter be forever debarred from deriving any benefits from their claims."

It is usual in pleading the bar to exhibit a transcript of the calling order, but it is matter of evidence, and may be produced on the hearing, if the pleader is not ruled, on motion, to file it before.

For the error of the court in holding the whole response insufficient, the judgment must be reversed and the cause remanded for further proceedings.

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ACTION.

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1. *On bonds to common school commissioner. Judicial notice.*

Since the adoption of the Act of 23d of July, 1873, "to maintain a system of free common schools," the State can sue on bonds previously executed to the common school commissioner of a county, without any assignment of the bond, and without stating in her complaint how she acquired the right to sue. The Statutes show this, and the courts will take judicial notice of it. Williams v. State, use, etc. 463

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See PRACTICE IN SUPREME COURT, 5. ATTACHMENT, 3.

1. *Affidavit in replevin amendable.*

An affidavit in replevin may be amended in the Circuit Court on appeal from a Justice's Court, so as to enlarge the damages claimed. Hanf v. Ford. 544

AGENT.

See EVIDENCE, 1.

ALLEGATIONS AND INTERROGATORIES.

See GARNISHMENTS.

ALLOWANCES.

See COUNTY COURT.

AMENDMENT.

1. PLEADING: *Amending complaint; when not necessary.*

When the defects in an imperfect complaint are supplied by the answer to it, an amendment of the complaint is not necessary. The cause is at issue by the filing of the answer. Webb v. Davis and Wife. 551

APPEALS.

See TRANSCRIPT, 1.

1. CRIMINAL PRACTICE: *Appeals from Justices of the Peace in forma pauperis.*

Appeals from Justices of the Peace may be prosecuted in *forma pauperis* in civil, but not in criminal cases. Parks v. The State. 97

2. *On overruling motion for new trial in Chancery.*

Where a party excepts to the overruling of his motion for a new trial in a Chancery case, and prays and obtains an appeal, it will be construed to be an appeal from the decree of the court, and not alone from the overruling of the unnecessary motion for a new trial. Hunt v. Curry. 100

APPRAISEMENT.

See ATTACHMENT, 1.

ARBITRATION.

1. *As at common law, good.*

An arbitration, as at common law, which appears regular and unimpeached by facts or denials, is of the very highest authority. The question in controversy is as fully determined, and the rights of the parties as fully settled as could be by their own agreement or the judgment of a court. Harris v. Hanie et al. 348

ARREST OF JUDGMENT.

See PLEADING AND PRACTICE, 13, 16.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

See REPLEVIN, 1.

1. *When title vests in assignee.*

In the absence of fraud the title to goods conveyed by a deed of assignment for

the benefit of creditors, vests in the assignee, upon the execution and delivery of the deed; but he must file the bond and schedule provided by the statute before he can have possession of them. Thatcher et al. v. Franklin. 64

2. *Registration of.*

Registration of a deed of assignment for the benefit of creditors, it being an absolute conveyance, without any defeasance, is not necessary to vest the title in the assignee, as against the assignor, and execution creditors who refuse to accept the benefits of the deed. Ib.

3. *Statute of, constitutional. Sales must be public.*

The Statute of assignments (*Gantt's Digest, chap. 10*) is constitutional. (*Clayton v. Johnson, 36 Ark.,*) and a deed which authorizes the assignee to sell at private sale is in violation of the Statute and void. Raleigh v. Griffith. 150

ATTACHMENTS.

See JUDGMENTS, 1, 2. SURETIES, 1. PRACTICE IN SUPREME COURT, 5. LANDLORD'S ATTACHMENT, 1, 2.

1. *Interpleader's bond. Statutory judgment on.*

The appraisement of attached property, when claimed by a third person, as provided by the Statute (*Gantt's Digest, Section* 469), is the foundation to the statutory proceedings against the obligors on the interpleader's bond: and if no such appraisement be made and shown by the officer's return, the statutory judgment on the bond does not accrue. Nor does it accrue then, until the officer *shows by his return* on the *fieri facias* issued against the defendant in the original action, the failure of the obligors to deliver the property according to the conditions of the bond. Turner v. Collier & Davis. 528

2. *Affidavit amendable after appeal from Justice to Circuit Court.*

An affidavit for attachment in a Justice of the Peace Court may be amended after appeal in the Circuit Court, if the amendment contains no cause for attachment not existing at the commencement of the suit. Sherrill v. Bench & Bro. 560

3. *Conveyance to defraud one creditor ground for attachment by others.*

A sale or conveyance by a debtor to cheat, hinder or delay any one creditor, or his removal from the county of his residence, to avoid the service of summons by any one creditor, will justify an attachment of his property by any other creditor. Ib.

4. DAMAGES: *Attorney's fees not recoverable on discharge of attachment.*

Upon the discharge of an attachment, only such damages can be recovered by the defendant as are actual, and the natural and direct consequences of the attachment. And these do not include attorney's fees. Patton v. Garrett. 605

5. *Measure of damage, when wrongfully sued out.*

When an attachment is discharged, and the attached property restored to the

defendant, then, in a suit upon the attachment bond, upon showing that the attachment was wrongfully sued out, the measure of damages is the actual loss from being deprived of the use of the property, the injury to it, and the expenses incurred in defending the attachment proceedings. But when the attached property is totally lost by means of a wrongful attachment, and only then, the measure of damages is the value of the property when attached. Boatwright el al. v. Stewart. 614

6. *Liability for waste of attached property.*

When an attachment is wrongfully sued out, the plaintiff and his surety on the attachment bond are liable for any waste occurring to the attached property in the hands of the officer levying the attachment, and for all damages resulting from the seizure. Ib.

7. *Wrongful; evidence of, in actions on attachment bonds.*

If the affidavit for attachment be controverted, and the issue be determined in favor of the defendant, and the attachment be thereupon discharged, the judgment will be conclusive in an action against the plaintiff and his surety on the attachment bond, that the writ was wrongfully issued. But if the judgment of discharge be for informality of the affidavit, and not its falsity, then it will not be sufficient proof that the order was wrongfully sued out. Ib.

8. *Action on attachment bond for damages.*

It is not necessary to the recovery of damages, by an action on an attachment bond, that the judgment in the original action, discharging the attachment, should fix the amount of the damages. Ib.

ATTORNEY'S FEES.

See ATTACHMENTS, 4.

1. COUNTIES: *Attorney's fees.*

A county collector has no claim upon his county for fees paid by him to an attorney for resisting objections to his bond. Fry, Collector, v. Chicot County. 117

2. *Receiver cannot pay*

A receiver cannot claim credit in his account for attorney's fees paid by him for either of the parties; but if upon final settlement of accounts there be sufficient funds in court, belonging to the party for whom he has paid, the court may allow him to be reimbursed out of them. Drake v. Thyng. 228

BANKRUPTS.

See PARTIES, 1.

BILL OF EXCEPTIONS.

See PRACTICE IN SUPREME COURT, 1, 2.

1. *By whom to be signed.*

A bill of exceptions can be signed only by the judge who tries the case, though he be a special judge, and it be not signed until after the term. Watkins v. The State. 370

2. *Must be signed by judge.*

A paper purporting to be a bill of exceptions, but not signed by the judge, is no bill of exceptions and will not be noticed by the Supreme Court. Turner v. Collier & Davis. 528

3 *When none, judgment presumed right*

In the absence of a bill of exceptions no error can be presumed of the judgment. Ib.

BILL OF PARTICULARS.

See EVIDENCE, 8.

BILL OF REVIEW.

See PRACTICE IN CHANCERY.

BILLS AND NOTES.

1. *When drawer entitled to notice of dishonor.*

When the drawee, in a bill of exchange, is indebted to the drawer, or in other words, has funds of the drawer in his hands, the drawer has the right to draw, and is entitled to notice of the dishonor of the bill, though he had no expectation at the time of drawing it that it would be paid; and default of the holder in presenting the bill for payment or in giving notice of its dishonor to the drawer will discharge him, both from the bill and the original debt for which it may be given, though it was given in discharge of the debt only if paid, and though the action be upon the debt for which it was given and not upon the bill. The want of injury or prejudice to the drawer will not excuse the holder's default in making demand or giving notice of the dishonor. Minehart v. Handlin. 276.

2. *Notice of dishonor, when to be given.*

When the parties to a bill of exchange reside at different places, notice of its dishonor should be deposited in the post office in time to go by the mail of the day after the dishonor, if the mail is not closed before early and convenient business hours of that day, in which case it must be sent by the next mail thereafter; or it may be sent by messenger or given personally, but must reach the party at furthest, on the same day it would have reached him in due course of mail. Ib.

BONA FIDE PURCHASER.

1. *Donee in deed of gift, is not; notice; forgery.*

The holder of title by deed of gift from one who has obtained the title by fraud, is not a *bona fide* purchaser for valuable consideration. Nor is one who has been informed, before purchasing the land, that the vendor had already conveyed it to another. Nor one who purchases from the fraudulent holder of the legal title, while the rightful owner is in actual possession. Nor one who obtains title from a vendor who has obtained his title by forgery. Bird et al v. Jones et al. 195

BOND FOR COST.

See PLEADING AND PRACTICE, 30.

CERTIORARI.

1. *None, where appeal may be prosecuted.*

The writ of *certiorari* should not be issued in any case where there is or has been a right of appeal; unless the opportunity for appealing has been lost without fault of the petitioner. Payne v. McCabe. 318

CHANCERY SALES.

1. *Foreclosing mortgage on land to be on credit.*

A decree for the sale of land in satisfaction of a mortgage, should direct a sale on credit, as provided by the Statute, and not for cash. Jackman v. Beck. 125

COLLECTOR OF REVENUE.

1. *Office forfeited if bond not given in prescribed time.*

The sheriff is by law *ex-officio* collector of revenue, but if he fails to give bond as such collector by the time prescribed by the Statute (the first Monday in January), he forfeits the office, and cannot be restored to it by executing the bond afterwards. Falconer v. Shores. 386

2. *Appointment of successor on failure to give bond.*

Upon the failure of a sheriff to give bond as collector of revenue, within the time prescribed by law, the Governor is required, upon notice of such failure from the county clerk, to declare the office vacant, and fill it by appointment. No judicial ascertainment of the vacancy is required. The power is rightfully vested by the Legislature in the Governor. Ib.

3. *Not elective. Vacancy, how filled.*

The office of collector of revenue is not elective, and the filling of vacancies in the office is not within the provision of Sec. 50, Art. VII., of the Constitution. Ib.

4. *Legislative power over.*

The office of collector is subject to the control of the Legislature, which has power to provide for his appointment by the Governor, or any other mode it may direct. Ib.

5. *When the appointee of Governor may enter into office.*

A collector of revenue appointed by the Governor, in place of a sheriff failing to give bond as collector, may enter upon the duties of his office, or sue the sheriff for the office, immediately after having his bond approved by the Circuit Judge, within ten days after his appointment. He need not wait for approval in term time. Ib.

CONDITIONAL SALE.

See CONSTRUCTION OF CONTRACTS, 1.

CONFEDERATE STATES.

1. *Validity of their acts.*

The acts of the several seceding States, and of their different departments of government, relating to their own internal government affairs, and not impairing the authority of the general government, were valid and obligatory. Howell v. Hogins, Collector. 110

CONSTRUCTION OF CONTRACTS.

1. *Partnership; Conditional sale.*

Pierce and the appellees entered into an agreement, by which Pierce engaged to put in $3000 to $5000, as he might deem best, to the founding and promoting of a newspaper, provided the appellees should put in, to aid the enterprise, the sum of $2000, which should represent a proportionate amount of the stock of said business. Pierce was to conduct the editorial management of the paper, and give it his best abilities and influence. He was, also, to keep an accurate record of all expenditures, in a set of books provided for that purpose. Scott and the other subscribers were to pay their subscriptions as the same should be required to pay rents, materials and other expenses incident to the enterprise, and Pierce was to have the privilege of refunding all or any of the sums subscribed and paid in, within one year from such payments, with interest thereon, and might then assume sole proprietorship of the paper; but, until such sums should be refunded, they should stand as so much stock in the bus-

iness and paper. *Held*, in a bill against Pierce for an account and distribution of the profits: *First*, That the agreement constituted a partnership, and the last clause was a conditional sale of the appellee's shares to Pierce, upon payment to them of their money, and interest, in a year. *Second*, That time was of the essence of the contract, and that he could not claim to purchase, after the year. *Third*, That the interest of the parties in the profits was in proportion to the amounts paid in by them. *Fourth*, That Pierce, having failed to keep books, was liable, to the strictest account of the profits which the proof would justify. *Fifth*, He could not, under the agreement, claim compensation for his services as editor, etc. Pierce v. Scott et al. 308

CONTRACTS.

See INFANTS, 1, 2, 3.

CONVEYANCES.

See ACKNOWLEDGMENT OF DEEDS, 1.

CORPORATIONS.

1. *When bound for services rendered before its existence.*

In order to recover against a corporation in an action at law for services rendered before its being, the plaintiff must prove either an express promise of the new company, or that the contract was made with persons then engaged in its promotion, and taking steps preliminary thereto, and was made on behalf of the new company, in the expectation of the plaintiff, and with the assurance of the projectors that it would become a corporate debt; and that the company afterward entered upon and enjoyed the benefit of the contract, and by no other title than that derived through it. L. R. & Ft. S. R. R. Co. v. Perry. 164

2. *Not bound by contracts of individual members.*

A corporation is bound only by its own contracts, and not by those of the individual members in their private capacity. Ib.

COST.

See COUNTIES, 1.

COUNTIES.

See ATTORNEY'S FEES, 1.

1. COSTS: *Liability of counties.*

Counties are liable for cost in all cases of acquittals on indictments. Bradley County v. Bond. 226

2. COUNTIES: *Power of Legislature over.*

The Legislature may, according to its own views of public policy and convenience, enlarge or diminish the powers of counties, and may extend, limit or change their boundaries, without the consent of the inhabitants, except that by the Constitution, "no part of a county shall be taken off to form a new county without the consent of a majority of the voters in such part proposed to be taken off." Pulaski County v. County, Judge Saline County. 339

3. SAME: *Power to apportion indebtedness on partition of county. Notice.*

The Legislature may require of a county, to which a part of another's territory has been attached, payment of part of the latter's indedtedness, and may direct how the debt shall be ascertained; and when the act designates the time for the adjustment of the amount by the County Court from which the territory is severed, the other county to which it is attached has notice, and may contest the correctness of the adjustment, and appeal it to the Circuit Court. Ib.

4. SAME: *Partition of, as affecting Senatorial districts.*

The transierring a portion of a county in one Senatorial district to another county, in a different Senatorial district, constitutes no change of those districts. They are each composed of the same counties as before; and counties, not territory or inhabitants, are the constituents of the districts. Ib.

COUNTY COURT.

1. *Allowances by; how reviewed.*

An order of allowance by the County Court may be reviewed, or opened—

First. By appeal to the Circuit Court.

Second. By *certiorari*, where it appears, upon the face of the record, that the claim allowed was not, by law, a charge against the county, and the court had no authority, or discretion, to allow it upon any evidence that could be adduced.

Third. The County Court is authorized to call in its warrants for review, etc., once in three years, and can then reject any warrants founded upon claims illegally or fraudulently allowed.

Fourth. In chancery, for fraud, accident, or mistake. State, use Izard County, v. Hinkle. 532

2. TAXES: *Extent of County Court's power to levy.*

When the County Court levies a tax of five mills to pay indebtedness existing at the time of the adoption of the Constitution of 1874, it exhausts its power, under the Constitution, to levy for that purpose, and cannot make an additional levy for a particular debt. Cope, County Judge, et al v. Collins, Adm'r. 649

3. *Its allowance of a claim unimpeachable, collaterally.*

An order of allowance by the County Court is in the nature of a judgment, and cannot be impeached, collaterally, by proof that the debt had been paid before the order was made. Ib.

COUNTY SCRIP.

1. *Cancellation and reissue of.*

Where there is less than three months between the making of an order by the County Court for calling in county scrip for reissue, and the date fixed by the order for presenting the scrip, an order of the County Court barring that not presented will be void Howell v. Hogins, Col. 110

2. *Statute Limitations.*

The County Treasurer is bound to pay off county scrip when presented, and the County Collector to receive it for county taxes, no matter how long it may have been issued. Ib.

3. *Tender of for taxes:*

A tender of a county warrant for taxes for a larger sum than the taxes amount to, is good; the tax payer may over pay if he chooses to. Ib.

4. *Barred by failure to present for reissue; Pleading.*

When a county warrant is not presented for reissue at the time required by an order of the County Court, properly made and published, it is barred; and in a suit on the warrant it is not necessary to aver in the answer setting up the bar that it was provided in the order of the court that claims not presented should be barred. The Statute makes that provision, and it is unnecessary in the order. Cope, County Judge, et al. v. Collins, Adm'r. 649

CRIMINAL LAW.

1. *Breaking partition fence; Trespass.*

It is not a misdemeanor for one to break a partition fence between his lot and another's, and the common property of both. Nor is it a trespass for him to knock off the plank added to it by the other; but destruction of such fence would be a trespass. Drees v. The State. 122

2. *Cohabiting as husband and wife, what is.*

To constitute the offense of cohabiting as husband and wife, the parties must live together, in the same house, as husband and wife, without being married; and whether they so live must be determined by the jury, from the testimony in the case, as to their bed and board, and the intercourse and apparent relationship in which they live and bear themselves toward each other. Bush v. The State. 215

3. SABBATH BREAKING: *Selling alcohol.*

Alcohol is embraced in any one of the terms "goods, wares, or merchandise," the sale of which by retail, on Sunday, is prohibited by *Sec.* 1618 *of Gantt's Digest.* Bridges v. The State. 223

4. *Murder; Manslaughter.*

Where parties quarrel, separate, arm themselves, and again meet and enter mutually into a fight, with deadly weapons, and one kills the other, or kills a third person, in an attempt to kill his adversary, it may be murder or man-

slaughter, according to the time intervening the first and second difficulties, and opportunity for cooling. Fitzpatrick v. The State. 238

5. *Murder in first degree.*

To constitute murder in the first degree, there must be the specific intent to take life, formed beforehand and carried out with deliberation. Ib.

6. *Presumption from age of prisoner.*

By Statute, an infant under twelve years of age cannot be convicted of any crime or misdemeanor; and the common law presumption that one between the ages of twelve and fourteen years is incapable of discerning good from evil until the contrary be affirmatively shown, still prevails. Dove v. The State. 261

7. LARCENY: *The intention in taking the property.*

When one takes another's horse, without any intention of converting him to his own use, but to ride him for some miles, which he does, and then abandons him, it is a trespass, but not larceny. Ib.

8. *Prisoner's right to copy of indictment.*

In criminal prosecutions the accused is entitled, by the Declaration of Rights, to counsel, process for witnesses, trial by jury, and to have a copy of the indictment before arraignment; but the Legislature has the power to regulate the manner of securing these rights to him; and by Statute he cannot, in a prosecution for an offense not capital, have a copy of the indictment, without tendering the fee for the copy. Howard v. The State. 265

9. *Taking or holding real estate by force; Jurisdiction.*

By Statute (*Gantt's Digest, Sec.* 1518), it is a misdemeanor to take or hold possession of real estate by force or violence without authority of law; and a Justice of the Peace has jurisdiction of the offense. Mann v. The State. 405

10. *Removing mortgaged property; Recording the lien.*

Actual recording of the instrument creating the lien is not necessary, under either *Sec.* 1409 *Gantt's Digest*, or the *Act of* 3d *February*, 1875, to make it a felony for one to remove, sell, barter, or otherwise dispose of the liened property. Filing in the Recorder's office, as required by the acts is sufficient. Cooper (I. Z.) v. The State. 412

11. *Verdict on several counts, when good.*

A general verdict of guilty on an indictment containing several counts is good, if either of the counts be good, and be sustained by evidence. Ib.

12. *Removing mortgaged property not condoned by giving other property.*

After the offense of removing mortgaged property has been committed it cannot be condoned by satisfying the creditor with other property. Ib.

13. *General verdict on good and bad counts, when good.*

A general verdict of guilty on an indictment containing good and bad counts is good, if the good count be sustained by evidence. Ib.

14. *Murder by poisoning punishable as murder in the second degree.*

Under our Statute a person charged with murder in the first degree may be convicted of a lower degree of criminal homicide, though the charge be for murder in the first degree by poisoning. Allen v. The State. 433

15. *Liability of sheriff for permitting prisoner to go at large.*

It is the duty of a sheriff, upon the conviction of a defendant for a misdemeanor, who is present at the trial, to retain him in his custody; and if the fine and costs be not immediately paid, to hire him out, as directed by the judgment, and if he voluntarily permit him to go at large, he is guilty of a misdemeanor. Griffin v. The State. 437

16. OBTAINING MONEY UNDER FALSE PRETENSE: *Proof of offense.*

Proof that the defendant, by false pretenses, obtained the satisfaction of his debt to another, though sufficient to sustain an action by the defrauded party against him for money lent, is not sufficient to sustain an indictment for obtaining money under false pretenses. The money must have been actually, and not merely impliedly or constructively obtained, and must have come into the defendant's possession. Jamison v. The State. 445

17. MISDEMEANORS: *Hiring out convict for fine and cost.*

Under the provisions of the 4th section of the *Act of March* 10, 1877, one convicted of a misdemeanor may be hired for as much as can be got for him—not less than seventy-five cents a day; but the court cannot *require* a greater hire per day than the *minimum* fixed by the Statute, nor direct that the hiring be for a less number of days than one for every seventy-five cents of the fine and cost. The State v. Barnes. 448

CRIMINAL PRACTICE.

See PLEADING AND PRACTICE, 5, 7, 8, 27, 30, 31.

CRUELTY TO ANIMALS.

See INDICTMENT, 3.

1. *Burden of proof as to character of the act.*

In an indictment for "needlessly killing an animal," the State must prove not only the killing, but that it was done under such circumstances as, unexplained, would authorize the jury to believe that it was needless, in the sense of the Statute. Grise v. The State. 456

2. STATUTES: *Construction of Act to Prevent Cruelty to Animals.*

The term "needlessly," in the Act of 18 9, "For the Prevention of Cruelty to Animals," has no reference to the lawfulness or unlawfulness of the act of killing or mutilating, except as the Statute makes it unlawful *as* needless; nor is it to be construed as characterizing an act which might by care have been

avoided. It simply means an act done without any useful motive, in a spirit of wanton cruelty, or for the mere pleasure of destruction. Ib.

DAMAGES.

See RAILROADS, 4. PLEADING AND PRACTICE, 44. LANDLORD'S ATTACHMENT, 1. ATTACHMENT, 4, 5, 6.

DECREE.

See PRACTICE IN CHANCERY, 1.

DELIVERY.

See SALES, 1.

DEMURRER.

See PLEADING AND PRACTICE, 1, 3, 22, 35, 36.

DEPOSITIONS.

See PLEADING AND PRACTICE, 24.

ESTOPPEL.

See PRINCIPAL AND DEPUTY. HOMESTEAD. 5.

1 *By statement as to facts.*

If one by his statements as to matters of fact, or as to his intended abandonment of existing rights, designedly induces another to change his condition in reliance upon them, he will afterwards be estopped to deny the truth of his statements or to enforce his rights against his declared intention to abandon them. Shields v. Smith. 47

EVIDENCE.

See WITNESS, 2, 5. FRAUD, 1. TAX SALES, 5. LIQUOR, 5, 6. PRACTICE IN SUPREME COURT, 7. EXHIBITS, 1. HOMESTEAD, 8. PLEADING AND PRACTICE 43. ATTACHMENTS, 7. TAX DEEDS, 1.

1. AGENT: *His declaration when admissible.*

The declarations of an agent, made in the course of his agency, and in relation thereto, are admissible against his principal. Shields v. Smith. 47

2 *Declarations of accomplice.*

The declarations of an alleged accomplice, in the absence of the defendant, are not admissible against him until other evidence than that of the principal is produced, implicating the declarant in the offense. Casey v. The State. 67

3. *Declarations of accomplice.*

The declarations of an accomplice are admissible against, but not for, his accomplice on trial. Ib.

4. *Exclusion of, when no prejudice.*

A party is not prejudiced by the exclusion of evidence in mitigation of punishment where the jury assesses the lowest punishment prescribed by the law. Crampton v. The State. 108

5. MARRIED WOMEN: *Acknowledgment to deed as evidence.*

A married woman's acknowledgment to a deed properly certified, is *prima facie*, but not conclusive evidence against her, either that the acknowledgment was made as certified, or that the facts acknowledged were true, except as to a vendee for valuable consideration, ignorant of the falsity of the facts, and not participant in the fraud. As to him she is estopped to deny an acknowledgment actually made. Holt v. Moore. 145

6. *Parol evidence, when admissible, to prove deed a mortgage.*

Parol evidence is admissible between the parties to show that a deed absolute upon its face is only a mortgage, where there remains a subsisting debt to the vendee to support it. But where no such debt remains, where the consideration has passed, or the obligation to pay it been incurred, and there is no obligation of the vendor to repurchase, parol evidence is inadmissible to support such option. Nevertheless the use of a parol promise to reconvey in overreaching a weak or ignorant mind, might become an element of fraud to be considered in connection with other circumstances.. Ib.

7. *Competency of, when and by whom determined.*

It is the province of the court to determine, when evidence is offered, whether it tends to prove the issue. After it has gone to the jury, unless wholly irrelevant, it is for the jury to determine how far it, with other circumstances, conduces to prove the issue. L. R. & Ft. S. R. R. Co. v. Perry. 164

8. *Bill of particulars, when not filed as exhibit.*

When a suit is upon an aggregate account filed as an exhibit, it is no surprise to the defendant to introduce and prove the bill of items composing the aggregate, though not filed as an exhibit. Ib.

9. CRIMINAL EVIDENCE: *Proving one felony by evidence of another.*

Generally it is not competent to prove one guilty of one felony by proving him

guilty of another; but when several felonies are committed together, and form parts of one entire transaction, then one is evidence to prove the character of the other. Dove v. The State. 261

10. *What sufficient proof of sale of liquor.*

If one goes into a dram shop and calls for a pint of whisky, and it is drawn and delivered to him by the keeper, this is evidence tending to prove a sale of the whisky, though it is proven that no money was paid, nor any directions given to the keeper to charge it. Hill v. The State. 395

11. *Of age, from family Bible.*

In a prosecution for the sale of liquor to a minor, the alleged minor may testify of his age from the record of his birth in the family Bible. Pounders v. The State. 399

12. BIGAMY: *Divorce decree as evidence of life of divorced party.*

In a prosecution for bigamy, a decree divorcing from the accused his former wife, rendered after the alleged bigamous marriage, and awarding to her the custody of their infant child, is *prima facie* evidence that she was living at the time of the bigamous marriage. State v. Ashley. 403

13. *When exclusion of legitimate is no prejudice.*

A party is not prejudiced by the refusal of the court to admit legitimate testimony which he offers if it would be unavailing without other testimony which he does not offer. Cooper, (G. M.) v. State. 421

14. *Record only prima facie evidence as against strangers.*

In a prosecution against a sheriff for permitting one convicted of a misdemeanor to go at large, the record of the judgment of conviction, is only *prima facie* evidence of its recitals and may be disproved. Griffin v. The State. 437

15. *Of payment by services, etc., without plea of set-off.*

When the nature of the defense to an action on a note is, that the defendant had rendered services for the plaintiff, and given him orders for money, with a mutual view to a settlement of the notes, evidence of the services and orders is admissible, without pleading them as set-off. Shinn v. Tucker. 580

16. ADMISSIONS: *The jury, the judge of their weight.*

Statements in the nature of, or tending to prove admissions, are always admissible, and should be considered and given such weight by the jury as they may think them entitled to, without any advice of the court as to their force. Ib.

EXHIBITS.

See EVIDENCE, 8.

1. *Of title deeds no part of the pleadings or evidence.*

Copies of title deeds filed as exhibits with the pleadings are no part of the

pleadings, nor of the evidence. The deeds themselves, or the next best evidence, if they can't be produced, must be read to the jury. Richardson v. Williams. 542

FORGERY.

See BONA FIDE PURCHASER, 1.

FRAUD.

See BONA FIDE PURCHASER, 1. PRACTICE IN CHANCERY, 5.

1. FRAUD: *In obtaining deed, onus probandi.*

Allegations of fraud in procuring a deed must be clearly proved, The *onus* is upon the party making them. Holt v. Moore. 145

GARNISHMENTS.

1. *Allegations and interrogatories must correspond with writ.*

In garnishments the allegations and interrogatories should conform to the writ. If that be against a single individual, allegations addressed to him and another, alleging a joint indebtedness to the defendant, and interrogatories pursuant to them, are demurrable. Frizzell v. Willard. 478

2. *When effects of defendant in hands of several.*

When the effects of the defendant are in the hands of several, who are jointly liable to him for them, and which are not under the exclusive control of either of them, all must be joined as garnishees before interrogatories can be filed against either. Ib.

HABEAS CORPUS.

1. *For custody of infant child; by what principles governed.*

In deciding contests upon writs of *habeas corpus* for the custody of infant children, the principles adopted in the Chancery Court must govern. No rigid rules to govern the practice have or can be formulated. Subject to a few general rules, to be taken as a guide, the chancellor must exercise his judgment upon the peculiar circumstances of the case, and act as humanity, respect for the parental affection and regard for the infant's best interest may prompt. All three should be considered. Neither should be conclusive. Verser v. Ford et al. 27

HOMESTEAD.

1. *Temporary removal from, no abandonment.*

Continuous actual occupation is not necessary to preserve the homestead. A removal from it for a temporary purpose, or with the intention of re-occupying it, is not such an abandonment as will forfeit the homestead right. Euper v. Alkire. 283

2. *Scheduling.*

When a schedule of the homestead has been filed against an execution, it is not necessary to file another against an alias execution on the same judgment, where there has been no change of circumstances. Ib.

3. *Wife need not join husband in conveying.*

A wife has no interest in the homestead during her husband's life, nor vested right in a future interest; and her concurrence in its alienation is not necessary. Klenk v. Knoble and Wife. 298

4. *Owner may prosecute his business on.*

The owner of an actual homestead may transact any business on it he may deem necessary for the support of his family; may erect conveniences proper for the business, and occasionally rent out such portion of the premises as may be temporarily spared; or he may cotract its area by cutting off a portion and appropriating it to other than family uses. Ib.

5. *Mortgage of, under Constitution of 1868; Estoppel.*

Where, during the life of the Constitution of 1868, a party has declared, in a mortgage of property, which he might claim as part of his homestead, that it was "no part or parcel of his homestead," he is estopped to afterwards assert to the contrary and avoid the mortgage, unless such estoppel would contravene the policy of the law by allowing him to denude himself, by the mortgage, of a necessary part of his homestead. Ib.

6. *Infant cannot waive.*

A minor cannot waive his right to a homestead during minority, and, being supposed to be under the control of others, does not perfect it by residence. The purchaser, at a probate sale of the tract of land, to which the homestead of a deceased parent appertained, must take notice of the minor's right, and, if he use the homestead for his profit, must account to the minor for the rents. Altheimer v. Davis. 316

7. *Mortgage of, under Constitution of 1868; Estoppel.*

A declaration by a mortgagor in a mortgage of real estate, made during the Constitution of 1868, that the mortgaged property was not his homestead, will not estop him to deny the truth of the declaration, and assert his homestead right against the mortgage. Webb v. Davis and Wife. 551

8. *Plea of, against mortgage under Constitution of 1868, must be proved.*

If in an action to enforce a mortgage executed during the life of the Constitu-

tion of 1868, the defendant pleads that the mortgaged property was his homestead, the burden of the proof is upon him. Ib.

HUSBAND AND WIFE.

1. *Right to property purchased with wife's funds.*

A homestead purchased by the husband with money given to the wife during the coverture, and coming to his possession, belongs to him; and so, also, does personal property so purchased, and cannot be screened from his debts by the scheduling of it as her separate property. Dyer v. Arnold et al. 17

2. *Property rights of wife under Constitution of 1868.*

Under the Constitution of 1868, a wife could acquire and hold personal property, but it was not protected from her husband's debts until scheduled. Ib.

3. *Parties; When wife may testify.*

In an action against husband and wife to foreclose a mortgage on a homestead, the wife may defend to avoid foreclosure of dower, and as to this, may testify for herself, but not in aid of the defense of her husband. Kleuk v. Knoble. 298

IMPROVEMENT.

1. *Meaning of, under our land system.*

An "improvement," under our land system, does not mean a general enhancement of the value of the land by the occupant's operations. All works directed to the erection of houses for families, or which are substantial steps towards bringing lands into cultivation, have, in their results, the specific character of improvements. The true test is, are they real and made *bona fide* in accordance with the policy of the law, or are they only colorable, and made for the purposes of fraud or speculation? As to their value, if they have any at all, the amount is immaterial. Simpson v. Robinson. 132

INCLOSURE.

See PLEADING AND PRACTICE, 6.

INDICTMENT.

See PLEADING AND PRACTICE, 4, 6, 19, 20, 28, 37, 38. CRIMINAL LAW, 8. LIQUOR, 9.

1. ACCESSORY: *Must not be indicted as a principal.*

One who advises or encourages the commission of a felony, but is not actually or constructively present when it is committed, cannot be convicted under an

indictment charging him as principal in the crime. Boze Smith v. The State. 274

2. *Signing by Prosecuting Attorney not necessary.*

It is not necessary that an indictment be signed by the Prosecuting Attorney. It is sufficient if found by the grand jury, and endorsed by the foreman. Watkins v. The State. 370

3. CRUELTY TO ANIMALS: *Allegations of value or ownership.*

In an indictment under the Act of 1879, for needlessly killing or mutilating an animal, the value or ownership of the animal need not be alleged Grise v. The State. 456

INFANT.

See HOMESTEAD, 8.

1. *His trust deed not void, nor voidable for necessaries.*

An infant's trust deed is not void, nor voidable, to the extent it is for necessaries. Cooper (G. M.) v. The State. 421

2. *How far and by what contracts bound.*

An infant is bound for necessaries for both himself and his wife, but he is not bound by any express contract for necessaries to the extent of the contract, but only on an implied contract for their value. Ib.

3 *His contracts; when void and voidable*

When the instrument given by an infant as security for payment is such that its consideration cannot, by the rules of law, be inquired into, it is void, and not merely voidable; but if it be such that the consideration can be inquired into, he is liable thereon for the true value of the necessaries for which it was given. Ib.

INJUNCTIONS.

See LANDLORD AND TENANT, 1. TITLE 1.

1. *Dissolved, not revived by an appeal.*

An appeal to the Supreme Court from an order of a Chancery Court, dissolving an injunction, does not revive the injunction during the pendency of the appeal. Payne v. McCabe. 318

INSTRUCTIONS.

See LIQUOR, 7. PRACTICE IN SUPREME COURT, 6.

1. *Repeating.*

There is no error in refusing to repeat for one party instructions already substantially given for the other. Casey v. The State. 67
Crampton v. The State. 108

2 *To be considered together.*

Any one of several instructions given, should be considered in connection with the others, and with reference to the different phases of the evidence, in view of which the instructions were framed. Fitzpatrick v. The State. 238

3. *Should be on all the evidence.*

Instructions should not be based upon isolated facts, or only part of the evidence, but should be so framed that all parts of the evidence should be considered and weighed by the jury. Newton v. The State. 333

4. *To find according to "weight" or "preponderance" of testimony.*

Where there is a conflict of testimony upon a plea of payment, an instruction to the jury that the defendant is entitled to a verdict, if, upon the whole testimony in the cause, his plea appears to be sustained by the "*weight*" of evidence, should not be given. The word "weight" is not synonymous with "preponderance." Shinn v. Tucker. 580

5. *Applicable only to the particular case; Admissions.*

Instructions are not intended to settle abstract principles of law. They are given for the guidance of juries in the particular case with reference to the testimony, and it is dangerous to rely upon them as abstract and immutable principles, applicable in all cases.
(The instructions as to admissions in *Frazier, Ad.*, v. *Prater and wife*, 11 *Ark.*, 267, criticised). Ib.

6. As to Admissions: *Strength or weakness of evidence.*

Since the adoption of the Constitution of 1874 (Art. VII., Sec. 23), it is the exclusive province of the jury to judge of the strength or weakness of any facts to support an issue, and the court should not instruct them as to the force of evidence. Ib.

7. *Abstract, not to be given.*

An instruction which is calculated to mislead the jury by leading them to infer that the evidence tends to establish the fact it hypothetically states, though abstractly correct, should not be given. L. R. & Ft. S. R'y. Co. v. Trotter. 593

INTEREST.

1. *Whether suspended by the war.*

The Statute of Limitations was suspended during the war, whether in actions between belligerents or between residents within the Confederate States; but the running of interest upon debts, between citizens of the same belligerent power, was not suspended by the war between the States. Williams v. State, use &c. 463

JUDGMENT.

See PLEADING AND PRACTICE, 11. PRACTICE IN SUPREME COURT, 8. REPLEVIN, 3.

1. *Summary, against sureties in attachment cases*

By executing the delivery bond in attachment cases, provided for by *Sec.* 406 *Gantt's Digest*, the sureties become parties to the suit, and subject to summary judgment in the action, without service of notice or process upon them. Fletcher et al. v. Menkin et al. 206

2. *For what amount on forthcoming bonds in attachment.*

The judgment against sureties on a forthcoming bond, provided for in *Sec.* 406 *Gantt's Digest*, must be for the value of the property, as found by the court or jury trying the case, and not the value fixed by the appraisers for taking the bond. Ib.

JUDICIAL NOTICE.

See LIQUOR, 7. ACTION, 1.

2. REAL ESTATE BANK: *History of, etc, within judicial cognizance.*

All matters connected with the organization, history and dissolution of the Real Estate Bank are within judicial cognizance. Davis et al. Adm. v, Hunt. 574.

JURISDICTION.

See VAGRANTS, 1. CRIMINAL LAW, 9. VENUE, 1.

JURY.

See PLEADING AND PRACTICE, 7, 8. VERDICT, 1.

JUSTICE OF THE PEACE.

See CRIMINAL LAW, 9.

1. *Jurisdiction questioned by tenant's denial of landlord's title.*

A Justice of the Peace should not dismiss an action for rent, for want of jurisdiction, merely upon the defendant's answer denying the plaintiff's title to the land. The answer is not to be taken as true. The facts should be investigated, and if the relation of landlord and tenant exists, the ownership of the land is not material. Jordan v. Henderson. 120

2. JURISDICTION: *For punishing Justice of the Peace for not filing abstract of misdemeanor's tried by him.*

For the violation of the Act of February 11, 1875, "prescribing and defining the duties of Justices of the Peace in certain cases," the justice must be prosecuted criminally, and not by civil action; and the Circuit Court has concurrent jurisdiction, with Justices of the Peace, of the offense. McClure v. The State. 426

3. *His abstract of misdemeanors must be complete.*

If the abstract of misdemeanors required of Justices of the Peace by the Act of eleventh February, 1875, "prescribing and defining the duties of Justices of the Peace," omit any item of information required by the act, the justice is guilty of a violation of the act, and liable to its penalty and to removal from office—although he may honestly believe and intend that the abstract fully conforms to the Statute. Ib.

4. PRACTICE BEFORE: *Setting aside default judgment; Notice of.*

No notice to the plaintiff of an application by the defendant to set aside a default judgment before a Justice of the Peace is necessary. Frizzell v. Willard. 478

LANDLORD AND TENANT.

See JUSTICE OF THE PEACE, 1. LANDLORD'S ATTACHMENT, 3.

1. *Re-letting to tenant after judgment in unlawful detainer satisfies the judgment.*

A re-letting of the premises to a tenant after recovering a judgment for possession against him, is a satisfaction of the judgment, and an execution on the judgment after the new lease will be enjoined. Barney v. Cain. 127

2. *Measure of rent when in kind.*

When land is rented for a portion of the crop produced on it, and nothing is stipulated about the manner of cultivation, the landlord can claim only the agreed portion of the crop actually produced, without regard to the manner of cultivation. Patton v. Garrett. 605

LANDLORD'S ATTACHMENT.

1 *Measure of damages on discharge of.*

On the discharge of an attachment of corn for rent, the presumption is, in the absence of evidence to the contrary, that the corn is returned to the defendant; and his measure of damages, in such case, is, the injury sustained by the detention of the corn and any deterioration of value resulting from the attachment. Patton v. Garrett. 605

2. *Attachment for removing crop*

A removal, by the tenant, of any considerable portion of the crop from the field where it grows, to another place rented from the same landlord, without his consent, and there consuming it, will justify him in attaching the crop. A removal of part of the crop from the premises, without his consent, even for honest purposes, will support an attachment. Ib.

3. *Rights and liabilities of landlord when attachment fails.*

When the grounds of a landlord's attachment prove untrue, he is subjected to damages; but he has the right, even in the case of a premature suit, to recover what he may be justly entitled to, including money value of rents not paid in kind. Ib.

LANDLORD'S LIEN.

1. *Superior to mortgagee's.*

A landlord's lien upon the tenant's crop for rent is superior to that of a mortgagee. Meyer v. Bloom. 43

2. *Right of assignee of rent note to crop.*

The assignment of a rent note does not carry the landlord's lien; but if the tenant deliver the crop to pay the note to one holding it as collateral security for a debt due from the landlord, his title and possession will be upheld against the claim of the tenant's mortgagee of the crop. Ib.

3. *Statute of Limitations.*

An action to enforce the landlord's equitable lien against one acquiring the tenant's crop, with knowledge of the lien, will be barred after six months from the maturity of the rent. King & Clopton v. Blount. 115

LANDS—DONATION.

1. *Section* 3905 *Gantt's Digest construed.*

The State Land Commissioner could not, under section 3905 *Gantt's Digest*, sell to the owner of an improvement, the land donated to another, until the three months allowed to the donee to pay for the improvement, and the thirty days for filing with the commissioner the owner's receipt for the payment, had both expired. Simpson v. Robinson. 132

2. LIEN: *Of State for purchase money of school land, superior to her lien for subsequent taxes.*

The lien of the State, for the purchase money for school lands, is prior and superior to her lien for taxes for general revenue, and is not merged in the legal title acquired by the State in the forfeiture of the land for taxes; and a sale in chancery, by the State, to enforce the school lien, made after the forfeiture for taxes, passed the whole title to the purchaser, free from the lien for taxes, and a subsequent donation of the land was void. Ib.

LANDS—REAL ESTATE BANK.

1. *Redemption of, from State.*

Under the Act of December 15, 1875, only owners of the equity of redemption in the Real Estate Bank lands sold to the State, can redeem them from the State. Davies et al, Adm'r., v. Hunt. 574

LEGISLATURE.

See COUNTIES, 2, 3.

1. *Resolution extending session of 1881.*

The resolution of the Legislature extending the session of 1881, did not require the approval of the Governor. It was constitutional without such approval. Trammell v. Bradley, County Judge. 374

LICENSE.

See LIQUOR, 1, 2, 8.

LIENS.

See TAX SALES, 1. PRACTICE IN CHANCERY, 2. LANDS—DONATION, 2. MORTGAGE, 4.

1. *Created by recital in deed.*

The recital in a deed that the "land is held bound for the payment of the notes" given for it, creates a valid express lien upon the land for payment of the notes. Taliaferro, Ex'r., v. Barnett. 511

2. *Created by agreement, by and against whom enforced.*

A lien created on real or personal estate by the express agreement of the owner, will be enforced in equity not only against him, but also, against any one afterward acquiring the estate with notice of the agreement. Such lien is in the nature of a trust, which equity will compel the holder of the legal title to perform. And in equity it passes by assignment of the debt it was created to secure. The cases of *Shepherd* v. *Thompson*, 26 *Ark.*, 617, and *Jones* v. *Doss*, 27 *Ark.*, 518, overruled. Ib.

LIQUOR.

See EVIDENCE, 10, 11. PLEADING AND PRACTICE, 33.

1. *Selling without license.*

A licensed dealer may sell his own or any other's liquor without offense; and if

the owner has license, his agent may sell; but if neither the seller, owner or person interested in the sale has license, all may be guilty. State v. Keith. 96

2. *Selling with and without license*

One having license to sell liquor may sell another's liquor who has no license, but one having no license cannot sell the liquor of another who has, except as his agent or employee, and under his license; and if neither has license, both the seller and owner, or party interested in the sale, are indictable. Johnson v. The State. 98

3 *Selling to a minor under mistake of his age, mitigates punishment*

A party's belief, however honestly entertained, that a minor to whom he sells liquor without the consent of his parent or guardian is of full age, will not justify or excuse him, but will mitigate his punishment. Crampton v. The State. 108

4. *Selling to minor under mistake of his age.*

It is no excuse or justification to one who sells liquor to a minor without the written consent of his parent or guardian, that both he and the minor believe at the time that the latter is of age. He sells at his peril. Edgar v. The State. 219

5. *Selling to minor, onus as to parent's consent.*

The State need not prove that a sale of liquor to a minor was without the written consent of his parent or guardian. The burthen of proving such consent is upon the seller. Ib.

6. *Same; Evidence of minor's age.*

In a prosecution for selling liquor to a minor, the minor may testify of his age from an entry of his birth in the family Bible without producing it, or from any other source of information. Ib.

7. *Instruction that whisky is intoxicating; Judicial notice*

An instruction in a prosecution for selling whisky to a minor, that whisky is an intoxicating liquor, without proof of it, is not objectionable. It is a fact of common intelligence, and needs no proof. Ib.

8. *License*

One who has license to sell liquor may lawfully sell the liquor of another who has no license. Lane v. The State. 272

9. *Indictment for selling vinous liquor; Demurrer; Proof.*

An indictment for selling vinous liquors in less quantities than five gallons, without license, is good, on *demurrer;* but *proof* that the wine sold was manufactured from grapes, berries, and other fruits, and that the defendant sold no other liquors, will acquit him. State v. Kate Marsh. 356

10 *Selling liquor without license; Proof of particular day*

In prosecutions for the sale of liquor without license, it is not necessary to prove a sale on the particular day named in the indictment. Proof of a sale at any time within twelve months before the finding of the indictment is sufficient. Fitzpatrick v. The State. 373

11. *Local Option Act of 1881, constitutional.*

The Act of 1881, authorizing the County Courts to make an order prohibiting the sale or giving away of liquor within three miles of any church or schoolhouse, upon the petition of a majority of the adult residents in said limit, is constitutional and valid. Trammell v. Bradley, County Judge. 374

12. *Sale of to minors*

The permission or order of a parent or guardian of a minor to sell liquor to him must be in writing. Hill v. The State. 395

13 *Selling to minors.*

That a minor is carrying on business for himself, will not justify a sale of liquor to him without the written consent or order of his parents or guardian. Pounders v. The State. 399

14. *Same; Burden of proof of consent.*

In prosecutions for selling liquor to minors without the written consent or order of the parent or guardian, the burden of proving the consent is upon the defendant. Ib.

15. *Same; Ignorance of age no excuse.*

Ignorance of the minor's age, and the honest belief that he was adult, afford no justification for the sale of liquor to him without the parent's or guar- consent. The seller sells to him at his peril. Ib.

16. PHYSICIAN: *Answerable for false certificate.*

If a physician give a false certificate, under the liquor Act of March 5, 1879, he is answerable therefor. Thompson v. The State. 408

LIQUOR LAW.

1. *Act of March 8, 1879; Constitutionality of.*

The first section of the Act of March 8, 1879, regulating the sale of liquor in this State, is not, in any provision, in conflict with the Constitution of the United States; but section 15 of the Act is, as it reads, in conflict with that provision of the Constitution which empowers Congress to regulate commerce with foreign nations and between the States; because it undertakes to discriminate in favor of wines made of the products of this State and against those of other States. The Legislature has no power to make such discrimination. But the constitutional part of the section, being separable from the unconstitutional, the latter will be treated by the courts as stricken out, and the section read without the discriminating provision. State v. Kate Marsh. 356

MALICIOUS MISCHIEF.

See PLEADING AND PRACTICE, 6.

MALICIOUS PROSECUTION.

1. *Malice, Proof of; when presumed.*

To maintain an action for maliciously attaching the plaintiff's goods, it is not necessary to prove that the defendant, in suing out the attachment, acted dishonestly, or with actual malice. If there was no probable cause to believe that the facts alleged in the affidavit for the attachment were true, the jury may presume malice. Bozeman v. Shaw. 160

MANDAMUS.

See PLEADING AND PRACTICE, 45, 46.

MARKS.

See PLEADING AND PRACTICE. 4.

MARRIED WOMEN.

See EVIDENCE, 5.

MISTAKE.

See LIQUOR, 3, 4, 15. JUSTICE OF THE PEACE, 3.

1. *Relief against judgment at law for.*

When a party comes into equity for relief against a judgment by default in a Justice's court, he must show not only that he has lost his appeal by mistake or accident, without laches, but also that he had a valid defense to the action. McCabe v. Payne. 450

2. *In deeds of conveyance. Relief in Equity—Rescission.*

If a vendor by mistake convey a tract of land which does not belong to him, instead of the tract sold and intended to be conveyed, equity will not restore to the vendee the purchase money, but will compel him to accept a deed for the proper land. Gilmore v. Hamblin. 626

3. *Successive vendees subject to correction of.*

A vendee of land from one who holds by deed, indefinitely describing it, will be charged with notice of the uncertainty, and be subject to its correction. Ib.

MORTGAGE.

See HOMESTEAD, 5, 7.

1. *Not released by taking other security.*

A subsequent written agreement by the mortgagor and new sureties to pay the mortgage debt by a future fixed day, in consideration that the mortgagee will forbear suit on the debt until that day, is no release of the mortgage, and an unsatisfied judgment on such agreement is no bar to a suit to foreclose the mortgage. Ford v. Brooks et al. 91

2. *Of undivided half interest in land.*

A mortgage of an undivided moiety in land will not be transferred and limited to the whole of a particular part of it, allotted to the mortgagor in severalty by a subsequent partition between the co-tenants, to which the mortgagee was not a party, nor assented. Jackman v. Beck, et al. 125

3. *Necessary elements of.*

There can be no mortgage without something conveyed by the mortgagor to the mortgagee, and a debt to be paid. Pierce v. Scott et al. 308

4. *Filing, with directions not to record.*

A mortgage filed in the recorder's office, with directions not to record it, is not filed *for record*, within the meaning of the Statute, and is no lien upon the property as against strangers to it. Bowen, Trustee, v. Fassett. 507

5. *To State, when good without registering.*

When a loan is made by the State, and a mortgage taken to secure it, in pursuance to the provisions of a public Statute, all persons are chargeable with notice of it, and the State will not be prejudiced by the neglect of her agents to have the mortgage recorded. M. & L. R. R. R. Co. v. The State. 632

6. *Foreclosing; Subsequent mortgagees should be parties.*

A second mortgagee, who is not a party to a suit to foreclose a first mortgage, is not bound by the decree rendered in the suit, but may foreclose and sell the equity of redemption, and the purchaser in that sale will be entitled to possession, and to redeem from the first mortgage. Ib.

NEGLIGENCE.

See RAILROADS.

1. *Permitting stock to go at large near railroad.*

Although one may not be altogether free from negligence in permitting his stock to go at large in the immediate vicinity of a railroad, yet, in doing so, he assumes only the risk of an accident which might not be avoided by ordinary care and watchfulness of the agents and employees of the railroad company. L. R. & Ft S. R'y. Co. v. Finley. 562

2. *Diligence required of railroad engineers to avoid injury to stock.*

It is the duty of the engineer of a railroad train to keep a constant and careful look-out for stock upon the track; and, although stock be wrongfully there, yet he must use ordinary care and diligence to discover it and avoid injury to it, or the company will be liable for the injury done to it. Ib.

3. *Presumed, from killing of stock on railroad track.*

The killing of stock upon a railroad track being shown, the presumption is that it was negligently done by the train; but the presumption may be repelled by proof. Ib.

NEW TRIAL.

1. *For newly discovered evidence.*

A new trial will not be granted on the ground of newly discovered evidence, where it appears that the evidence was known to the party before the trial, and no good reason is shown for not producing it. Newton v. The State 333.

2. *Disqualification of juror concealed on voire dire; Affidavit.*

An affidavit of the plaintiff that he is informed since the trial, and believes, that one of the jurors was related to the defendant in the fourth degree, both by blood and affinity, and that he did not disclose the fact on his examination on the *voire dire*, wituout stating what the relationship was, and without proof of it, will not sustain a motion for new trial. Shinn v. Tucker. 580.

NOTICE.

See BONA FIDE PURCHASER, 1. JUDICIAL NOTICE. BILLS AND NOTES, 1, 2. JUSTICE OF THE PEACE, 4. VENDOR'S LIEN, 3.

PARENT AND CHILD.

1. *Custody of child; Preference to whom given.*

As against strangers, the father, however poor and humble, if of good moral character, and able to support the child in his own style of life, cannot be deprived of the privilege by any one whatever, however brilliant the advantage he may offer. It is not enough to consider the interest of the child alone. And as between father and mother, or other near relation of the child, where sympathies of the tenderest nature may be confidently relied on, the father is generally to be preferred. Verser v. Ford et al. 27

PARTIES.

See PLEADING AND PRACTICE, 3. HUSBAND AND WIFE, 3. ACTION, 1, 2.

1. *Bankrupt.*

Bankrupts are neither necessary nor proper parties in suits concerning their effects which have passed to their assignee. Fry v. Street. 39

2. *Who necessary.*

It is a general rule that all persons materially interested in the subject matter of the litigation should be made parties to the suit, either as plaintiffs or defendants. Taliaferro, Ex'r., v. Barnett. 511

PARTNERSHIP.

See STATUTE OF FRAUDS, 3. CONSTRUCTION OF CONTRACTS, 1.

1. PARTNERS: *Power of partner to sell partnership business.*

Though a partner may sell a part or the whole of any of the effects of the firm which are intended for sale, and if the sale be within the scope of the partnership business, yet he cannot, without the consent of the other partners, dispose of the partnership business itself, nor of all the effects, including the means of carrying it on. This is without the range of his implied powers, and contrary to the objects and designs of the association. Drake v. Thyng. 228

2. SAME: *Fraudulent sale of whole effects by one partner; Trust.*

When a partner, in the absence of his co-partner who has furnished the capital, sells the partnership effects and business at a sacrifice, to parties having knowledge of the interest of the co-partner, and when there is no necessity for the sale, a constructive trust will attach to the property in the hands of the purchasers, and as trustees they and the vendor will be held to a rigid accountability to the co-partner. Ib.

PAYMENT.

See PRINCIPAL AND DEPUTY, 1. EVIDENCE, 15.

PEDDLERS.

1. *Act defining and imposing license on, unconstitutional.*

The Statute (*Gantt's Dig., sec. 4376 et sequitur*), defining peddlers, and imposing license on them, discriminates in favor of the products and manufactures of this State, and against those of other States, and is, therefore, unconstitutional and void. State v. McGinnis. 362

PLEADING AND PRACTICE.

See TRESPASS, 2. INSTRUCTION, 1, 2. SECURITIES, 1. EVIDENCE, 4, 7, 38. INDICTMENT, 2, 3. MISTAKE, 1. EXHIBIT, 1. AMENDMENT, 1.

1. PLEADING: *Demurrer to complaint in part good.*

When one of several paragraphs of a complaint is good, a general demurrer to the whole complaint is bad. Warner v. Capps. 32

2. SAME: *Common law forms not abolished by the Code.*

The Code has made no change in the substantial allegations necessary to constitute a cause of action, and an appropriate common law form of pleading may still be used, if in the use of it the material facts constituting the cause of action be specifically stated. Id.

3. PLEADING: *Misjoinder of parties.*

A misjoinder of defendants is not cause for a demurrer, but may be corrected by motion to strike out the party improperly joined. Fry v. Street. 39

4 INDICTMENT: *For larceny of heifer yearling; marks.*

It is not necessary to allege in an indictment for the larceny of a heifer yearling that it was marked or branded. If it was over one year old, running in the range, and not marked or branded, the defendant should prove the facts in defense. Perry v. The State. 54

5. CRIMINAL PRACTICE: *Trial without plea, error.*

If the record shows no plea to the indictment, made by the defendant or entered by the court, the trial is without issue, and a judgment of conviction will be reversed. Ib.

6 MALICIOUS MISCHIEF: *Indictment for killing a mule; Inclosure.*

An indictment for killing a mule need not allege that it was killed in an enclosure having an insufficient fence. If killed while trespassing in the defendant's inclosure, having a lawful fence, he can prove it in defense. Dean v. The State. 57

7 CRIMINAL PRACTICE: *Swearing jury.*

Where the record fails to show that the trial jury in a felony case were sworn in that case, a judgment of conviction will be reversed. Barber v. The State. 62

8. CRIMINAL PRACTICE: *Discretion of court in rejecting juror.*

It is the province of the Circuit Court, in the exercise of a sound discretion, to determine the qualification of a juror challenged for bias, and this court will not say that the discretion is abused by admitting a juror who says, upon examination, that he has formed an opinion of the guilt or innocence of the accused, upon rumor, that will require evidence to remove, but that he has no bias or prejudice against him, and can try the case impartially and without prejudice to his rights. Casey v The State. 67

9. PRACTICE: *Retiring jury during argument of instructions.*

Requiring the jury to retire during the argument of instructions is a matter of practice within the discretion of the court, and is not objectionable. Ib.

10. PLEADING: *Contradicting terms of written instrument.*

An answer alleging that a county warrant, payable in "dollars," was to be paid in Confederate money, is bad. Harrell v. Hogins, Collector. 110

11. PRACTICE IN CIRCUIT COURT: *Judgment on bad indictment.*

No judgment should be rendered against a defendant found guilty on a bad indictment, though no motion in arrest be made. Younger et al. v. The State. 116

12. *Illegal allowance of claim.*

Illegality in the allowance of a claim in the Probate Court cannot be set up in a collateral proceeding. Mays v. Rogers, Admr. 155

13 *Arrest of judgment.*

If a matter in controversy has been adjudicated in a former suit, this is ground for defense, but not for arrest of judgment. Bozeman v. Shaw. 160

14. PRACTICE: *Verdict in conformity to appellant's instructions must stand.*

A party cannot complain of a verdict which conforms to an instruction asked by himself, though the instruction be wrong. Ib.

15. *Equitable relief in actions at law.*

Relief of a purely equitable nature cannot be given in an action properly begun and prosecuted at law. L. R. & Ft. S. R. R. Co. v. Perry. 164

16. *Transfer of cause from law to equity docket.*

When a complaint at law discloses a purely equitable cause of action, it may be transferred on motion of either party, or of the court's own motion, to the equity docket; but the failure of the court to make the transfer, when neither party asks it, will not be error for reversal. The rule is the same where a purely legal action is brought in equity. Ib.

17. *When legal relief administered in equity—no equity at law.*

When a complaint in equity contains any equitable element to which the jurisdiction of a Court of Chancery may attach, the court may, in the same cause, administer all proper legal relief essential to complete justice at once to all parties before it; but actions at law, purely legal upon their face, must be decided on legal principles alone. Ib.

18. PRACTICE: *Directing jury what verdict to find.*

If there is any evidence whatever, however slight, pertinent to the issue, the court should not take it from the jury and direct their verdict, even if it is satisfied that it would grant a new trial if a verdict should be found upon it. Ib.

19 INDICTMENT: *Charging one offense in separate counts.*

An indictment which charges the defendant in one count with violating the Sabbath, by selling whisky, and in another, by selling alcohol on the same day, charges but one offense, committed in two different modes, in distinct counts. Bridges v. The State. 223

20. CRIMINAL PRACTICE: *Entering finding of indictment on record.*

When an indicted party is not in custody, the clerk should not disclose upon the record that an indictment has been found against him. It is sufficient for the record entry of the finding of an indictment to describe it by number, and an indictment endorsed with the same number and date of filing as the number mentioned in the entry of that date, will be sufficiently identified as the one filed. Fitzpatrick v. The State. 238

21. PRACTICE IN CIRCUIT COURT: *Summing up evidence.*

The Constitution of 1874, in effect, prohibits judges from summing up the evidence, as under the common law practice. Fitzpatrick v. The State. 238

22. DEMURRER: *Suit brought in wrong forum; Transfer of cause.*

That an action at law has been brought in equity is no ground for demurrer. The error should be corrected by motion to transfer to the proper docket. Conger v. Cotton. 286

23. PRACTICE: *Forum, when equitable cross-bill filed.*

When a defendant files a cross-bill, setting up equitable grounds for relief, to a complaint in equity which should have been brought at law, the case should proceed in equity. Ib.

24. SAME: *Amending certificate to depositions.*

There is no error in allowing an officer to amend his certificate of the taking of depositions so as to conform to the facts, after it is filed in court. Ib.

25. SAME: *Amount of proof required when answer responsive to complaint.*

The rule that when an answer is responsive to the complaint it requires two witnesses, or one with strong corroborating circumstances, to overturn it, does not obtain, under the Code practice. Ib.

26. SAME: *Evidence: Testimony of a party.*

The testimony of a party taken subject to the test of a cross-examination is a different thing, and of a higher nature than sworn allegations in pleading, and is sufficient, when unimpeached and credible, to sustain a decree in the absence of evidence on the other side. Ib.

27. CRIMINAL PRACTICE: *Amending at the trial, examination before committing court; Impeaching deceased witnsss.*

When, in the trial of a criminal case in the Circuit Court, the written examination of a witness before the committing court (who has since died) is read as as evidence against the accused, he may impeach the evidence by proof of previous contradictory statements made by the witness, provided that he was

interrogated, in the examining court, of such contradictory statements, with a proper specification of the time and place they were made; and if the written examination fails to show that such foundation was laid for impeaching the witness, the committing magistrate may amend it, to show the fact. Griffith v. The State. 324

28. CRIMINAL PLEADING: *Joinder of offenses—burglary and larceny*

A count for burglary and one for grand larceny may be joined in the same indictment. Watkins v. The State. 370

29. PRACTICE IN CIRCUIT COURT: *Suspending trial for further evidence*

The suspension of a trial after it has commenced, to enable a party to get further testimony, is within the sound discretion of the Circuit Court. Hill v. The State. 395

30 CRIMINAL PRACTICE: *Bonds for cost in misdemeanors before J. P*

A failure of the prosecutor to give bond for cost in a misdemeanor case before a Justice of the Peace, is matter in abatement, and is waived by the defendant pleading not guilty, instead of requiring him by rule to give the bond. Mann v. The State. 405

31. SAME: *Judgments against sureties on appeal bond.*

Previous to the Act of March 15th, 1879 (*Acts of* 1879, *p.* 81), it was error to render judgment against sureties in appeal bonds in misdemeanor cases from Justice of the Peace. Ib.

32. CRIMINAL PLEADING: *Indictment charging offense in the alternative, bad.*

An indictment charging that the defendant "did sell *or* give away whisky," under an act making it an offense to sell or give it away, is bad for uncertainty; but to charge that he "did sell *and* give away," is good. So to charge that he sold whisky *or* brandy is bad, but a charge that he sold whisky *and* brandy is good. Thompson v. The State. 408

33. INDICTMENT: *Negativing prescription of physician.*

Where an act makes it an offense to sell liquor without the prescription of a graduated physician, or regular practitioner of medicine, the indictment charging the offense must negative the prescription of both. Ib.

34. CRIMINAL PLEADING: *Indictment for disposing of mortgaged property*

An indictment charging that the accused "feloniously did sell, barter, or *otherwise dispose of*" a mortgaged horse, is bad for uncertainty. The manner of the disposal must be specified. Cooper (I. Z.) v. The State. 412
Cooper (G. M.) v. The State. 421

35. SAME: *General demurrer to several counts.*

A general demurrer to an indictment containing several counts should be overruled, if either count be good. Ib.

36 SAME: *General demurrer to good and bad counts bad.*

A general demurrer to an indictment containing several counts should be overruled, if either count be good. Cooper (G. M.) v. The State. 421

37. CRIMINAL PLEADING: *Indictment for disposing of mortgaged property*

An indictment charging that the accused "feloniously did sell, barter, or otherwise dispose of" a mortgaged horse, is bad for uncertainty. The manner of the disposal must be specified. Ib.

38. RECEIVING MONEY UNDER FALSE PRETENSE: *Indictment. Description of money.*

An indictment for receiving money under false personation of another must describe the money with the same particularity and certainty as an indictment for larceny. Treadaway v. The State. 443
Jamison v. The State. 445

39 PRACTICE IN CIRCUIT COURT: *When part of complaint not answered.*

When an answer to a complaint for several tracts of land is entirely silent as to one tract, the plaintiff is entitled to judgment for it for want of an answer. Richardson v. Williams. 542

40. PRACTICE IN CIRCUIT COURT: *Entering judgment without disposing of plea.*

It is error to render judgment for a plaintiff without disposing of the defendant's plea. But if the plea presents no defense the judgment will not be reversed in the Supreme Court. Turner v. Stroud. 556

41. PRACTICE IN CIRCUIT COURT: *Discretion in admitting testimony*

The admission of further testimony after closing the instructions in a case, is within the sound discretion of the Circuit Court. L. R. & Ft. S. R. R. v. Finley. 562

42 PRACTICE IN CIRCUIT COURT *Verifying pleadings from Justice's Court.*

It is not necessary to verify pleadings in a Justice's Court, either oral or written; nor, when amended, on appeal, in the Circuit Court. Shinn v. Tucker. 580

43. PLEADING: *Denials; Non detinet in Replevin. General issue, evidence under.*

Non detinet, or words to that effect, is no answer to an action for personal property. General denials, under our Code practice, are inadmissible. They must be special to each allegation of fact; but to deny that one *unlawfully* detains property, responds to no fact. But when parties accept general issues as sufficient, and go to trial upon them, it is too late afterwards to hold them void, though they might have been struck out on motion; but the evidence should be confined to the simple and obvious issues which they make, so as not to dispense with pleading specially, matters of which notice should have been given to the opposite party. Tyner v. Hays. 599

44 PRACTICE: *Damages; Judgment for more than claimed in the pleadings.*

It is an error to render judgment for more damages than is claimed in the complaint, and the error is not cured by an offer to remit the excess. Ib.

45. MANDAMUS: *Plea of payment by withholding funds.*

To a petition for mandamus, to compel the County Court to levy a tax for the payment of the petitioner's debt, allowed against the county, the County Judge and justices answered that at the time the allowance was made, and the warrant on it was issued, the petitioner was county treasurer, and had in his hands a large sum belonging to the fund out of which said warrant was payable, and that he retained out of said sum the amount of said warrant, and afterwards held said warrant as treasurer, as a voucher for the payment to himself, individually, and had never accounted for the funds in his hands. *Held:* A good defense to the petition. Cope, County Judge et al. v. Collins, Admr. 649

45. MANDAMUS: *Plea of set-off.*

To a petition for mandamus, to compel the County Court to levy a tax to pay a particular debt, an answer in the nature of a set-off, which opens too wide a field for inquiry by the Circuit Court in such case, in matters within the peculiar original jurisdiction of the County Court, is bad. Ib.

PRACTICE IN CHANCERY.

See ATTORNEYS FEES, 2. PLEADING AND PRACTICE, 25, 26.

1 *Selling property for cash; Construction of decree.*

A decree ordering real property to be sold, without saying on credit, means a sale for cash, and is therefore erroneous. Fry v. Street. 39

2. CHANCERY SALE: *For enforcement of lien.*

A sale in Chancery to enforce a lien on land must be on credit, as provided by section 4708, *Gantt's Digest.* Hunt v. Curry. 100

3. CHANCERY PRACTICE: *When there is jurisdiction of one matter, all will be disposed of.*

When Chancery once obtains jurisdiction of a matter in controversy it will retain the cause for the settlement of all rights between the parties growing out of and connected with the subject-matter, whether legal or equitable, so as to do complete justice; and may even give damages, for compensation, which it could not do if they were the principal object of the suit. Conger v. Cotton. 286

4. MASTER IN CHANCERY: *Should act only on proof, in taking account.*

In taking an account, the Master in Chancery should not act on his own knowledge, or the unsworn statements of others, but as a jury, solely upon the evidence adduced. Pierce v. Scott et al. 308

5. BILL OF REVIEW: *Vacating decree; Lien, etc.*

Estes executed to H. Harris, for land purchased of him, two obligations to deliver cotton at Christmas, 1877 and 1878, respectively. Harris transferred the first, with his lien on the land, to Hanie, the other, to J. R. Harris. Hanie sued in equity to enforce the vendor's lien for his obligation, not noticing J.

R. Harris' interest; and pending the suit, he and Estes and J. R. Harris submitted their rights to arbitrators, who awarded that Hanie should accept a designated forty acres of the land, and one hundred dollars from Estes, and deliver up the first obligation; that the balance of the land stand as security for payment of the second obligation held by J. R. Harris, and that Hanie assume the payment of that obligation, and upon payment, Estes should convey to him the balance of the land. The award was accepted and ratified by the parties. Afterward Hanie and Estes, without notice to Harris, had a consent decree entered in the pending suit, to sell the land in payment of the first obilgation. Upon a bill by Harris to review and set aside the decree, and enforce his equities. *Held:* That there was no vendor's lien for the enforcement of the obligation; that Estes could not create a lien against Harris by consenting to the decree; that Harris was not prejudiced by it; and could not maintain a bill of review; but the decree, after the arbitration, was a fraud upon him, and the bill would be retained and the decree vacated. Harris v. Hanie et al. 348

6. *Removing cloud upon title.*

A party who sues in equity to remove a cloud upon his title to land, must be in possession when he brings his suit, unless his title be an equitable one. Lawrence v. Zimpleman. 643

7. *Same.*

A court of equity will not interpose to remove a cloud upon title, unless the beclouding title be good upon its face, and a resort to extrinsic evidence be necessary to establish its invalidity. A deed worthless upon its face casts no cloud upon the owner's title. Ib.

8. *Same: Plaintiff must show title*

The plaintiff in a bill to remove a cloud upon his title, must himself have a reasonably clear title. He must proceed upon the strength of his own title, and not the weakness of the defendant's. Ib.

PRACTICE IN SUPREME COURT.

See PLEADING AND PRACTICE, 40.

1. *Bill of exceptions signed in vacation.*

When a motion for new trial is not acted on by a special judge trying the case, and a bill of exceptions is afterwards signed by him in vacation with a statement that he would have overruled the motion if he had not been called away, the case stands as if no motion for new trial had been filed and no bill of exceptions taken, and presents no question for the decision of this court. Kearney, Assignee, v. Moore et al. 37

2. *Bill of exceptions.*

Where the bill of exceptions does not state that it contains all the evidence introduced, or facts proved on the trial, the presumption is in favor of the correctness of the judgment. Dean v. The State. 57

3.

This court will not refer for the facts of a case to the record in another case. The facts must be shown by the bill of exceptions. Fry, Collector, v. Chicot County. 117

4 *Judgment upon two counts, erroneous as to one.*

A judgment *in solido*, upon two counts, will be reversed *in toto*, if erroneous as to one. L. R. & Ft. S. R. R. v. Perry. 164

5 *Objection for want of bond in attachment suit; Affidavit insufficient*

The defendant in an attachment suit cannot object here for the first time, that no bond was filed by the plaintiff before the writ of attachment was issued. Nor can he object here for the first time, that the affidavit for the attachment was insufficient. Such objections must first be made in the Circuit Court. Fletcher et al. v. Menkin et al. 206

6. *Wrong but innocent instruction.*

Though an instruction be inapplicable, and calculated to mislead the jury, if the facts show that it did not have that effect, and other proper instructions were given on the same point, this court will not reverse. Fitzpatrick v. The State. 238

7. EVIDENCE: *Record excluded must be in bill of exceptions.*

When the record of another court, excluded as evidence in the trial of a cause, is not incorporated in, or made part of, the bill of exceptions, this Court can not tell the grounds for its exclusion, and will presume that it was excluded for sufficient cause. Pounders v. The State. 399

8. *In erroneous judgments of acquittal*

A verdict and judgment of acquittal on a valid indictment, though erroneous, cannot be reversed in the Supreme Court on appeal by the State. State v. Ashley. 403

9. *As to error against party not appealing*

Judgments, though erroneous, as to parties who do not appeal, will not be reversed upon the appeal of a party as to whom there is no error. Mann v. The State. 405

PRESUMPTION.

See PRACTICE IN SUPREME COURT, 2, 7.

PRINCIPAL AND DEPUTY.

1. *Deputy's right to control conduct of principal: Payment; Estoppel.*

Mervin, as deputy of Furbush, collector of revenue of Lee county, delivered to Hewitt interest bearing State scrip, which he had collected as revenue, to be

paid to the County Treasurer on Furbush's indebtedness to the county. Hewitt delivered the scrip to the Treasurer, and took his receipt to Furbush for the principal, the Treasurer refusing to allow the interest. Furbush, upon receiving the receipt, repudiated the transaction, and returned the receipt to the Treasurer, and demanded the scrip, and the Treasurer returned it to him. Afterwards, Furbush having defaulted and absconded, Mervin petitioned the County Court in his own name for the protection of Furbush's sureties, to to credit the scrip on Furbush's account, on the ground that the delivery to the Treasurer was a payment. From the evidence, the scrip had not been entered on the Treasurer's books, nor placed with the county funds, and the receipt was not regarded by the Treasurer as a final matter, but merely as a memorandum showing how much Furbush had paid. *Held:* That the deputy could not thus control the conduct of his principal; that he had no right to petition for the sureties; that Furbush had the right to repudiate the transtion, and reclaim the scrip, and that the transaction was no payment; and treating the proceeding, which was docketed on appeal in the Circuit Court, and conducted in the name of *Furbush* v. *Lee County*, as the suit of Furbush, he was estopped to claim it as a payment. Furbush v. Lee County. 87

PURCHASERS,

See RAILROADS, 1.

RAILROADS.

See NEGLIGENCE, 1, 2, 3.

1. *Liability of purchasers of, for their obligations.*

A purchaser of the road bed, property and franchises of a railroad company is not liable for its obligations, which are not liens upon the property. Sappington et al. v. L. R., M. R. & T. R. R. Co. 23

2. *Cars must stop at depot platforms.*

It is the duty of the conductor of a railroad train to stop the cars at the depot platforms for the safe landing of passengers. St. L., I. M. & S. R. R. Co. v. Cantrell. 519

3. NEGLIGENCE: *Alighting from moving train under direction of conductor.*

A passenger who alights from a slowly moving train at the instance or direction of the conductor, or other agent in management of the train, on whose opinion or judgment in the matter he has the right to rely, and when the risk or danger is not apparent, is not chargeable with negligence. Ib.

4. DAMAGES: *For injury from negligent running of railroad train.*

A passenger on a railroad train, who is injured by the negligent running of the train, or, on account of an insufficient platform at which he is landed, is entitled, as damages, to compensation for the bodily injury sustained, the pain suffered, the effect of the injury on his health, according to its degree and probable duration, the expenses of his sickness resulting from the injury, and of attempting to effect a cure, and the pecuniary loss sustained by reason of inability to attend to his business, or profession. Ib.

5. SAME: *Platforms.*

A railroad company is bound to provide safe and sufficient platforms for the landing of passengers, of sufficient length to afford safe egress to passengers from an ordinary train. Ib.

6. NEGLIGENCE: *Duty of engineer on discovery of stock on railroad track.*

It is not always necessary that the engineer on a railroad train should stop it, or slacken its speed, on discovering stock on the track. Ordinary prudence requires him to promptly endeaver to drive them off by sounding the whistle, but does not require him to stop, or slacken the speed of the train, when he may reasonably believe that they will leave the track in time, and there is no cause or reason to suppose there is any r sk or danger. L. R. & Ft. S. R. R. Co. v. Trotter. 593

RAILROAD COMPANY.

1. *Liability upon agreements for building road bed.*

An agreement of a railroad company, in consideration of the right of way through one's lands, to so build its road bed as to protect the lands from overflow, imposes upon it, as an artificial person, a personal obligation, for a breach of which it, or a company afterwards consolidated with it, would be liable to an action at law for damages. Sappington et al v. L. R., M. R. & T. R. R. Co. 23

2. *When bound by contracts of other parties.*

Whenever a third party enters into a contract with the promoters of a railroad, which is intended to inure to the benefit of the company, and it takes the benefit of the contract, it will be bound to perform it. L. R. & Ft. S. R. R. Co. v. Perry. 164

RECEIVER.

See ATTORNEY'S FEES, 2.

RECITALS.

See LIEN.

REGISTRATION.

See ASSIGNMENT FOR CREDITORS, 2. CRIMINAL LAW, 10.

RELEASE.

See MORTGAGE, 1.

REPLEVIN.

See AFFIDAVIT. PLEADING AND PRACTICE, 43.

1. *Requisites of. When Assignee may have.*

Title, general or special, and a right to the immediate possession of the goods, are both necessary to maintain replevin for them, and until the schedule is filed and the bond given, as required by the Statute, the assignee in a deed of assignment for benefit of creditors has no right of possession, and cannot maintain the action. Thatcher et al v. Franklin. 64

2. *Verdict in solido for value of several articles, wrong. How corrected.*

If, in action for replevin for several distinct articles of property, the jury assess their value *in solido*, they should be sent back for a verdict assessing the separate value of each article. The defendant who retains several distinct articles may return any one of them, or its value; and is entitled, for this purpose, to have the value fixed by the jury, and an alternative judgment accordingly. If this be not done, he may have a *venire de novo*, which is the only mode of correcting the error, except by new trial. Hanf v. Ford. 544

3. *Judgment in, must be in the alternative.*

Unless a judgment in replevin against the defendant be in the alternative, for the property, *or* its value, the Supreme Court will reverse it without a motion for new trial in the Circuit Court. Ib.

RES JUDICATA.

See PLEADING AND PRACTICE, 13.

REVIVOR OF JUDGMENT.

See STATUTE LIMITATIONS, 1.

SALES.

See PRACTICE IN CHANCERY, 1, 2. TAX SALES. CHANCERY SALES, 1. ASSIGNMENT FOR BENEFIT OF CREDITORS, 3.

1. *Delivery; what sufficient.*

In a contract for the sale and delivery of cotton, it is not always necessary that the cotton be weighed and the exact number of pounds be set apart, to make a transfer of title. Any agreement to receive on one side, and abandon control on the other, will be sufficient. Gans v. Holland, Ad. 483

SCHEDULE.

See HOMESTEAD, 2. LIQUOR, 11.

SECURITIES.

1. *Cumulative and collateral.*

Cumulative and collateral securities may be all pursued simultaneously, but the party can have but one satisfaction. Ford v. Burks et al. 91

SENATORIAL DISTRICTS.

See COUNTIES, 4.

STATUTES.

See PEDDLERS, 1. CRUELTY TO ANIMALS.

1. *Constitutional only in part, when good pro tanto.*

When part of an Act, or of a section of an Act, is unconstitutional, that part will be considered by the courts as stricken out, and the constitutional part maintained, if it can be seperated from the unconstitutional part and stand without it. State v. Kate Marsh. 356

STATUTE OF FRAUDS.

1. *Parol promise to reconvey.*

A parol promise to reconvey, when the sale is absolute, comes within the Statute of frauds. Holt v. Moore. 145

2. *Promise of a corporation to pay debt contracted before its organization.*

A verbal promise of a corporation to pay a party's claim, contracted with other parties prior to the incorporation, is void by the statute of frauds, as an undertaking to pay the debt of a third person. L. R. & Ft. S. R. R. Co. v. Perry. 164

3. *Assumption by partner of debts due to the firm.*

It, upon the close of a partnership, one partner takes to his own use a portion of the assets, whether choses in action or anything else, on an oral agreement to account to his copartners for a definite share, it is a separate and direct agreement, on a new consideration, and not within the Statute of frauds. Conger v. Cotton. 286

STATUTE OF LIMITATIONS.

See COUNTY SCRIP. LANDLORD'S LIEN. INTEREST, 1.

1. *None against Probate Court allowances.*

There is no Statute bar against the enforcement of Probate Court allowances: and there is no necessity or occasion for reviving them. Mays v. Rogers. 155

SURETIES.

See JUDGMENTS, 1, 2. PLEADING AND PRACTICE, 31.

1. ATTACHMENTS: *Liability of surety on cross-bond and surety on the debt. Priority.*

When in an action against the principal and sureties in a note, the property of the principal is attached, and he executes a cross-bond with sureties, as provided by *Sec. 406 Gantt's Digest*, such sureties are, as between them and the sureties on the note, primarily liable to the extent of the value of the property attached, for the satisfaction of the debt, Fletcher et al v. Menkin et al. 206

TAXES.

See COUNTY COURT, 2.

TAX SALES.

1. *Purchaser's remedy for taxes paid upon an invalid sale.*

If a tax sale prove invalid for any informality in the proceedings of any officer having any duty to perform in relation thereto, the purchaser has a personal right and remedy against the owner, and a lien upon the land as against him or his assignee, for the taxes, penalty, cost and interest thereon, from the time of payment, and for all subsequent taxes paid by him; but he can have no personal decree against the assignee, for taxes accrued on the lands before the assignment; and in a suit against the assignee to enforce such lien, he may have] the former owner made defendant for personal decree against him. The failure of the purchaser to pay the excess of his bid over the aggregate amount of taxes, penalty and cost due on the land before receiving the certificate of purchase, will not toll his relief for the amount paid. Hunt v. Curry. 100

2. *For taxes paid before sale, no remedy against owner or the land.*

Where land is sold for taxes which have been paid, the purchaser is without remedy against the owner or the land, to recover them. Ib

3. *Object of the Statute for tax sales.*

It is the policy of the Statute to protect purchasers paying the taxes upon lands of defaulting owners. Ib

4. *Assignment of certificate of purchase; effect of; erasing.*

The assignment of the certificate of purchase of lands purchased at a tax sale, vests in the assignee all the right and title acquired by the purchaser in the land: and the purchaser cannot divest the assignee, or his heirs, of the title, by fraudulently procuring the certificate from the widow of the assignee. and erasing the assignment, and thereupon obtaining a deed to himself. Equity will not permit him, or one not an innocent purchaser, holding under him, to keep title so obtained. Bird v. Jones. 195

5. ASSIGNMENT OF CERTIFICATE; *Impeachment of; burden of proof.*

Where the assignor of a certificate of purchase of tax lands denies that the assignment was for value, and asserts that it was for another purpose than to transfer the title to the assignee, he must prove it. Ib

TAX DEEDS.

1. *Recitals: Evidence.*

A tax deed for land sold under the revenue law contained in *Gould's Digest*, is evidence only of its own recitals; and if it fails to show that the sheriff filed in the clerk's office his assessment list, or that the County Court corrected or adjusted the assessment, or that the clerk made out a tax book, or attached a warrant thereto and delivered it to the sheriff, it shows no valid sale and no title. Lawrence v. Zimpleman. 643

TENANT IN COMMON.

See CRIMINAL LAW, 1.

TENDER.

See COUNTY SCRIP.

TITLE.

See PRACTICE IN CHANCERY, 6, 7, 8.

1. CLOUD UPON: *Test of. Injunction.*

When a sheriff's deed would contain such *prima facie* evidence of title in the purchaser, that, to avoid it, proof of extraneous facts by the owner of the land would be necessary, it would be a cloud upon his title; and if the court, to remove such cloud, would set aside the deed if made, it will interpose to prevent the sale that would result in making such deed. Taliaferro, Exr., v. Barnett. 511

TRANSCRIPT.

1 PRACTICE: *Transcript from Circuit Court on second appeal.*

On a second appeal to this court it is not necessary that the transcript contain any of the proceedings previous to the first appeal, They are already here upon the former transcript, and the Court takes notice of them. Gans v. Holland. 483

TRESPASS.

See CRIMINAL LAW, 1.

1. *Not cured by return of property.*

The return of property is no defense to an action of trespass for taking it. Warner v. Capps. 32

2. *Pleading; Plaintiff must allege title; Evidence.*

In an action for taking goods the plaintiff must allege in his complaint, property in the goods; and proof upon the issue, that he has a special property in them, as mortgagee, bailee or officer, etc., will sustain the allegation. So, also, mere peaceable possession will support the action as against one who disturbs the possession without right. Ib.

3. *Stock going upon unenclosed land of another,*

The doctrine of the common law, that if the owner permits his stock to run at large, and they enter upon the land of another, though unenclosed, he becomes a trespasser, is inapplicable to the condition and circumstances of our people, and has never been recognized in this State. L. R. & Ft S. R'y Co. v. Finley. 562

TRUSTS.

See PARTNERSHIP, 2; LIEN, 2.

VAGRANTS.

1. VAGRANCY: *Jurisdiction of Municipal Courts.*

The Constitution of 1874 (Sec. 28, Art. VII.) did not abrogate the jurisdiction of municipal courts to try and punish vagrancy. The jurisdiction conferred by that section upon County courts, as to vagrants, extends only to such matters of police regulation as are designed, to prevent them from becoming burdensome to the county. Brizzolari v. The State. 364

VENDOR'S LIEN.

See PRACTICE IN CHANCERY, 5.

1. *None for performance of an act:*

A vendor's lien is a creation of equity—is unknown at law, and arises to secure the payment of purchase money, but not to secure the performance of an act, the non-performance of which would make a claim for unliquidated damages. Harris v. Harris et al. 348

2. *None, where land sold for cotton:*

Where one sells land for cotton, to be afterwards delivered, he has no lien on the land for performance. The non-delivery creates no debt, but only an injury sounding in damages, which equity will not liquidate, and then declare a lien to pay them. Ib.

3. *When apparent on deed, passes to assignee of purchase note:*

When it appears upon the face of a deed that the land was sold on time, and notes were given for the purchase money, the vendor's lien will pass to his assignee of the notes; and subsequent purchasers of the land are charged with notice of the lien. Stevens v. Anthony et al. 571

VENUE.

1. CHANGE OF VENUE IN CIVIL CASES: *Payment of fees in fifteen days not necessary to transfer.*

A fair construction of the statute for the change of venue in civil cases is to allow the clerk, after the expiration of the fifteen days allowed for the payment of the fees, to waive their non-payment, and transmit the papers, if so disposed, although he cannot be compelled to do so; and to make the jurisdiction of the court, to which the venue is taken, to depend, not at all upon the payment of the fees to the clerk, but upon the reception of the papers, accompanied by the record, under seal of the order of the court transferring the cause. ENGLISH, C. J., dissenting; holding that payment of fees within the fifteen days is prerequisite to jurisdiction. Haglin & Pope v. Rogers, Judge. 491

VERDICT.

See PLEADING AND PRACTICE, 14. CRIMINAL LAW, 11. REPLEVIN, 2.

1 *Preponderance of testimony.*

The jury can find for the party holding the affirmative of the issue, only when there is a preponderance of testimony in his favor. The degree of preponderance is immaterial, but there must be some, of which they are the judges. L. R. & Ft. S. R. R. Co. v. Perry. 16

2. *On sundry counts:*

A general verdict of guilty on an indictment containing a count for burglary and one for grand larceny, is good. But if the verdict evidently applies to only one of the charges, the defendant may require it to be specified. Watkins v. The State. 370

3. *Not impeachable by juror, except, &c.*

The court should not allow an affidavit of a juror impeaching his verdict to be filed, except to show that it was made by lot. St. L., I. M. & S. R'y Co. v. Cantrell. 519

4 PRACTICE: *Verdict should be on preponderance of evidence:*

In a civil action it is the duty of a jury to find a verdict in accordance with the preponderance of the testimony; but they need not be satisfied of its truth, in the sense of resting upon it confidently. That principal belongs to criminal law. Shinn v. Tucker. 580

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WITNESS.

See HUSBAND AND WIFE, PLEADING AND PRACTICE, 27.

1. *Accomplice:*

An accomplice who is not indicted, or is separately indited, is a competent witness, though convicted, if he has not been sentenced. Casey v. The State. 67

2. *Evidence; Advice of counsel:*

A witness cannot be compelled to disclose in his testimony the advice or communications of his counsel. Ib.

3. *Wife of co-defendant incompetent:*

In this State the wife of one who is jointly indicted with the defendant on trial, is not a competent witness for him. Ib.

4. *Contradiction in immaterial matter:*

The contradiction of a witness in an immaterial matter—that is, one not tending to connect the prisoner with the crime—is material, as affecting the credit of the witness with the jury. Ib.

5. *Competency; under Constitution of 1874:*

In actions by the widow and heirs of an intestate for property descended from him, the defendant is not precluded by the Constitution of 1874 from testifying to transactions with and statements of said intestate in relation to the matter in controversy. Bird et al v. Jones. 195

WRITS AND PROCESS.

1. SUMMONS OF JUSTICE OF THE PEACE: *To whom directed and by whom served:*

By the Act of 1873, regulating proceedings before Justices of the Peace, a Justice's summons must be directed to a Constable, but may be served by any officer authorized to serve process; but if *directed* to the Coroner, it is only voidable, and not void, and if duly served by him, will support a verdict by default against the defendant. McCabe v. Payne 450

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ERRATA.

On page 94, seventh line from bottom, read "*r*igorous," for "*v*igorous."

On page 98, fifth line from top, read "$10," for ,'$1000."

On page 129, sixth line from top, read "1875," for "1878."

On page 321, marginal note, read "*certiorari*," for "*mandamus*."

On page 528, third paragraph of syllabus, in third line from bottom, read "*on*," for "*or*."

If the reader will at once turn to the proper places, and with pen or pencil make the proper corrections, it may save him confusion afterwards.