REPORTS

OF

CASES AT LAW AND IN EQUITY

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF THE

STATE OF ARKANSAS,

COMPRISING THE CASES DECIDED AT THE NOVEMBER TERM, 1881, AND NOT REPORTED IN VOL. XXXVII, AND THOSE DECIDED AT THE MAY TERM, 1882, UP TO NOVEMBER 11, 1882.

By B. D. TURNER,
SUPREME COURT REPORTER.

VOLUME XXXVIII.

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Rec. Jan. 18, 1883

OFFICERS

OF THE

SUPREME COURT OF THE STATE OF ARKANSAS

DURING THE PERIOD COMPRISED IN THIS VOLUME.

HON. E. H. ENGLISH..... CHIEF JUSTICE.

HON. WM. M. HARRISON,* }
HON. JOHN R. EAKIN, } ..... ASSOCIATE JUSTICES.
HON. WM. W. SMITH,† }

B. D. TURNER..... *Reporter.*

C. B. MOORE..... *Attorney-General.*

LUKE E. BARBER..... *Clerk.*

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* Term expired November 1, 1882.

† Elected, September 4, 1882, and commissioned, November 2, 1882.

CHANCELLOR:

HON. DAVID W. CARROLL.

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1st Circuit.....Hon. J. N. CYPERT.
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. SORRELS.
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

NOVEMBER TERM, 1881.

(CONTINUED FROM VOL. 37.)

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JONES, MCDOWELL & CO. ET AL. v. ARK. MECH. AND AGL. CO.

1. INCORPORATION: *Assets, a trust fund for payment of its debts. Innocent purchaser. Director is not.*

The assets of an incorporated company are a trust fund for the payment of its debts, and may be followed into the hands of any person acquiring them with notice of the trust. A director of the company is conclusively presumed to know its pecuniary condition, and his purchase of the assets will not be *bona fide*, and without notice of the trust.

2. TRUSTEE: *Purchase by, voidable.*

The purchase of the assets of an incorporated company by a director of the company, is not void, but only voidable at the instance of a party in interest.

3. LIENS, JUNIOR: *How affected by Chancery sale to enforce senior.*

A sale of property under a Chancery decree to enforce a paramount lien, extinguishes a junior lien, or transfers it to the proceeds of the sale; and the junior lienor can avail himself of it, only by becoming a party to the Chancery suit and intervening for the surplus.

4. LIEN: *Acquired by filing bill, etc.*

A judgment creditor who first files his bill and serves summons upon his debtor, thereby obtains a lien on the assets which he seeks to reach, and will have preference over other creditors in their distribution.

APPEAL from *Pulaski* Chancery Court.

HON. J. R. EAKIN, Chancellor.

U. M. Rose, for Jones, McDowell & Co.:

"While the law permits an insolvent debtor to make choice of the persons he will pay, it denies him the right in doing it to contrive that other creditors shall never be paid, or to use the debt of the preferred creditor as a colorable consideration to screen and protect his property from their claims, or to delay, hinder and embarrass them in the enforcement of their demands." *Bump. Fraud. Conv.*, 189; *Cook* v. *Cook*, 43 *Md.*, 522; *Young* v. *Hermans*, 66 *N. Y.*, 374. Any secret trust in favor of the Association or its stockholders would annul the conveyance. *Catlin* v. *Cumir*, 1 *Sawyer*, 7; *Clark* v. *Robbins*, 8 *Kansas*, 574; *Beutez* v. *Rockey*, 69 *Penn.*, 71; *Aird* v. *Sukins*, 6 *Wall.*, 78; *Sparks* v. *Mack*, 31 *Ark.*, 667.

The capital stock and assets of a corporation are held by it as a trust, for payment of creditors, and cannot be dissipated by going through the process of re-incorporation, etc. *San. F. R. R. Co.* v. *Bee*, 48 *Cal.*, 398; *Sanyer* v. *Hoag*, 17 *Wall.*, 620. Creditors have a lien upon it in equity, and can follow it, if diverted, except as against *bona fide* holders for valuable consideration. *Sanger* v. *Upton*, 91 *U. S.*, 60; *Upton* v. *Tribilcock*, 97 *U. S.*, 47; *Marr* v. *Bk. West Tenn.*, 4 *Cold.*, 479; *State* v. *Bank*, 7

Tenn., 112; *Hoffman S. C. Co.*, v. *Cumberland C. Co.*, 16 *Md.*, 456.

A purchase by a director, of corporate property is void, and property belongs to corporation. 16 *Md.*, 456; *Perry on Trusts, sec.* 207, and cases cited. *Imboden* v. *Hunter*, 23 *Ark.*, 626; *West* v. *Waddle*, 33 *Id.*, 575. "The intervention and abuse of the process of the court cannot change the aspect of the case." *Stephens* v. *Bardett*, 7 *Dana*, 259.

The decree of Wait being paid off by money raised by defendants, removed the incumbrance created by his decree, and left appellants' title free from any adverse claim, and their title should have been quieted. 12 *Ark.*, 219; 14 *Id.*; 69; 19 *Ib.*, 62.

The State Fair Association being a mere volunteer, can have no claim on the property as against appellants; *Bump. Fraud. Conv.*, 263; whether its motives were good or bad. *Ib.*, 266.

B. C. Brown, for appellees:

Appellants charge fraud, and the *onus* is on them. This is an attempt by Jones to get advantage of his co-creditors. Community of interest involves mutual obligations. *Jackson* v. *Ludding*, 21 *Wall.*, 616.

The legal proposition stated in italics in appellants' brief is incorrect. *Twin Lick Oil Co.* v. *Marbury*, 1 *Otto.*, 587, 593. See also, *Murray* v. *Vanderbilt*, 39 *Barb.*, 140; *Ashhurst's Appeal*, 60 *Penn. St.*, 290; *Buell* v. *Buckingham*, 16 *Iowa*, 284.

M. W. Benjamin, for appellee:

If mortgagee sells upon a prior mortgage, and there is a

surplus, a junior incumbrancer can bring suit for funds in his hands, if in proper time. *Jones on Mortgages*, *sec.* 1940; *Wiggins* v. *Heywood*, 118 *Mass.*, 514. But if such fund is paid into court, such payment is a good defense to suit for the surplus. *Ib.* Mortgagee must have actual notice, lien of record not sufficient. *Jones on Mortgages*, 1930; *McLean* v. *Lafayette Bank*, 4 *McLean*, 430; *Nelson's Heirs* v. *Boyce*, 6 *J. J. Marshall*, 401. Same rule in vendor's sales. Appellants should have intervened, prior to the sale, for the surplus; not doing so, they have no right to the fund. *Snyder* v. *Stafford*, 11 *Paige*, 11.

The time for redemption had not expired when the land was sold under Wait's decree, and when said sale was made appellants lost all right to the land, but had a specific lien upon the surplus, which they lost by failing to take proper steps in time. *Snyder* v. *Stafford, supra; Jones on Mortgage, sec.* 1940.

Before Hon. W. M. Harrison, Judge, and W. W. Smith and Geo. W. Caruth; Special Judges, Hon. E. H. English and J. R. Eakin, being disqualified.

STATEMENT.

W. W. Smith, S. J. The Arkansas Agricultural and Mechanical Association, a corporation organized under the laws of this State, had purchased of William B. Wait, a tract of land near Little Rock, afterwards known as the Fair Grounds, and a balance of purchase money remaining unpaid, Wait had obtained a decree therefor, with the usual order of foreclosure and sale. Hunter, clerk and master of the Pulaski Chancery Court, was charged with the execution of the decree, with directions, in the event of sale, to apply the proceeds to the payment of the debt, interest and

costs of suit, and the surplus, if any, to the corporation defendant. The land was sold July 25th, 1874, to George R. Weeks, for $4000, payable in three months. On the twenty-ninth of the same month, this sale was reported to and approved by the court. On the second of November, 1874, Hunter made a further report, stating that Weeks had paid his bid, that a deed had been made to him, and a surplus of $2590.63 had been turned over to the association. Weeks conveyed the land, February 19th, 1875, for an expressed consideration of $4000.00, to the State Fair Association, a new corporation, which appears to have been formed out of the wreck of the Agricultural and Mechanical Association, now defunct.

Meantime, Jones, McDowell & Co. had on the thirtieth of March, 1874, recovered judgment against the old association, before a justice of the peace. An execution having been returned "*nulla bona*," a transcript of the judgment was filed, April 13th, 1874, in the office of the clerk of the Circuit Court. An execution was issued out of the last named court, which was levied June 24th, 1874, upon the land bought of Wait, and at the sheriff's sale, July 18th, 1874, Jones, McDowell & Co. purchased it, bidding therefor the amount of their debt.

Miles Q. Townsend had also recovered against the old association, before a justice of the peace, six several judgments, but later than the judgment of Jones, McDowell & Co. He pursued for the enforcement of his judgments, a course similar to that detailed above; and on the same day, last mentioned, bought the land at a sale under execution, issued out of the Circuit Court, bidding the amount of his several debts, which, with the interest and costs, aggregated about $1000.

Neither of these purchasers redeemed the premises by paying off Wait's decree before the master's sale, nor did they

intervene for the surplus produced by that sale. But, on the twenty-sixth of March, 1875, the Chancellor opened so much of the master's report as related to the disposition of this surplus. Thereupon, Jones, McDowell & Co. filed the present bill against the two associations, Hunter, Weeks, Logan H. Roots, and Townsend.

The bill, after reciting most of the foregoing facts, charges that Weeks, who was a director in the old company, paid off the Wait decree with money raised by an assessment upon the stockholders of that corporation, and the remainder of his bid in claims against said corporation, which he had bought up or controlled; that the stockholders had abandoned the old company, and had organized a new one under the name of the Arkansas State Fair Association; that the purposes and stockholders of the two companies were the same, and that the last was in fact launched by a call upon the unpaid stock of the old company; that the sole object of the scheme of re-incorporation was to avoid the payment of the old company's debts, particularly the debt due plaintiffs; that Weeks was a nominal purchaser, and the State Fair Association a mere volunteer. And it was prayed that the lands might be subjected to the plaintiffs' debt.

The original bill was framed with a view to remove a fraudulent obstruction to the assertion of the plaintiffs' legal remedy, and to reach social assets, which had been improperly withdrawn before the creditors of the association had been satisfied. Afterwards, the period of redemption from the execution sale having expired, the plaintiffs procured a conveyance of the land from the sheriff, and amended their bill, proposing to pay into court the amount of the Wait decree, with interest, and praying to be allowed to redeem from the master's sale. And the counsel for Jones,

McDowell & Co. claims, in his brief, that they are now the owners of the land.

The appellees filed a joint answer, alleging, among other things, that Weeks bought in good faith for his own account, and that he paid his bid as follows:

Cash on the Wait decree	$1409.37
Debts due by the old company for premiums	300.00
Debt due to W. D. Blocher	50.00
Debts evidenced by two certificates	73.00
Judgment in favor of Little Rock Printing and Publishing Company	490.26
Note due J. C. Kinesey	1731.72

The answer denied the identity of the two associations or that they had any connection with each other, or that they were composed of the same stockholders; although it was admitted that some persons held shares in both. And it averred that the $4000, mentioned as the consideration in the deed of Weeks to the State Fair Association, was paid by the issue of full paid stock in the last named corporation.

Townsend made his answer a cross-bill, praying that the land might be charged with the payment of his debt, after Jones, McDowell & Co. were satisfied and offered to redeem from the Wait decree.

The Chancellor was unable to see any fraud in the transaction, and refused any practical relief to the appellants.

The evidence satisfies us of the truth of the principal charges in the bill. The new company was not, however, started by an assessment upon the unpaid stock of the old company. That capital stock, $20,000, had been already fully paid in, and had been exhausted in promoting the objects of the Association, leaving nothing except the land. The old company having fallen into great embarrassment, its stockholders held a meeting, September 16th, 1874,

when it was resolved to assess each stockholder $8 per share, for the purpose of repurchasing the land then recently sold under the Wait decree; and stockholders were assured that the money so raised should be faithfully applied to this purpose, and that the property would then belong to those of them who responded to this appeal. A printed circular was addressed to the stockholders, stating the total indebtedness of the concern, including Wait's debt, at $6,252.44, and the value of the land which had recently been sold under the decree. at $15,000. It was represented that an assessment of $8 on the share, if responded to by all, would discharge all of this indebtedness; that Weeks, one of the signers of the circular, had bought the property, but would allow such of the stockholders as paid their *pro rata*, to redeem, and hold the grounds for the purposes designated by the original founders. And stockholders were warned that if any of their number neglected to heed the call, the delinquent would have no part or lot in the premises, as the contemplated redemption would redound to the benefit of those only who should contribute.

The payment of this assessment was, of course, voluntary. The purpose was to raise a fund for the payment of the corporate debts, and to freeze out such of the shareholders as were unwilling to put any more money into the enterprise. Some honored the call, but not all. Those who complied with the invitation were awarded stock in the new association Dudley E. Jones, the managing partner of Jones, McDowell & Co., held fifteen shares in the old association, and had once been its president, but had resigned. Townsend had four shares. These parties declined to take stock in the new association in satisfation of their debts, and their refusal seems to have incensed the promoters of the new scheme, who then determined to defeat the collection of those debts if possible. So far as the record dis-

closes, no one held stock in the new company who had not been a stockholder in the old one.

1. CORPORATION. Assets a trust fund to pay debts.

The assets of an incorporated company are a trust fund for the payment of its debts, which may be followed into the hands of any person having notice of the trust. This doctrine was invented by Judge STORY, in the case of *Wood* v. *Drummer*, 3 *Mason*, 308, and it will constitute not the least enduring of his titles to be considered a great jurist. It has been applied by the Supreme Court of the United States in the following cases: *Mumma* v. *Potomac Co.*, 8 *Pet.*, 281; *Curran* v. *Arkansas*, 15 *How.*, 308; *Ogilvie* v. *Knox Ins. Co.*, 22 *Id.*, 387; *Drury* v. *Cross*, 7 *Wall.*, 299; *Railroad Co.* v. *Howard*, 7 *Id.*, 392; *New Albany* v. *Burke*, 11 *Id.*, 96; *Burke* v. *Smith*, 16 *Id.*, 390; *Sawyer* v. *Hoag*, 17 *Id.*, 610; *Sanger* v. *Upton*, 91 *U. S.*, 60; *Upton* v. *Tribilcock*, *Ib.*, 47; *Hatch* v. *Dana*, 101 *U. S.*, 205; *County of Morgan* v. *Allen*, 103 *U. S.*, 498.

The cases in the State courts on this subject are too numerous to cite; but it is sufficient to say that the doctrine has never been denied by any court of last resort in the Union, before which the question has come, and it is as well settled as any legal principle can be.

The rule in England is different. The winding up act of 1848, and the companies act of 1862, as expounded in *Re Phillips*, 18 *Beavan*, 629, and *Spackman* v. *Evans*, *L. R.*, 3 *H. L.*, 171, seem to have been intended rather to secure equality among shareholders than to protect creditors.

Innocent purchaser. Director is not.

Now, it is quite plain that Weeks was not a *bona fide* purchaser, without notice of the trust. As a director, he is conclusively presumed to know the pecuniary condition of his company. Moreover, his deposition shows that he had actual knowledge that it was on the verge of insolvency. And we cannot doubt, from the testimony, that he had purchased in pursuance of a scheme to preserve to the

members of the corporation its property, and at the same time to get rid of its debts, in the event that a sufficient sum of money was not raised by the assessment to pay all creditors.

2. TRUSTEE: Purchase by, only voidable.

Indeed there is some doubt whether being a trustee for stockholders and creditors, he could buy at all. It is laid down in some of the text books, and in some adjudged cases, that such a purchase is absolutely void without regard to the good faith of the transaction, and that the property belongs to the corporation, the same as it did before such sale. The better opinion, however, is, that it is only to be avoided at the instance of some party in interest. *Twin Lick Oil Co.* v. *Marbury*, 91 *U. S.*, 587. And such we understand to be the rule indicated by this court in an analogous class of cases. *Imboden* v. *Hunter*, 23 *Ark.*, 622; *West* v. *Waddell*, 33 *Id.*, 575.

There is evidence enough in this record to set aside the sale to Weeks, and his subsequent conveyance to the State Fair Association, as an attempt to place the assets of the Agricultural and Mechanical Association beyond the reach of creditors by going through the process of re-incorporation, taking on a new corporate name, transferring the assets of the old corporation to the new one, and issuing stock in the new corporation to holders of stock in the old one. And we should not hesitate to apply the axe to the root, if the ends of justice required it. But we have no disposition to upset things further than is necessary to work out the equities of the parties before the court. The State Fair Association may keep the property, on condition that it pays the debts of its predecessor. Being a volunteer, it is immaterial whether it had notice of the trust or not. *Perry on Trusts*, *secs.* 217, 828.

We regard the whole transaction as a scheme to distribute the assets of the corporation among its stockholders, or

such of them as were willing to embark a further advance of money in it, leaving creditors unprovided for. This was not only against conscience, but it was against the spirit if not the letter of our statute. *Gantt's Digest*, *sec.* 3354.

We therefore declare that Weeks and the State Fair Associotion took the property charged with a trust in favor of creditors, which a court of equity will enforce by laying hold of the property and compelling its application to the satisfaction of these demands.

But Jones, McDowell & Co. are not the owners of this land. We attach no special significance to their judgment, except as a judicial ascertainment of the amount of their debt, and as placing them in a position to assail the subsequent transfers. The filing of a transcript of their judgment in the office of the clerk of the Circuit Court, with a view to obtain a lien upon the real estate of the corporation, was futile. As the justice of the peace rendered judgment on the thirtieth of March, 1874, and the transcript was filed April 13th, 1874, it is obvious that the constable must have returned the execution, "no property found," before its return day. The fact that a defendant has no property subject to a writ, when it comes to the officer's hands, gives no assurance that he will continue to have none until the return day. And inasmuch as, in such cases, the return is the basis of further proceedings, which further proceedings depend for their validity on a previous valid return, it is doubtful whether Jones, McDowell & Co. acquired any lien by filing the transcript and docketing their judgment in the Circuit Court. *Freeman on Executions*, *secs.* 14, 353.

3. JUNIOR LIEN: Effect on, of Chancery sale to enforce senior.

But if they did secure such a lien, it was swept away by the master's sale, under a decree enforcing a paramount lien. After that their lien was either extinguished or it was transferred to the proceeds of the sale. *Markey* v. *Langley*, 92 *U. S.*, 155, and cases there cited. And to get any benefit

from it, they were bound to make themselves parties to the Wait suit, and intervene for the surplus produced by the sale. *Jones on Mortgages*, *secs.* 1684, 1687; *Clark* v. *Carnall*, 18 *Ark.*, 209.

It follows that the purchases of the land by Jones, McDowell & Co., and by Townsend, under their respective executions, were nugatory, and the satisfaction of their judgments thereby was apparent and not real. The equitable principles of the Statute of 22 *Henry VIII*, *ch.* 5, which gave a remedy to the creditor to whom the debtor's land had been delivered under an elegit, when the tenant was thereafter evicted, without fault on his part, are probably a part of the common law of this State, as they have been decided to be of New York; and remain in force, notwithstanding that writ has no place in our system, and are so far applicable to sales under execution as to entitle plaintiffs to equitable relief on the failure of title to property purchased by them, under execution against defendant. *Bank of Utica*, v. *Musena*, 3 *Barb.*, *ch.* 586; *Freeman on Executions*, *secs.* 54, 352.

4. LIEN: Acquired by filing bill.

The only lien that the appellants have is by virtue of having brought this suit, and served process upon the appellees. And as the judgment creditor, who first files his bill and serves his subpœna, obtains a lien upon the assets, which his bill seeks to reach, Jones, McDowell & Co. will have preference over Townsend, in the distribution of the fund. *Freeman on Executions*, *sec.* 434; *Jackson* v. *Robinson*, 64 *Mo.*, 290; *Kimberling* v. *Hartley*, 1 *McCrary*, 136, and cases cited.

The decree of the Chancellor is reversed, and this cause is remanded to the Pulaski Chancery Court, with directions to enter a decree there, charging the land with a trust in favor of the appellants; and that unless their debts be paid by a short day, the premises be sold and the proceeds applied,

first, to the payment of the expenses of such sale, and the costs of this suit, both here and below; secondly, to the payment of the judgment of Jones, McDowell & Co., computing the interest thereon at the rate of ten per cent. per annum from the rendition thereof by the justice; thirdly, to the payment of the several judgments recovered by Townsend, and the surplus, if any, to be returned to the State Fair Association. The judgment of Jones, McDowell & Co., as copied in the transcript, purports to carry interest at the rate of eighteen per cent. per annum; but the contract for the higher rate was merged in the judgment, as held in *Badgett* v. *Jordan*, 32 *Ark.* 154; and *Miller* v. *Kempner*, 32 *Ark.*, 573.

HARRISON, J., dissenting. I am unable to concur in the opinion in this case.

I think, if there might be a sale of the property, if the appellants be not paid, as is directed, that the $4,000 paid by Weeks in the purchase of it at the foreclosure sale, ought, before their claims are satisfied out of the proceeds, to be refunded to the Arkansas State Fair Association. As to so much thereof as went to satisfy the decree, it seems to me clear beyond question; and if the appellants had no liens, as the opinion holds, it is equally so, as to the remainder.

I am, however, of the opinion that they did have liens. No particular day was named in the executions upon which the constable was required to return them. The Statute (*sec.* 3792 *Gantt's Digest*) says that the execution "must be dated as on the day on which it is issued, and made returnable *within* thirty days thereafter." It was not necessary that the constable should have retained them in his hands until the last day within which they were returnable; but if the facts warranted it, he had the right to make the returns he did on any day within the thirty days after their

date, or during their life, and his returns were conclusive as to the facts stated in them. *Lovegrove* v. *Brown*, 6 *Maine*, 592; *Dana* v. *Banks*, 6 *J. J. Marsh*, 219; *Bowen* v. *Parkhurst*, 24 *Ill.*, 257; *Thornton* v. *Lane*, 11 *Ga.*, 459; *Wilcox* v. *Ratcliff*, 5 *Blackf.*, 561; *Forbes* v. *Waller*, 25 *N. Y.*, 430; *Renaud* v. *O'Brien*, 35 *N. Y.*, 99; *Tyler* v. *Willis*, 33 *Barb.*, 327; *Freeman on Executions*, *sec.* 353.

But if such an objection could possibly be raised, it could only be directly by motion to set aside the return, and not in a collateral proceeding. *Tyler* v. *Willis*, *supra; Sterling* v. *Levy*, 10 *Abb. Pr.*, 426.

Townsend's lien, presuming as I do that he had one, was junior to that of Jones, McDowell & Co., and was extinguished by the sale under their execution, which, as a matter of course, also extinguished theirs.

If the appellants never had liens on the property, how could they, then, have any on the proceeds of the sale, or the surplus, after paying Wait?

But Jones, McDowell & Co. are not now creditors. Their judgment was satisfied by their purchase of the equity of redemption in the property at the sale under their execution. If they had a lien, this was most assuredly the case.

And if the appellants had no liens, their claims were not superior to those of the other creditors, who were paid out of the surplus. A debtor has the right to prefer one creditor to another.

Weeks, being a director of the company, was prohibited by public policy from purchasing the property—but there was not, so far as I can see, the slightest ground in the evidence for imputing to him bad faith or unfairness. Indeed, his conduct appears to have been characterized by great fairness and liberality. Nor can I see any cause for attaching blame or censure to the other stockholders of the old com-

pany, who after the purchase, became associated with him in the new. There was no evidence whatever that they contemplated, when he purchased, forming a new company, and he swears in his deposition that he purchased for himself only.

But if bad faith had existed, the money paid in the purchase should nevertheless be paid back, for "he who seeks equity must do equity."

I think the decree of the court below was right, and should not be disturbed.

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CHRISMAN v. PARTEE AND WIFE.

1. MARRIED WOMEN: *May convey, but not contract to convey, their lands.*
Married women may convey estates acquired since the adoption of the Constitution of 1874, but cannot make executory contracts to convey.

2. SPECIFIC PERFORMANCE: *Mutuality.*
Where a husband, having use of his wife's lands, contracts to convey them, with her approbation, to one who knows that the fee is in the wife, and the husband and wife promptly join in the execution of a deed and tender it to the purchaser, and he, for no good reason, declines to accept it, and they join in a bill for specific performance and tender a good deed in court, and the Chancellor decrees performance, the decree should not be reversed on appeal. SMITH, Special Judge, dissenting.

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

STATEMENT.

This was a bill by Partee and wife against Chrisman, for

specific performance of a contract for the exchange of real property.

The facts and issues, as contained in the pleadings, are sufficiently stated in the opinion of the Chancellor, which is inserted by direction of the court; and to avoid a repetition of them here, is referred to on page 38.

The hearing was upon the pleadings and exhibits, as set out in the opinion, and the following

DEPOSITIONS.

The plaintiff, Reuben D. Partee, deposed, in substance, as follows:

"About the first December, 1876, while on my way from Little Rock to my wife's place, commonly called the Mosby place, I met with Chrisman, and he asked me how I would like to exchange the place for city property in Little Rock. I replied, 'very well, if the town property was available.' The result of this interview was that three days afterwards I went to Little Rock to see his property, and he then showed me all through it. It was the Central Hotel property. The next day we went to the Mosby place to examine it. I rode over it with him—that portion of it described in the deed and contract exhibited with the complaint. He expressed himself well pleased with the place. Several days afterward he and his brother came to the place, and I went over it with them. A few days after this I went to Little Rock to see if we could trade, and during the negotiations the question of title came up, and I told him that there was no difficulty about the title; that the place belonged to my wife, and had been in the family for twenty-five or thirty years, and she inherited it from her father's estate. We thereupon went to the office of Fletcher & Bay and had the contract drawn up, which is exhibited with the complaint. A deed was also prepared for me to carry

home in Mississippi and have my wife to execute it. We lived then and now in Mississippi. Before leaving Little Rock the defendant came to me and stated that he wanted some changes made in the deed, and I left it with him to be changed and forwarded to me in Mississippi. A few days after my return home I received the deed, with a letter from the defendant, of which the following is a copy:

"LITTLE ROCK, ARK., Dec. 20, 1876.

"*Mr. Partee:*

"I send deed as you gave it to me. It is as I want it, upon second reflection.

"Respectfully,

"F. M. CHRISMAN."

"In a day or two my wife and I signed and acknowledged the deed, and I started with it the next day to Little Rock; and on my arrival there, informed the defendant that I had the deed all fixed up, and was ready to complete the contract. He replied that he was sorry to inform me that his wife would not convey with him; that he was ready and anxious to carry out his agreement, but his wife would not join him. He assigned no other reason for his refusal, and said he was willing to make the deed himself, if I would take it without his wife's joining. I told him that he ought to indemnify me against his wife's dower; but he said he could not do that. We then separated, but that night I again called on him, and told him I would take his deed without his wife's joining. He then absolutely refused to execute it or carry out the contract, and said he would have to take the consequences.

"The next day I tendered the deed to him at his office at the hotel, and at the same time demanded of him a deed to the hotel property and possession of it. He again refused to comply. The personal property, stock, farming imple-

ments, etc., included in the exchange, was all on the plantation, and was to be delivered when the deeds were executed.

"On the day that I returned to Little Rock with the deed, and offered to carry out the contract, he told me that he had been down to the place, and found everything as I represented, except the corn, which he thought was more than I represented. He had also taken possession of one of the mules and carried it off.

"He never at any time complained of any deficit in the forty-acre tract at Wildcat Landing; but at the time of the contract it was distinctly understood with the defendant that five acres of the forty-acre tract was to be reserved in the conveyance for James B. Core, in lieu of his wife's interest in the forty-acre tract. My wife and Core's are sisters, and each owns an undivided half interest in the tract.

"Chrisman was fully informed of the whole matter, and well understood that the title to the lands was in my wife, and the deed had to come from her. One day, before the written contract was drawn up, when I was showing him the lands, we would frequently stop and examine the plat of the land I had with me, showing the division of the land among the heirs of my wife's father, consisting of my wife and her two sisters and the widow. On this plat was distinctly marked the metes and bounds of the several interests—the division lines between them, and the names of the heirs on their respective parts—and I fully pointed out and explained to Chrisman my wife's interest on said plat. I had full authority from my wife to dispose of the place before I ever saw Chrisman, and pending the negotiations with him, and before the contract was drawn up, I received a letter from her, expressing the hope that I would consummate the trade. I had before informed her of the negotiations.

"The plaintiffs have been heavily damaged by having the hotel property withheld from them; and also relying upon the defendant's promise to take possession of the lands, they did not make the usual necessary arrangements to put the same in cultivation."

Mrs. Partee, in her deposition, fully corroborated her husband in his statements of her authority to him to sell the land, and to complete the negotiations and sale to Chrisman.

James B. Core, witness for the plaintiff, deposed that "I heard both parties talk about the exchange at Little Rock. I went with Partee to Little Rock to assist in making the trade. Before the signing of the agreement it was understood that Partee should go to Mississippi at once and get his wife to sign the deed to that part of the Mosby place that had been allotted to her. That part of the Mosby place had been platted by John N. Martin, county surveyor, and I think Mr. Partee had the plat in his possession. Chrisman and Partee had gone over the place a few days before the agreement was made. Chrisman came to my house, I think, twenty-third December, about two miles from the place, and talked with me about the trade he had made with Partee, and expressed himself perfectly satisfied. The place was divided by order of court six or seven years ago, between Mrs. Steven, Mrs. Core, Mrs. Partee and Mrs. Mosby, the widow, and each one's portion assigned to them separately.

"There was a fractional forty-acre block at Wildcat to be included in the trade by Partee, which belonged equally to Mrs. Partee and my wife. I had an understanding with Chrisman and Partee that I should reserve five acres of this forty-acre tract; all the rest to belong to Chrisman, with choice of the two store-houses. It was perfectly under-

stood between Chrisman and myself about the five-acre reservation."

William Gilbert, witness for the plaintiffs, deposed that "About the twenty-third of December, 1876, at the Mosby place, Chrisman told me that he had traded for the Partee portion of the Mosby place, and the forty-acre tract of land at Wildcat, and asked me about the stock on the Partee portion of the Mosby place, particularly about the mules. He went to McElroy's house, on the Mosby place, to look at the tools, and asked him to take care of them for him, which McElroy agreed to do."

Samuel Humphreys, for the plaintiffs, deposed that on the twenty-third December, 1877, he met Chrisman at Deutsh's store, near the Partee portion of the Mosby place. Witness lived on the place. Chrisman told him that he had traded for Partee's place and the stock that was on it, and he got from witness one of the mules and rode it off home, leaving his pony with witness to take care of. It was about a month before the mule got back to the place. Witness lived on the Core part of the Mosby place. He had no special authority to get the mule, which he was using and which Dr. Chrisman got, but had been living on the place nearly all his life, and had permission to take up any of the stock on the place when they were not in use. He let Dr. Chrisman have the mule because he supposed it belonged to him, from what he and Mr. Core had both told him.

McElroy, for plaintiffs, deposed that he had been living on the Mosby place for ten years. On the twenty-third day of December, 1876, Chrisman came to him and told him he came by reference of Mr. Partee for information about the stock and tools. Witness gave Chrisman all the information he wanted; showed him all the tools belonging to

Partee. He said he had traded for the Partee place, together with the stock and tools, and after examining the tools asked witness to take care of them for him. Witness agreed to do so, and did do so until some time in February, 1877, when they and the stock and corn were turned over to Dr. Wilburn through Mr. Core, by orders, as he said, from Mr. Partee. Wilburn rented the places (the Wildcat and Partee part of the Mosby places) from Partee for 1877.

Otho O. Badgett, witness for the plaintiffs, was present when the plaintiff, Reuben D. Partee, tendered the deed to Chrisman and demanded in return a deed to the Central House property. Chrisman declined to give the deed, assigning as a reason that his wife would not join him in its execution by relinquishment of her dower. Partee then offered to take his deed without his wife's relinquishment. Chrisman replied that, owing to existing circumstances in his family he would decline to make any deed at all. Partee said that he would institute suit at once. Chrisman replied that he expected it.

Matlock, a witness for the defendant, deposed that about the third of January, 1877, he applied to Partee to rent the place in controversy. Partee at first offered to rent, saying that something would have to be done with it during the litigation to prevent waste and destruction; but he put witness off until the eighth, telling him to call then on his attorney, Mr. Dodge. He did so; Dodge put him off till the tenth. He then told witness to get Partee's mule from Chrisman and go down and see the place, and if he liked it he would draw up the contract. Witness did so, but did not like the place and didn't rent it. He left the mule with Mr. Badgett, a relative of Partee's, at Little Rock, and Partee afterwards sold the mule to him. When wit-

ness went to Chrisman for the mule he said it was all right—to take him.

Before the hearing the defendant moved to suppress all the depositions for the plaintiffs, in so far as they attempt to vary or add to the written contract between the parties, and to suppress Partee's deposition, because he could not testify in behalf of his wife.

The cause was submitted to the court on the sixteenth of November, 1877. The court found that the contract ought to be specifically performed, but that there was a material mistake in the description of the lands tendered to the defendant—only a small portion of those included in the contract being included in the deed. It therefore ordered that the submission be withdrawn; that the parties have leave to amend their pleadings, to correct mistakes, or state more clearly matters of charge or defense; and that the plaintiffs bring into court, by the tenth day of December, 1877, a deed in accordance with the contract upon which the action was brought.

The following is the

OPINION OF THE CHANCELLOR.

Pulaski Chancery Court.

R. D. Partee and wife
v.
F. M. Chrisman.

This bill is brought by Partee and wife to enforce the specific performance of a contract made by Chrisman with the husband, R. D. Partee, to convey to him the property in Little Rock known as the Central Hotel.

It states that on the twenty-second day of December, 1876, defendant was the owner of said hotel property, together with all furniture, fixtures and appurtenances belonging thereto; and that complainant, Georgie M. Partee, was the

owner of a certain farm in Jefferson county, describing it particularly.

That upon that day, said R. D. Partee, acting for himself and wife, and said defendant made a contract for the exchange of said property. This contract was in writing, as follows:

LITTLE ROCK, ARK., December 22, 1876.

This is to certify that we, the undersigned, have made the following exchange of property, and that we have obligated ourselves, according to law, to adhere to the following described trade or exchange:

That is to say, that I, F. M. Chrisman, have this day agreed to exchange lots 11 and 12, block 84, city of Little Rock, Arkansas, including hotel and fixtures, for R. D. Partee's entire interest—not including widow's dower—in the place known as the Mosby place, in Jefferson county, Ark.; and also, his interest in a forty-acre block at Wildcat Landing. And that I, R. D. Partee, agree to abide by the above described trade, it being understood that both parties are to give clear titles to their respective property above described.

(Signed) F. M. CHRISMAN,
R. D. PARTEE.

Duplicate.

Witnessed by
J. L. BAY,
H. L. FLETCHER.

A copy is exhibited of a list of the furniture and personal property belonging to said hotel, as furnished by the defendant at the time.

That complainant, R. D. Partee, proceeded at once to the State of Mississippi, where his wife then was, and they together executed to defendant, Chrisman, a valid and suficient deed, according to the terms of the contract.

This deed is exhibited by the original annexed to the bill. It is a general warranty deed from said R. D. Partee and wife to defendant, Chrisman, of certain lands in Jefferson county, Ark., particularly described by numbers; and also, "an undivided one-half interest in the S. E. $\frac{1}{4}$ of the S. W. Fr. $\frac{1}{4}$ and S. $\frac{1}{2}$, S. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ sec. 3—less five acres off the east end of last described tract—containing thirty-six acres, more or less, all being in township 3 south, and range 10, west of the 5th principal meridian."

This deed bears date December 27th, 1876, and is duly acknowledged by both parties, in the manner required by law to pass a wife's interest in lands.

The complaint proceeds to state that said R. D. Partee returned immediately to Little Rock, and at various times from the twenty-ninth of December, 1876, till the first day of January, 1877, made tender of this deed to defendant, offering at the same time to deliver immediate possession of the property, and demanding like immediate possession of the hotel.

There is nothing in the deed to show that the lands described in it were what was known as the Mosby place, but the allegation of the bill in this regard is, that it was such a deed "as by the terms of said contract they were obliged" to make.

Defendant, on his part, after several days' delay and prevarication, as charged, finally refused to execute a deed or deliver possession, first excusing himself on the ground that he could not procure his wife's relinquishment of dower, and afterwards, when complainant, as he says, "to test his sincerity," offered to take the deed without his wife's relinquishment, then refusing altogether, and this, after he had visited and examined the Jefferson county place, and expressed himself entirely satisfied with the trade.

After allegations as to the inducements leading complainants to the purchase, and their damages from defendant's non-compliance, the bill, amongst other things, prays specific performance, and in case the relinquishment of dower cannot be had from defendant's wife, compensation in lieu thereof, and for general relief.

The answer of defendant, Chrisman, denies that he made any contract at all with complainants, in manner and form as alleged in the complaint, or otherwise; denies that R. D. Partee was acting for his said wife, or had any authority to do so in making the alleged contract; denies that there was any consideration for the alleged agreement.

He admits the signature of the instrument exhibited, but denies that complainant, Georgie, was known to him in the contract; claims that he was led to believe, and did believe, that the property belonged to R. D. Partee.

He says there was a deficit of about ten acres in the forty-acre tract, of which he was not apprised until after said Reuben D. had left Little Rock.

He says that said R. D., at the time of the alleged contract, also agreed to deliver to him certain personal property, in which he has failed. A list of the property is set forth.

And generally denies all matters and things material in said complaint, not specifically denied.

This is the substance of the answer, leaving out conclusions and matters of law urged and submitted. In accordance with the expression of the court, formerly made, that all matters of law would be reserved for the hearing, he expressly appends to his answer a demurrer, and for cause says:

1. That the complaint does not show cause of action, nor—

2. A case upon which to decree specific performance.

3. That there is no mutuality in the contract.

4. That it does not show that said Reuben D. had authority to act for his wife.

5. That a married woman cannot constitute her husband her agent to sell her lands, or to make a contract for sale that would be binding upon her.

6. That a married woman cannot make an executory contract; and—

7. Because this court has no jurisdiction, the lands being in Jefferson county.

Of the above the third, fourth, fifth and sixth causes are argumentative, and included in the first and second.

The seventh does not apply, as the property concerning which specific performance is sought, lies in this county.

The Jefferson lands are alleged to have been the consideration.

The demurrer is, in effect, a general one, and as such, will receive due consideration with the merits.

Defendant, before hearing, moved to suppress the deposition of R. D. Partee, as being in favor of his wife, and also, so much of the depositions of other witnesses as tends to vary or add to the terms of the written instrument.

As to the latter motion, the court will so regard it as to give no effect to any testimony not properly admissible; and as to the former, I am of the opinion that any testimony which R. D. Partee would give should be considered primarily in his own interest, and not incompetent, because having joined his wife with him in this suit, and thereby conceded her rights to the fruit of any decree to be made, such testimony would inure to her benefit also. He is entitled to all his marital rights in the property here, if recovered, as he is to the Jefferson property, if he fails. The contract was made with him, and he is to be regarded as the active complainant, and

not as the bare trustee. There would be more reason in excluding that of his wife, although I consider each entitled to consideration *pro interesse suo*. The testimony of the wife, however, is not important, and will not be regarded.

Before proceeding to the evidence, it is best to clear away any confusion regarding the force of the agreement, as expressed upon its face. It is not, in any view, the contract of complainant, Georgie M. Partee. It is the contract of R. D. Partee alone, with defendant, Chrisman, in which he binds himself to make to Chrisman a clear title of his interest in the "Mosby place," whatever that may be, together with "a forty-acre block at Wildcat Landing," and in consideration of which defendant binds himself to make to Partee a clear title to the lots in question.

Partee is bound by this contract, whether he made it in his wife's behalf, or by her authority or not. Chrisman might maintain an action at law upon it, if Partee has promised more than he can fulfill, and his promise is at law sufficient consideration for Chrisman's. It is a personal obligation, which he makes at his peril, and if he fails to procure the assent and co-operation of his wife or any one else in its performance, and which may be essential, he brings on himself the penalty of being compelled to respond in damages. On the other hand, if he should perform, and Chrisman should fail on his part, the latter would then be in like case, and certainly, in an action at law, could not plead "no consideration." The contract is good at law as between Partee and Chrisman, on its face, provided it has sufficient certainty, without any reference whatever to Partee's wife. She had the right, on being advised of the obligation her husband had thus voluntarily assumed, to convey her lands in furtherance of his purposes, and thus to justify the assurance he felt in making the contract; and this would be true even if he claimed the conveyance from

Chrisman to himself. For a wife is not restrained in her discretion to dispose of the corpus of her property, provided there be no fraud in the matter, nor undue influence, and she pursue the statutory method. She was not a necessary party to this suit If the husband has any right to specific performance, he has it in himself, *sui juris*, for the whole fee simple, if he had chosen to claim it. It is commendable in him to have joined her with him, thus conceding an equity, and enabling the court to mould any decree to which he might be entitled, in such a manner as to vest in her the same interest in the property recovered which she had in that given as a consideration. Doubtless this was the original intention of husband and wife, and the court can well see how the husband considered himself as acting for the joint benefit of himself and wife; but that does not alter the legal aspect of the case, nor is it conceivable what interest the defendant can have had in the motives of the parties concerning each other; nor how it can concern him now, if he be found bound to specific performance, whether the court shall decree the property to be vested in R. D. Partee alone, or in his wife, subject to his marital rights.

Disembarrassed of all immaterial considerations, the real questions are:

1. Is the contract sufficiently *certain* on its face to be valid in law?

2. If so, is it such a contract, and attended with such circumstances, as to call upon the sound equitable discretion of a court of Chancery to administer the peculiar relief of specific performance; or must the parties be left to legal remedies?

The first is to be determined by the contract itself. The undertaking, on defendant Chrisman's part, the thing sought now to be specifically enforced, is absolutely certain. It is to convey two described lots, but if the consideration, being

also executory, is too uncertain to be valid, the whole must fall. This was an greement on Partee's part to make to Chrisman a clear title to "his entire interest (not including the widow's dower) in the place known as the 'Mosby place,' in Jefferson county, Arkansas, and also his interest in a forty-acre block at Wildcat Landing." There is no patent obscurity in this. It means to say that there is a place in Jefferson county called the *Mosby place*, and also at Wildcat Landing *a forty-acre block*, in both of which Partee claims an interest, and both of which he agrees to convey to Chrisman. The definite article is used in describing both, to mark a special Mosby place, and a particular block; not any place in Jefferson county, nor any forty-acre tract near or at Wildcat Landing. If there is any obscurity it is latent, and would be developed by proof that there were two or more places in Jefferson county called the "Mosby place," or two or more forty-acre tracts at Wildcat Landing, in which Partee claimed an interest. Such latent obscurities, either in deeds or wills, may be removed by parol proof, and the instrument hold good.

If no such obscurity be developed, the instrument stands good on its face. It is as if one in England should convey his manor by name, or a certain tract of land called blackacre in a named parish. So in this country, it is not necessary to convey by government surveys, or recorded plats, or courses and distances. Any description which may be identified by inquiry *in pais*, is sufficient. I think it will not be doubted that if Chrisman had performed his part, and had sued Partee at law for failure or refusal, he would have been entitled to show what land was meant, and to have recovered. I therefere conclude the contract to be valid on its face.

Ought complainant to have specific performance, or be left to his remedy at law? This requires an examination of

the evidence; for it is not done *ex debito justiciæ* in all cases of legal contracts. It is matter of course only when there are no equitable considerations arising out of the circumstances to influence the discretion of the court against it, but in the absence of these, it is now never refused. The whole doctrine of title bonds goes upon the idea that a contract to convey, itself transfers the equitable title to the land.

The evidence shows that the Mosby place was well known; that it had descended to several heirs, of whom Mrs. Partee was one. The plantation had been divided amongst them by commissioners, and a plat made, showing the interests of each. This plat is exhibited with the deposition of R. D. Partee. Upon it in one place his wife's portion is designated, "No. 1, Mrs. G. M. Partee, 280 acres." This portion embraces the S. E. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of S. W. $\frac{1}{4}$ of Sec. 13; and the N. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of Sec. 14.

In another place is marked, "No. 1, Mrs. G. M. Partee, 102 acres." This embraces the west half of the N. W. $\frac{1}{4}$ and the N. W. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ of Sec. 14, with the exception of a narrow strip running along down the east side of the three tracts of fractional forties included in the adjoining lands marked to Mrs. Core.

Before the trade was made Partee examined the Central Hotel property. He and defendant went next day to the Mosby place, rode over it and examined it—or, as complainant says, "that portion of it described in the contract filed as exhibit 'A,' and conveyed to said Chrisman by deed from myself and wife, marked as exhibit 'C,' and filed with the complaint." Upon one occasion, prior to the contract, Partee was riding over the land, showing it to defendant; they had this plat with them, and would occasionally stop and examine the land, by reference to the plat, which was explained to Chrisman, and the interests and distinct por-

tions of the several heirs pointed out. He was distinctly told that the land belonged to Mrs. Partee.

The evidence is positive that the land was examined, and the contract made with reference to this plat, and if this plat does not identify what was meant by "his interest" in the Mosby place, there is nothing which does.

The lands in the deed tendered are described as follows: "The S. pt. of S. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$, and S. pt. of S. $\frac{1}{2}$ of S. W. $\frac{1}{4}$ of Sec. 14, containing 102 acres, more or less; and the N. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ of Sec. 14—40 acres; and the W. $\frac{1}{2}$ of S. E. $\frac{1}{4}$ of Sec. 13—80 acres; and the N. E. $\frac{1}{4}$ Sec. 13 —160 acres, besides the lands in section 3, heretofore mentioned."

I think I have never met a more amusing tripartite error in the course of a twenty years' practice amongst conveyances among government surveys. Here Chrisman, Partee and the draftsman of the deed, the last of whom should have been skilled, and the first two of whom were deeply interested, have attempted to transfer title to nearly 400 acres of Mrs. Partee's interest in the Mosby place, and have so misdescribed it as to have included only 80 acres of land to which Mrs. Partee ever claimed title at all. Instead of that, they have inserted 102 acres which, by the plat, did not belong to the Mosby place or any of the heirs; a slice of the dower lands, and 160 acres of Mrs. Core's. This deed Chrisman took home with him and examined, and sent it by letter to be executed as satisfactory. It was so executed and returned, and tendered as a compliance with the contract. Chrisman made no objection to the description of the property, but refused positively to receive it, on no good grounds assigned, and in evident anticipation of unpleasant consequences to result from his refusal.

It is deliberately offered in a suit for specific performance, and in a litigous controversy passes without objection or

criticism on either side. It is submitted in this shape to the Chancellor, who, knowing well the usual care and ability of the counsel on both sides, might have entertained some uneasy doubts as to whether or not his own wits were wool-gathering, had he not been relieved by the happy discovery that all parties had read the surveyor's plat wrong side up, making that north which should be east. So held, all would go fair and even, but for the fact that sections 12 and 24 would appear respectively on the left and right of section 13, and section 14 below it, against which the surveyor might, on his part, entertain such decided objections as to materially weaken the force of the exhibit as evidence.

Seriously, the mistake, although somewhat absurd, is a very natural one, and might easily escape the notice of even careful and able attorneys, not practised in careful readings of descriptions of land by government surveys. Taken in connection with the plat, and the key to the solution of the riddle, it is perfectly certain that Partee and wife sold and meant to convey, and Chrisman was satisfied they did so mean to convey, the identical lands marked on the plat as the portions assigned to Mrs. Partee, and which he had examined with reference to their purchase. But neither the plat nor the solution of the riddle would go with the deed, and Chrisman would get no title from it to Mrs. Partee's part of the Mosby place, save 80 acres. In the case of Partee's acting *sui juris*, it would be easy enough, and proper for the court to correct a mistake so obvious; and if, in other respects, a specific performance were proper, decree the title in the proper lands directly to defendant Chrisman, without requiring a new deed. But very grave doubts suggest themselves as to the propriety or policy of reforming the deed of a married woman, so as to make it accord with her supposed intention, or decreeing divesture of her title under any circumstances, where it might be

proved that she had attempted to do so by the statutory mode, and had failed. Courts of Chancery have ever exercised extreme caution in disposing of the property of *femmes covert* in any other mode than that pointed out by Statute, and rarely, if ever, do so, unless the *femme covert* is personally brought into court, and the court is satisfied, upon examination, that she freely assents to, and desires such a disposition. The fact that she is a party plaintiff will not of itself suffice, except where she is herself the real party directly interested, and the very relief in question is sought, and the court is well satisfied that the suit was brought by her consent The court cannot know that she now desires to make a conveyance, which she attempted to make a year ago, and failed. Besides, the deed purports to convey about 36 acres in section 3. There is nothing in the deed itself, nor in the description of the lands, to connect them with "a forty-acre block at Wildcat Landing," and the court finds it impossible, clearly, by irresistible deduction, or even from strong probabilities, to settle itself in the conviction that the 36 acres so described, in section 3, is indeed the same forty-acre block the parties intended in the agreement.

The witnesses allude frequently to what seems to have been a forty-acre tract, well known amongst them at Wildcat, belonging to Mrs. Partee and Mrs. Core, her sister, which seems to have been well understood as included in the trade, subject to an abatement of five acres for Mrs. Core's interest, and it seems clear enough that Chrisman assented to these terms. But that does not wholly clear up the mystery difficulty, or even touch it. What tract was that? By what name was it known, and how can it be identified with the description by numbers given in the deed? The deed itself does not make the identification. *Non con-*

stat that Chrisman, in taking this deed, would get the identical tract at Wildcat for which he bargained.

There is another consideration not without its bearing. It appears incidentally from the evidence that the land has been rented for the present year. Chrisman would not be bound by that; and the court would be compelled, if specific performance were decreed, to defer the possession of Chrisman, or interfere with the rights of third parties.

I am satisfied from the whole case that defendant Chrisman, has wilfully determined to recede from his contract, which he had deliberately entered upon, and that if he had co-operated in good faith with complainant, to carry it out, there would have been no difficulty in his obtaining all that for which he had bargained. But for his peremptory refusal to convey, even after complainant had agreed to accept his deed without his wife's relinquishment, all mistakes might have been, and doubtless would have been at once corrected. The mistake in the description of the lands was mutual, and was not made ground of refusal. If he had objected to the description of the Wildcat lands, doubtless Partee would have given him full assurance. It is evident that Partee and wife were desirous of fulfilling their contract to the letter, and in its full spirit and meaning; and quite as clear that defendant had deliberately determined to recede from it, whatever might be the consequences. And the subsequent renting of the lands, if they have been rented, was made necessary, or at least prudent, by his refusal to take them.

Whilst I cannot, under the difficulties of this case, in accordance with the cautious rules applied to specific performance by courts of equity, in the administration of this delicate branch of jurisprudence, grant the desired relief at once, by allowing complainant to amend the description in his bill, and decreeing to each party their respective por-

tions, I cannot at the same time fail to recognize that the complainant has regulated his conduct and his business affairs in good faith, upon the design of abiding by the contract, and with the just expectation that defendant, on his part, would do the same.

It is contrary to all settled principles of equity, and shocking to a sense of justice, to hold that he has forfeited any rights by a mere mistake of so obvious and natural a character, that neither he nor his wife, nor the draftsman, nor the defendant, nor the attorney of either party have discovered it at all. It had no influence whatever on defendant Chrisman's refusal, who does not assert directly, nor as I understand his attorney, mean to imply that he had any serious doubt that the joint deed of Partee and wife conveyed all he contracted for. The delay of a year, and change of circumstances regarding the property, resulted from defendant's refusal to abide by the contract, which is no whit mitigated by the discovery now of a mistake in the deed tendered. Equity endeavors always, as far as practicable, in each particular case, to administer relief by considering that as done, which the parties ought in conscience, in good faith to have done. And especially to compel parties to observe their solemn contracts. The whole business of the community rests upon the security which men feel in contracts solemnly reduced to writing, and executed by the parties to be bound thereby. Without this security no man can lay his plans for the future.

At law, Partee can only recover positive damages, in money, such as he can prove he has actually sustained, as the direct consequence of Chrisman's breach of contract. Will any one say that is an adequate compensation for the wrong in this case? Courts of equity have always retained so much of the feudal respect for land as to hold that no money damages can be a full compensation for its depriva-

tion, and have never refused to interpose for its permanent protection, even where damages might be recovered at law: which, in cases of personal property would be considered as fully adequate. The effects of the delays consequent upon the refusal of defendant, the annual rents of both places for the year 1877, and compensation for personal property, the status of which may have meanwhile been changed, are matters which may in a proper state of case, be all equitably adjusted by reference to the master; or if they cannot fully, the parties are not *in pari delicto*, and a court of equity might be content with the nearest approximation. But such a reference could only be had upon a decree in favor of complainants for the main relief, and as incident thereto, I feel that it would be unjust to dismiss this cause for want of equity, and I cannot now decree any relief. Justice requires that complainant be allowed to do what he contracted and intended, if he can, and that the defendant be compelled to comply, or show reasonable cause against it. The case has been submitted under a mutual mistake. The submission may be recalled, and the cause returned to the rules for further proceedings. Complainants may amend their bill to describe precisely the interest in the Mosby place, and the forty-acre tract at Wildcat Landing, referred to in the contract, and may have reasonable time to tender a deed thereto, and to make any necessary proof to identify the descriptions in the deed tendered, with the property described in the agreement.

Meanwhile, either party may amend pleadings, or take further proof, with leave to either, if the cause be protracted beyond the year, to apply for a receiver.

For the present let the record show the filing of this opinion, and order that the submission of this cause, heretofore made be recalled, and that the cause stand on the docket for further orders, with all questions of law or fact

reserved, and that either party may amend pleadings, so far as may be necessary, to correct mistakes, or state more clearly matters of charge or defense, and also to take additional proofs. And it is further ordered that complainants bring into court, by the tenth day of December, a deed in accordance with the agreement of R. D. Partee, upon which this action is brought.

JOHN R. EAKIN,
Chancellor, etc.

Afterwards, within the time allowed, the plaintiffs brought into court a deed correctly describing the lands found by the court from the evidence, to be embraced in the contract, and thereupon, on their application—the defendants saying nothing further—the court decreed specific performance of the contract, requiring the defendant to execute to the plaintiff, Georgie M., a deed for the lots and appurtenances in Little Rock, and to accept the corrected deed for the lands in Jefferson county; and further decreed that the title of Mrs. Partee in the lands be invested in Chrisman, and his title to the hotel property be invested in her, as of the date of the contract of exchange—the twentieth of December, 1876; and that all questions in regard to the personal property claimed by each from the other party, and questions of damage to the plaintiffs by the defendant's non-performance of the contract, and of the rents and profits due to each be referred to a master for an account.

The report of the master and subsequent proceedings are not material to an understanding of the questions determined by the court, and are therefore omitted.

From the final decree Chrisman appealed.

W. G. Whipple, for appellant:

I. Equity will not decree specific performance of a con-

tract of a husband to convey his wife's separate estate in lands.

The lands belonged to Mrs. Partee. *Act April* 28, 1873; *Sec.* 4193 *Gantt's Digest; Const.* 1874, *Art.* 9, *Sec.* 7; and not necessary for her to record her separate statutory estate. *Act December* 15, 1875; *Sec.* 8, *Session Laws* 1875, *p.* 174, repealing *Sec.* 4201 *Gantt's Digest.*

Partee had no interest in the lands. *Sec.* 4193 *Gantt's Digest; Forbes* v. *Sweeny, Sup. Ct. Neb., April T.*, 1879; *S. C. Reporter, Vol.* 7, *p.* 688; *Bishop on Married Women, Vol.* 2, *Secs.* 148, 149, 150; and his contract was *void. Bishop on Married Women, Vol.* 1, *Sec.* 601; *Parsons on Contracts, Vol.* 3, **p.* 413; *Story Eq. Jur., Vol.* 1, *Secs.* 731–2–3–4–5; *Weegan* v. *Boyle*, 19 *How.*, 148; *McCann* v. *Janes*, 1 *Robinson, Va.*, 256; *Peeler* v. *Levy and wife*, 11 *C. E. Greene, N. J. Eq.*, 330; *Emery* v. *Ware*, 8 *Ves.*, 513; *Welsh* v. *Bayard*, 6 *C. E. Greene, N. J.*, 187; 2 *Chitty Cont.*, 1485–6, *Note N.*, 11 *Am. Ed.; Pomeroy on Cont., Sp. Perf., Secs.* 456, 463, *and N. I. to Sec.* 442; *Otread* v. *Rounds*, 4 *Vin. Ab.; Emery* v. *Ware*, 8 *Vesey; Martin* v. *Mitchell*, 2 *Jas. and W.*, 414 *et seq.; Paid* v. *Young*, 4 *Am. L. Reg.*, 412, *S. C.* 2 *Stock., N. J. Eq.; Luse* v. *Deitz*, 46 *Iowa.*, 206 (1877); *Fry on Sp. Perf., Sec.* 286; *Jarman* v. *Davis*, 4 *Monroe*, 115; *Benedict* v. *Lynet*, 1 *John. Ch.*, 370; *Tyron* v. *Watts*, 1 *M'd. Ch.*, 13; *Rogers* v. *Brooks*, 30 *Ark.*, 627, 631.

II. There being no *mutuality*, equity will not enforce the contract. *Keatts* v. *Rector*, 1 *Ark.*, 415; *Fry on Sp. Perf.*, 133, *and c. c.; Paris* v. *Haley*, 61 *Mo.*, 457; *Greenlee* v. *Greenlee*, 22 *Pa. St.*, 225; *Levy* v. *Huber*, 3 *Watts*, 368; *Watts* v. *Kinney*, 3 *Leigh. Va.*, 272; *Bishp. Eq., Sec.* 377; *Pom. on Cont. Sp. Perf., Sec.* 163, 165; *Luse* v. *Deitz, sup.; Duvall* v. *Meyers*, 2 *M'd. Ch.*, 401; *Martin* v. *Halley*, 61 *Mo.*, 196; *Dowers* v. *Collins*, 6 *Hare*, 441; *Moore*

v. *Fitz Randolph*, 6 *Leigh*, 175; *Fry Sp. Perf.*, *Sec.* 286, *et seq.; Sugden on Vendors*, *p. 22; *Pomeroy Sp. Perf.*, *Sec.* 166; *Bodine* v. *Glading*, 21 *Pa. St.*, 50.

Even if Partee had any interest in his wife's lands, by virtue of his marital relations, "A husband cannot be decreed to convey a life estate in his wife's lands during her life." *McCann* v. *Janes*, 1 *Rob.*, *Va.*, 256.

Specific performance is always *discretionary* with a court of equity, and will not be enforced if it will work injustice to either party. 15 *Ark.*, 327; 16 *Ib.*, 367; 19 *Ib.*, 59; 21 *Ib.*, 116; 34 *Ib.*, 676; *Story Eq. Jur.*, *Vol.* 1, *Secs.* 742, 750; *Parson's Cont.*, *Vol.* 3, *p 350–1; 51 *Penn. St.*, 281; 4 *Peters*, 342; 61 *Mo.*, 196, *Oct. T.*, 1875.

John H. Cherry, for appellant:

The contract was void for want of *mutuality*. 29 *Ark.*, 658; 30 *Ark.*, 385; 33 *Ark.*, 432; *Pilcher et al.* v. *Smith et al.*, 2 *Head.* (*Tenn.*), 208; *Sugden on Vendors*, *p.* 230, *Sec.* 14; *Pom. on Sp. Perf. Cont.*, *Secs.* 459, 463, *and Note* (1) *to* 442; *Peeler* v. *Levy and wife*, 11 *C. E. Greene* (*N. J.*) *Ch.*, 331; *Welsh* v. *Bayard*, 6 *Ib.*, 186; *Addison on Cont.*, 74; *Harris* v. *Mott*, 14 *Beav.*, 169; *Emory* v. *Ware*, *supra; Martin* v. *Mitchell*, 2 *Ja. and W.*, 414; *Nicholl* v. *Jones*, 3 *L. R.* 30 *Vic.*, 710; *Avery* v. *Griffin*, 6 *L. R.* 32 *Vic.*, 606; *Castle* v. *Wilkerson*, 5 *L. R. Ch. App.*, 534; *Chaffee* v. *Oliver*, *East Dist. Ark.* (1880), *Fed. Rep.*, *Vol.* 3, *p.* 607; 16 *Gratt.*, 109; 2 *Caldwell*, 632; *Lomax*, *Vol.* 2, *p.* 70, and other cases cited in associate counsel's brief.

A contract by the husband alone, or by the husband and wife, for lands of the wife, in which he may have an interest, will not be enforced. *Bronson & Ward* v. *Cahill*, 4

McLean, 19, and cases above; also *Pom. on Sp. Perf.*, (1879); *Emory* v. *Ware*, *sup.*

The contract was void *ab initio* for uncertainty, and for lack of mutuality of obligation, the lands being the *separate* statutory estate of the wife. See cases cited *supra.*

Dodge & Johnson, for appellees:

A wife is not restricted to dispose of her property, provided there be no fraud, etc., and she pursues the statutory remedy. *Gantt's Digest*, *Sec.* 849; 2 *Bish. Mar. Wom.*, *Sec.* 370–1, *Note* 3; 2 *Kens. Com.*, 167; *Const.* 1874, *Art. IX.*, *Sec.* 7.

On the question of *mutuality*, cite *Chitty on Cont.*, 11 *Ed.*, *p.* 1425; *Simons* v. *Stewart*, 1 *Ch'y. Rep.*, 610; *Willard* v. *Taylor*, 8 *Wal.*, 557; *Salisbury* v. *Thatcher*, 2 *Young & C.*, 54; *Martin* v. *Pycroft*, 2 *DeGex. M. & G.*, 795; *Wyms* v. *Morgan*, 2 *Vesey*, 202; *Morelock* v. *Butler*, 10 *Vesey*, 292; *Eyrston* v. *Simonds*, 1 *Young & Col.*, 607; *Murrell* v. *Goodyear*, 1 *DeGex*, *F. & J.*, 432; *Baldwin* v. *Saltee*, 8 *Paige*, 473; *Tyson* v. *Smith*, 8 *Texas*, 147; *Moore* v. *Smedley*, 8 *Paige*, 600; *Smith* v. *Flecks*, 96 *Penn. St.*, 480; *Lowry* v. *Mehaffy*, 10 *Watts*, 387; *McFarson's Appeal*, 1 *Jones*, 503; *Shofstall* v. *Adams*, 2 *Grant*, 209; *Simpson* v. *Breckinridge*, 8 *Casey*, 287; *Ewing* v. *Jordan*, 49 *N. H.*, 457; *Carson* v. *Mulvany*, 44 *Penn. St.* (13 *Wright*), 88; *Richmond* v. *Gray*, 3 *Allan*, 25; *Harley* v. *Brown*, 98 *Mass.*, 546; *Dresel* v. *Jordan*, 104 *Mass.*, 407.

The fact of performance, or offer to perform, by the party seeking relief, makes a contract, coupled with a promise in writing, *signed by the party to be charged*; all that is required in equity to force a compliance on part of defendant. *Dresel* v. *Jordan*, *supra*; *Old Colony R. R.* v. *Evans*,

6 *Gray*, 25. Here the contract was signed by parties on both sides *competent to contract.*

The contract bound Mrs. Partee. *In re Jane Hunter*, 1 *Ed.* (*N. Y.*) *Ch'y.*, 6. She joined in the deed, brought it into court, and joined in the petition for specific performance.

Hon. JOHN R. EAKIN disqualified. Hon. W. W. SMITH, Special Judge.

OPINION.

ENGLISH, C. J. Since the appeal in this case Mrs. Partee has departed this life, and her children have been made parties in her stead.

No one can read the pleadings and evidence and fail to be be impressed with the justness of the decree below, sustained as it is by the able opinion of the Chancellor, embodied in the Reporter's statement by direction of this court; and unless the decree is in conflict with some well established and inflexible rule of Chancery law, it should be affirmed. So far as the decree for specific performance rested in the sound discretion of the Chancellor, it was well exercised, and would not be controlled here unless abused.

1. MARRIED WOMEN: Cannot make executory contracts to convey.

This was not a contract by Mrs. Partee to convey her lands to appellant in exchange for his city lots, hotel and fixtures. Had she made such a contract, it may be conceded that it would have been void, (*Wood and wife* v. *Terry et al.*, 30 *Ark.*, 385), for our statutes and constitutions have not so far removed the common law disabilities of married women as to enable them to make valid executory contracts to convey their lands, though prior to the adoption of the present constitution they might convey any interest they had in real estate by joining their husbands in

properly acknowledged deeds; and now they may convey estates acquired since the adoption of the Constitution of 1874, as if *sole*. *Roberts and wife* v. *Wilcoxon & Rose*, 36 *Ark.*, 355; *Ward* v. *Estate of Ward*, *Ib.*, 386.

The contract for exchange of the properties was made between Partee and appellant twentieth of December, 1876. It was made on the part of Partee, with the approbation of his wife, and in a few days afterwards he tendered to appellant a deed executed by himself and wife, which had been previously submitted to and approved by him, but which, when so tendered, he declined to accept, for no other reason than that his own wife had declined to relinquish her dower right in the hotel property.

Passing over some minor questions which were properly settled by the Chancellor, we will consider what the counsel for appellant designate as the main proposition in the case:—

2. SPECIFIC PERFORMANCE Husband's contract to convey wife's lands, in which he has no interest.

I. That the Mosby place, and an undivided interest in the Wildcat tract, which Partee contracted to convey to appellant in exchange for the hotel property, were the *separate property* of his wife; that he had no interest whatever therein, which he could contract to convey, and that he could not make a valid contract to convey his wife's lands.

Mrs. Partee did not hold the lands under any deed or will settling them upon her, to her sole and separate use, but she held them by inheritance from James Mosby, her father; and all of the lands which her husband contracted to convey to appellant had been partitioned to her (subject to Mrs. Mosby's dower right), except the Wildcat tract, in which she held an undivided half interest, her sister, Mrs. Core, owning the other interest.

Mrs. Partee must have acquired the lands before the adoption of the present constitution, and as early as 1870 or 1871, because James B. Core, whose deposition was

taken on the twenty-sixth of September, 1877, deposed that her father's estate was divided between her and her sisters, and each one's portion assigned separately, six or seven years before then.

It does not appear that she ever scheduled the lands.

It may be taken to be true, upon the record before us, that at the time Partee contracted to convey the lands the fee was in his wife, and he had the right to the use of them during coverture, which was a freehold estate, (*Schoulers Dom. Rel. p.* 142), with expectancy of curtesy.

II. We will next consider the question of MUTUALITY.

MUTUALITY.

After appellant declined to accept the deed jointly executed by Partee and wife, and tendered to him, the bill for specific performance of the contract was filed, and the deed tendered in court.

Here it may be remarked that when the case came on to be heard, the Chancellor discovered that in drafting the deed a clerical error had been made in describing the lands, which neither of the parties had before noticed, and he declined to make a decree, unless another deed correcting the mistake was executed and brought in, which was accordingly done by Partee and wife; and then decree for specific performance was rendered.

At the time the contract was made Partee had a valuable interest in the lands, but was unable himself to convey the fee, because it was in his wife, as was known to appellant.

Appellant had the fee in the hotel lots, subject to his wife's right of dower. Neither party to the contract had in his own right power to make a perfect title. But when the remedy was sought, and the decree for performance asked, Partee was in a condition to deliver to appellant a clear title, as he had contracted to do.

In *Clayton* v. *Ashdown*, 9 *Viner*, *Abr.*, 393, the contract was made by an infant, and the bill for specific per-

formance brought after he was of age; and it was objected by defendant that he was bound, when the contract was made, but the infant was not; and so there was no mutuality; but the objection was overruled, and the contract decreed to be performed.

So in *Fishmonger's Company* v. *Robinson*, 5 *Manning & Granger*, 131; it was held that the parties were mutually bound at the institution of the suit, and that was sufficient, though the plaintiff was not bound when the contract was made.

There are numerous English and American adjudications to sustain the proposition that it is sufficient, if the vendor be able to make a good title before decree pronounced, although he had not a good title when the contract was made. See note to *Rose* v. *Calland*, 5 *Vesey, Jr., Sumner's Edition, p.* 189, *and cases cited. Hoggart* v. *Scott*, 5 *English Chancery*, 293; *Mortlock* v. *Butler*, 10 *Vesey, Jr.*, 292; *Wynn* v. *Morgan*, 7 *Ib.*, 202; *Hepburn* v. *Auld*, 5 *Cranch*, 262; *Dutch Church*, v. *Mott*, 7 *Paige*, 77.

In *Baldwin* v. *Salter*, 8 *Paige*, 474, Chancellor WALWORTH said: "It is a general rule that specific performance of an agreement may be decreed if the complainant is in a situation to perform on his part, and make a good title, when the cause comes before a court for a decree."

See also, *Seymore* v. *Delacy*, *Cowan*, 446; *Hepburn et al.* v. *Dunlap & Co.*, 1 *Wheaton*, 178; *Moss* v. *Hanson*, 17 *Penn. State*, 382.

——: Where vendor has no title at time of contract.

One who attempts to speculate upon land to which he has no title, and no legal or equitable means of acquiring title, cannot ask specific performance, because he is not a *bona fide* contractor; but such is not the condition of one whose land had been sold for taxes, and the tax-deed made at the time he contracted to convey it, but the time for redemp-

tion had not expired, and it was in his power to redeem. *Ley* v. *Huber*, 3 *Watts*, 367.

In *Cotton* v. *Ward*, 3 *Monroe*, 313, Chief Justice BOYLE said: "The invariable inquiry of a court of equity, when about to pronounce a decree, is not whether the vendor *was* able, at the time he entered into the contract, (to make a good title), but whether he *is* able to do so; and a purchaser cannot, it is said, insist upon being discharged from his purchase upon the master's report of a defective title, if the same is capable of being made good in a reasonable time. (1 *Maddock's Ch'y.*, 349.) The British courts of equity have even gone so far as to give the vendor, on a bill being filed by him for specific performance, time to procure an act of Parliament to perfect his title. *Sug. Vend.*, 252."

In *Ives* v. *Hazard, et al.*, 4 *Rhode Island*, 28, the court said: "It is now well settled by authority, that mutuality of remedy, existing at the time of action brought, is all that is required to enable a plaintiff to maintain his action" for specific performance.

Dresel et al. v. *Jordan*, 104 *Mass.*, 407, is a strong case.

In Massachusetts a wife may contract to convey her land, with the assent of her husband. The following is a correct abstract of the decision of the Supreme Judicial Court of that State in the case referred to:

"If a married woman makes a written contract in her own name and her husband's, with a third party, for the sale and conveyance to him of land owned in part by her, in her own right, and in part by her husband, their joint execution [and tender] of the deed of the land to the purchaser, before any indication of his intent to repudiate the contract, is a sufficient assent of the husband to the sale of her part of the land, and a ratification by him of the contract for the sale of his part, to entitle them to enforce specific perform-

ance, without evidence of her original authority to enter into the contract in his behalf."

Justice WELLS, who delivered the opinion of the court, after deciding other questions, said: "This consideration leads to another objection urged by the defendant, namely: that there is a want of such mutuality as is requisite for an agreement entitled to specific performance. * * * * The point of the objection is, that the seller must have, at the time the agreement is made, such title and capacity to convey, or such means and right to acquire them, as will enable him to fulfill the contract on his part; otherwise the court will not hold the purchaser to a specific performance. But we do not so understand the rule. On the contrary, if the obligation of the contract be mutual, and the seller is able in season, to comply with its requirements on his part, to make good the title which he has contracted to convey, we see no grounds on which the purchaser ought to be permitted to excuse himself from acceptance. The suggestion of such a rule in *Hurley* v. *Brown*, 98 *Mass.*, 545, was foreign to the case there decided, and is not borne out by the authorities cited," etc.

And after reviewing other cases, Justice WELLS added: "The equitable rule is established by numerous authorities that where time is not of the essence of the contract, and is not made material by the offer to fulfill by the other party, and request for a conveyance, the seller will be allowed reasonable time and opportunity to perfect his title, however defective it may have been at the time of the agreement. And in all cases it is sufficient for the seller, upon a contract made in good faith, if he is able to make the stipulated title at the time when, by the terms of his agreement, or by the equities of the particular case, he is required to make the conveyance in order to entitle him to the consideration"—citing quite a number of cases.

There was no dissenting opinion, and among the six eminent Judges, then composing the court, was the distinguished jurist Hon. HORACE GRAY, recently appointed an Associate Justice of the Supreme Court of the United States.

The decision was criticised by an article in the American Law Review, (1872), but the writer's name was not given, and we have no means of judging other than from the article itself, of his claims as a lawyer.

In *Jenkins* v. *Hiles*, 6 *Vesey*, 646–655, Lord Chancellor ELDON, remarked: "It is impossible to deny that, upon the old authorities a specific performance might be obtained if the title could be made good before the report. The court would execute the contract then, regard being had to the justice due to particular cases.

And, in the latter case of *Coffin* v. *Cooper*, 14 *Vesey*, 205, Lord ELDON held that if the master report that the plaintiff will have a good title upon getting a term, procuring administration, etc., the court will put him under terms to procure that speedily; and the motion of a defendant to be discharged, because the master reported that a good title could not be made, was refused, the plaintiff having in the meantime obtained an act of parliament to enable him to perfect the title.

These are among the cases reviewed and relied on in the opinion of Justice WELLS.

The contract to convey was not valid as to Mrs. Dresel, because she signed it without the consent of her husband; and it was not binding on him because she signed his name to it without authority; yet, they, in accordance with the contract, joined in the execution of a deed, and tendered it, and on refusal of the purchaser to accept it, they filed a bill for specific performance, and brought the deed into court, and the court decreed performance. There was no mutuality

when the contract was made, but there was when the decree was asked.

In *Richards* v. *Green*, 8 *C. E. Green*, (23 *New Jersey*), 536; the husband, Green, went into possession of a house and lot under a parol agreement to purchase of Richards. Afterwards Richards signed a written contract, in which he agreed, with the consent of the husband, to sell the property to the wife, Mrs. Green, for $2,500, and that when $500 and the back rent were paid, he would make her a deed, and take a mortgage for $2,000. The back rent was paid, and a tender of the $500, and of a bond and mortgage for the residue of the consideration money being made to Richards, he refused to convey the premises to Mrs. Green, and Green and wife filed a bill for specific performance. The court refused to decree enforcement of the written contract made with Mrs. Green; because, at the time the contract was made and at the time the decree was asked she was under the disability of coverture, and unable to perform the contract on her part; but the court decreed her the title, on the terms tendered, upon the parol contract made with her husband, who was under no disability to contract or perform.

In remarking upon the agreement with the wife, the Chief Justice said: "In every case that I can find, where specific performance has been ordered, a mutual remedy existed upon it at the time of the rendering of the decree. It seems to me that the rule is universal to this extent, that equity will not direct a performance of the terms of an agreement by one party, when, at the time of such order, the other party is at liberty to reject the obligations of such agreement."

And he illustrates the rule by the case of *Flight* v. *Bolland*, 4 *Russ.*, 298, where the plaintiff was an infant when

he made the contract, and was still an infant at the time he asked a decree to enforce its performance.

But in this case the contract was not made with the wife, but with the husband, who was under no disability, and bound by it, and able to perform it when the decree was made, for he had delivered in court a deed executed by himself and wife; he had done what it was understood by appellant he was to do, when the contract was entered into between them.

In *Farley* v. *Palmer*, 20 *Ohio State*, 223, Palmer and wife entered into a written contract to convey to Farley land to which the title was in the wife. At the time of making the contract a deed was executed by Palmer and wife, and placed in the hands of a third person, and by the terms of the contract this deed was to be delivered to Farley upon his paying the stipulated purchase money. Upon Farley's refusal to pay the purchase money and receive the deed, at the time agreed upon, Palmer and wife brought their action for a specific performance. It was insisted for the defense that Mrs. Palmer, being a married woman, was incapable of making the contract, and was not bound by it, and it was therefore, not binding on Farley, for want of mutuality. But she and her husband had executed the deed, and placed it in the hands of the third party, (who was regarded by the court as agent of both parties), to be delivered on payment of the purchase money, according to their contract, and the court decreed specific performance of the contract.

It is difficult to see any difference between that case and this, on principle. Here the husband contracted to make title to lands known to be in the wife; he promptly procured the wife to join him in the execution of a deed, and tendered it to appellant, who declined to accept it on no other ground than that his own wife had refused to relinquish dower in the lots, which he had bound himself by

the contract to convey in exchange for the lands; and then both husband and wife brought the deed into court, and asked specific performance. With what plausability could it be said that the husband was not able to perform the contract, and that the wife was not bound by it, when both of them had executed and delivered the deed in court, and asked appellant to accept it? On what substantial principle could the Chancellor have refused the decree, dismissed the bill, and left Partee to sue in a court of law for damages for the breach of the contract?

In *Watts, et al. v. Kinney and wife*, 3 *Leigh*, 272, 292, HENRY SAINT GEORGE TUCKER, President of the Court of Appeals said: "The wife in this case is the essential contracting party, if indeed *she* is to be called a contracting party, who is bound or not bound, at her absolute will and pleasure. But only thus far bound, the other party cannot have been bound, and cannot therefore have been a debtor. Upon this ground also it is probable that no specific performance could properly have been decreed, since the want of mutuality in the contract is generally a valid objection to the exercise of that jurisdiction. (*1 Madd, Ch. Prac.* 423-4.) Certain it is, I think, that no decree should have been rendered against the vendee until the vendor had procured and offered in court a deed executed with all proper solemnities to pass the title of the wife; since otherwise, this solecism is presented, that the decree between the parties is binding or not binding, at the will and pleasure of one of them."

That is just what Partee did in this case: The deed of himself and wife, executed on her part with all proper solemnities, was brought into court.

In *McCann v. Jane*, 1 *Robinson* (*Virginia*) 256, the husband sold land, in which his wife had an estate in fee, and executed a bond to the purchaser, conditioned that he and

his wife would make a deed to the purchaser within a specified time. The wife declined joining the husband in the deed, and forbid him to convey his estate, and he refused to make any conveyance. Thereupon a bill was filed by the purchaser against the husband stating that there were children by the marriage, and that the husband was therefore entitled to a life estate, and praying that he might be decreed to convey to the complainant all his interest in the land, reserving to the complainant his right of action at law upon the bond against the husband for failing to procure his wife to unite with him in the conveyance. A demurrer was sustained to the bill, and it was dismissed, and the decree was affirmed by the court of appeals.

In a note the Reporter states that the decree was affirmed on the ground that a court of equity ought not to sustain a bill for specific performance as to part, and allow the plaintiff to proceed at law for the recovery of damages as to the residue.

In *Clarke et al.* v. *Reins*, 12 *Grattan*, 98, it was decided that a court of equity will not decree a specific performance of a contract by a husband and wife for the sale of the wife's land, at the suit of the vendee, the wife refusing to execute the contract. The court did not favor the earlier English practice of compelling the husband, even by imprisonment, to procure the wife's title, as it might create domestic disturbance, and was contrary to American public policy.

This is not a case where the vendee is seeking to compel the husband to procure the wife to convey her title.

On that subject, Judge STORY said: "There is another sort of contract, respecting which there has been no small diversity of opinion, whether a specific performance ought to be decreed or not. It is where a husband covenants that his wife shall levy a fine, or execute any other lawful con-

veyance to bar her right in his estate, or in her own estate. There are many cases in which covenants of this sort have been decreed to be specifically performed. And, on one occasion Sir Joseph Jekyll, Master of the Rolls, said 'there have been a hundred precedents, where, if the husband, for a valuable consideration, covenants that the wife shall join him in a fine, the court has decreed the husband to do it, for he has undertaken it and must lie by it, if he does not perform it.'' '

Then, after showing that the later English decisions did not favor this practice, and that it was contrary to public policy in our country, he adds: ''Where, indeed, there is no pretence to say that the wife is not ready and willing to consent to the act, and that defense is not set up in the answer, but the objections to the decree are put wholly upon other distinct grounds; there may be less difficulty in making a decree for a specific performance. Even in such a case, a court of equity ought not to decree in so important a matter affecting the wife's interest, without bringing her directly before the court, and obtaining her consent upon full deliberation. But when the answer expressly shows an inability of the husband to comply with the covenant, and a firm refusal of the wife, it will require more reasoning than has yet appeared to sustain the justice or equity or policy of the doctrine.'' 1 *Story Eq.*, *2d Ed.*, *secs.* 731–735.

In *Luse* v. *Deitz*, 46 *Iowa*, 205, Luse contracted to convey to Deitz a brewery property, which did not belong to him; but his wife was the owner of it by recorded deed, which was not known to Deitz when he entered into the contract with Luse, and agreed to convey him other property in exchange for the brewery property. Mrs. Luse was not a party to the contract, and in no way bound thereby. Luse tendered a deed executed by himself and wife to Deitz, who refused to accept it, and Luse brought an action of specific

performance. The decree was refused on the ground of want of mutuality at the time the contract was made. It seems that Luse had no interest in his wife's brewery property—nothing that he could contract to convey.

To sustain the proposition that mutuality must exist at the time the contract is made, Chief Justice DAY quoted *Section* 286 *of Fry on Specific Performance of Contracts.* But in *sec.* 154, the same author said: "The incapacity to contract, and the incapacity to execute a contract, are of course different questions; the one must be judged of at the time of the contract, the other when its performance is sought.

In *Leading Cases in Equity, White & Tudor, vol.* 2, *part* 2, *p.* 1101, it is said: "The language held in *Green* v. *Richards*, (*sup.*) implies that a specific performance may be decreed at the instance of a complainant who is *sui juris*, although she was under the disability of coverture at the time of entering into the agreement, because the institution of the suit supplies the mutuality which was wanting in the first instance. A like principle was applied in *Clayton* v. *Ashdown*, 9 *Viner Abr.* 393, in favor of an infant who became of age before the filing of the bill. The conclusion may be at variance with the doctrine held in other instances, that a contract will not be specifically enforced unles it was binding when made. *Ante*, 1099, *Hooner* v. *Calhoun*, 16 *Grattan*, 109; but it is sustaiued by the weight of authority and by principle; see *The Fishmonger's Company* v. *Robinson*, 5 *M. & G.*, 131."

In *Coldcleugh* v. *Johnson, admr., et al.* 34 *Ark.*, 316, where the fee was in a *feme covert*, and a bond for title given by her and her husband, and the purchaser had gone into possession and paid part of the purchase money, it was held that if the deed of the husband and wife was tendered, or the deed of the wife, if she had become discovert, the

purchaser could not defeat the bill for specific performance on the ground of want of mutuality at the time the bond for title was made.

Turner v. *Baker*, 30 *Ark.*, 195, is not in point. There, as said by Bro. HARRISON: "As the contingency upon which the assent of the parties depended, never happened, there was no contract," etc. See on the subject of mutuality in suits at law, *Drennen* v. *Boyer & Clark*, 5 *Ark.*, 497.

Rogers ad., v. *Brooks*,, 30 *Ark.*, 612, was ejectment by the husband as administrator of the wife, and by cross-bill defendant sought specific performance. On page 627 the Chief Justice said: "Rogers could not bind his wife or her heirs by contract to convey the legal title to any part of her lands. It is probable, from the evidence, that Mrs. Rogers in her lifetime, knew of the contract between her husband and Brooks, and was satisfied with the division line, which seems to have been agreed upon between them. But this did not entitle Brooks to enforce a specific performance of the contract as against her or her heirs. She could only bind herself or her heirs by a deed of conveyance, executed according to the forms prescribed by law, and this Brooks failed to obtain, *Wood and wife* v. *Terry et al.*, *ante*, and cases cited."

There the wife was dead when the remedy was sought, and had not bound her heirs. Here Mrs. Partee was living, joined her husband in the suit, and they tendered in court, as they had done before suit, a joint deed for the lands which the husband had, with her approbation, contracted to convey, and which appellant had declined to accept for no other reason than that his wife had refused to relinquish dower in the lots, which he had agreed to convey in exchange for the lands; and this was waived, and no compensation asked in the bill, or taken by the decree for the value of the dower right.

The truth of the whole matter, from the evidence, is, that appellant changed his mind, and concluded to make a child's bargain of it; and attempted to defeat the bill for specific performance by the defense of want of mutuality, when he and Partee, both *sui juris*, entered into the contract.

Our conclusion upon the question of mutuality, which we think is sustained by the weight of authorities, may be formulated thus:

Where the husband, having use during coverture of the wife's lands, contracts to convey them with her approbation, to one who knows that the fee is in the wife, and husband and wife promptly join in the execution of a deed and tender it to the purchaser, and he, for no good reason, declines to accept, and they join in a bill for specific performance and tender a good deed in court, and the Chancellor decrees performance, the decree should not be reversed on appeal.

Some of the minor points made here for appellant are not founded on the facts in evidence, and others were as indicated above, well answered by the opinion of the Chancellor.

Decree affirmed.

W. W. Smith, Sp. J., dissenting. I doubt the propriety of granting specific performance in any case where a man has undertaken to sell his wife's lands, for the reason that the remedy is not mutual. And by mutuality I understand that the contract must be such that it might at the time it was entered into have been enforced by either of the parties against the other. Now, if Partee had been reluctant to complete this exchange, or his wife had refused to be bound by her husband's agreement, it is obvious that Chrisman could have had no decree for specific execution. My opinion is that Partee should be left to his action for damages.

McLeod v. Scott et al.

1. Pleading and Practice: *Parties—Misjoinder.*

In an action on a bond executed to two or more obligees for the payment of such sum as should be recovered in a pending suit in equity against the obligors, the obligees should be joined as plaintiffs, although the decree in that suit had adjudged to each of them separate sums; and this (under the code) though one of the plaintiffs be the personal representative of a deceased obligee.

2. Bonds: *Statutory—Common Law.*

Though a bond given in the course of judicial proceedings may not be authorized by Statute, it will be good as a common law bond, if founded upon sufficient consideration and not opposed to any principle of public policy.

Generally any bond entered into voluntarily and for a valid consideration, is good at common law if not repugnant to the letter or policy of the law.

3. Pleading and Practice: *In actions on conditional bonds.*

In an action upon a bond given for the payment of such sum as should be recovered in a specified suit it is not necessary to aver or prove that an execution had issued against the obligor for the amount recovered in that suit and returned *nulla bona.*

APPEAL from *Sebastian* Circuit Court.
Hon. J. H. Rogers, Circuit Judge.

Clendenning & Sandels, for appellants:

There was a misjoinder of plaintiffs. They had two demands, separate, distinct, definitely ascertained and reduced to judgment. All community of interest and connection of plaintiffs was severed by the decree, and by the judgment. *Bliss on Code Pleading, secs.* 61, 67; *Taylor, Landlord and Tenant, sec.* 116.

W. A. Compton, for appellee:

1. Complaint properly amended. *Gantt's Digest*, 4616.

2. Plaintiffs properly joined. *Ib. secs.* 4475 *and* 4477.
3. Not necessary to prosecute Pearce to insolvency.

Thomas Marcum and *Du Val & Cravens* for appellee.

1. Plaintiffs properly joined. *Gantt's Digest*, 4475; *Bliss Code Plead., secs.* 62, 63, 76; 16 *Barbour*, 325, cited in *Pomeroy on Leg. Rem., sec.* 202; *Ib. secs.* 221–226.

2. It was a good common law bond. *Thompson* v. *Buchanan*, 7 *Reporter*, 335; being entered into voluntarily, for valid consideration, and not repugnant to the letter or policy of the law. See also Note to *Harris* v. *Simpson*, 14 *Am. Decisions*, 101; *Drake on Attachment, sec.* 150, 151; 25 *Ark.* 108; 8 *Ark.* 345; *Bigelow on Estoppel*, 2*nd Ed.* 419; 5 *Peters*, 129; *U. S.* v. *Bradley*, 10 *Peters*, 361.

3. No execution against Pearce was necessary, *Lincoln* v. *Beebe*, 11 *Ark.* 697.

STATEMENT.

English, C. J. This action was brought thirtieth of June, 1879, in the Circuit Court of Sebastian county, Fort Smith District, by Thomas H. Scott, and John Paterson, Sr., administrator *de bonis non* of William Paterson, deceased, against H. A. Pierce and Samuel McLoud.

The action was upon the following bond, as set out in the complaint:

"CIRCUIT COURT OF SEBASTIAN COUNTY,
"Fort Smith District.

"*William Paterson and Thomas H. Scott*, } Plaintiffs.
vs.
"*H. A. Pierce*, Defendant.

"Know all men by these presents, That we, H. A. Pierce, as principal, and Samuel McLoud, as surety, ac-

knowledge ourselves to owe, and be indebted unto William Paterson and Thomas H. Scott, plaintiffs in the above entitled cause, in the sum of five hundred dollars ($500) lawful money of the United States; signed with our hands, and sealed with our seals, this the eighteenth day of June, 1873.

"The condition of this obligation is this: That, whereas, the said Thomas H. Scott and William Paterson have commenced an action in said court above named upon the equity side thereof, and that previous to the filing of the defendant's answer therein, obtained from the judge of said court an order in the nature of an injunction, temporarily restraining the said H. A. Pierce from selling or disposing of the newspaper known as the *Arkansas Patriot*, or its press, types, or material; and, whereas, upon notice before the Hon. E. D. Ham, Judge of said court, at Fayetteville, on the third day of June, A. D. 1873, the said Judge by his order then made, did modify said previous order in this, and his said order did provide, that upon the said defendant, H. A. Pierce, giving bond to the said William Paterson and Thomas H. Scott, in the sum of five hundred dollars, to be approved by the clerk of said court, conditioned that the said H. A. Pierce should pay any and all sums that said William Paterson and Thomas H. Scott should recover against him by virtue of their said action, that their said restraining order should be dissolved.

"Now, therefore, if said H. A. Pierce shall pay to the said William Paterson and Thomas H. Scott such sum of money as they shall recover in said action, then the above obligation to be void, otherwise in full force and effect.

"H. A. PIERCE, [SEAL.]
"SAMUEL McLOUD, [SEAL.]"

ENDORSED.—"The within bond approved both as to form and security, and filed this twenty-sixth day of June, A. D. 1873.

"SAMUEL A. WILLIAMS,
"*Circuit Clerk.*"

The complaint as finally amended by permission of the court, further alleged that upon the execution, approval, and filing of said bond, the restraining order mentioned in its conditions was dissolved, &c.

That pending the Chancery suit, and before final decree, William Paterson, one of the complainants therein, died, and John Paterson, duly appointed administrator *de bonis non* of his estate, was substituted as a complainant in his stead.

That upon the final hearing of the cause, the court ascertained upon the master's report, that defendant H. A. Pierce was indebted to complainant Thomas H. Scott in the sum of $817.17, and to John Paterson, as such administrator of William Paterson, in the sum of $450.94, on partnership account, and decreed that they repectively recover of Pierce said sums, with the costs of the suit.

The Chancery decree is set out in the complaint.

Prayer that plaintiffs have judgment for the sum of the bond sued on, &c.,

Defendants, after motion overruled to strike out the amended complaint, demurred to it on the grounds that it did not set forth facts sufficient to constitute a cause of action, and that there was a misjoinder of plaintiff's.

The demurrer was overruled, and defendant, McLoud, filed a separate answer with three paragraphs, in substance:

1. *Nul tiel* record as to the alleged decree in Chancery.

2. That the bond sued on was of no binding effect as to this defendant, because executed without authority of law.

3. That no execution was issued against Pierce, the principal in the bond, nor any demand made upon him for the amount recovered by plaintiffs against him in the decree.

Plaintiffs demurred to the 2d and 3d paragraphs of the answer, and on hearing of the demurrer, they were permit-

ted further to amend their complaint, by alleging that an execution was regularly issued against Pierce on the decree, and returned no property found, and the demurrer was then overruled.

The cause was submitted to the court, and plaintiffs read in evidence against the objection of the defendants, the Chancery decree, and an execution issued thereon against Pierce, and returned no property found, and the bond sued on.

The court found the issue for plaintiffs, and rendered judgment in their favor for the amount of the bond, and that plaintiff Scott recover of defendants $320.93, and that plaintiff Paterson, as administrator, &c., recover of defendants $179.07, and that defendants pay the costs,

A new trial was refused, bill of exceptions, and appeal taken by defendant McLoud.

OPINION.

I. The only point made here, by counsel for appellant, is, that there was a misjoinder of plaintiffs.

1. PLEADING AND PRACTICE: Parties; Misjoinder

The bond was executed and payable to Thomas H. Scott and William Paterson, plaintiffs in the Chancery suit, jointly, and no doubt they could, and should have joined in a suit upon it, though the decree ascertained and adjudged sums to be paid to them respectively. *Gayle, et al, v. Martin, et al.* 3 *Ala.*, 593; *Newman Plead. and Prac.*, *p.* 111.

By the common law where a bond or note is made payable to two persons, and one of them dies, the right of action survives to the other, and this was not changed by the statute abolishing survivorships in real and personal estates. *Trammell* v. *Harrell*, 4 *Ark.*, 602.

But by the code. "All persons having an interest in the

subject of an action, and in obtaining the relief demanded, may be joined as plaintiff, except where it is otherwise provided." *Gantt's Dig.*, *sec.* 4,475.

Here the decree ascertained and adjudged the respective sums to be paid by Pierce to the surviving obligee in the bond sued on, and to the administrator of the deceased obligee, and so their interests in the decree were severed, but they were compelled to resort to a suit on the bond to enforce the liability of McLoud, the surety of Pierce. The bond was the subject of the action, and they were both interested in it. See *Loomis et al.*, v. *Brown et al.*, 16 *Barb.*, 325.

MR. POMROY says : The effect of the above code statute was to permit the uniting as plaintiffs of the survivors of joint promises and the personal representatives of those deceased, though by the common law this could not be done in actions at law. *Pomroy on Legal Remedies*, *&c.*, *sec.* 197.

2. BONDS: Statutory; Common Law.

II. We have no statute authorizing the giving of such a bond as the one sued on to procure the release of an injunction, but the Chancellor, on the application of Pierce, thought proper to order the release on the execution of such bond. There was a sufficient consideration for it. There is no law which inhibits the taking of such bond, nor is it opposed to any principle of public policy, and must consequently be good as a common law obligation. *Gayle et al.* v. *Martin et al.*, *Sup*

Generally, any bond entered into voluntarily and for a valid consideration, is good at common law, if not repugnant to letter or policy of the law. *Thompson* v. *Buckhannon*, 2 *J. J. Marsh*, 416; *Norton et al.* v. *Miller et al.*, 25 *Ark.*, 108; *Outlaw et al.* v. *Yell*, *use &c.*, 8 *Ib.*, 352.

3. PLEADING AND PRACTICE: In actions on conditional bonds.

III. It was not necessary to allege or prove that an execution was issued against Pierce on the decree, and returned *nulla bona*, before suit on the bond. *Lincoln* v. *Bebee surv.*, 11 *Ark.*, 697.

There is nothing further in the case. There was no abuse of the discretion of the court in permitting amendments of the complaint.

Affirmed.

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BELL ET AL V. GREEN, ADM'R., ET AL.

1. ADMINISTRATION: *Sale of land without appprаisement.*

The failure of an administrator to have land appraised before selling it under an order of the Probate Court will not render the sale *void*, if it be confirmed by the court. It can be set aside only by appeal from the order of confirmation, or by direct proceedings for that purpose. It cannot be impeached in a collateral proceeding.

2. SAME: *Presumption; Confirmation of Probate Court sale; Pleading; Tender of deed.*

In a suit to enforce an administrator's sale of real estate against the purchaser, the court will not presume that the sale has been confirmed. If confirmed it should be so averred in the complaint. If not confirmed, the sale is void, and confers no title upon the purchaser. And if confirmed, the court should require the administrator to bring a deed into court for the purchaser, before decreeing a foreclosure and sale of the property.

APPEAL from *Hempstead* Circuit Court in Chancery. Hon. J. K. YOUNG, Circuit Judge.

STATEMENT.

Benjamin W. Green, as administrator of the estate of Wm. W. Andrews, deceased, and W. P. Hart, filed in the Hempstead Circuit Court their complaint in equity, alleging, in substance, that Andrews and Hart were tenants in common of certain town lots (which it described) in the town of Fulton, in said county. That the administrator, after

due notice of his intended application therefor, had obtained an order of the Probate Court of the county to sell Andrews' interest in the lots for payment of his debts, and the administrator had sold the same, together with Hart's interest, with his consent, at public auction, to the defendant, Bell; and that he and defendant Holman, as his surety, had executed to the plaintiffs, jointly, their promissory notes for the purchase money; and they had executed to Bell an agreement to make a deed to him upon its payment. No part of it had been paid.

Prayer for judgment on the notes, and for foreclosure of the equity of redemption, and sale of the property for payment.

The defendants answered, setting up as a defense that the property had been sold by the administrator without the previous appraisement required by law; that the sale was, therefore, void ;the defendant had acquired no title, and the notes were, therefore, without consideration and void.

A demurrer to the answer was sustained, and the defendants excepted and appealed.

Dan W. Jones, for appellant:

The administrator having failed to comply with the law, the sale was void for irregularities and informalities. The Probate Court being one of limited and prescribed jurisdiction, the Statute must be strictly complied with. Purchasers at administration sales should be protected against future disputes of their title, before being compelled to pay the purchase money.

Williams & Battle, for appellees:

Appellant cannot inquire into the proceedings in the matter of the sale of lands in the Probate Court, collaterally.

It is a proceeding *in rem;* the court had jurisdiction; the title to the lands will be good on payment of the purchase money, although there may in fact have been no appraisement. See *Borden* v. *State, use of Robinson*, 11 *Ark.*, 519; *Bennett et al* v. *Owen et al*, 13 *Ark.*, 177; *Rogers et al* v. *Wilson*, 13 *Ark.*, 507; *Sturdy and Wife et al* v. *Jacoway*, 19 *Ark.*, 499.

1. ADMINISTRATION. Sale of land without appraisement not impeachable collaterally.

HARRISON, J. Though the Statute requires an executor, or administrator, upon obtaining an order of the Probate Court for the sale of land for the payment of the debts of the estate, before offering it for sale, to have the same appraised by three disinterested householders of the county in which it is situated, yet, if he neglects to do so, and the sale is confirmed by the court, the sale would not be void, and could be set aside only on appeal from the order of confirmation, or by a direct proceeding for that purpose, and could not be attacked or impeached in a collateral proceeding. *Carter* v. *Engles*, 35 *Ark.*, 205; *Montgomery and wife* v. *Johnson et al.*, 31 *Ark.*, 74, and cases there cited.

2. ——. Confirmation not presumed. Pleading.

But we are not to presume that the sale in this case had been confirmed. If it had been, the complaint should have so alleged. Until confirmed it was not completed or binding, and conferred no right to the property to the purchaser, or at least, to the interest that Andrews' estate had in it, and he might call in question its validity. And it could not be known, though he brought the money into court, that he would ever be able to get a title. *Ror. on Jud. Sales, sec.* 2; *Wells et al* v. *Rice et al*, 34 *Ark.*, 346.

The complaint, therefore, showed no equity or cause of action.

Tender of deed.

And if it had been shown in the complaint that the sale had been confirmed, and that Andrews' administrator could

convey the estate's interest in the lots to Bell, the court should, before decreeing a foreclosure and sale, have compelled the plaintiffs to bring the deed into court. *Anderson, ad., et al*, v. *Mills, ex'x.*, 28 *Ark.*, 175; *McGehee* v. *Blackwell et al*, 28 *Ark.*, 27.

The decree is reversed, and the cause remanded to the court below, with instruction to permit the plaintiffs, if so advised, to amend their complaint, and for further proceedings.

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STATE V. LEATHERMAN ET AL.

1. QUO WARRANTO: *Jurisdiction of Supreme Court.*
   The Constitution of 1874, in giving to the Supreme Court power to issue the writ of *quo warraanto* to test the legality of municipal corporations, may be held, in view of the settled practice of the court, to have included informations for public purposes in the nature of the writ, as well as the writ itself, and prescribes the limits of the power and the proper parties to the suit.
2. MUNICIPAL CORPORATIONS: *Jurisdiction to create.*
   The act of April 28, 1873, conferring power upon Circuit Courts to annex territory to municipal corporations, did not empower those courts to create corporations.
3. SAME: *Long recognition by State cures illegal creation of.*
   The State may by long acquiescence and continued recognition of a municipal corporation, through her officers, State and county, be precluded from an information to deprive it of franchises long exercised in accordance with the general law.

Information in the nature of the writ of Quo Warranto.

James P. Clarke, for relator:

1. It was competent under *Art* 7, *Sec.* —, *Const.* 1868, for the Legislature to impose on County Courts the duty of ascertaining the facts authorizing the assumption of corporate powers, &c.

At the time Arkansas City attempted to incorporate, the Circuit Court had been deprived of all jurisdiction, the act of 1868 having been repealed by act of April, 1869. *State* v. *Jennings*, 27 *Ark.*, 419.

2. The act of March, 1875, perpetuates only such towns as had an actual legal existence under former laws. Arkansas City never *existed* as an incorporated town. *Acts* 1874-5, *p. 2, sec.* 5.

3. In Arkansas there can be no such thing as a corporation existing by presumption. *Cooley Const. Lim. top p.* 239; 1 *Dillon on Mun. Corp., p.* 51, *sec.* 37, (17). In this case the attempt was *coram non judice*, and 15 *Mich.*, 470, and 16 *Ills.*, 257, cited for respondents, not applicable. In this connection see 45 *Ills. p.* 17, *et seq.* The provisions of Constitution 1868 and 1874 are exclusive of all others. *Const.* 1868, *Art* 5, *sec.* 49, and corporate powers can only be exercised in the manner provided.

C. B. Moore, Attorney General, for relator.

Martin & Martin and *L. A. Pindall*, for respondents.

Under Constitution of 1868, municipal corporations were originally organized under *general laws. Sec. 50, Art 5, Const.* 1868. *Sections* 3202, 3255 to 3258, *Gantt's Dig.* All necessary facts existed in this case, and all courts take judical notice of the corporation. *Gantt's Dig., sec.* 3,258. The Constitution prescribed no particular forum. The act of 1868 prescribed the Circuit, the act of 1869 the County Court. The latter abolished in April, 1873, and by act of April 28, 1873, vested jurisdiction in the Circuit Court. See *sec*, 3318 *Gantt's Dig.* Purely a ministerial act, not clearly defined, nor after a lapse of time and ac-

crual of rights, material. The *5th sec.*, *act* 1875, cured any defects. *Secs.* 3198, 3199, 3200, 3201, *Gantt's Dig.*; *Secs.* 3, 4 and 5, *act March* 9, 1875.

After a length of time courts will not disturb the organtion of towns. *Jamison* v. *People*, 16 *Ill.*, 256; *People* v. *Mainard*, 15 *Mich.*, 471; *U. S.* v. *Dandridge*, 12 *Wheat*, 64; *R. R. Co.* v. *Creegor*, 5 *Har. & John.*, 125; *Middlesex* v. *Davis*, 3 *Metcalf*, *Mass.*, 137; *Dunning* v. *N. A. & S. R. R.*, 2 *Carter*, *Ill.*, 438.

The Constitution of 1874 does not vest power to create corporations in County Courts, and the Legislature cannot give them additional *judicial* powers; and unless the act of 1875 confers *ministerial* powers on County Courts it is unconstitutional, and Circuit Courts which exercise the residuum of *all judicial* power are the proper tribunals.

Enquiry is now barred by limitation. *High's Ext. Legal Rem.*, *par.* 692; *Knight* v. *Heaton*, 22 *Vt.*, 481; *Secs.* 4129, 5677, *Gantt's Dig.*

1. QUO WARRANTO: Jurisdiction of Supreme Court.

EAKIN, J. This case invokes the original jurisdiction of this court, in one of the cases provided for, by the 5th section of Art. VII of the Constitution. It is an application by the Attorney General in the nature of an information on behalf of the State, against the Mayor, Aldermen and Recorder of the town of "Arkansas City" to test the legal existence of the corporation; substantially it is an applicatian for a writ of quo warranto. Notwithstanding some earlier decisions to the contrary, it had long before the adoption of the Constitution of 1874, been the practice of this court to disregard the distinction between the old writ of quo warranto, and the information in the nature of it; and the Constitution in giving this court power to issue the writ of quo warranto to test the legal existence of municipal corporations, may be held, in view

of the settled practice, to mean and include informations for public purposes in the nature of the writ, as well as the old writ itself.

Limits of jurisdiction and proper parties prescribed

The language of our Constitution relieves us of the necessity of deciding a point of practice which has been elsewhere a matter of some embarrassment; that is, whether the suit should be against the corporation itself, *eo nomine*, or may be against its officers. It is that this court may issue the writ to officers of political corporations, "when the question involved is the legal existence of such corporations," thus not only giving the jurisdiction, but prescribing its limits, and the proper parties.

The cause is submitted on demurrer to the answer. The only question presented by the pleadings is, whether the town of "Arkansas City" can be recognized as an existing municipal corporation. The material facts disclosed by the admissions of the answer are: that an attempt was made to organize the town as a corporation, upon application to the Circuit Court of Chicot County, and by virtue of an order thereof, made on the twelfth day of September, 1873. It is conceded, save as to the tribunal, that the organization was effected, substantially, in accordance with the general incorporation act then in force. It further appears that from that time until the commencement of this suit the town had continuously exercised the powers and franchises of a corporation; electing officers of whom the mayors successively elected had been commissioned by the Governor, and the others had been duly qualified; passing and enforcing ordinances, collecting fines, making public improvements, entering into contracts for the public benefit; levying taxes which, from time to time, had been regularly extended on the tax books, and placed in the hands of the County Collector, and that for delinquencies in payment of such taxes, lands had been sold and titles become involved.

Other matters of like nature tending to show the inconvenience and embarrassment of now holding the corporation void *ab initio* are urged; and it is also shown that the territory of the town is upon the Mississippi river and the common terminus of two railroads from the interior; that it has a population of from one to two thousand inhabitants, that many strangers are continually passing and that it requires a local police for the protection of property, and the security of the peace. Further that the ground had been platted into blocks, lots, streets, alleys, parks, &c., which plat had been recorded and sales and transfers had been made with reference thereto.

It will be seen that two points only are presented: 1st. Was the corporation organized in accordance with law so as to acquire thereby a valid existence; and, 2nd, if not, has the acquiescence of the State for so long a period so affected her right to now question the franchise as to leave it within the power of this Court in the exercise of a sound discretion to refuse a relief fraught with consequences so disastrous to the long line of officers, and list of contractors and purchasers of property, who have been acting *bona fide* in obedience to and accordance with what they supposed to be a legitimate governing body. It goes without saying, that if this Court can find such discretion, it will, under the circumstances disclosed, exercise it to cure what has been done, and maintain the existing order of things. Whilst a moral wrong can never rest harmless, a mere mistake may become so insisted in healthful surroundings, and embedded under supervening rights, as to make its extraction as dangerous as useless.

Upon the first point it is obvious that the Circuit Court and the petitioners in the proceedings for organization, mistook the tribunal. The power had been conferred upon the Circuit Court by the general incorporation act of 1868;

but this act had been superseded by another covering the same ground passed April 9th, 1869. The latter act had not been published in the regular pamphlet acts of the session, but in a separate one commonly known to the profession in our State as *McClure's Digest*, which contained a collection of acts supposed to have been adopted by the Legislature, as a part of the general revision of the whole statutory law of the State. The greater part of them, however, though not all, were held invalid by the Courts (*Vinsant admx.* v. *Knox*, 27 *Ark.*, 266). Amongst those sustained was the said act of 1869, vesting in the County Courts the jurisdiction to determine and pronounce upon the creation of municipal corporations. At that time by the constitution then in force, the powers which the Legislature might vest in County Courts were not strictly limited, and the right to confer upon them this power cannot be seriously questioned.

2. MUNICIPAL CORPORATIONS Jurisdiction to create.

On the third of April, 1873, County Courts were abolished, and Boards of County Supervisors appointed in their stead; to which were transferred all the powers and duties of the County Courts. It is noticeable, however, that the Legislature, afterwards, on the twenty-eighth of April, 1873, seems to have overlooked the former transfer of jurisdiction from the Circuit Courts, or at least to have still considered it a very appropriate tribunal for kindred subjects. By act of that date, making provision for the annexation of territory to corporations, it was provided that application for the purpose should be made to the Circuit Courts. It is rather suggested to the Court, than contended, that this was a recognition of a remaining jurisdiction there, over the subject matter; which would still authorize those courts to receive and act upon applications for the *creation* of new corporations. We cannot so extend the language of the act, which regards annexations only. It seems anomalous, and

was, perhaps, passed under the mistaken impression that the act of 1868 was still in force; but we cannot, on that account, hold the act of April 9th as having been suspended.

So the law stood when the order of the Circuit Court was made, establishing Arkansas City. There was no jurisdiction and the order was void. I find nothing to cure this in the Constitution of 1874, nor in subsequent legislation. The new general incorporation act of March 9th, 1875, sec. 5, adopted only such corporations as were existing at the time the new Constitution took effect, and which had been "described or denominated" by some law then in force. This had not been.

But it had been an existing *de facto* corporation all the time from 1873 till now; and many things had in good faith been done under it which it would be shocking now to undo. The disastrous consequences would not be confined to the case of Arkansas City. Municipal corporations throughout the State have become numerous. They are not only highly beneficial, but necessary agencies of good government. We can see how many of them may have been heretofore, or may be henceforth, put in operation under the same, or similar mistakes. To declare them all null, after long acquiescence on the part of the State would open a very Pandora's box of litigation, and produce incalculable hardship and confusion.

This impels us to the broader field of enquiry, whether this court, in view of justice, equity, and the security of titles, can find, in recognized principles of law, sufficient warrant for refusing its aid in opening the flood-gates of such unmitigable evil.

The practice of filing informations in the nature of a quo warranto existed at common law. But it was always on the relation of the Attorney General, to vindicate or protect the rights of the crown against usurpation and abuse of its

franchises. Never upon the relation of a private person to try his right to an office, until the statute of Anne, which made this proceeding subservient to the trial of private rights of this nature, and allowed informations by the Attorney General on the relation of individual citizens, for their benefit. The statute was never in force in this State. We have other appropriate proceedings to determine, between individuals, the right to hold office. The course of judicial decisions under the act in England, are however worthy of note, being pregnant examples of their tendency to prevent the abuse of the proceedings, after long acquiescence on the part of those assuming to have been aggrieved.

Originally, upon the passage of the act, the granting of these informations was matter of course; and when once filed, by leave, the courts felt bound to determine the right by strict law regardless of consequences. This afterwards ceased to be the practice in case of private relators. The granting of leave was made to depend on the sound discretion of the court, which it came to exercise upon the particular circumstances of each case. Although, at common law, the time in which the right to exercise an office might be impeached, was indefinite, the person against whom the remedy, under the act of Anne, was sought, might show that his right had been acquiesced in for a long time. By analogy to the statute of limitations the time was at first fixed at twenty years. Afterwards it was reduced to six. See cases collected and cited in *Bacon's Abridgement Title "Informations" (D)*. See also *High on Extraordinary Remedies Title "Quo Warranto" (passim)*. I do not find, however, that any English cases go to the extent of holding that this applies to other cases than those of private relators seeking personal rights; or that the doctrine of "*nullum tempus occurrit regi*" has ever been there

ignored in case of such applications, in behalf of the sovereign, as the Attorney General might have made before the act of Anne. The discretion of the court, indeed, although not used at first, is based upon the language of the act, which expressly provides that the relations therein allowed must be filed by leave of court.

But times change, and the exigencies of society and good government change with them. The great multitude of new municipal corporations continually springing up in the American states, their convenience, and indeed absolute necessity, as agencies of government, and the danger of the impending evils to which I have alluded, have induced several American courts and distinguished jurists to go a step further, and apply this discretion to proceedings on the part of the State herself, without any private relator. The step seems to have been impelled *ex necessitate rei*, and in truth implies sounder views, and advanced ideas of the nature of sovereignty, as resting in the State for the public good, and not for the distraction of business, and confusion of rights.

The case of *Jameson* v. *The People*, 16 *Illinois*, *p*. 257, was a *quo warranto* to test the validity of a municipal corporation, which had not been organized in accordance with aw. The corporation had gone into operation and had been named in a subsequent legislative act, giving it certain powers. This was held to have cured the irregularity, but the opinion of the court goes upon still broader grounds. SKINNER, J., said: "If there is no such corporation, all acts done under the supposed corporate powers, are mere nullities, and no liabilities can exist by reason of contracts made in the corporate name. * * * * Were we to hold, after this acquiescence of the public, and these recognitions of the Legislature, that the town remains unincorporated, on account of some defect in its original organiza-

tion as a corporation, what confidence could individuals have in the validity of securities emanating from these local authorities? Municipal corporations are created for the public good—are demanded by the wants of the community; and the law, after long continued use of corporate powers, and the public acquiescence, will indulge in presumptions in favor of their legal existence." It is true that the defect of organization in that case was only the result of an irregularity, and there had been an express legislative reorganization. But the grounds upon which the court proceeds extend much beyond the facts of the particular case.

The case of *The People* v. *Maynard*, 15 *Michigan*, 470, was an information in the name of the attorney general, by a private relator, against the treasurer of a county. The issue involved the legal existence of a county. The case, as to facts, is not in point, as an authority; but in the course of the opinion I find these broad grounds again asserted: "In public affairs, where the people have organized themselves, under color of law, into the ordinary municipal bodies, and have gone on, year after year, raising taxes, making improvements, and exercising their usual franchises, their rights are properly regarded as depending quite as much on the acquiescence, as on the regularity of their origin, and no *ex post facto* enquiry can be permitted to undo their corporate existence. Whatever may be the rights of individuals before such general acquiescence, the *corporate standing* of the community can be no longer open to question."

There is a case in the early reports of Alabama, *State*, *etc.*, v. *Burnett*, 2 *Ala.*, *N. S.*, *p.* 140, in which the judge, in arguing, recognizes the discretion of the court to refuse an information at the instance of one who had no claim to the office, and also when the franchise involved no qestion of private rights "as in the cases of corporations, either public

or private." The distinction drawn in that case, however, seems to us novel, inasmuch as it denies the discretion where the information is in behalf of a private right.

The opinions above quoted taken altogether, although none are exactly in point, seem to us utterances of an enlightened and progressive jurisprudence, widening and adapting itself to free American institutions, and the rapid developments of the country in the growth of towns and cities.

3. MUNICIPAL CORPORATIONS. Long acquiescence by State cures illegality of its creation.

We are emboldened by them to declare in behalf of the public good, that the State herself may, by long acquiescence, and by the continued recognition through her own officers. State and county, of a municipal corporation, be precluded from an information to deprive it of franchises long exercised in accordance with the general law.

The case made by the answer shows an acquiescence for nearly nine years, and a recognition by the Governor, county court, county clerk, county collector, and the whole of a population now over one thousand. If the answer be true, the corporation of Arkansas City should not *now* be held null and void.

Overrule the demurrer.

TILLER & TAYLOR ET AL V. MCCOY.

1. HUSBAND AND WIFE: *His rights in her land before Constitution of 1874.* Before the adoption of the Constitution of 1874 a husband acquired by the marriage an interest in the wife's lands which was subject to execution for his debts; unless she held it by a title expressly exempting it from his liabilities, or had scheduled it as her separate property as provided in the married woman's law in *Gould's Digest*, or *sec.* 4201 *Gantt's Digest.*

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

McCain & Crawford, for appellants.

At common law, the husband was entitled during coverture to the possession, rents, &c., of wife's land. This was a *vested* right, 2 *Black. Com.*, 433; 2 *Kent Com.*, *Lecture XXVIII.*, **p.* 130; *Butler & Hargrave's note No.* 280 *to Coke on Littleton*, *sec.* 594, *&c.*, subject to be conveyed without wife joining, and since by Statute, subject to execution. *Freeman on Ex.*, *sec.* 186 and cases cited; 20 *Mo.*, 269; 23 *Ib.* 112; 2 *Biney*, 91; 12 *Ind.*, 615; 25 *Ala.*, 152; 15 *Peck. Mass.*, 29; 12 *N. Y.*, 208; 2 *Kent Com.*, *sec.* 28, *p.*110, *8th Ed.*, *marg. p.* 131; *Harrison* v. *Lamar*, 33 *Ark.*; *Cooley Con. Lim.*, 829 *marg. p.* 360.

This has not been changed by *Sec.*6, *Art.* 12. *Const.* 1868, which is not self-executing, but requires the passage of a registration law. No such law passed until April 28, 1873, after McCoy's rights had become vested, which the Constitution of 1874 could not divest.

Mrs. McCoy never registered or scheduled the land, and the "estate during coverture" is subject to our debt, not being held by her by any deed or will creating a separate estate. See *Berlin* v. *Cantrell*, 33 *Ark.* 611; *Howell* v. *Howell*, 19 *Ark.* 344; *Beeman and wife* v. *Cowser*, 22 *Ark.* 432.

Martin & Martin, for appellee.

As to the husband's right, *jure mariti*, see *Black. Com.*, *Book* 2, *p.* 126. It was subject to voluntary and involuntary transfer. *Freeman on Cot. and Part.*, *sec.* 73–4: 56 *Penn, St.*, 289; 19 *Wis.*, 362; 12 *Ohio*, 79; 12 *N. H.*, 396; 25 *Ala.*, 152. This right has been radically changed by legislation. See *Gould's Digest*, *p.* 765, *sec.* 1; *p.* 766, *sec.* 7; *Sanders* v. *Sanders*, 20 *Ark.*, 610; *Act Dec.* 31, 1860, *Ch.* 111, *Gould's Digest Laws* 1860, *p.* 84.

At the time of appellee's marriage, she held title under Constitution of 1868. See *Art. XII., sec.* 6. The first clause of this section vests the title in her exclusively and absolutely "so long as she may choose," but makes no provision for manifesting that choice, save by intervention of the Legislature. See *Act April* 28, 1873; *Gantt's Digest, sec.* 4193 *and* 4201. The terms *registered* in the Constitution of 1868 and *recorded* in act 1873 were only intended to compel such "record evidence" as was contemplated by act 1860.

Con. Ark., 1874 *Art.* 9, *sec.* 7 did away with necessity of scheduling real property by a married woman, and by implication repealed all existing laws on the subject matter. 10 *Ark.* 590; 31 *Ark.*, 19.

The proper construction of the provisions of the Constitutions of 1868, 1874, and acts of the Legislature is, that they abolished the husband's rights by virtue of the marriage, leaving only courtesy *consummate*, on death of wife. Hence McCoy, at the institution of this suit, had not, nor has he now, any interest in the land, subject to execution. 54 *N. Y.* 280; 1 *C. E. Green*, 97; 2 *Vroom*, 244; 7 *Jones, N. C.*, 161; 51 *Ills.*, 226; 2 *Mich.*, 93.

English, C. J. Bill by Mrs. Sallie E. McCoy against John M. Clayton, sheriff, and Tiller & Taylor, execution creditors of her husband, to enjoin the sale of land claimed by her as separate property.

The material facts in the case as shown by the bill, answer, and an agreement made by the parties on the hearing, are in substance:

That Mrs. McCoy inherited the land in question from her father, Hiram Riggins, who died intestate in 1860, possessed of the land, leaving her his sole heir; and she was in posses-

sion of the land after his death down to the time it was levied on by Sheriff Clayton under an execution in favor of Tiller & Taylor against her husband.

She intermarried with H. A. McCoy in June, 1872, by whom she had a child born alive in May, 1875, which died shortly after its birth.

The land was never scheduled as her separate property. Her husband had never assumed control or management of it, except as her agent, and as such had rented it to others from year to year.

On the first of January, 1875, her husband, H. A. McCoy, executed a note to Tiller & Taylor for $150.00, bearing ten per cent. interest, and due in the following January.

On April 7, 1876, they recovered a judgment against him on the note before a Justice of the Peace, an execution was issued thereon, and returned *nulla bona*. On the nineteenth of October, 1879, a transcript of the judgment, &c., was filed in the office of the clerk of the Circuit court of Jefferson county, entered in the judgment docket, and an execution issued thereon, which Sheriff Clayton levied on the interest of the execution debtor in the land in question, and advertised it for sale.

The bill was filed by Mrs. McCoy to enjoin the sale, and she alleged that other creditors of her husband would follow the example of Tiller & Taylor, and subject her to a multiplicity of suits, &c.

A temporary injunction was awarded on the filing of the bill, which, on the hearing, was made perpetual by final decree, from which defendants appealed.

1. HUSBAND AND WIFE: His rights in her land before Constitution of 1874.

At common law the husband, by marriage, acquired the right to the possession, and rents and profits of his wife's land during coverture, which was a free-hold estate, and which he could sell or lease without her consent.

So he became tenant by courtesy, and entitled to an estate for his life, if there was issue born alive of the marriage, and he survived the wife.

The estate of the husband in the wife's land, was subject to execution. *Freeman on Executions, sec.* 186; *Gantt's Dig., sec.* 2630.

The marriage between appellee and the execution debtor occurred in June, 1872, when the constitution of 1868 was in force. By section six, Article XII of that constitution: "The real and personal property of any female in this State, acquired either before or after marriage, whether by gift, grant, inheritance, devise, or otherwise, shall, so long as she may choose, be and remain the separate estate and property of such female, and may be devised or bequeathed by her the same as if she were a *feme sole*. Laws shall be passed providing for the registration of the wife's separate property, *and when so registered*, and so long as it is not entrusted to the management or control of her husband, otherwise than as an agent, *it shall not be liable for any of his debts, engagements, or obligations.*"

No scheduling act was passed under this section of the constitution, until the act of twenty-eighth April, 1873, was passed. *Gantt's Dig., secs.* 4193, 4201.

But by sec. 16, Art. XV of the constitution of 1868, laws then in force, not in conflict with its provisions, were continued in force until otherwise provided by the Legislature, &c.

From the adoption of the constitution of 1868, until the passage of the scheduling act of twenty-eighth April, 1873, chap. III, Gould's Digest, title MARRIED WOMEN (except so much as relates to slaves) was in force. *Berlin* v. *Cantrell*, 33 *Ark.*, 618; *Humphries* v. *Harrison*, 30 *Ark.*, 85; *Hydrick* v. *Burke*, *Ib.*, 126.

By section 7, chap. III, Gould's Dig., a married woman

was required to schedule her property in the Recorder's office of the county where she resided, in order to protect it from her husband's debts; except (by sec. 8) the deed bequest, grant, decree or other transfer of property to her, expressly set forth that it was to be held by her exempt from the liabilities of her husband, &c. *Humphries* v. *Harrison, sup.; Howell* v. *Howell, ad.*, 19 *Ark.*, 344; *Beeman and wife* v. *Cowser, et al.*, 22 Ark., 432.

Appellee did not schedule her land as required by the act in *Gould's Digest*; and she held it by inheritance, and not by any conveyance, or bequest, &c., showing that it was to be exempt from liabilities of her husband.

Nor did she cause the land to be recorded in her name as required by the act of twenty-eighth April, 1873. *Gantt's Dig., sec.* 4201.

The constitution of 1874, was adopted after the marriage, and after the husband had acquired thereby a vested estate in the wife's land. See *Ward* v. *Estate of Ward*, 36 *Ark.*, 718; *Roberts & wife* v. *Wilcoxen & Rose*, *Ib.*, 355, as to estates acquired by married women since the adoption of present constitution.

The decree must be reversed and the bill dismissed.

STATE, USE &C., V. WATSON.

1. CLERK CIRCUIT COURT: *Liability of himself and sureties for money in his custody.*

When money in the control of the Circuit Court, is, by its order, placed in the custody of the clerk, he holds it in his official capacity and may be punished for contempt for failing to pay it over as ordered by the court, and deprived of his office for malfeasance; and he and his sureties will be liable for it on his official bond to the party entitled to it.

APPEAL from *Jackson* Circuit Court.
Hon. R. H. POWELL, Circuit Judge.

Coody for appellant:

The condition of the bond was, "That he would *well and truly perform the duties of his office*, and *pay over* to the proper officer or person *all moneys* that may come to his hands *by virtue of his office.*" *Gantt's Dig.*, sec. 1,001.

McCanany received this money *by virtue of his office* as clerk and master, and appellee is clearly liable. See *Gantt's Dig.*, *sec.* 4,814; *Ib.*, *sec.* 1,018; *Ib.*, 997; 76 *N. C.*, 78; 63 *N. C.*, 508; 75 *N. C.*, 505; 9 *Yerger*, 102; 3 *Caldwell*, 244; 11 *Kansas*, 378; 2 *Metcalf*, (*Ky.*). 91-2-5; 34 *Ind.*, 105; 2 *Bailey*, (*S. C.*) 28.

J. W. Butler and U. M. Rose for appellee:

McCanany received the money by virtue of the special order of the court, and not *by virtue of his office*, and appellee not liable. Cites *Gantt's Dig.*, *secs.* 4814–15–16–17–18–19; *Hardin's Ex.* v. *Garrico*, 3 *Met.*, (*Ky.*) 289; 9 *Yerger*, 102.

STATEMENT.

ENGLISH, C. J. On the twenty-fifth of February, 1871, Michael McCanany was appointed and commissioned by the Governor county clerk of Jackson county.

On the fourth of March, 1871, he executed a bond to the State in the penal sum of $3,000, with Elbert C. Watson, and others, sureties, conditioned that he would "well and truly perform the duties of said office, and pay over to the proper officers or persons all moneys that may come into his hands by virtue of his office," &c., &c.

On the eleventh day of May, 1872, in a suit for partition pending in the Circuit Court of Jackson county, wherein John Billings and William Billings, minors, by their next friend, R. R. Kellogg, were *ex parte* plaintiffs, a special commissioner who had been appointed at a previous term of the court to make sale of a tract of land, reported that he had made the sale as ordered, and the land sold for $763,62, and the court confirmed the sale, directed a deed to be made to the purchaser, and after allowing certain claims against the fund, concluded the order as follows:

"And it further appearing to the court that there is no regular and qualified guardian for said minors, and that they are non-residents of this county, it is ordered that the remainder of said purchase money be paid into this court, and a receipt therefor given to said commissioner by Michael McCanany, clerk of this court, and the said money be safely kept by said clerk until such time as a duly qualified guardian be appointed for said minors, and that upon the appointment of such guardian, and a demand therefor being made by him, the said clerk shall deliver the money to him, and take sufficient voucher therefor."

The present action was brought in the name of the State, for the use of John and William Billings, upon the bond of Michael McCanany, as such clerk, against Elbert L. Watson, one of the sureties.

For breach of the condition of the bond, the complaint set out the above order of the court made in the partition suit, and alleges that thereunder Michael McCanany, as such clerk, received of the commissioner $646.19.

That by order of the same court made fifteenth day of September, 1873, it appearing to the court that Allen Dills had been duly appointed guardian of said minors, said McCanany, as such clerk, was directed to pay over to him said sum of money, which he failed and refused to do.

The court sustained a demurrer to the complaint, interposed by defendant, on the ground that it did not state facts sufficient to constitute a cause of action; and plaintiff resting, defendant was discharged by final judgment, and plaintiff appealed.

OPINION.

1. CLERK CIRCUIT COURT: Liability of himself and sureties for money in his custody.

By virtue of his office as county clerk, and under the same bond, McCanany was clerk of the circuit court, and master and commissioner in chancery. *Gantt's Dig., chap.* 36.

The money brought by the sale in the partition suit, and belonging to the two minors, was placed, by the order of the court, in his custody as clerk; he unquestionably held it in his official capacity, and not as an individual, and might have been punished for contempt for failing to pay it over as ordered by the court, and deprived of his office for malfeasance.

Was there a liability upon his bond as clerk for failure to pay over the money? His Honor, the circuit judge, held there was not.

If the clerk had been ordered to sell the land as commissioner in chancery, he and his sureties on his bond as clerk, would have been responsible for the money. *State ex rel. Cox* v. *Blair*, 76 *N. C.*, 78; *State ex rel. McNeill*, 63 *Ib.*, 508.

The special commissioner who made the sale was not a bonded officer, hence the court directed him to pay the money into court, and ordered the clerk, who was a bonded officer, to keep it in his official custody until a guardian should be appointed for the minors, and after the guardian was appointed, the court ordered the clerk to pay the money over to him, which he failed to do.

When the money was brought into court by the commissioner, the court might have ordered the clerk to deposit it

in a bank for safe keeping, if there had been one in Jackson county or an adjoining county. *Gantt's Dig.*, 4818.

Had such order been made, and had the clerk, instead of obeying it, put the money in his pocket, and converted it to his own use, no doubt he and his sureties would have been liable on his bond for it. So if he had put the money in bank, and the court had ordered him to check for it, and pay it over to the guardian of the minors, and he had drawn it, and then instead of paying it over as directed, converted it to his own use, he and his sureties would have been liable on his bond for it.

The court of chancery has power to appoint a receiver, and require him to take an oath, and give a bond, in the cases specified in the statute. *Gantt's Dig.*, 4809–13. But this case was not within the letter of the statute. No doubt the court, in the exercise of its general chancery powers, might have appointed a receiver, and required him to take an oath, and give a bond, and ordered the money into his custody, until the guardian should be appointed. But the court deemed it proper to order the money into the custody of its own sworn and bonded clerk, and if the order was not literally within the provisions of section 4814, *Gantt's Dig.*, it was within the general powers of the court.

In some of its features, but not in all of them, this case is like that of *Hardin's exrs.* v. *Carrico*, 3 *Metcalf*, (*Ky.*) 261. In that case the condition of the bond of the clerk was, that he would "well, truly and faithfully discharge the duties of clerk &c., and pay over and account for all taxes, fines and other *public moneys* which might come into his hands as clerk." In a suit pending in court, an order was made reciting that one of the parties to the suit deposited money in court, which was to be held subject to the future order of the court. Afterwards a receiver was ap-

pointed in the suit, and he was directed to collect the money which had been deposited in the hands of the clerk, who, in the meantime, had died. The court held that a surety of the clerk was not liable for the money; that it was not "*public moneys*," and hence not within the condition of the bond. The court also held that there was no statute authorizing the clerk to be made the custodian of the money paid into the court by a party to a suit, and that it should have been placed in the hands of a receiver.

In this case the condition of the bond was to "pay over to the proper officers or persons all moneys that may come into his hands by virtue of his office," &c.

Here the money was not paid into court by a party to a suit, but the court ordered the commissioner to pay it into court, and placed it in the official custody of the clerk, to be safely kept, and paid out as ordered by the court.

The case of *Waters* v. *Carroll, Governor*, 9 *Yerger*, 102, favors the decision of the court below, but in the later case of *Craig, et al.*, v. *The Governor*, 3 *Caldwell*, 244, it is shown that money may be placed by order of court in custody of the clerk and master, which he cannot pay out without an order of court, and for which he and his sureties are responsible on his bond.

It often happens in the progress of suits that money is brought into court, and placed in the custody of the clerk until disposed of by order of the court, and it would be unsafe to hold that the clerk and sureties are not responsible on his official bond for such moneys.

Under the English chancery system, until the passage of the act of 12 George I, providing for an Accountant General, the master had custody of money &c., paid into court, and delivered the money, &c., into bank, and drew it out, &c., under orders of court. 2 *Daniel, Ch. Pl. & Prac.*, *p.* 1,771.

McCanany was both clerk and master.

The court below erred in sustaining the demurrer to the complaint.

Reversed, and remanded for further proceedings.

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HIBBARD V. KIRBY.

1. JUSTICES OF THE PEACE: *Jurisdiction; Amount.*

An action upon an account for less than three hundred dollars is within the jusrisdiction of a justice of the peace.

2. PRACTICE: *Defects in service or summons waived by answer.*

Any defect in the summons or service is waived by filing an answer to the merits.

3. CONTINUANCE: *Absent witness; Practice.*

A motion for continuance for the absence of a witness should be overruled, if the adverse party will admit that the witness, if present, would testify as stated in the motion.

4. BILL OF EXCEPTIONS: *The evidence.*

A bill of exceptions should state expressly that it contains all the service, but will be sufficient if it shows with reasonable certainty by its expressions that no other evidence was introduced than that set out in it.

5. CONTRACTS FOR SERVICE: *Entire; Action on.*

When a contract for service is for a particular time, and payment is to be made either expressly or by implication of law, at the end of the period, and the servant leaves the service of his master improperly, without a sufficient cause, and without his consent, before the expiration of that time, he can recover no compensation for his services, either on the contract or on a *quantum meruit.*

6. JUSTICE OF THE PEACE: *Practice; Variance.*

In an action before a justice of the peace on an open account for wages, (no formal complaint being filed) the plaintiff may prove a verbal contract for stipulated wages if any was made, or if not, the value of the services rendered.

APPEAL from *Montgomery* Circuit Court.

HON. A. B. STUART, Circuit Judge.

R. G. Davies for appellant:

1 The verdict was contrary to the evidence and the first instruction, and was such as to shock the sense of justice. 1 *Parsons Cont.*, 520, *et seq.*, *notes* (*j*) (*l*) *and* (*n*), *p.* 524, (*o*), 522 (*l*); *Temple* v. *McLachlan*, 2 *Bos. & Pul.*, *N. R.*, 136; *Farnsworth* v. *Garrard*, 1 *Campbell*, 38; *Withers* v. *Green*, 9 *How*, 227–8; 11 *How*, 475; 6 *N. H.*, 481; *Thas* v. *Williams*, 1 *Ad. and El.*, 28; *E. C. L.*, 258; *Bac. Ab.*, *master and servant* (*N.*); *Chitty Cont.*, 577, *n.* (1); *Ib.*, 579, *n.* (1).

2. There was no final judgment before the justice.

3. The summons improperly served. *Gantt's Dig.*, *secs.* 3735, 4082, 5648.

4. The second instruction for appellant should have been given. 27 *Ark.*, 564; 31 *Ark.*, 486. Also the 5*th*, 24*th Wend.*, 63; 45 *N. Y.*, 165; 2 *Pick*, 274. Also the 7*th*, 13*th John.*, (*N. Y.*) 94; 9 *N. Y.*, 96; 18 *Wend.*, 187; 17 *N. Y.*, 185; 20 *N. Y.*, 429, 487. See also, 12 *Johnson*, 165; 10 *Ib.*, 203; 8 *Cow.*, 63; 4 *Denio*, 121; 20 *N. Y.*, 197.

W. F. Hill for appellee.

1. This court will not disturb a verdict on a mere conflict of evidence.

2. The bill of exceptions does not purport to contain all the evidence, and this court will presume that there was evidence to support the verdict. *Moss* v. *State*, 17 *Ark.*, 331.

3. The court properly instructed the jury, and did not err in refusing the instructions asked.

U. M. Rose also for appellee.

1. Nothing in bill of exceptions to show it contained all

the evidence, and this court will presume there was evidence to support verdict and justify instructions. *Moss* v. *State*, *sup.*; *Taylor* v. *Spears*, 3 *Eng.*, 430.

2. The instructions are correct.

3. The continuance properly refused. *Gantt's Dig.*, *sec.* 4631.

English, C. J. On the eleventh day November, 1879, Wellington Kirby sued Richmond Hibbard on an open account before a justice of the peace of Silver City, Montgomery county.

The claim was for services rendered, and labor performed by plaintiff, for and in the employment of defendant from June 25th, until the eighth day of October, 1879, sixteen weeks at six days to the week, ninety-six days, at $5 per day,		$480.00
Credits, by cash at various times, paid in Chicago	$100.00	
By cash at various times	104.90	—204.90
Balance claimed		$275.10

Upon a summons issued by the justice, the constable returned service upon the defendant, and that he had seized into his custody, as property on which plaintiff claimed a lien for his labor, an engine and boiler, a rotary pump and belting, a furnace and piping, a building, rotary fan and belting, an iron tank, and a smelting furnace and implements.

On the return day, the defendant filed a motion to dismiss the cause for want of jurisdiction, which the justice overruled.

Defendant then filed an answer, in which he denied that

he was indebted to plaintiff in any sum whatever, and on the contrary alleged that the plaintiff owed him $300.

On hearing the evidence, the justice gave judgment in favor of plaintiff for $275, and defendant appealed to the Circuit Court.

In the Circuit Court C. D. & W. L. Bancroft filed a motion in which they claimed to be the owners of the property seized by the constable, and asked to be made defendants, which the court overruled.

There was a trial by jury, verdict and judgment in favor of plaintiff for $275, motion for a new trial overruled, bill of exceptions, and appeal by defendant.

I. It is a matter of no consequence whether the court erred in refusing to permit C. D. & W. L. Bancroft to be made defendants. There was a personal judgment against appellant only, and no lien fixed upon the property seized by the constable, and no condemnation of it to satisfy the judgment.

1. JUSTICE OF THE PEACE: Jurisdiction. Amount.

II. Before the trial, the motion filed before the justice to dismiss the cause for want of jurisdiction, was taken up, argued and overruled by the court.

The sum claimed in the account filed was less than $300, and within the jurisdiction of the justice. *Sec.* 40, *Art.* 7, *Constitution.*

2. PRACTICE: Defects in service, etc.

Any defect in the summons, or service, was waived by filing an answer to the merits.

It is not material whether the justice had jurisdiction to enforce a laborer's lien on the property seized by the constable or not. There was no judgment for a lien in the Circuit Court.

3. CONTINUANCE: Absent witness.

III. It was made ground of the motion for a new trial, that the court overruled a motion for a continuance filed by appellant.

In the motion appellant stated that he could prove by W. L. Bancroft, an absent witness, that appellee told him that appellant had only contracted to give appellee seventy-five dollars per month, and not five dollars per day as alleged.

Appellee admitted that if the absent witness were present at the trial, he would testify to the statement contained in the motion, whereupon the court overruled the motion.

This was in accordance with the act of March 5th, 1879, (*Acts of* 1879, *p.* 26), amending *Sec.* 4644, *Gantt's Dig.*

4. BILL OF EXCEPTIONS: The evidence.

IV. It was made grounds of the motion for a new trial, that the verdict was contrary to the evidence, and that the court erred in refusing certain instructions moved for appellant.

Counsel for appellee submit that the bill of exceptions does not purport to contain all of the evidence introduced on the trial, and that therefore this court should presume that there was evidence to support the verdict, and justify the instructions of the court.

It is true that the bill of exceptions does not follow the proper practice by expressly stating that it contains all the evidence introduced, or facts proved on the trial, but it appears with reasonable certainty, from its expressions, that no other evidence was introduced than that set out by it.

It first sets out the evidence introduced by appellee (plaintiff below) and then states: "Plaintiff here rested."

Then the evidence introduced by appellant (defendant below) is set out, and then follows: "Defendant here rested. The court thereupon gave the following instructions for plaintiff," &c.

This statement reasonably excludes the presumption that appellee introduced any evidence in rebuttal after appellant closed. *Leggett* v. *Grimmett*, 36 *Ark.*, 496.

V. The substance of the evidence introduced on the trial, as stated in the bill of exceptions, follows:

Plaintiff Kirby (appellee here) testified that on or about the twenty-fifth of June, 1879, defendant Hibbard (appellant here) engaged him in Chicago, Illinois, to select, ship, erect and run a certain smelting works at Richmond, Montgomery county, Ark., defendant's place of residence. That defendant agreed to give him five dollars per day for his services in the matter. That he was at the time engaged in the carpenter's business, his trade, but had been engaged in the smelting works of the "Horn Silver Mining Company" for seven months, and was getting $1.50 per day for his services, and boarding himself. He told defendant he understood the business of erecting a smelter, and running it, for the extraction of silver ores. That he left Chicago about the sixteenth of July, 1879, and defendant paid him $100.00 as an advance payment on his wages. That he proceeded in the erection of the works, but did not complete them. Defendant paid him at different times $104.90 more, making $204.90. He remained in the employment of defendant until the eighth day of October, 1879, when he left, without giving defendant any previous notice. He simply went in, and told him he was going to Chicago. Defendant asked him, what for? He replied, to buy a smelter for one Blish. Defendant said, all right. He left, and had continued in the employment of said Blish ever since. Erected a smelter for him, and it was started, but it failed to smelt ore for want of enough ore.

Never told W. L. Bancroft, at any time, that his engagement with defendant was for $75 per month.

D. C. Baldwin testified that he had been mining for the previous 20 years. Never smelted any ores, but had seen them smelted. The works erected by plaintiff seemed to be

erected all right. Thought that such services as plaintiff performed were worth from three to five dollars per day.

"Plaintiff here rested."

Defendant testified that being desirous of purchasing a stamp mill for the reducing of silver ore, he went to Chicago in June, 1879, and met plaintiff, who stated that he understood the erection and operation of a smelter for said ore. Agreed to give him $5 per day to purchase machinery for him, and he was so engaged for three days, for which he paid defendant $15.00. And agreed to give him $75.00 per month, and board thereafter, to erect, and put in successful operation the works at Richmond, Montgomery county, Ark. Paid plaintiff $100.00 which was a settlement for purchasing the machinery, and one month's wages. Plaintiff came to Richmond, and partially erected the works. Before he had completed them, without notifying defendant, he came in one morning, and said: "I am going to Chicago to-morrow to buy a smelter for Mr. Blish." Defendant told him "all right," which he did. That was about all that was said. Defendant did not discharge him. Plaintiff never returned to his employ—was still working for Blish. Had no confidence in plaintiff's ability to perform his contract owing to the fact that he made assays of ores and pretended to tell how many dollars of silver they would go to the ton, without weighing the silver buttons. Did not discharge plaintiff; he discharged himself. Paid him money whenever he called for it.

Defendant then read in evidence his statement in the motion for continuance that W. L. Bancroft would testify, if present, that plaintiff told him that defendant only agreed to give plaintiff $75.00 per month.

By way of rebuttal, plaintiff testified, that he never had any conversation with W. L. Bancroft, to the effect

that he was to receive $75.00 per month instead of $5.00 per day.

John Morse, for defense, testified that he was a machinist, and placed the engine of the smelting works at Richmond in proper position, and put it in running order. That plaintiff only put it in the inside of the enclosure.

"Defendant here rested. The court thereupon gave the following instructions," &c., &c.

Before considering the instructions, it may be remarked that the evidence was conflicting, and it was the province of the jury to weigh it, and determine whether the preponderance was for appellee or appellant.

Appellee's version of the contract was that he was to get $5 per day for his services. Appellant testified that he agreed to give him $5 per day while purchasing machinery, and thereafter $75 per month, and his board, for his services. He did not prove that he boarded him, or paid for his board while in his employment. They did not differ as to the time when, nor as to the circumstances under which the employment ceased.

If the court properly instructed the jury, the verdict should not be disturbed on the ground that it was contrary to the evidence.

VI. Appellee moved three instructions, the first of which the court gave, and refused the other two. That given, and to which no objection appears to have been made by appellant, was: Instructions.

"That if the jury find from the evidence that defendant agreed to pay the plaintiff the sum of five dollars per day for his services, and they also find that the contract was by mutual agreement dissolved on the eighth day of October, 1879, they will find for plaintiff."

VII. Appellant moved the following instructions:

1. "The court instructs the jury that when a party con-

tracts to serve until a certain result is accomplished, if he quits without just cause, he is not entitled to recover anything for his contract." [*Given.*]

2. "If the jury believe from the evidence that plaintiff is a mechanic, builder, or artisan, and not an ordinary laborer, they will find for the defendant." [*Refused.*]

3. "A contract entire in point of time must be completely performed before any right to compensation accrues." [*Refused.*]

4. "When a person undertakes to do work, which requires skill in the performance of his contract, he will be held to strict performance thereof, and should he fail, he is not entitled to compensation." [*Given.*]

5. "The plaintiff is suing upon his contract, and cannot recover upon a *quantum meruit*; that is, unless he has complied with his contract, he is not entitled to recover what the work is reasonably worth." [*Refused.*]

6. "If a person holds himself out to the world, as a workman, that very representation raises a covenant that he will do his work in a workmanlike manner." [*Given.*]

7. "When the time of payment is not expressed, the implied agreement is, that it shall be when the service is performed." [*Refused.*]

The court gave the 1st, 4th and 6th, and refused the 2nd, 3d, 5th and 7th of these instructions.

(*a*). The second instruction asked for by appellant, and refused by the court, manifestly related to the laborer's lien feature of the suit, as to which there was no verdict or judgment; and as an abstract proposition, whether law or not, is of no consequence in this suit. The proper steps to fix such a lien, if there was a right to any, do not appear to have been taken, and doubtless the court treated the suit as a personal action for wages.

(*b.*) It is not submitted in the brief of counsel for appellant that the third instruction should have been given. It asserts as a legal proposition that, "a contract entire in point of time must be completely performed before any right to compensation accrues."

5. CONTRACTS FOR SERVICE: Entire, action on.

The rule seems to be that if the contract of the servant to labor, be for a specified period of time, and payment is to be made, either expressly or by implication of law, at the end of the period, and the servant leaves the service of his master improperly, without a sufficient cause, and without his consent, before the expiration of that time, he can recover no compensation for his services, either on the contract or on a *quantum meruit*. 2 *Chitty on contracts*, (11 *American Ed.*) 844 *and notes*. See also, *Wright* v. *Morris*, *as ad.*, 15 *Ark.*, 444; *Walworth* v. *Finnegan*, 33 *Ark.*. 751; *Fain* v. *Godwin*, 35 *Ark.*, 110.

In this case appellant did not swear that appellee contracted to serve him for a specified period of time to be paid at the end of the period. His version of the contract was that he employed appellee to make purchases for him at $5 per day, and after that to serve him at $75 per month and his board, until the smelter was erected and put in successful operation. That he paid him for the days he was engaged in purchasing machinery, and a month's wages, and paid him money whenever he called for it. Admits that he did not object to his leaving his service; was not satisfied with his skill as a smelter of silver ores.

(*c.*) The fifth instruction assumed that appellee was suing on a contract, and asserted as a legal proposition that he could not recover on a *quantum meruit*.

6. JUSTICE OF THE PEACE: Practice; variance.

No complaint was filed before the justice, and none was required.

The account filed was for 96 days' labor at $5 per day, with credits deducted.

Appellee swore that he was employed at $5 per day.

Witness Baldwin testified, without objection from appellant, that the services performed by appellee were worth from three to five dollars per day. This was the only evidence on a *quantum meruit*.

No doubt in a suit before a justice of the peace on an open account for wages, no formal complaint being required or filed, plaintiff may prove a verbal contract for stipulated wages if any was made, or if not, the value of the services rendered.

(*d.*) It may be true as an abstract proposition, and as asserted in the seventh instruction, that when the time of payment for labor is not expressed, there is an implied agreement that payment is to be made when the service is performed.

The remarks made above in relation to the third instruction apply to the seventh.

(*e.*) Upon the whole, the instruction given for appellee, and such as were given for appellant, fairly submitted the case to the jury.

Affirmed.

St. L., I. M. & S. Railway Co. v. Hart.

1. Action: *For use and occupation is ex-contractu. Exemption.*

The statutory action for use and occupation is of the nature of assumpsit at common law on an implied promise, and not an action *ex-delicto;* and is subject to the exemption of the Constitution as a debt by contract.

The exemption clause of the Constitution is highly remedial, and should be liberally construed.

ERROR to *Nevada* Circuit Court.

Hon. J. K. Young, Circuit Judge.

Smoote & McRae, for plaintiff:

The occupation was a tort, a mere trespass, and not a "debt by contract," within the meaning of *Art.* 9, *Sec.* 1, *Const.* 1874. *Thomp. on Homesteads*, *sec.* 381; *State* v. *Melogue*, 9 *Ind.*, 196; *Crane* v. *Waggoner*, 27 *Ind.*, 52, and 83 *Ib.*, 85; 1 *Parsons*, 6 *Ed.*, 475; *Bliss on Code Pleaa.*, *secs.* 128 and 152 to 154; *Gantt's Dig.*, 4023.

C. C. Hamby, for defendant:

1. The action for use and occupation is one of *assumpsit* upon an express or implied contract, and not on the case *ex-delicto.* 7 *Ark.*, 305; 25 *Ib.*, 134. It is based on the relation of landlord and tenant, and will not lie where there is a wrongful taking, retention or holding. 2 *Nott & McCord*, *S. C.*, 156; 4 *Ohio*, 205; 6 *Ib.*, 371; *Acts* 1874–5. *p.* 196.

2. *Debt by contract* in *Sec.* 1, *Art.* 9, *Const.* 1874, includes every pure contract, express, implied or special. Exemption laws being of a humane nature, intended to aid one in distress, are liberally construed. *Thomp. on Homesteads*, *sec.* 7, and cases cited.

EAKIN, J. The appellant company had recovered judgment against Hart, in the Circuit Court, for use and occupation of land, and had caused an execution to issue. Defendant filed a schedule of personal property, as exempt; and obtained a supersedeas. This is a motion to quash the supersedeas. It was refused, and the company appealed. It takes the ground that the provisions of the Constitution (*Art. IX.*, *Sec. 1*), apply only to "debts by contract, and that the statutory action, for use and occupation, supposes a tort." That there is no contract in fact, but a trespass, for which the Statute has given a new remedy.

The action for use and occupation, given by *section* 4023 *of Gantt's Digest*, to the owner of lands against another who has held and occupied them, is, in all respects, of the nature of *assumpsit* at common law on an implied promise, and is an action *ex-contractu*, and not *ex-delicto*. There are remedies in tort also, against trespassers, which an owner of land might elect to pursue; but if he adopts this, he adopts it with its characteristics, and waives the tort.

It would be reasoning too nicely to confine the meaning of the Constitution to contracts actually made, or existing in the intention of the parties. The exemption clause is a highly remedial one, and to be liberally construed. The supersedeas should not have been quashed.

Affirm the judgment.

VAUGHAN ET AL V. KENNAN.

1. BILLS AND NOTES: *Construction of; Interest; Rate and computation of; Application of credits.*

A promissory note payable at a future fixed day, "with ten per cent. per annum from date," and stipulating that "if the interest be not paid annually, to become principal and bear the same rate of interest," will continue to bear interest at ten per cent. after maturity; and the unpaid interest due at maturity of the note, and each successive annual installment of interest from that date, will bear interest at the same rate (ten per cent.); not, however, so as to compound the interest on the amounts in default. They will each bear simple interest only, at the contractual rate. It is only the interest on the principal which will become principal. Credits will be applied, 1st, to the deferred amounts of annual interest, with the secondary interest accrued thereon, and the remainder, if any, to the interest accrued on the principal since the last annual period, and then (if any remains) to the principal itself. It will be only the interest on the balance of principal from that time to the annual period which will be next payable, or be subject to interest, and so on.

APPEAL from *Madison* Circuit Court.
Hon. J. H. BERRY, Circuit Judge.

J. M. Pittman, for appellant.

1. From the first of September, 1874, the note only bore six per cent., and the judgment should only have borne that rate. *Newton* v. *Kennerly*, 31 *Ark.*, 626; *Pettigrew* v. *Summers*, 32 *Ib.*, 571; *Ragan* v. *Bell*, — *Ark.*, *MSS.*

2. A note payable at a future day, with interest greater or less than six per cent. in which nothing is said about the rate after the maturity, draws the stipulated rate only till maturity, and afterwards six per cent. *Eaton* v. *Boisissault*, 5 *Maine Rep.*, 270; *Ludwick* v. *Huntsinger*, 5 *Watts & Sug.*, 37; *Brewster* v. *Wakefield*, 22 *How.*, 118; *Burahisel* v. *Firman*, 22 *Wall.*, 170; *Cook* v. *Fowler*, *L. R.*, 7 *H. L.*, 17; *Hubbart* v. *Callahan*, 42 *Conn.*, 524; *Pierce* v. *Swanpoint Cemetery*, 10 *R. I.*, 227; *Burns* v. *Anderson*, *Ind.*, 1880; *Holden* v. *Freedmen's Saving Co.*, 8 *Wash. L. R.*, 6.

John Kennan, pro se.

It was clearly not contemplated by the parties that the principal should be paid when due, but only the interest, and the principal to continue to bear interest, together with the interest, if not paid annually, at ten per cent. till paid.

BILLS AND NOTES.

EAKIN, J. Kennan recovered judgment by default, in the Circuit Court, on the first day of April, 1881, against the appellants, on a joint promissory note for $875, dated February 5th, 1873, and payable on the first day of September, 1874, "with interest from date at the rate of ten per cent. per annum," in which it was stipulated that "if

interest be not paid annually, to become principal and bear the same rate of interest." There were credits upon the note as follows:

November 22, 1875	$242.50
October 14, 1879	500.00
October 7, 1880	354.19

The judgment was for $531.34.

Construction of.

Appellants contend that there is error upon the face of the record, inasmuch as the note from maturity, should have borne interest at the rate of six per cent. only.

This court has repeatedly decided that, in case of notes bearing contractual interest, when there is no agreement as to interest after maturity, they can only bear interest at the ordinary rate of six per cent. after due. It is a matter of intention to be gathered from the direct expressions, or plain import of the instrument.

In this case there is an express agreement at a certain time to do two things: 1st, to pay the sum of $875, and also another amount to be ascertained by calculating interest on that sum at ten per cent. per annum from the date of the note. Nothing is said, expressly, as to the interest after maturity, and if there were nothing else in it, there would be no question but that the subsequent interest could only be at the rate of six per cent. The doubt arises on what follows being the closing expression. That is, if interest be not paid *annually*, to *become principal*, and bear the *same* rate of interest. When are the annual installments to be due? Is it to be a year from the date of the note, and the successive anniversaries? or are the annual payments only to begin at the maturity of the note, and be continued on those annversaries during forbearance? and what is meant by the *same* rate of interest? Is it the same agreed upon before maturity, or the same the principal may be bearing

when the failure to pay the annual interest occurs? The questions are not easily answered.

Parties would not have been apt to express themselves in the language of the note if they had intended that any part of the interest should be payable before its maturity. It is unusual to speak of *annual* interest upon a note running less than nineteen months. There would only be one payment, and the whole interest would be payable before the end of another year. Besides, there is no obligation to pay anything before maturity, and nothing could be due to be converted into principal.

The most probable view of the intention of the parties, to be gathered from the language, is that forbearance was contemplated upon condition of paying interest when due, and annually thereafter; or else, if the debtor should retain the interest, he should be chargeable with the respective installments in the nature of new and additional loans, each to bear interest thereafter. In this view of the case the words *same interest*, doubtless refer to the contractual interest before expressed in the face of the note.

We think, therefore, that the note itself continued to bear interest at the rate of ten per cent. after maturity as before, and that the unpaid interest due at maturity became interest-bearing at the same rate, together with the successive annual installments of interest as the failure to pay them occurred on each anniversary of the maturity of the note; not, however, so as to compound the interest on the amounts in default, which should each bear simple interest alone at the contractual rate. It is only the interest on *the principal* which is to become principal. This is the course adopted by the court of North Carolina. *Bledso* v. *Nixon*, 69 *N. C.*, 89. Each unpaid sum of annual interest stands alone, as if a new note had been given for it, bearing like interest. The

Application of credits.

credits should be applied, first to the payment of the deferred amounts of annual interest, with the secondary interest thereon accrued, and the remainder, if any, should be applied to the interest accrued on the principal since the last annual period; and then, what may still be left, to the principal itself. It will be only the interest on the balance of principal from that time to the annual period which will be next payable, or be subject to interest, and so on.

That the parties adopted this view of the case becomes obvious by a careful consideration of the amount of the first payment, made on the twenty-second of November, 1875. The sum of $242.50 will cover within a few cents the interest due on the first of September, 1874, with interest on that to the day of payment, added to the next annual payment, which should have been made on the first of September, 1875, with interest on that also. The object of the payment was, doubtless, to take up all deferred interest, leaving the principal to run on interest for the next annual payment of $87.50 to be paid on the first of September, 1876. The almost exact coincidence of the sums paid, and the sums deferred cannot readily be otherwise accounted for.

Payments of the annual interest were not continued, and, by the fourteenth of October, 1879, they, with the interest on each, reached an aggregate sum exceeding $400. The payment of $500 at that date made some diminution of the principal, and the subsequent payment of October 7, 1880, reduced it very materially. Following the calculations, we find the result reached by the court below to be nearly if not quite correct. The appellant does not complain of any error in calculation, and the matter will not justify the cost of a reference upon the court's own motion, to correct any unimportant error. The principle adopted by the court was correct.

Affirm the judgment.

KURTZ v. KURTZ.

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1. DIVORCE. *Parties competent witnesses; Decree.*

Husband and wife are competent witnesses in divorce cases, but a decree should never be granted upon the uncorroborated testimony of the parties.

2. SAME *Personal indignities, what are.*

The ruling in *Rose* v. *Rose*, 9 *Ark.*, 507, that the personal indignities contemplated by the statute as grounds for divorce, include rudeness, vulgarity, unmerited reproach, haughtiness, contempt, contumely, studied neglect, intentional incivility, injury, manifest disdain, abusive language, malignant ridicule, and every other plain manifestation of settled hate, alienation and estrangement, is the settled construction of the Statute; but it goes to the very verge of safety, and should be cautiously applied, and pressed no further.

3. SAME. *Alimony; Lien.*

Upon decreeing a divorce to a wife, alimony should be ordered only for the joint lives of the parties; and future payments should not be made a lien upon the husband's property.

4. SAME. *Alimony, subject to modification.*

Decrees for continuing alimony are always subject to the modification of the Court upon a change of circumstances, upon the application of either party.

APPEAL from *Conway* Circuit Court in Chancery.
Hon. W. D. JACOWAY, Circuit Judge.

Clark & Williams, for appellant:

1. The court erred in ordering that execution should issue for future alimony. *Gantt's Dig. secs.* 2203, 2205, and that future alimony be a lien. *Ib. secs.* 3605; 2202. *Wilson* v. *Wilson*, 2 *Dev. & Bat. N. C.*, 377.

2. The alimony is excessive and double attorneys fees not authorized. *Bishop Mar. & Div. secs.* 604–5, 611–12–13.

3. It was error to decree alimony for the life of the wife. *Ib.* 592–6–7; *Sockridge* v. *Sockridge*, 3 *Dana*, 28; *Gantt's Dig. sec.* 2205.

4. The maltreatment charged was only words and overwork; no indignities to the "*person*" shown. *Lewis* v. *Lewis*, 5 *Mo.*, 278; *Gantt's Dig. sec.* 2155, *clause* 5; *Hooper* v. *Hooper*, 19 *Mo.*, 355; *Rowes* v. *Rowes*, *Ib.* 321; *Rose* v. *Rose*, 4 *Eng.* 507, 516; *Sheel v. Sheel*, 2 *Sneed*, 716. The indignities must be habitual.

Ratcliffe & Fletcher, for appellee.

1. No proof of adultery except testimony of appellant, which is not corroborated. 31 *Ark.*, 684; 33 *Ark.*, 259; *Ib.* 207; 34 *Ib.*, 37.

2. The grounds set up in cross bill sufficient, and fully proven. 1 *Bish. Mar. & Div.* (4 *Ed.*) *sec.* 726 *and notes* 2 *and* 3 *et seq.; Ib. sec.* 826; *Coble* v. *Coble*, 2 *Jones, Eq.*, (*N. C.*) 392; *Gale* v. *Gale*, 2 *Robertson*, 421; *Nogus v. Nogus*, 7 *Tex.*, 538; *Honnett* v. *Honnett*, 33 *Ark.*, 156, 161; *Rose* v. *Rose*, 9 *Ark.*, 507.

3. Alimony properly decreed. 2 *Bish. Mar. & Div.* (4 *Ed.*) *sec.* 481; *Musselman* v. *Musselman*. 44, *Ind.*, 106; and not excessive. 2 *Bish. Mar. & Div.*, (4 *Ed.*) *secs.* 462–3–4 *to* 484 *and* 512; *Turner* v. *Turner*, 44 *Ala.*, 437. It was properly for life of wife. *Wait* v. *Wait*, 4 *Const.*, 95; *Whitsill* v. *Mills*, 6 *Ind.*, 229; 23 *Ind.*, 71; *Lewis* v. *Sleator*, 2 *Green* (*Iowa*), 604; *McCrany* v. *McCrany*, 5 *Clarke* (*Iowa*), 232; *Burdick* v. *Briggs*, 11 *Wis.*, 126; 2 *Bish. on Mar. & Div*, (4 *Ed.*) *sec.* 706; 2 *Scribner on Dower*, 507—522; *Stewart* v. *Stewart*, 43 *Ga.*, 294; *Rose* v. *Rose*, *Sup.*

4. The alimony properly decreed a lien upon land of Kurtz, *Hill* v. *Mitchell*, 5 *Ark.*, 608; 7 *Ohio Rep.* (1 *pt.*)

161; *Olin* v. *Hungerford*, 10 *Ohio*, 269–70; *Fishli* v. *Fishli*, 2 *Litt.*, (*Ky.*) 337; *Sheafe* v. *Sheafe*, 3 *N. H.*, 155; *Blankenship* v. *Blankenship*, 19 *Kan.*, 159; *Holmes* v. *Holmes*, 29 *N. J.*, *Eq.*, 9.

5. The allowance to attorneys reasonable. *Hecht* v. *Hecht*, 28 *Ark.*, 94–5.

EAKIN, J. The appellant, John Kurtz, sued his wife, Annie, for a divorce on the ground of adultery. She denied the charge in her answer, and on her part, filed a cross bill for a divorce, on the ground of cruel and inhuman treatment on his part in requiring of her overwork; and also charging circumstances of gross and repeated insult, and studied coldness and contempt; amounting as she contends to such indignities to her person as to render her condition intolerable. Upon the hearing the Chancellor dismissed his bill, and granted the divorce upon her prayer, with an order for a semi-annual sum to be paid her as alimony, with her counsel fees incurred in the suit. Kurtz appealed with a supersedeas. Upon the application of appellee, she has been allowed, by this court, a small amount for the payment of her attorneys here, and also a small monthly sum for maintenance, during the pendency of the appeal, to be credited in case of affirmance upon the alimony decreed below. There has been a subsequent application to this court, on the part of appellant, to modify its allowance of alimony pending the suit, which motion has been reserved until the determination of the cause upon its merits. It is now submitted upon the whole case.

No question of law is involved in this decision. It would serve no useful purpose to detail the evidence, or set forth its substance. It has been carefully considered by the court, and we concur with the Chancellor in thinking that

the charges of the complaint are not sustained. The testimony of the complainant himself, as to the adultery, is direct and positive, but we think is wholly without corroboration. If it were struck from the record and all else admitted there would be nothing which, upon a fair construction, would impeach or tarnish the general character, which, it is otherwise proved, the lady sustains as a virtuous woman.

For her the cause of divorce is not so clear as want of it on the side of her husband. There was no such cruelty as amounted to *saevitia* on his part—nothing directly endangering her person with bodily hurt. Her health was bad, and she undertook, and was, perhaps, driven by her husband's want of care and consideration, to undertake and perform more household and farm work than she ought to have endured. But on this point there was no such compulsion as, standing alone, could, with safety to society, be declared ground of divorce.

But the evidence does reveal a course of conduct on his part which we cannot doubt would render the life of any female, with average sensibilities, too intolerable for endurance. He was afflicted with a jealousy of his wife, which is proven, in part, to have been groundless; and which, in the absence of any proof to sustain his own testimony, we must suppose to have been wholly a delusion. Under its influence he became cross, morose, and insulting. His manner towards her was repeatedly and persistently unkind. He withdrew from her all confidence, watched her movements secretly, and openly charged her, in coarse and disgusting language, with the grossest immoralities with divers persons at different times, He did this not only in private, as a husband, believing it to be a fact, might and should do, to give opportunity for explanation, but did it in presence of others, and made it a matter of discussion with common laborers on the farm. He persisted in declaring to her physician,

against his positive assurances, that his wife had a loathsome disease, contracted from illicit intercourse. He persecuted her with charges of adultery when she would be suffering and unable to reply; until at last, goaded to desperation, as it seems, she left his bed and refused to live longer with him as his wife.

1 DIVORCE Parties competent witnesses, but no decree on their testimony alone.

It is to be remarked that a great deal of this depends, and must of necessity depend, upon her own testimony. The rules of evidence, as to parties, in divorce cases, render them competent to testify; but this court has heretofore announced that a divorce should never be granted upon the unsupported testimony of the parties alone. We think this rule has been well applied to the complaint of the husband. With regard to hers, it may be said, upon the other hand, that it *is* corroborated in many points, so far as facts of so private a nature between man and wife can be. We feel satisfied that so far as these insults and these indignites are concerned, her testimony is true.

2. ——: Personal indignities; what are.

Do they come within the statute which authorizes a divorce where either party "shall offer such indignities to the person of the other as shall render his or her condition intolerable?" The question in each case is always a difficult and dangerous one, where there is no proof of actual bodily harm. It will not do to say that the quarrels and contentions of married life amongst people who lack refinement, even when accompanied by the grossest insults, may be always accepted as ground of divorce. The great and predominant obligation of mutual forbearance and mutual forgiveness would soon sink from sight, and society would be delivered over to all the evils which civilized governments have anticipated in the loosenesss of the marriage tie. Those who assume those ties should do so gravely, and take each other not only "for better" but "for worse" also, if life be endurable in any tolerable shape. They should be driven

by necessity to conciliate each other rather than to aggravate dissensions with a hope of separation. Still there are limits of endurance which this court has recognized in the construction of this clause, and which fall short of *saevitia* in its ecclesiastical sense. The meaning of the "indignities to the person," too, has been extended beyond insulting gesture or touch.

A leading case on this question is that of *Rose* v. *Rose*, 9 *Ark.*, 507. In that case it was considered that the personal indignities contemplated by the statute included "rudeness, vulgarity, unmerited reproach, haughtiness, contempt, contumely, studied neglect, intentional incivility, injury, manifest disdain, abusive language, malignant ridicule, and every other plain manifestation of settled hate, alienation, and estrangement." The court, however, seemed to admit these with great circumspection and some reluctance, holding that to constitute grounds for divorce as creating the intolerable condition the statute had in view, they must be habitual, permanent, and continuous.

It must be confessed that this position goes to the very verge of safety, and should be pressed no further In applying it the Chancellors should act with great caution to avoid the gradual approach, by imperceptible steps, to the practice of holding all matrimonial bickerings by which parties may render each other unhappy, to be valid grounds of divorce. Where there are no fixed and well defined barriers of principle it is difficult to limit the encroachment of precedents, setting in one direction. Each so nearly supports the next that before one is aware the bounds of reason are passed.

These expressions in *Rose* v. *Rose* have been adopted and followed in the case of *Honnett* v. *Honnett*, 33 *Ark.*, 156, under circumstances appealing strongly for its application, and it must now be considered the settled construction of the statute. Whether it has been wisely done must depend on the care and circumspection of the Chancellors.

In the case now in judgment the circumstances develop the existence of all the material elements conceded to be sufficient in the case of *Rose* v. *Rose*. We are not called upon to say what our decision might be, if it were a case of original jurisdiction. It is enough to say that there is enough in former decisions to support the finding of the Chancellor, and as there does not appear to have been any abuse of his authority or perversion of his judgment, we conclude to allow his decree to stand. The hatred of the husband seems as fixed as groundless; and the insults and and outrages upon her feelings and character have been repeated and continuous, with no reasonable probability of cessation.

The amount of alimony being $250 per annum besides counsel fees is not excessive, though large in comparison with appellant's estate. He seems to be a farmer in comfortable circumstances, with a large body of land, and a considerable amount of personal property, worth altogether from six to ten thousand dollars, The amount was in the sound discretion of the court, which does not appear to have been abused.

ALIMONY.

Permanent alimony was decreed to appellee of $250 to be paid in 30 days, and a further semi-annual payment of $125 to be paid to the wife during her natural life, on the 1st days of January and July. The appellant was also ordered to pay the counsel fees, in sums designated. This alimony, and those fees were declared to be a lien on all the real estate of the appellant, and it was further ordered that upon failure of payment execution might issue.

According to the English Ecclesiastical practice, alimony was an incident to the pendency of a suit for a divorce, or a decree for a divorce *a mensa et thoro*. It was never given

in a decree *a vinculo*, for in such case it was held that no marital rights ever attached. It was indeed an incident of a continued marriage relation, and during separation was the substitute for the husband's support, which would have been rendered if they had been living together. It was always during their *joint* lives, or until reconciliation. At her death it was not necessary. At his, she, as wife, might claim dower. Meanwhile, it was always subject to modification by the court at any time, upon application showing change of circumstances sufficient to justify it.

Early in the history of our State, by the Revised Statutes (See *Gantt's Digest* 2195 *to* 2206), divorces *a vinculo* were allowed as well as divorces *a mensa et thoro*, in a great many cases, where, formerly, the latter alone were proper. In all these cases, as the Statute has been construed, the court was authorized to make any reasonable order as to the alimony of the wife, and the care of the children—being governed by the circumstances of the parties.

This introduction of alimony into decrees of divorce *a vinculo* was a novelty, and the reason of the old rules governing it, did not apply. As the matter is left to the reasonable discretion of the court upon the nature of the case (See *Gantt's Digest, sec.* 2204), it is entirely competent for this court to fix the rules to be observed by the Chancellors.

3. ALIMONY: Should be only for joint lives of the parties.

We do not think it a convenient practice to grant permanent alimony during the natural life of the wife. Without greatly embarrassing the settlement of estates upon the death of the husband, there are no apt means under our system of enforcing its payment. Until the legislature may otherwise provide, we think alimony should only be ordered during the joint lives of the parties, as has always been the rule in English cases.

A similar embarrassment, and perhaps greater inconvenience would be incurred by making future payments of alimony a lien upon real estate. This is too obvious for discussion. As for all sums ordered to be paid at once, and for which execution may issue, they are already general liens, without being so expressed.

Future payments not liens on husband's estate.

Decrees for alimony are always subject to modification on a change of circumstances, by the original court. This relieves us of the necessity of deciding upon the application made here for the purpose of modifying our order *pendente lite*. The purpose of that order is accomplished, and its effect ends with the decree rendered on this opinion.

4. ——: Subject to modification.

DIRECTIONS FOR DECREE.

Let a decree be entered here, affirming so much of the decree below as grants a divorce to the appellee, and fixes the amount to be paid her, and the times, as also the amounts to be paid her attorneys, and in all other respects save as herein indicated. Modify the decree so as to make future alimony payable during their joint lives. Omit the clause making the future payments a lien upon the real estate of appellant.

Let the decree so modified be certified to the court below, to be there entered of record, and stand for enforcement, subject to any modification which the Chancellor may deem meet, on the application of either party.

SORRELLS v. MCHENRY.

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1. BILLS AND NOTES: *Assignee after maturity.*

The assignee of a note after maturity takes it subject to the same defenses which the maker has against the assignor.

2. VENDOR AND VENDEE: *When action accrues to, on dependent contract.*

Where in a contract for the sale of land, the agreements of the vendor to make title and the vendee to pay the purchase money are dependent, the vendor cannot sue at law for the purchase money, without first tendering the deed and demanding the purchase money; but the rule is otherwise in equity where costs are under the control of the chancellor.

3. PLEADINGS: *Dependent contracts.*

In an action at law upon an instrument setting forth mutual stipulations of the parties, performance or offer to do so by the plaintiff must be averred in the complaint; but when the stipulations do not so appear the defendant may plead them.

4. SAME: *Exhibits, when part of.*

When a writing is the foundation of an action, counter claim or set-off, and is filed with the complaint or answer, it is part of the pleading; but if not such foundation, it is mere evidence to be used on the trial, and does not become part of, or help defective pleading.

5. VENDOR AND VENDEE: *Action on purchase note; want of title, when good defense.*

When a purchaser accepts a deed to land with covenants of warranty, and the title fails, he cannot successfully plead a total failure of consideration, unless there has been an eviction or its equivalent; but this rule does not apply where the sale was void and the vendor has made no deed, and has no power to make one.

6. SAME: *Possession as consideration for purchase note.*

Possession of land, under a void sale, is no consideration for a note given for the purchase money.

APPEAL from *Union* Circuit Coutr.
HON. G. M. BARKER, special judge.

F. W. Compton for appellant.

1. Appellees did not tender a deed before suit. *Lewis* v. *Davis*, 21 *Ark.*, 235; *McDermott* v. *Cable*, 23 *Ib.*, 200; *Smith* v. *Henry*, 2 *Eng.*, 207; which is always requisite in actions *at law*. In equity, under peculiar circumstances, the rule is sometimes relaxed. *McGhee* v. *Blackwell*, 28 *Ark.*, 27; *Anderson* v. *Mills*, *Ib.*, 175; *but never at law.*

The general rule in equity is laid down in *Wakefield* v. *Johnson*, 26 *Ark.*, 506.

2. The title is in Rhodes' heirs, and at the time of the sale was in Rhodes, an insane person, and no order of sale was ever obtained. The sale was void.

B. B. Battle for appellee.

1. The exhibit of the title bond filed with the answer is not a part thereof. The title bond was not the foundation of the suit, counter claim, or set off, but merely documentary evidence, *Dodd* v. *King*, 1 *Met.*, (*Ky.*) 430, and could not aid a defective allegation, or supply an averment wholly omitted, *Allen* v. *Shortridge*, 1 *Duvall*, 35. "An exhibit, which even forms a part of the pleadings, does not dispense with the express averment of all the facts necessary to show the rights of the party; it can only aid in making direct, positive, and certain an allegation which otherwise would be vague and uncertain." *Hill* v. *Barrett*, 14 *B. Mon.*, 67; *Collins* v. *Blackburn*, *Ib.*, 203; *Dodd* v. *King*, 1 *Met.*, (*Ky.*) 430; *Allen* v. *Shortridge*, *sup.*; *Newman*, *Pl. and Pr.*, 250–1. It was no part of the pleading unless made so by the billof exceptions. *Vaughan* v. *Mills*, 18 *B. Mon.*, 633; *Newman's Pl. and Pr.*, 251; *Strother* v. *Lovejoy*, 8 *B. Mon.*, 136; *Harmon* v. *Wilson*, 1 *Duvall*, 322; *C. & F. R. R.* v. *Parks*, 32 *Ark.*, 134; *Howell v. Rye*, 35 *Ib.*, 479; *Chamblee* v. *Stokes*, 33 *Ark.*, 543; *Abbott* v. *Rowan*, 33 *Ib.*, 596.

2. The demurrer put in question the sufficiency of the answer. *Davies* v. *Gibson*, 2 *Ark.*, 115; *Peck* v. *Rooks*, 22 *Ib.*, 222; *Gantt's Dig.*, *sec.* 4577.

3. No fraud is averred in the answer, only false representations *at the time* of sale; but it is not alleged that appellant was thereby induced to purchase.

4. Appellant obtained title by adverse possession. *Clement* v. *Sampkins*, 34 *Ark.*, 598, 602; *Logan* v. *Jelks*, *Ib.*, 548; *Jacks* v. *Chaffin*, *Ib.*, 534; *Drennen* v. *Boyer*, *&c.*, 5 *Ark.*, 500.

5. Before a purchaser can rescind a contract of sale, he must put or offer to put the vendor *in statu quo*. *Hynson v. Dunn*, 5 *Ark.*, 395; *Bellows* v. *Cheek*, 20 *Ib.*, 424; *Davis* v. *Tarwater*, 15 *Ib.*, 286; *Johnson* v. *Walker*, 25 *Ib.*, 286; *Sugden on Vendors*, (*8 Ed. by Perkins*), *p.* 356. The allegation that he does not "occupy, or exercise control over said land," &c., insufficient. *Bellows* v. *Cheek*, *sup.*

6. The answer fails to show that the bond contained mutual and dependent covenants. *Farish* v. *Jones*, 23 *Ark.*, 323; *Prewett* v. *Vaughan*, 21 *Ark.*, 417.

7. Appellant could not question the consideration of the assignment of the note. *Gentry* v. *Owen*, 14 *Ark.*, 396.

English, C. J. This suit was brought in the Circuit Court of Union county the eighth of April, 1879, in the joint names of Ellen McHenry and her husband John V. McHenry, against James M. Sorrells, on the following note and assignment:

"Twelve months after date, I promise to pay R. C. Vanhook, as guardian of H. W. Rhodes, the sum of three hundred dollars for value received, with ten per cent. interest after due—16th December, 1872.

J. M. Sorrells."

Endorsed: "Received on the within $58.33, May 2d, 1877."

"For value received, I transfer the within note to Ellen McHenry as so much of her interest in the real estate of her father H. W. Rhodes, without recourse. April 1st, 1879. R. C. Vanhook."

The complaint set out and exhibited the note and assignment, and admitted the partial payment endorsed. Alleged that plaintiff Ellen McHenry was the daughter of H. W. Rhodes, and the wife of plaintiff, John V. McHenry. That at the time the assignment was made her father was dead, and that she had become the ward of Robert C. Vanhook, to whom the note was made payable as guardian of her father, and that he assigned it to her as so much of her interest in the real estate of her deceased father.

Pending the suit plaintiff John V. McHenry died, and the cause progressed in the name of plaintiff Ellen McHency.

A demurrer to the complaint was interposed, and overruled, but no point is made upon that here.

A demurrer having been sustained to the original answer, defendant filed an amended answer with two paragraphs, in substance as follows:

I. That the sole and only consideration for the note sued on was a part of the purchase money for certain lands lying in Union county, and described as the west half of section 32, and the southwest quarter of section 29, in T. 17 S., R. 13 W., containing 485 acres, less 5 acres. That at the time the defendant purchased the lands, said Robert C. Vanhook, payee in said note, falsely represented to him that he had a good right to sell and convey the same to defendant, when in truth and in fact he, the said Robert C. Vanhook, had no title to, or right, to sell the same to defendant, which said Vanhook well knew at the time of said sale; and defendant never knew said representation to be false and fraudulent until after the institution of this suit. That said Vanhook executed to said defendant a pretended bond for title in his own name, which is hereto attached and made part of this answer, and marked Exhibit A; and no deed has been executed to defendant by said Vanhook, or any other person for him; and the power to

make a deed to said lands is in the heirs or legal representatives of Henry W. Rhodes, deceased, and not in said Vanhook; nor does the defendant occupy or exercise control over said lands, nor had he for one year previous to the institution of this suit.

II. And for a further defense, defendant avers that the said lands were sold by said Vanhook assuming to act as guardian of said Rhodes, without any order of court or authority of law, and that no obligation for title or deed has been tendered to this defendant for said lands for which said note was given as a part of said purchase money; and he here offers and proposes to rescind said contract and place R. C. Vanhook, and Ellen McHenry and John McHenry plaintiffs, *in statu quo:* and further avers that said plaintiffs are not holders or owners of said note by purchase for any valuable consideration.

The court sustained a general demurrer to the amended answer, and defendant resting, final judgment was rendered in favor of Mrs. McHenry for the amount due on the note, and defendant appealed.

1. BILLS AND NOTES: Assignee after maturity.

I. The note in suit was executed before the passage of the act of twenty-fourth April, 1873, (*Gantt's Digest*, sec. 566,) putting such paper on a commercial footing: and it did not contain the words "without defalcation," and hence was not commercial paper under the act of April 10th, 1869, (*Acts* 1868–9, *p.* 146); and moreover it was assigned after maturity, and hence appellee took it subject to any defense which appellant had against it in the hands of Vanhook, the original payee. *Nisbett* v. *Brown & Norton*, 30 *Ark.*, 590.

2. VENDOR AND VENDEE: When action accrues on dependent contract.

II. Upon an agreement for the sale and purchase of land, where the stipulations by which the vendor undertakes to make title, and the vendee to pay the purchase money, are dependent, the vendor cannot maintain an action

at law for the purchase money unless he has performed, or offered to perfom his part of the contract—that is, he must tender a deed and demand the purchase money before suit. *Smith* v. *Henry*, 7 *Ark.*, 207; *Lewis* v. *Davis et al.*, 21 *Ark.*, 237.

(The rule is otherwise in Chancery, when the costs are under the control of the Chancellor. *Anderson ad., et al.* v. *Mills ex.*, 28 *Ark.*, 180.)

Pleading at law.

In actions at law, if the mutual stipulations of the parties are set forth in the instrument declared on, the fact of performance, or offer to do so, must be averred in the declaration, and when the stipulations do not so appear, the defendant may plead the fact. *Lewis* v. *Davis et al., sup.*

In *Smith* v. *Henry*, 7 *Ark.*, 213, it was held that where the obligation for purchase money had been assigned the assignee must tender a deed and demand payment before suit, because, by the statute then in force, the assignment did not deprive the obligor of any defense he had as against the obligee. *Gould's Dig., sec*, 3. *Chap.* 15.

In *Duncan et al* v. *Clements*, 17 *Ark.*, 279, it was held under the statutes then in force regulating the common law pleading and practice, that where a note for purchase money was sued on, and the defense was that plaintiff had executed to defendant a bond to make him title on payment of the note, and had not tendered a deed and demanded payment before suit, the title bond relied on must be pleaded with profert.

In *Faust* v. *Jones*, 23 *Ark.*, 323, the plea alleged, in substance, that the note sued on was given for the last payment of the purchase money of four acres of land, which the plaintiff sold to defendant and gave him a bond for a fee simple title deed; and that the deed was to be made and delivered to defendant upon the payment of said purchase money, but that no deed had been tendered before suit.

The plea made profert of the bond for title, but did not set it out, or state the substance of it, nor was it brought upon the record by oyer. On demurrer the plea was held bad because it failed to show that the bond contained mutual and dependant covenants; or, in other words, that the plaintiff was bound by the terms of the contract of sale to make or tender the defendant a deed for the land before suit for the purchase money. The bond did not help the plea, because, though profert was made of it, it did not become part of the plea without oyer prayed and granted.

4. EXHIBITS: No part of pleading unless foundation of the action.

Under the code practice, where a bond, bill, note or other writing, is the foundation of the action, counter-claim or set-off and is filed with the complaint or answer, it becomes part of the pleading; but if not the foundation of the action, counter-claim or set-off, it is mere evidence to be used on the trial, and does not become part of or help defective pleading. *Gantt's Dig.*, *sec.* 4599, *&c.*; *Chamblee* v. *Stokes*, 33 *Ark.*, 543; *Howell* v. *Rye et al*, 35 *Ib.*, 479; *Abbott* v. *Rowan*, 33 *Ib.*, 596; *Cairo & Fulton R. R.* v. *Parks*, 32 *Ib.*, 132.

The answer in this case set up no "counter-claim or set-off." It alleged affirmative matter in defense of the action and on demurrer to it the bond for title made and exhibited was not part of the pleading, and did not help it. It was a matter of evidence only.

Had the answer alleged that the note sued on was given for the purchase money of land; that the vendor executed to defendant a bond, describing it, by which he covenanted to make him a deed on payment of the note, and that no deed had been tendered before suit, the answer would have set up a valid defense, if sustained by the terms of the bond when offered in evidence.

The answer alleges that the note was given for part of the purchase money of land, but whether other notes

were given, and whether they had been paid, and whether the deed was to be made on payment of the note sued on, was not alleged, nor are the stipulations of the bond alleged.

As a plea of mutual and dependent covenants to make a deed on payment of purchase money, and failure to tender deed before suit, the answer was bad pleading.

III. But such is not the character of the defense intended to be set up by the answer. Looking at the whole answer, it was evidently designed to be a plea of failure of consideration.

5. VENDOR AND VENDEE: Action on purchase note; want of title when good defense.

The note sued on was executed to Vanhook, as guardian of Rhodes, an insane person. It was given for the purchase money of lands belonging to Rhodes, and which, the answer alleges, Vanhook sold to appellant without an order of court; and if so the sale was void. The answer also alleges that at the time of the sale Vanhook falsely represented to appellant that he had a good right to sell and convey the lands, when, in fact, he had no title or right to sell, and knew it, and appellant did not know such representation to be false and fraudulent until after suit was brought. That no deed had been made to him, and, in effect, that the title of the lands was in the heirs of Rhodes, who was dead. The answer was not skillfully drawn, and was fancifully paragraphed, but if true, as admitted by the demurrer, it set up a good defense.

When a party contracts for and receives a deed to land, with covenants of warranty, and the title fails, in a suit for purchase money, the purchaser cannot avail himself of the plea of total failure of consideration, unless there has been an eviction, or its equivalent. *McDaniel* v. *Grace*, 15 *Ark.*, 487.

6. POSSESSION OF LAND: Under a void sale is no consideration for a note.

But this rule does not apply in this case, where, if the answer be true, the sale was void, and the vendor made no deed, and had no power to make one. Nor can the posses-

sion of lands, under the void sale, be treated as a consideration for the note in suit. *Lewis* v. *Davis et al*, 21 *Ark.*, 239. If appellant is liable for rents of the lands while in possession of them and to the time he abandoned them, he must account to the legal representitives of Rhodes in a proper proceeding.

There is nothing in the contention of counsel for appellee that appellant acquired title to the lands by adverse possession of them for the period of limitation. There is nothing in the answer, which was disposed of on demurrer, to show that he acquired any title by limitation. He had no deed; when he took possession of the lands does not appear; the statute would not run against Rhodes, an insane person while living; when he died and what heirs he left (except appellant) or what their ages were, in no way appears.

This was not a proceeding by appellant to rescind the contract of sale, in which he could account to the heirs or legal representatives of Rhodes for rents of the lands, but an action on a note for purchase money, and the substance of the defense is that the sale was void, for want of power in the guardian of Rhodes to make it, or to make any title, and therefore the consideration of the note had totally failed.

The court erred in sustaining the demurrer to the answer.

Reversed and remanded for further proceedings.

COCHRAN, ET AL, VS. EDWARDS, ET AL.

1. COUNTY SEATS: *Petition for removal of; Repetition of.*

When at an election for the removal of a county seat, the proposed removal is defeated, the time within which another petition for removal may be filed, is not limited.

APPEAL from *Sharp* Circuit Court.
HON. R. H. POWELL, Circuit Judge.

J. L. Abernethy for appellants.

1. It could not have been the intention of the Legislature, *sec.* 3, *Act* 1875, to vest in one-third of the voters of a county the power to have repeated elections, without limit, at the expense and annoyance of the other two-thirds, for the removal of a county seat to one and the same point. Such a construction is unreasonable and absurd.

2. The Circuit Court should have heard the case *de novo*, and made all necessary orders. *Gantt's Dig.*, *secs.* 1191, 1195, 1198.

John H. Holt for appellees.

The petition conformed *in every particular* to *act*, *Mch. 2d*, 1875. *Section* 12 of this act repealed *sec.* 973, *Gantt's Digest*, and the response set up no defense. *Sec.* 9 of said act only applies where the county seat has *actually been changed* in ten years.

ENGLISH, C. J. At the July term, 1880, of the county court of Sharp county, a petition was presented by electors of the county praying for a removal of the county seat from EVENING SHADE to CENTER.

The petition appears to have been in conformity with the provisions of the act of March 2nd, 1875, providing for locating and changing county seats. *Acts of* 1874–5, *p.* 201.

James P. Cochran, and others, tax-payers and voters of the county, filed a remonstrance, in which they alleged, in

substance, that the petitioners theretofore, at the July term, 1879, of the court, by petition, obtained an order for an election on a proposition to remove the county seat from EVENING SHADE to CENTER, which election was held on the twenty-fifth day of August, 1879. That the voting population of the county, at that time, according to the assessment list, numbered 1492, and upon casting up the votes polled at said election it was found that there were only 525 votes for removal, and so the court declared that the proposition had failed.

That the petition for removal, order for election, returns, order of court declaring the result, &c., were destroyed by the burning of the court house, records, &c., January 20th, 1880.

The court sustained a demurrer to the remonstrance interposed by the petitioners, and the remonstrants rested.

The petition for removal was then heard by the court, and it was made to appear to the court that more than one-third of the qualified voters of the county had joined in the petition; that the town of CENTER, in Sharp county, was designated as the place to which petitioners desired the county seat moved, which was fully designated; that the abstract of the title to the land upon which it was proposed to locate the county site was perfect; that the amount and terms of donation of said lands to the county, for county purposes, were fully set forth, and that the law had in all things been fully complied with, &c. It was therefore adjudged by the court that the prayer of petitioners be granted, and an order was made that an election be held on the sixth of September, 1880, on the proposition for removal, &c.

The remonstrants appealed to the Circuit Court where the demurrer to the remonstrance was submitted and sustained, and the order of the county court for an election affirmed and remanded.

The remonstrants appealed.

By section 9 of the act of March 2nd, 1875, providing for locating and changing county seats: "Whenever an election has been held in pursuance of this act, and the county seat changed in compliance therewith, it shall not be lawful to change the county seat again under ten years."

Appellants did not plead that an election had been held under the act, and the county seat of Sharp county changed, within ten years, (see *Varner, et al*, v. *Simmons, et al*, 33 *Ark.*, 212), but that an order had been made for an election on a petition for removal, and that an election was held and the proposed removal defeated by the electors.

There is nothing in the act which limits the time in which petitions for removal may be repeated; and if public inconvenience and expense may arise from frequent petitions and orders for elections, as submitted by counsel for appellants, the evil must be remedied by legislative amendment of the act. The courts must administer the law as it is written.

Affirmed.

Bell & Carlton v. Welch, Adm'r.

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58 401
38 139
190 500

1. Practice in Supreme Court: *Finding of Court conclusive as a verdict of a jury*

The finding of the Circuit Court sitting as a jury, is equally as conclusive in the Supreme Court as the verdict of a jury.

2. Administrators: *Employment of Attorneys; Construction of Statute.*

Where one who is executrix and also sole legatee of an estate, employs an attorney to prosecute a suit for land devised to him, which is not needed for the payment of the testator's debts, upon a contingent fee of part of the recovery, the contract will be considered as that of the legatee, and not of the executrix; and will be binding, and not avoidable by a succeeding administrator *de bonis non* with the will annexed; and the attorney can set off his claims for services

against the suit of the administrator against him for the fruits of the recovery in his hands.

The scope and design of the Statute (*Gantt's Dig.*, 195-197), is to require the allowance of fees to representatives of estates out of sums for which they may be chargeable, and has no application to a contract made by the devisee and owner of the land, in good faith, with the attorneys for its recovery.

3. ATTORNEYS' FEES: *Jury can assess only on proof.*

A jury can assess the value of an attorney's services only on proof of them and their value adduced at the trial.

APPEAL from *Pulaski* Circuit Court.
HON. J. W. MARTIN, Circuit Judge.

Bell & Elliott, for appellants:

This court has decided that a new will not be granted on mere weight of evidence, but only where the case is so clear as to shock the sense of justice "at first blush," and has gone so far as to apply the doctrine to a finding of the court sitting as a jury, which is not based on the same foundation of reason. The same reason exists for reversing the finding of a sole judge, as for reversing the opinion of a judge on questions of law. The Statute never contemplated fixing the seal of infallibility on a judge sitting as a jury. The same principle might apply to Chancery proceedings, but it has been held that when the facts are before this court in writing, the same as below, this court will reverse. 34 *Ark.*, 212; 33 *Ark.*, 651.

The finding was not only contrary to the weight of evidence, but absolutely to all legitimate evidence, and such a verdict as would shock the sense of justice of any fair-minded man.

The declaration of law, if given to a jury, would be so clearly erroneous as to demand a reversal.

U. M. Rose, for appellee:

This court will not reverse on the weight of evidence.

Plaintiff was not precluded from denying anything in the letter to Cockrill, because he had introduced it in evidence. 14 *Ark.*, 442.

This court will not set aside the finding of a court sitting as a jury, unless there is a total want of evidence to support it. 21 *Ark.*, 306.

The original agreement with Ashley was abrogated, a cash fee being substituted, *payable out of the rents.*

EAKIN, J. Welch, as administrator, sued Bell & Carlton upon an account for moneys collected by them as attorneys, and recovered the sum of $2130. Pending the suit Carlton died, and his executrix was made a party.

The defendants resisted the claim, setting up, by way of defense and set-off, matter substantially as follows:

They say that in the year 1858, they were employed by Mary E. Ashley, who then represented said estate, and was the sole legatee, to begin and prosecute a suit in ejectment to recover a certain tract of land for the estate, which was then adversely held, and had been in the possession of the adverse claimant for more than fifteen years. That they did so under an agreement that they should have for their services one-half of all that might be recovered. That they prosecuted it successfully, both in the Circuit Court and in the Supreme Court, on appeal; and again in the Circuit Court, to which it was sent for an inquiry as to damages. That besides the land, which was very valuable, they recovered and collected damages to the amount of $2200, being the same for which they are now sued. That pending the suit, said Mary E. Ashley died, and plaintiff Welch, her successor, refused to carry out the contract. That Carlton,

one of the partners, had an interview upon the subject with George C. Watkins, who was then the agent and attorney for the estate, in which he claimed a fee of $2000; and that he finally agreed to accept, and said agent agreed to pay said sum of $2000, in lieu of an interest in the property recovered, and also consented to look for remuneration out of the damages to be thereafter recovered. They claimed the right to retain so much of the damages as may be required to satisfy their claim for such fees, and for costs by them expended on behalf of the estate. They also plead, by way of set-off, that Welch was appointed administrator during the pendency of the ejectment, and accepted the services, and they claim said fee on account of said services. It is conceded that the sum of $500 has been paid, and that defendants are liable for so much of the damages collected as they may not have the right to retain for fees and costs.

The cause was submitted to the court for trial of the facts. The evidence was conflicting. The statements of parties on both sides, including Carlton's in his lifetime, and divers letters also, passing between them in the course of negotiations, were admitted with a freedom which indicates an earnest desire on both parts to have all the circumstances fairly presented.

The plaintiff, Welch, testifies that he was unwilling to pay the conditional fee claimed. That under advice and directions of Watkins, he paid to Bell the sum of $500, pending the appeal in this court, and offered to pay him $500 more out of any damages to be finally recovered; and that Bell agreed to that, pronouncing it "all right" at first, but afterwards informing him that his partner, Carlton, would not agree to it, whilst acknowledging himself that the agreement was as above stated. Welch says further, that he had never himself employed Bell & Carlton in the

business; that Watkins & Rose were the attorneys of the estate, and that in paying said $500, and in agreeing to pay the further sum for like amount, he did so on Watkins' instruction, and not in discharge of any obligation on his part to the defendants.

Upon the other hand, Bell positively denies having received the $500 upon any such agreement for a settlement, but says he did agree to put the claim of the firm on a cash basis, and to fix it at $2000. He says that he further consented to make the remainder depend upon the collection of damages in the suit, and that such was the agreement at the time.

It is further apparent, from the evidence, that the result of the suit was of a very doubtful nature; that Watkins had not sufficient confidence in it to make him deem its prosecution advisable; and that he had nothing to do with it, or in the employment of Bell & Carlton; that the defendant had been a long time in possession, much beyond the period of limitations; that the proof of his holding, in conformity with Ashley's claim, had been lost, and that the property was of such value as to make $2000 a very cheap estimate of one-third, even, of the property, with the damages recovered. It may be mentioned, in passing, that Bell's recollection of the proportion they were to receive was only one-third, instead of one-half, as stated in the pleadings, and testified to by Carlton. The prosecution of the suit seems to have required a great deal of professional skill and labor. It lasted through a series of years, and was followed by Bell & Carlton into this court; and back again for the collection of the damages, out of which they now seek to retain their fees. More than that, it was necessary to file a bill of discovery, in aid of the suit, at law. These services were all rendered at the risk of defendants, who were to receive nothing on failure. We are strongly

impressed with the conviction that the amount which the plaintiff testifies that Bell was content to accept, was grossly inadequate to the services rendered upon such precarious conditions, and far below what Mrs. Ashley, in the first instance, would have been willing to allow in case of success.

1. PRACTICE IN SUPREME COURT: Finding of Circuit Court when jury waived, conclusive as verdict of jury.

Nevertheless, the court, a jury having been waived, was the judge of the facts; and, with competent evidence on both sides, had the same right to determine them as is accorded to a jury. We could not disturb the finding without violation, not only of past precedents, but of a sound, general principle. If the court had based its judgment on that finding, believing that the testimony of Welch was correct, and that Bell was mistaken in his recollection of the the exact value of the agreement, the firm might be held bound by the compromise, and could retain no more than the $500 which the plaintiff was willing to allow. A judgment rendered on such facts could not be held erroneous.

But the declarations made by the court for the plaintiff, and refused on the part of defendants, do not render it at all certain that it really found the facts as above indicated, or attempted to reconcile the discrepancies of testimony, or to determine, between that of Welch and Bell, which was really true. If the fact of the compromise was not found, it cannot support the judgment; and we must look to the grounds upon which the court really based its judgment, to see of there be error in its views prejudicial to defendants.

All which the judgment itself indicates, upon this point, is: that the court, having heard all the evidence adduced, and the argument of counsel, finds "that the plaintiff is entitled to recover of said defendants the sum of," etc., and "it is

therefore ordered, considered and adjudged," etc. This was no finding at all, and the uncertainty and embarrassment we now feel in determining the real grounds of the decision, illustrates the wisdom of the Code in requiring the court, in questions of fact, "to state, in writing, the conclusions of fact found, separately from the conclusions of law." As the counsel upon neither side insisted upon it, nor excepted to the omission, the failure cannot be held for error, but it is bad practice where the parties have not made up their minds in advance to rest upon the decision of the court as final.

Failure of Court to find facts; when waived.

The declarations of law given and refused afford us some light. At the suggestion of plaintiff, the court declared that there was no showing upon the evidence of *any valid contract* between Mary Ashley, as executrix, etc., upon which defendants can rely to sustain the set-off herein; and that as there was no evidence as to any agreement as to the value of the services, the claim of defendants for a set-off could only be established by independent proof of the value of such services. To this the defendants did except; and on their part asked the court to declare that the evidence introduced was sufficient to sustain the set-off herein. This the court, of course, refused, being inconsistent with the declarations of law.

2. ADMINISTRATORS ETC.: Employment of attorneys.

There was a paragraph in the answer setting up a *quantum meruit*, and it is quite clear from the declarations above set forth that the court did not deem it at all necessary to find either way upon the supposed compromise. The court must have considered, 1st, that the executrix had no power to make such a contract as that proved, with the attorneys, and, 2nd, that the court had no power, upon being advised of the actual rendition and nature of legal services, to judge of their value without proof *aliunde*. As the judg-

ment seems to have been based on these views, justice requires their examination.

The estate was large and solvent. There is no proof of any debts. Mrs. Ashley was executrix and sole legatee, managing the business through an agent for her own benefit, as we must presume. That she could have bound herself individually to the attorneys for legal services, admits of no question. Could she bind the estate in such manner as to be obligatory upon the administrator *de bonis non*, with the will annexed after her death? That was the position occupied by the plaintiff. The contract was never directed by, nor reported to and confirmed by, the Probate Court, which would have certainly rendered it valid beyond question.

Construction of the Statute.

The *Revised Statutes* (*chap.* 4, *secs*, 174 *to* 176) authorized the Probate Courts, when deeming it necessary for an executor or administrator to employ an attorney to prosecute or defend a suit concerning the estate, to allow said attorney to receive a compensation, at a rate fixed by the act, to be paid as expenses of administration, and provided that "no attorney's fee shall be allowed any executor or administrator unless for prosecuting or defending a suit under the directions of the court." We are called upon to give the true construction, scope, and bearing to this act.

By the common law and English statutes, as adopted in this State, executors, as such, whilst they might be devisees in trust under a will, had otherwise no interest in or control of real estate. Upon the death of the owner it passed at once to the heirs or devisees. Our Revised Statutes modified this in so far as to make it assets in the hands of the executor or administrator, and to clothe them with the possession, but only for a specified purpose—that is, "the payment of debts." Subject to this charge lands still pass from the deceased immediately by descent, or on due probate of the will, by devise.

Mrs. Mary Ashley is described as "sole legatee." The term is generally used to describe those to whom there has been a bequest of personal property, but it may include a devise of real estate also. (*See Bouvier in verb.*) In this case it is so meant. The land for which ejectment was brought belonged to Mrs. Ashley as her own property, subject to an account by her for the benefit of creditors, and no others. She was not required to include it in her inventory. The attorney for the estate seems not to have considered the claim worth the risk of prosecution. She, acting for herself, had then the right, in the protection of her own interest, to save what planks she could from the wreck, and to make such contract for the purpose as she might deem advisable. The contract could not be made by her in her character of administratrix, but it was valid against her as devisee and owner. When the *fruits* of the litigation should come into her hands she would be liable to account for *them*, but not for what she never had. Let us suppose that she lived, that the contract was in good faith, and that the litigation had been closed and the proper proportion of money and land allowed to the attorneys by partition. Can it be supposed that she could have then turned around in her character of executrix and sued the attorneys for restoration of their portion, on the ground that as executrix she could not make such a contract, that she was chargeable to the estate for the whole value of the land and damages recovered in the suit, and the law did not, under the circumstances, allow her any credit for fees? And this, too, after the attorney for the estate, who represented her as executrix, had declined to prosecute the claim? And if she could not, upon what better right can the administrator *de bonis non* after her death do so, or what is equivalent in effect? To give the statute such scope as this would be attended with much absurdity.

If there be any fraud, that stands upon a different footing. But none is charged, nor can any be reasonably suspected. If she were guilty of waste, as executrix, it concerns the creditors and her bondsmen. The administrator *de bonis* is only chargeable with the administration of what does, or should come to his hands, which in this case is the net results of the litigation. Indeed the whole question of creditors may be left out of consideration. The estate was a large one, and solvent, and no debts whatever are shown by the record.

If these views be not sound what is to become of a devisee of lands adversely held? Must he stand paralized, and lose the benefit of the bounty, if the executor or administrator should not need the property for the payment of debts, and should very naturally refuse to enter upon a litigation that did not concern him, or those whom he represented. If he be poor must he have no counsel upon the credit of his contingent interests? He could not have if the fees as soon as earned could be taken from the counsel by the representative of the estate, on the ground that he was entitled to take control of the whole proceeds of the suit, and there could be no valid contract for fees not sanctioned by the probate court.

We think the scope and design of the statute was to regulate the allowance of fees to representatives of estates, *out of sums for which they may be chargeable*, and that it has no application to a contract made in good faith by the devisee and owner of the land, with counsel, for its recovery. We think such a contract, unattended with fraud, made by one whose whole interest prompts him to sacrifice as little as possible, is valid, and that the representative is under no obligation to collect even for the payment of debts, and certainly in no other case, more than the net results of the litigation to the devisee. And this cannot be otherwise

when the character of devisee and executrix are at the time united in the same person; nor where the character of representative is transferred afterwards to another, as in this case to Welch. The court erred in declaring that no valid contract for fees existed between Mrs. Mary Ashley and defendants. Upon this point the proof of the fact was indisputable. The only doubt is as to the proportion defendants were to receive. It was certainly not less than a third.

3. ATTORNEYS' FEES Jury can assess only on proof

Upon the second point, regarding the *quantum meruit*, on the set off. As a matter of law, the court adopted the rigid rule, which would certainly have been applicable in a jury trial—holding that proof was required, not only of the fact that the services were rendered. and their nature and extent, but also of the value of the services. This is usually had by the testimony of attorneys as experts.

In this case all the matters in controversy were submitted to the court. There had been throughout a remarkable disregard of technicalities, as to the admission of evidence; such however, as might have been expected from parties of their intelligence and standing, anxious on one part only to discharge a fiduciary trust; and on the other, to claim what might be justly and honorably retained. Doubtless they both intended, that if the court found it necessary to consider the question of *quantum meruit* at all, it should fix the value of the legal services, not only by such light as the proof would afford, but also from its general knowledge and experience of usual charges in such cases, calling to its aid, if it seemed advisable the testimony of other attorneys; or at least suggesting leave to the parties to introduce them. We think the court should have done this, in this particular case, as the better practice, although we waive any decision here as to whether or not the court could have taken judicial cognizance of the reasonable value

of stated professional services, concerning property, the value of which, and of the results of the services, were reasonably shown.

These remarks concern the view of the law, as expressed by the court. We think it was mistaken, however, in supposing that there was no proof whatever of the value of the legal services rendered by Bell & Carlton. We notice in the transcript divers indications of their value which might have supported some positive finding. It may suffice, for instance, to cite the statement of Garland, included in Carlton's statement, all of which was admitted without objection, that he would not have rendered the services in question for less than $2000. There were other indication, also, very much tending to show that the services were of greater value than the amount which the plaintiff was willing to concede.

Upon the whole case we think there should be a new trial, and that it was error to refuse it.

Reverse and remand to that end.

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38 150
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PIERCE v. EDINGTON, TREAS.

1. PRACTICE IN SUPREME COURT: *Original book of accounts brought up with transcript.*

The circuit court has no authority to order an original book of accounts used as evidence on the trial, to be sent up with the transcript of the cause to this court; and if sent here it will form no part of the record, and cannot be noticed by the court, unless incorporated into the bill of exceptions. The proper practice where ponderous books are used as evidence, is to transcribe into the bill of exceptions such portions as were used, or to have some witness testify with the books before him, as to what they show, with any circumstances touching their condititition and appearance material to the case.

2. COUNTY COURT: *Presumption as to regularity of its acts.*

The County court is a superior court of record in the sense that in subject matters within its jurisdiction its action will, in the absence of evidence to the contrary, be presumed to be upon facts sufficient to justify it; and so its appointment of school directors, as required by the act of December, 1875, will, without proof to the contrary, be presumed to be upon the vacancy in office contemplated by the act, though the record of the appointment does not show any such vacancy. Such directors have color of title to the office and their school warrants, drawn for teachers' services, are valid.

3. OFFICER: *De facto.*

What constitutes color of title by election, appointment or commission is not essential as between other parties to constitute one an officer *de facto*. An officer *de facto* is one who exercises an office either by virtue of some appointment or election, or of such acquiescence of the public as will authorize the presumption, at least, of a colorable appointment or election.

APPEAL from *Desha* Circuit Court.
Hon. J. A. WILLIAMS, Circuit Judge.

P. C. Dooley, for appellant.

1. Mandamus will lie against a ministerial officer to compel him to perform an act enjoined by law. *Gantt's Dig. sec.* 4150. It was the duty of the county treasurer to pay the warrants out of any funds in his hands for that purpose. *Acts* 1875, *sec.* 68, *p.* 77. The warrants conform to sec. 67 of said act in every particular.

2. Mills, Dixon, and Goza were *at least* directors *de facto*, and as such their acts are binding, because they concern a third person who is assignee for valuable consideration. *Miller* v. *Calloway*, 32 *Ark.*, 666. They were recognized as directors by the school examiner and all the county officials; they were in possession of all the books and records and property of the district, and were universally recognized and their authority undisputed. They held under color of

title, and their acts cannot be enquired into in a case like this.

3. In public trust the act of a majority is the act of the whole. *Gantt's Dig.*, *sec.* 5647; *Perry on Trusts*, *sec.* 413; *Dillon on Mun. Corp.*, *secs.* 217, 218, 221; 35 *N. H.*, 477; 22 *Barb.*, 137; 19 *Vt.*, 37; 9 *Pick.*, 146.

L. A. Pindall, for appellee.

1. There was no power in two of the appointed directors to draw the warrants. They could not write. *Sec.* 56 *School law*, 1875, *adj'd session*. When power is conferred upon more than one person and no provision for a majority to act, the acts of less than the whole are invalid. JUDGE MILLER in *Schenck* v. *Peay & Bliss*, 1 *Walw. Ct. Ct.*, 187–8; 3 *Denio*, 253: *Pulaski County* v. *Lincoln*, 9 *Ark.*, 327; *Dillon on Corp.*, *sec.* 221, *n.* 3; *Field on Corp.*, 258, *sec* 23, *&c.*, *&c.*; *Gredley* v. *Barker*, 1 *B. & P.*, 229. Goza was not present, had nothing to do with it, was not consulted. The court could not appoint directors except under the circumstances of *sec.* 60, *Act* 1875.

2. The issuance of the first warrants exhausted the powers of the directors, and the first were barred on their face, and the change in the date, a forgery, destroyed the warrants, debt and all. See 31 *Ind.*, 9; 35 *Barb.*, 414 *et seq.*

3. The contract was made on Sunday. *Tucker* v. *West*, 29 *Ark.*, 388.

4. The school was not taught in the district.

5. If the right be doubtful, mandamus will be denied. *Ackerman* v. *Desha County*, 27 *Ark.*, 457; 6 *Tex.*, 473; 2 *Dutcher*, *N. J.*, 135.

6. *Sec.* 5647 *Gantt's Dig.*, (*sec.* 782 *Code*) has no reference to this question; it only relates to the pratice of law,

and such acts as commissioners to partition lands, assign dower, &c., &c.

7. After the first warrants were drawn and passed out of the directors' hands and been protested, they acquired a new character—they became county warrants. 2 *Vroom*, 208–9–10; 17 *Ohio*, 340, 351–2–3; 1 *My & Keen*, 165; 7 *Eng.*, 165–6; 1 *Am. R. R. Cases*, 151; 12 *La. An.*, 544; 35 *Barb.*, 414 *et seq.*; 1 *Hill, N. Y.*, 285; 20 *John*, 271–2–3; 8 *Cowen*, 134; 12 *Wend.*, 220.

8. A *quasi* judicial discretion was vested in the treasurer which cannot be controlled by mandamus. 27 *Ark.*, 457; 6 *Tex.*, 473; 2 *Dutcher, N. J.*, 135.

STATEMENT.

EAKIN, J. Appellant, who was plaintiff, held three school warrants for $100 each, drawn on the ninteenth of March, 1877, upon the county treasurer by Emanuel Mills and Steven Dixon, as school directors of district No. 6, in Desha County, for the payment of the services of a teacher, which warrants had been assigned to plaintiff. He filed this petition for a mandamus on the same day, alleging that he had presented them to defendant, as treasurer, who had refused either to pay or to protest them as "not paid for want of funds," and that there was then in the treasury to the credit of said district $217, against which there was no prior warrants outstanding. He asked a writ commanding the treasurer to pay the sum in his hands, and to protest for the balance, that he might have a warrant drawn by the county clerk. The warrants are exhibited and appear to be in due form as required by law.

Defendant waived notice and answered:

1st. That said warrants were not properly drawn.

2nd. That the same parties acting as directors, had there-

tofore, on July 15th, 1876, drawn three other orders or warrants in favor of the same teacher, and endorsed to plaintiff, which had been presented to the treasurer, and which had been, by him, protested for want of funds, and that those warrants were for the same services.

3d. That the drawers were not, in fact, school directors of the said district, because at the annual school meeting thereof, on the third Saturday in August, 1875, John H. McDowell had been duly elected trustee for the ensuing year, and had qualified and acted. That there had been no school meeting since, but the county court, at its April term, 1876, misapprehending the law of December 7th, 1875, and supposing the trustee's office to be vacant, appointed James Goza, together with said Mills and Dixon, as directors, all three of whom accepted. That they have no other authority. That Goza is the only one of the three able to read or write, or qualified for the office, and he had informed respondent that the said warrants were fraudulently drawn.

4th. That the said teacher did not serve out the time for which, under the contract, the pay was given, but abandoned the school; and that the contract under which he taught was made in writing on a Sunday.

5th. That the teacher demanded and received pay from the patrons of the school as for a private school.

He denies that he had money in his hands when the warrants were presented, or that there were no warrants outstanding of prior date, but says he had, in State scrip, $217.99, of which he had subsequently paid $50 on a prior warrant. There is also a demurrer to the petition.

A demurrer to this answer was interposed and overruled. Whereupon petitioner replied, stating that the three former warrants had been withdrawn and cancelled by the directors, for informality, and these issued instead. He denies fraud, or that the treasurer had any legal notice or information,

from any one, that they were fraudulently drawn. He says the services were duly rendered by the teacher; also, that the said Goza, Mills and Dixon were the only lawfully appointed directors in the district, and were recognized as such by all classes in the community; that the action of the two latter as such was matter of public notoriety; and that they had been so recognized by the defendant, who, in other cases, had paid their orders, and by other county officers. He denies that the contract was made with the teacher on Sunday, and says, if it was, that it was afterwards ratified. Denies, also, that McDowell is legal trustee or director; but says that he had himself recognized Goza, Mills and Dixon, by turning over to them the books and papers of the district; and long before the warrants were drawn, had removed from the State; and that no other persons have claimed to act.

The cause was heard upon the issues thus made, and evidence; whereupon the court denied the writ of mandamus, and adjudged the costs against petitioner. He appealed, and brings up the evidence by bill of exceptions. A rule was made on the clerk to send up with the transcript the original warrant book and teacher's record, which appear here with the case.

OPINION.

1. PRACTICE IN SUPREME COURT: Original books of accounts no part of record.

The books cannot be noticed, as they form no part of the bill of exceptions. It appears that witnesses testified with reference to them, but they were not made part of the record. The Circuit Court had no authority to order the originals to be sent here; nor, finding them, can we use them as original evidence. We can reverse or affirm only on the record. The proper practice, where ponderous books have been used in evidence, is to transcribe into the bill of exceptions such portions as were used, or to take the

testimony of some witness, with the books before him, as to what they show, with any circumstances touching their condition and appearance material to the case. If the practice were indulged of examining original books here, it is easy to conceive of great embarrassment which might arise in complicated banking or mercantile cases.

It appears that in August, 1875, McDowell was elected school trustee for district No. 6, qualified and entered upon his duties as such. In July, 1876, he made to the court a report of the children, etc., in his district, upon which the apportionment of school money had been made. This seems to have been his last official act. He afterwards left the State, about three months before the warrants were drawn.

The transcripts from the county court show that on the third day of April, 1876, upon the recommendation of the county examiner, Goza, Mills and Dixon were, by the court, appointed *trustees* in district No. 6.

A subsequent entry, of April 8th, shows that the county examiner, in pursuance of an order to redistrict the county, made his report, showing that he had made a new school district, the territory of which he describes, to be known as No. 6. He further recommends three persons for each district in the county to be appointed as *trustees*. The report was adopted as a whole. For the 6th district appear the names of Goza, Stephens and Dixon.

These persons were recognized as directors of the district by citizens and officers of the county, including the treasurer, previous to, up to the time, and after the date of the warrants, and were then the only persons who were.

The services of the teacher were proved in reasonable accordance with the contract; and there is no evidence of fraud in drawing the warrants. They were given in substitution for three previous ones, which had been taken back and cancelled.

The county court proceedings reveal a very great misapprehension of the law. The school *act of* 1873, *sec.* 22, had provided for the election of a district *trustee* by the legal voters, at the annual meeting in August of each year, to hold until his successor might be elected and qualified.

The *act of December 7th*, 1875, repealed this, and provided in each district three *directors* in place of a trustee, each to hold office for three years, and until his successor should be elected and qualified. One was to be elected each year, at the August meeting, except that on the first meeting after the passage of the act three were to be elected at once, for one, two and three years, severally. Upon the formation of a new school district, the voters were to elect three directors immediately, to hold for one, two and three years, etc., as in other cases. (*Sec.* 57 *Act of December* 7, 1875.)

In case of a vacancy, the electors of the district were to assemble and fill it, in fifteen days, and in case they should fail, then the county court should appoint. (*Ib.*, *sec.* 60.)

It was further provided that the old trustees in the district should hold office until the directors should be elected and qualified, under the new act.

2. COUNTY COURT: Presumption as to its acts.

Under this act the election of McDowell as trustee in August, 1875, made him the *de jure* officer of the district until a proper board of directors should be chosen under its provisions. It does not appear that any ever was chosen by the electors. But the county court is a superior court of record, in the sense that within the scope of the *subject matters* over which it has jurisdiction, and in the absence of a showing to the contrary, it will be presumed to have acted upon facts sufficient to maintain its action. There is nothing *in the record itself*, concerning the appointment, to show that a vacancy, on the third of April, 1876, had not occurred, which the electors of the district had failed to fill;

and although it now, clearly enough, appears from the proof, and the record of the trustees' report in July following, that there was no vacancy, yet the appointment of the directors in April gave color of title. The subsequent establishment of No. 6 as a new district appears to have been, in fact, only a change of boundaries.

3. OFFICER *De facto.*

But color of title by election, appointment or commission, is not essential, as between other parties, to constitute officers *de facto*.

Mr. GREENLEAF (*Ev.*, *sec.* 92, *n.* 5), describing an officer *de facto*, says that he is one who exercises an office either by virtue of some appointment or election; or of such acquiescence of the public as will authorize the presumption, at least, of a colorable appointment or election.

These directors certainly were such by the plainest and fullest proof. They were universally recognized by citizens, and such officers as were required to transact public business with them; and no one else, at the time the warrants were drawn, was claiming the right to perform the appropriate duties of their office. (*Kaufman & Co.* v. *Stone, adm'r.*, 25 *Ark.*, 336.)

The services were proven, although the treasurer had no right to enquire into that matter, nor into the validity of the original contract. It appertained to the directors.

School warrants would be of little value if the holders were required to establish their consideration to the treasurer's satisfaction, on presentation. Such rules in the administration of State and county affairs, as are prescribed by law for the purpose of subserving the wants and interests of the whole people in their general operation must be observed by the courts, although liable to abuse in counties where the predominance of an uneducated class of citizens new to self government, and uninformed as to their true interests, may for awhile present the humiliating spectacle

of school commissioners authenticating their official acts by mark. If time, and the gradual elevation of this class, may not correct this, the remedy lies in the law making power, and not in other county officers who may be more enlightened, nor in the courts.

It was the duty of the treasurer to pay the warrants out of any funds in his hands for that purpose belonging to that district, (*Act of Dec. 7th*, 1875, *sec.* 68) or for want of funds to endorse that fact on the warrant. *Gantt's Dig.*, *sec.* 1040. The court erred in refusing the mandamus.

Reverse the judgment and remand the case for further proceedings consistent with this opinion.

STREET ET AL V. STUART ET AL.

1. COURT OF COMMON PLEAS. *Jurisdiction.*

The court of Common Pleas has no jurisdiction to render a judgment for damages for a wrongful attachment, for more than five hundred dollars. Both verdict and judgment in that court for greater damages than five hundred dollars are void for excess of jurisdiction.

2. SAME: *Practice upon return of excessive verdict.*

When a jury returns in the court of Common Pleas a verdict for damages above five hundred dollars, the court should inform them of the extent of their jurisdiction and direct them to retire and reconsider the matter.

3. SAME: *Judgment of, void upon its face, quashed on certiorari.*

A judgment of the court of Common Pleas which is void upon its face for excess of jurisdiction will be quashed on *certiorari.*

4. SAME: *When court abolished; to what court its causes transferred.*

Upon the abolition of a Court of Common Pleas in which an inquest of damages on a discharged attachment is pending, if the claim on which the suit was instituted be within the concurrent jurisdiction of the Circuit Court and a justice of the peace, and judgment has been rendered on it, the party claiming the damages may transfer the

cause either to a justice of the peace or the Circuit Court as he may elect. If to a justice of the peace the recovery of damages can not exceed three hundred dollars exclusive of interest. If to the Circuit Court the jurisdiction will be as unlimited as if the suit had been originally brought there.

APPEAL from *Jackson* Circuit Court.
HON. R. H. POWELL, Circuit Judge.

Coody, for appellants:

1. The Court of Common Pleas was a court of superior jurisdiction, and its judgments are not void, only *voidable*. 11 *Ark.*, 519; 31 *Ib.*, 83; 21 *Ib.*, 367. The court certainly had jurisdiction of the subject matter and parties, and of the assessment of damages on dissolution of the attachment, (*Act* 14 *Dec.*, 1875; *Act Nov.* 10, 1875,) hence if the court erred, it was not in the *assumption* of jurisdiction but merely in its *conclusion* of law on the merits. 28 *Ark.*, 91.

The writ of *certiorari* is simply a common law writ to remove the record of an inferior to a superior court. 1 *Bouv. Dict.*, 215, and can only be invoked to supply appeal or writ of error where none is supplied by law or lost. 11 *Ark.*, 613; 14 *Ib.*, 337; 21 *Ark.*, 264. When an appeal lies, the writ is wrongfully granted, 17 *Ark.*, 580; 25 *Ib.*, 476, and can never be properly granted where there is power to render judgment. 3 *Ark.*, 532; 30 *Ib.*, 17. To authorize its issuance the judgment must be void for *want of jurisdiction*, or an *excessive exercise of jurisdiction*, and not for an *excessive amount*. 11 *Ark.*, 519; 21 *Ib.*, 475; 29 *Ib.*, 173. The judgment must be *void*, not *voidable*. 17 *Ark.*, 440; *Gantt's Dig.*, *sec.* 1196. See also *Ib.*, *secs.* 1192, 1195; 2 *Ark.*, 158. A remittitur for any excess was allowable. 3 *Ark.*, 280; 23 *Ib.*, 112; 19 *Ib.*, 92.

2. The act abolishing the Court of Common Pleas (*Pamph. Acts*, 1879, *p.* 29) took effect *May 1st.* This action was disposed of at the *April term*, and hence was *not* "*remaining*" but disposed of.

J. M. Moore for appellees.

I. The judgment of the Court of Common Pleas was void. 1st, for excess of jurisdiction in amount of the judgment rendered. 2nd, because the assessment of damages was not made *at the time* and *by the tribunal* that tried the attachment. *Act. Dec.* 14, 1875; *Holliday Bros.* v. *Cohen*, 34 *Ark.*, 707.

English, C. J. On the twenty-sixth January, 1878, Amanda J. Dailey sued D. L. Ringler, C. E. Street and J. A. McCauley, partners under the firm name of C. A. Street & Co., in the Court of Common Pleas of Jackson county, on a note for $124, on an affidavit that defendants were about to make a fraudulent disposition of their property, and the execution of a code form of attachment bond by Peter B. Dailey and Silvey Stuart as sureties, a writ of attachment was issued, and levied by the sheriff on two rafts of square timber lying in White river.

Defendants made no defense to the note sued on, but they controverted the truth of the affidavit on which the attachment was issued as to the alleged fraudulent disposition of their property.

At the April term, 1878, neither party desiring a jury, the case was submitted to the court, and the court after allowing a credit of $50 on the note, gave judgment in favor of plaintiff for $78 as balance of debt; and upon the evidence introduced on the issue as to the truth of the affi-

davit, found for defendants, and discharged the attachment; whereupon defendants moved the court to assess the damages sustained by them by reason of the attachment, which motion, by consent of the parties, and permission of the court, was continued until the next term, with leave to either party then to introduce additional evidence on the motion.

At the January term, 1879, some lost papers were substituted, and the case continued on the application of C. E. Street, & Co., for want of evidence.

At the April term, 1879, the case was submitted to a jury, and they returned a verdict assessing the damages of C. E. Street & Co., at $732.00, with interest at six per cent. per annum from the date of the attachment; and the court rendered judgment in their favor against the plaintiff in the suit and Peter B. Dailey and Silvey Stuart, sureties in the attachment bond, for $720.00, with interest thereon at six per cent. per annum from the twenty-eighth of January, 1878, the date the attachment was levied, to the time the judgment was entered.

On the twenty-ninth of April, 1879, an affidavit and motion for an appeal to the Circuit Court were filed by Stuart and Dailey, but no order granting the appeal appears to have been made.

On the first of May, 1879, two days after the affidavit and motion for appeal were filed, the act of March 6th, 1879, abolishing the Court of Common Pleas for Jackson county, and other counties, took effect and went into force. *Acts of* 1879, *p.* 29.

By the 4th section of that act the clerk of the Circuit Court was made custodian of the records of the abolished Court of Common Pleas, and, by the 5th section authorized to issue executions upon its judgments.

On the third of May, 1879, the clerk issued an execution

to the sheriff of Jackson county upon the judgment for damages in favor of C. E. Street & Co., against the plaintiff in the attachment, and the sureties in the attachment bond, which the sheriff levied on goods and lands, and advertised them for sale.

On the tenth of May, 1879, upon the application of Silvey Stuart, the judge of the Third judicial circuit awarded a writ or *certiorari* to the clerk commanding him to make out and certify to the Circuit Court of Jackson county, at its next term, a transcript of the record of the proceedings and judgment of the Court of Common Pleas in the attachment suit, and upon the execution of a supersedeas bond, issued a restraining order.

At the return term, (Sept., 1879), after motion to quash the writ of *certiorari* had been made by C. E. Street & Co., and overruled by the court, it was agreed by the parties that the transcript of the record of the proceedings and judgment of the Court of Common Pleas, exhibited with the petition for *certiorari*, should be taken as if returned upon the writ.

The facts shown by the transcript are stated above.

The court quashed the judgment for damages rendered by the Court of Common Pleas in the attachment suit, and C. E. Street & Co., appealed to this court.

I. By section 1, article VII of the constitution, the General Assembly may vest such jurisdiction as may be deemed necessary in courts of common pleas, where established. 1. COURT OF COMMON PLEAS Jurisdiction.

By section 32 of the same article, "the General Assembly may authorize the judge of the county court of any one or more counties, to hold severally a quarterly Court of Common Pleas, in their respective counties; which shall be a court of record, with such jurisdiction in matters of con-

tract and other civil matters, not involving title to real estate, as may be vested in such court."

By section 14 of the same article the Circuit Courts are vested with a superintending control and appellate jurisdiction over Courts of Common Pleas, and empowered to issue, hear and determine all the necessary writs to carry into effect their general and specific powers, any of which writs may be issued upon the order of the judge of the appropriate court in vacation.

By section 3rd of the act of fourteenth December, 1875, establishing a Court of Common Pleas in the county of Jackson, and in other counties named in the act, it was provided that "said courts shall have jurisdiction of all law actions of contract, either expressed or implied; all actions of replevin, and of actions of damages, either to person or property, or both, where the sum in controversy, exclusive of interest, shall not exceed five hundred dollars; but said courts shall have no jurisdiction of any action where the title to real estate is in controversy, nor of any criminal action, nor of any action or matter where exclusive jurisdiction is given by law to the County Court and Court of Probate." *Acts of* 1875, *p.* 124.

The damages in this case were assessed in the attachment suit under the provisions of the act of tenth of November, 1875. *Acts of* 1875, *p.* 7.

Had the appellants, instead of moving for an assesement of their damages in that suit, on discharge of the attachment, brought suit on the attachment bond, or the common law action of case, for the wrongful suing out of the writ of attachment, in the Court of Common Pleas, they could not have recovered a sum exceeding five hundred dollars for their damages, that being the limit of the jurisdiction of the court.

Excessive verdict and judgment void.

The jury to which the matter of damages was submitted in the attachment suit, under the statute, had no legal power to return a verdict in favor of appellants for a sum exceeding five hundred dollars as damages, and the court had no jurisdiction to render judgment upon the verdict for a larger sum. The verdict for $732.00 as damages, and the judgment of the court upon it for that sum were illegal and void for excess of jurisdiction.

2. ——: Practice, when excessive verdict returned.

If the jury had not been properly instructed as to jurisdiction, before they retired, when they returned and announced their verdict, the court should not have received it, but should have instructed them that they could not render a verdict for more than $500 as damages, and directed them to retire, and again consider of the matter. This was not done.

If upon the return of the excessive verdict, the court might have disregarded the excess, and rendered judgment for a sum within its jurisdiction it was not done.

Or if appellants might have entered a remittitur for the excess, and taken judgment for the balance, they failed to do so.

Counsel for appellants submits that if appellees had prosecuted their appeal from the judgment of the Court of Common Pleas to the Circuit Court, the judgment would thereby have been opened, and the matter of assessing the damages stood for trial anew in the Circuit Court on the appeal, and that on such trial a verdict and judgment might have been rendered for an amount of damages within the jurisdiction of the Court of Common Pleas.

This may be true, but though appellees filed an affidavit and motion in the Court of Common Pleas, for an appeal to the Circuit Court, no appeal was granted, and hence they could prosecute none. *Ferguson, et al*, v. *Doxey*, 33 *Ark.*, 663.

The act abolishing the Court of Common Pleas having gone into force two days after the appeal was prayed, and no appeal having been granted, it could not have been granted after the court ceased to exist.

3. ——: Judgment of, void on its face, quashed.

Execution having been issued by the clerk of the Circuit Court under a provision of the repealing act, upon the judgment for damages, appellees had no other remedy at law, than to apply to the circuit judge for *certiorari*, and the judgment being on its face void for excess of jurisdiction, the Circuit Court on the return of the writ properly quashed it.

The judgment of the Circuit Court quashing the judgment of the Court of Common Pleas for damages must be affirmed.

4. ——: When Court abolished, to what Court its causes transferred.

II. The matter of damages in the attachment suit, will stand, on this affirmance, as if there had been no inquest and judgment thereon in the Court of Common Pleas, at the time the court was abolished.

The assessment of damages under the act of tenth November, 1875, on the attachment bond, is an incident to the attachment suit.

The note on which the suit was brought was for $124, and is within the concurrent jurisdiction of a justice of the peace and the Circuit Court. Under provisions of the act abolishing the Court of Common Pleas, appellants may obtain and file a transcript of the record of the orders and proceedings of the Court of Common Pleas in the attachment suit, with the original papers, before a justice of the peace, or in the Circuit Court at their election, and have an inquest of damages. If they elect to file the transcript and original papers before a justice of the peace, the assessment of damages cannot exceed three hundred dollars, excluding interest, that being the constitutional limit. If they elect to file the transcript and papers in the Circuit

Court for the inquest of damages, the jurisdiction will be as unlimited as if the attachment suit had been originally brought in that court. Such, in effect, are the provisions of the act abolishing the Court of Common Pleas.

Affirmed.

BOURLAND, ET AL. v. WITTICH. cf Williams on Creditors pp 1319, 1321

38 167
72 31

1. MORTGAGES: *Satisfaction; Equities; Parties.*

Buchanan, as administrator of the estate of Davis, loaned Bourland money of the estate, and took his note for it, secured by mortgage upon different town lots in Ozark. Afterwards Bourland mortgaged one of the lots to secure other debts, and it was sold to satisfy this mortgage, and purchased by Wittich. About this time Buchanan settled up the estate of Davis, and by decree of the probate court delivered to Bourland, as guardian of the distributees of Davis' estate, his note and mortgage. In a bill in equity by Wittich against Buchanan and Bourland, claiming that the delivery of the notes and mortgage to Bourland discharged them, and praying that his title be quieted against them, or that the other lots be first sold to pay them; *Held:* 1. That this transaction did not extinguish the note and mortgage; 2, but the other lots should be first subjected to the satisfaction of the mortgage; 3, that the distributees (Bourland's wards,) were necessary parties to the suit.

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

U. M. Rose for appellant.

1. When the legal and equitable titles became united in Bourland, that did not operate as a merger, or extinguishment of the debt; he held the mortgage as guardian, and the equity of redemption in his own right. 2 *Black. Com.*, 177; 4 *Kent Com.*, 102; *Bouv. Inst.*, *sec.* 1995; 2 *Broom*

& Had. Com., 329; *Jones* v. *Davis*, 5 *Hudstone & N.*, 766. Affirmed in 7 *Ib.*, 507.

2. If the release of block 35 was fraudulent as to creditors they alone could take advantage of it, and in the present suit the matter cannot be enquired into. *Bump on Fraud. Con.*, 2 *Ed.*, 451; *Clute* v. *Fitch*, 25 *Barb.*, 428; *Bessey* v. *Windham*, *C. A. & E.*, (*N. S.*) 166; *Bigelow on Fraud*, 346.

3. The final settlement of Buchanan, as administrator, could not extinguish the note to him in that capacity. The debts of the estate having been paid, the note would pass as assets to the guardian. *Gantt's Dig.*, *sec.* 165; *Hester* v. *Hester*, 3 *Iredell Eq.*, 9.

J. V. Bourland also for appellant.

Makes the same points as his co-counsel, and cites *Kent on Real Estate*, *p.* 101; *Marr & Lewis*, 31 *Ark.*, 203.

Wittich, *Hughes* and *C. B. Moore* for appellees.

The lien of the mortgage was extinguished by the final settlement of Buchanan as administrator, and appellee having purchased after the lien was so extinguished, there was no lien on the land at the time of the sale to appellee.

The assignment of the property in 1874, subject to the mortgage lien, and his subsequent receiving from the administrator his note and mortgage, is evidence of fraud, and appellee is estopped from setting it up.

There is no evidence of any assignment; of any intention on the part of the administrator to keep alive; no transfer of the mortgage, so as to keep it alive as a lien; but only a naked delivery.

The transfer to Bourland extinguished the debt, and his

sureties on his guardian's bond became liable, and the wards must look to them.

EAKIN, J. On the eighth of January, 1868, Ebenezer Bourland obtained $5000 in money from Thomas Buchanan, as administrator of the estate of J. M. Davis. He gave his note, secured by a mortgage upon three separate pieces of town property in Ozark, described as follows: *Lot No.* 3, *in block No.* 5; *all block* 35, and *lot No.* 11, *in block No.* 20.

In the month of April, 1869, the wife of said mortgagor, being entitled to dower from the estate of Davis amounting to $1666.66, allowed that sum to be credited on her husband's note. Another payment appears to have been made about March, 1875, of $2580.70. There were also some rents collected for the mortgagee, amounting, net, to something over $300. The note does not appear to be entitled to any other credits.

About August, 1874, Bourland made for the benefit of certain creditors, an assignment to Sutherland of the greater portion of his personal and real property. He included in it "two-thirds of *lot No.* 11, *in block* 20, being "twenty feet off of the East side of said lot, and on which the store house of the said Ebenezer and D. L. Bourland is situate," "subject to the lien of Thomas Buchanan as administrator, &c., on the same." Lot 3, in block 5, was also included, but not block 35. D. L. Bourland joined in the deed.

At the trustee's sale, under the power given in the assignment, Wittich purchased said two-thirds of lot eleven, paid the proportion of cash required, gave notes for the balance, and received a title bond. This was on the twenty-second of December, 1875, About that time the administration of

Buchanan was closed. He made his final settlement showing balance in his control, due upon the note, of something over $1300, which he was ordered to turn over to Bourland as guardian of Davis' heirs. This he did by simply delivering up to him the note and mortgage.

Afterwards Wittich filed this bill, setting up the foregoing facts, and making Buchanan and Bourland defendants. He alleges that they keep him out of possession of his purchase, under the pretense that the mortgage lien exists, whereas, as he says, it has been fully paid; that Buchanan had promised him that he would bring an action and have the mortgage foreclosed, but failed to do so. He says if anything be still due, it is amply secured by block 35, which was included in the mortgage.

The prayer is, that, if anything be due Buchanan, he be compelled first to exhaust block 35, before selling complainant's lot, and that, when the mortgage may be satisfied, his title be declared unclouded.

Bourland answers for both, denying that the mortgage has been satisfied. He says that when it was agreed that his wife should allow her dower to be credited on the note, Buchanan agreed to and did release said lot No. 35 from the mortgage. He acknowledges rents, &c., received. Bourland makes his deposition also, in which he testifies positively as to the release, which he says was by parol and letter, but that the letter has been lost or mislaid. Buchanan testifies to other facts substantially as set forth above, but denies that he ever made, or agreed to make, a release of any part of the property. It will be observed hereafter that his honor, the Chancellor, did not consider the proof upon this point important. It further appears throughout that the whole management of the business of Davis' estate was pretty much left to the hands of Bourland, who acted for Buchanan as his agent. The latter denies, indeed, that

any money was paid to him at all, upon the mortgage, or that he ever assumed any control of the mortgaged property.

Upon the hearing the Chancellor, amongst other things, found that the administration of Buchanan on the estate of Davis had been concluded; that the estate had been fully settled, and that the lien upon said lot, created by the mortgage, had been extinguished, together with the debt; whereupon the title to the property was decreed free of all incumbrance to the complainant. The defendants appealed.

The decision of the court below seems to have turned upon the opinion of the Chancellor to the effect that the transfer of the note and mortgage to Ebenezer Bourland, at the close of the administration of Buchanan, extinguished it, inasmuch as it was his own obligation; and that, too, notwithstanding that he took it only as guardian of the *heirs*, as they are called, but really the *distributees* of Davis' estate, of whom he was guardian. It seems to have been thought that, as he could not sue himself, all right of action on the note and mortgage was gone, and the property released; and that he became, thereby, liable to his wards for the amount due, for which his sureties on his bond would take the place of the mortgaged property.

Courts of Chancery have, from the beginning, interfered to prevent the failure of justice from too strict an application of legal rules. Hence they frequently keep alive judgments and debts, which, by strict rules of law, would be considered as satisfied and extinguished. Generally this is done to subserve the purposes of subrogation; but the principal is broad enough to apply to all cases where a merger of rights would work injustice. In the present case, to consider the mortgage as extinguished would not only deprive the wards of a security upon real estate to which they are justly entitled, in addition to the personal security of the

guardian's bondsmen, but it would deprive the sureties of the guardian of the means of subrogation to the real estate lien, in case they should be compelled to answer for their principal for any defalcation, as to funds, with which he may be chargeable. In this case the note and mortgage were not taken by Bourland in his own name or for his own benefit. He gave no consideration for them. They passed into his hands—not in his individual, but his fiduciary capacity. They lost none of their virtue or efficacy by their transfer from the administrator, and remained as formerly obligations which bound the guardian, personally, and made a specific lien on his realty.

A court of Chancery would not permit a guardian to take in his own mortgages in his fiduciary character, and by charging himself with the proper amounts, at the risk of his sureties, thus obtain a release of liens upon his own property. This would be dealing with the funds for his own benefit. He might dispose of his liberated property, and thus trifle with the rights of both sureties and wards. There can be no reason in saying that equity will give an effect to an act which it would not have permitted the parties concerned to give by direct intention.

Parties in foreclosure of mortgage.

No difficulty can arise in a court of Chancery concerning parties. Any person interested may come in, and upon a showing of the facts insist upon a foreclosure of the mortgage. The appellee had that right upon his own account, but we think the court erred in declaring the mortgage satisfied, and decreeing a clear title in his favor. His right was to have an account of what might be due on the mortgage, and to have any property sold for its payment, which might be found liable before his own. Before this can be done, however, the wards must be brought in and made parties. The account must be for their benefit, and not that of the

guardian, and they must have a special guardian *ad litem*, as their interests are antagonistic to his; whilst he must remain a party in his own right. *Gantt's Dig.*, *sec.* 4493.

By the disclaimer of all further interests in the subject matter by the administrator, and from knowledge, brought to the court of the interest of the wards, it is plain that no final determination can be made of the questions between Wittich and Bourland without danger of prejudice to the rights of the wards, nor can their rights well be saved without leaving the questions open for readjustment between the original parties. The court must order them to be brought in. *Gantt's Dig.*, *sec.* 448.

With regard to the release, the proof fails. The testimony of Bourland on that point, although positive in assertion, fails to show clearly any valid release before the execution of the assignment to Sutherland. He does not prove clearly that it was made at the time of the credit of his wife's dower interest and in consideration of her agreement to receive her dower in that way. If made afterwards, voluntarily by the administrator, it would be such a transaction as a court of Chancery ought not to tolerate, as it would, whether so intended or not, indicate collusion between the administrator and Bourland to destroy the securities of the estate for the benefit of the latter, thus endangering the sureties of the administrator directly, and the estate itself indirectly, if said sureties should prove insolvent. It is the duty of the administrator not only to preserve but carefully nurse all the securities under his control. Besides the administrator positively denies that he ever made such a release. Block No. 35 is still subject to the mortgage, so far as appears from the present transcript, but it would be premature to decree so decisively until the wards are brought in.

For this reason we forbear, also, at present all discussion as to the order or proportions in which the several parcels of property are to bear the burden of the mortgage.

Reverse the decree, and remand the cause, with directions to the court below to cause the wards of Bourland, entitled to the funds, to be brought in as parties, and to appoint a suitable special guardian for the protection of their interests in this suit, and for further proceedings, to be had in conformity with this opinion, and the principles and practice in equity.

WARD v. KADEL.

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88 433

38 174
90 103

1. CONTRACTS: *Mutual; Non-performance by one releases the other.*

Where there is a mutual contract for successive acts to be performed, the refusal on the one side to perform will justify the other in treating the contract as rescinded.

2. SAME: *Same.*

In mutual contracts for the performance of successive acts, one party cannot recover damage for non-performance by the other, if such failure was occasioned by his own violation of the contract, or his failure or refusal to perform its stipulations.

3. MARKET VALUE: *Evidence of.*

Evidence of what one can purchase a commodity at from a particular party is not evidence of its market value.

4. CONSTRUCTION OF CONTRACT: *Building material; What is.*

One who contracts to deliver material for building a house in payment of supplies, cannot refuse to deliver *lumber* to the assignee of the contract on the ground that he was a manufacturer of brick, and not of lumber, and that brick, and not lumber, was contemplated in making the contract.

APPEAL from *Pulaski* Circuit Court.

Hon. J. W. MARTIN, Circuit Judge.

The opinion states the case.

U. M. & G. B. Rose, for appellant:

There was no breach of the contract if plaintiff was ready to deliver, on demand, any kind of ordinary material for house building. 2 *Parsons on Cont.*, *sec.* 657. A demand of "some bricks" or "some lumber" not sufficient. Defendant should have stated how much he claimed to be due and demanded payment in building material. Until this was done there was no default. *Rice* v. *Churchill*, 2 *Denio.*, 145; *Mosey* v. *Euke*; 5 *Minn.*, 392; *Smith* v. *Tiffany*, 36 *Barb.* 23; *Wear* v. *Jacksonville R. R.*, 24 *Ill.*, 593.

The modifications made by the court rendered the instructions asked by plaintiff irrelevant and misleading. The instruction given on motion for the defendant is open to the same objection. The court gave the jury no instruction of what would amount to a violation of the contract. It is not the duty of the court to give general principles of law to the jury, but it should apply the propositions of law to the particular facts of the case. *Turner* v. *Toler*, 34 *Mo.*, 461; *Coal Oil Co.* v. *R. R. Co.*, 45 *Ib.*, 85. General instructions that apply to one case as well as to another are abstract.

No proper demand was ever made.

W. L. Terry, for appellee:

Lumber is "building material," and it made no difference whether plaintiff was engaged in the manufacture of it or not. A proper demand was made for it and the refusal was a violation of the contract. 38 *Vermont*, 486. All objections to the *form* of the demand were waived. *Parsons on Cont.*, *Vol.* 2, *p.* 645 (6*th Ed.*)

The instructions related to the *issue directly* made by the pleading, and were not *abstract*, because no explanation was given of what was meant by "violation of a contract." *Gans* v. *Holland*, 37 *Ark.*, 483; *Palmore* v. *State*, 29 *Ark.*, 265.

An instruction is good if it *fairly* states the *law* on the general state of facts. 17 *Iowa*, 250.

If Ward violated his contract, appellee could recover upon a *quantum valebat*. *Desha* v. *Robinson*, 17 *Ark.*, 252; 39 *N. H.*, 431; 10 *Ill.*, 298; 9 *Ind.*, 166; 7 *Black. Ind.*, 603.

The verdict did "substantial justice between the parties" and should not be disturbed. 34 *Ark.*, 105; 23 *Ib.*, 126; 15 *Ark.*, 451; 24 *Ark.*, 253; 19 *Ib.*, 330–1.

EAKIN, J. The appellant, Ward, sued Kadel upon a parol undertaking of the latter, to assume and perform the obligations of a written contract which had, on the twelfth day of January, 1875, been made between said Ward and the firm of Joseph A. Martin & Co. By the terms of the contract said firm had agreed to deliver to Ward, who was lessee of the State penitentiary, all the beef which might be necessary to feed the convicts from that time until the first of January, 1876. The beef was to be fresh, and a good merchantable article; to be delivered in such quantities, and at such times as Ward might designate; Ward, on his part, agreed to pay for the same at the rate of 3 1-2 cents per pound, as follows: Settlements were to be made at the end of each month, upon which Ward was to pay one half of the amount then due in current funds, and place the other half to the credit of the firm, to be paid by Ward in work or material, in building a house, or furnishing material, or both, for the firm, at a cash basis. There were other provisions in the contract not affecting the point raised in this suit.

A few days afterwards, said firm by written consent of Ward, and for a valuable consideration, assigned to defend-

ant, Kadel, the benefits and burdens of this contract. Kadel assumed them, but signed no writing. He furnished beef according to its terms for about two months, and then refused any longer to do so. This suit is for damages, laid at $2500.

The answer presented several issues, some of which were disposed of in plaintiff's favor. That upon which the questions presented by the appeal arise, was in effect, that Ward had upon his part first violated the terms of the contract, whereby defendant became entitled to consider the same as rescinded, and on his part to recover, by way of set off, the money value of the beef delivered, which was to be paid for in work or material. It is well to remark, in passing, that counsel make no point upon the propriety of entertaining either a plea of set off, or counter claim, in an action for unliquidated damages, where the defendant bases his claim upon his right to rescind the contract altogether.

Upon the trial the jury found for the defendant on the set off, the sum of $435.43, for which judgment was entered. After a motion for a new trial, the plaintiff appealed, and a bill of exceptions was taken.

The motion objects to the instructions given by the court for defendant, and upon its own motion, and to the modifications which the court made before giving them, of those asked by the plaintiff. It assigns, also, that the verdict was not supported by the testimony.

The evidence well supports the verdict as to the amount and value of the beef delivered. The real contest is, as to whether the plaintiff had so violated the contract on his part as to release the defendant from further obligation. There is proof tending, but we think not sufficient, to show that the plaintiff refused to deliver brick to defendant, on his request, at cash rates. There is positive proof that he refused to deliver any lumber on request, stating that he

had no lumber, and could not furnish it. Upon the other side there is evidence denying this, and also some tending to show that the defendant refused to carry out the contract because he found it would be ruinous to continue; and also, partly, because plaintiff refused to settle for beef furnished his family, except upon the same terms as for beef furnished the convicts under the contract.

For the plaintiff, the court instructed the jury that if it were no part of the contract that beef should be furnished to Ward's family, his claim that it should be, would not justify the defendant in refusing to perform the contract as actually made by him. Also, that they could not find for the defendant any sum for the failure to furnish work and materials, unless they should find that the defendant made a demand for them before filing his answer.

It qualified both these instructions, however, against plaintiff's objections. The first by adding "unless the jury find that Ward actually refused to perform his part of the contract," and the second, by adding "unless the jury find from the facts that the plaintiff has violated his part of the contract so as to permit the defendant to treat the contract as at an end."

1. CONTRACTS

Mutual; Non-performance by one releases the other.

The law is well settled that where there is a mutual contract for successive acts to be performed, the refusal upon one side to perform, will justify the other party in treating the contract as rescinded.

All that was asked was given, and the additions were pertinent to the issues and the evidence, and correctly expressed the law. There was no error upon this point.

For the defendant the court instructed in effect, that the plaintiff was not entitled to recover any damages for the failure of defendant to fulfill the contract, if such failure was occasioned by a violation of the contract by plaintiff, or

his failure or refusal to perform its stipulations. This was correct.

2. SAME:

The court then, upon its own motion, instructed that a mere claim by Ward to have Kadel do what the contract did not require, would not amount to a violation of the contract, unless Ward, upon Kadel's refusal, failed to perform his part of the contract, and added that it was for the jury to say whether Ward had so failed on such refusal.

The instructions contain a very clear and well guarded statement of the law, by which the evidence was to be considered, and were properly given.

3. MARKET VALUE: Evidence of.

Whether or not the evidence can be held to sustain the verdict must depend on the construction to be given to the contract. There is no sufficient proof that the plaintiff refused to deliver brick at the ordinary cash rates. He was willing to deliver them at ten dollars per thousand. The defendant told him he could get them for nine, and there the matter ended. The plaintiff was not bound to deliver the brick as low as the defendant could purchase them elsewhere, but at the cash price in market. There might have been some one manufacturing brick under a pressure for ready money, or some one willing to befriend the defendant by allowing him a deduction. The plaintiff could not be required to make a like reduction, and there was no proof as to the ordinary cash price of brick in market.

Nor is there any sufficient proof that the plaintiff refused to settle for the convict beef, because the defendant refused to allow the family beef to be estimated at the same rates. The latter was outside the contract altogether. If the proof upon this point has any tendency at all it would be to raise the suspicion that defendant was largely induced to refuse any more convict beef, because the plaintiff refused the enhanced price for that furnished his family. But this was properly left to the jury.

The defendant testifies that plaintiff did refuse to furnish lumber for building, in such terms as to waive all formal demand for any particular quantity, to be delivered at any named place. This was a violation of the contract on his part, if its terms imposed on him the obligation to deliver lumber. The plaintiff denies that defendant ever called upon him for any materials or work under the contract, but the jury were entitled to determine as to which of them might be mistaken, and the question must be considered as if they believed the demand and refusal had been virtually made.

4. CONSTRUCTION OF CONTRACT: Building material; what is.

It is shown that at the time the contract was made, Ward was engaged in the manufacture of bricks; that he did not manufacture lumber; and that he was not allowed to work convicts within the limits of Little Rock. The appellant contends that a fair and reasonable construction of the terms of the contract, in accordance with the intention of the original parties, would be that Ward was to deliver such building material as he was manufacturing for sale, and that it was not expected that he should go into the market and buy for defendant, any building material which he did not usually make or have on hand. The contract is not aptly worded, however, to show such intention. If that had been the original intention, and the original parties had endeavored to enforce the written contract, according to its letter, there might possibly have been some relief in equity, on the ground of fraud. But there is no showing that defendant was advised of such intention when he got the contract for valuable consideration, and he became entitled to all its benefits according to the plain import of the language.

The contract was to pay one half the beef bills in work, or materials for building a house. Lumber is timber sawed or split for use in building, and is material essential for building any kind of a house ordinarily used for business or by families. It was not the duty of defendant, in taking

the assignment of the benefits and burdens of the contract, to enquire by what means the plaintiff expected to get the lumber. Upon the other hand it was the duty of plaintiff, if he had meant to confine his obligation to bricks, so to have expressed it in the contract; or at least to have advised defendant, when the latter assumed the contract, that its general terms must be understood only to embrace such building material as plaintiff might have, or be engaged in making. The defendant had the right to demand lumber, and if the jury believed from the evidence that he did so, and that it was refused, they might find such a violation of the contract as would justify their verdict.

Upon the whole case, we think there was no error in refusing the motion for a new trial.

Affirm the judgment.

WILSON AND WIFE v. SPRING.

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62 18
38 181
71 393
38 181
73 353
77 479
38 181
81 302
38 181
83 370

1. EVIDENCE: *Decree; When admissible alone.*

A decree divesting and vesting title, and reciting the facts and proceedings upon which it is founded, is admissible as evidence in a subsequent suit for the party claiming under it, without producing the whole record of the cause in which it was rendered, where it is shown that the record is lost or destroyed, and cannot be produced.

2. SAME: *Unrecorded deed.*

The acknowledgement of the execution of a deed of conveyance, as required by the statute, does not alone authorize its introduction as evidence. It must also be filed and recorded, or its execution proven at the trial.

3. SAME: *Of title to land.*

Title to land must be proved either by force of the statute of limitations or by showing chain of title from the government, or at least from a source common to both parties, which implies admission of title up to that source on both sides.

4. DECREE DIVESTING TITLE: *Who bound by.*

A decree divesting title out of a party binds him, his heirs and all subsequent purchasers from him, except purchasers for valuble consideration and without notice after the expiration of a year from its rendition, when it has not been recorded in the recorder's office under sec. 3642 Gantt's Digest.

5. STATUTE OF LIMITATIONS: *A statute of title.*

The Statute of Limitation is not merely defensive, but confers title which may be asserted by ejectment by the original holder, his heirs or assigns, and possession under a deed, for the statute period, of a part of the tract described in it, confers title to the whole.

6. ADVERSE POSSESSION: *Presumption of continuance.*

Adverse possession of land once taken under color of title, is presumed to continue, when there is no proof of an interruption in the possession within seven years. The burden of proof of abandonment or interruption is upon the adverse party.

7. ATTACHMENTS: *Sale of land not attached void.*

In attachment suits where there is only constructive service on the defendant the court acquires no jurisdiction over any property not attached, and a sale of any other under a personal judgment and execution rendered in the case, is void.

8. CAVEAT EMPTOR: *Purchaser at execution sale.*

The purchaser of land at execution sale is not chargeable with notice of mere irregularities in the suit, but if there be no jurisdiction or other defects rendering the judgment void, the case is different.

APPEAL from *Crawford* Circuit Court.
Hon. THOMAS MARCUM, Special Judge.

Duval & Cravens, for appellants:

1. The decree alone without the whole of the record and papers was not admissible. To have any validity or effect it was requisite to show that the court had jurisdiction of the defendants as well as of the subject matter. 2 *Wharton Ev.*, *sec.* 824 *et seq.*; 1 *Greenleaf*, 511. The whole record should have been produced or exemplified. 2 *Whart. Ev.*, 824; *Jay* v. *East Livermore*, 56 *Maine*, 107; *Hawks* v.

Truesdell, 49 *Mass.*, 507; *Com.* v. *Front*, 76 *Pa.*, 376; *Davidson* v. *Murphy*, 12 *Conn.*, 213; *Belding* v. *Muller*, 2 *Lansing*, 470.

2. The plaintiff, to make out title, was bound to show that the land belonged to Wilson, a valid attachment, judgment, execution, and sheriff's deed. Plaintiff relied alone on the recitals of the sheriff's deed. Defendant offered to prove that part of the land was not attached. It was shown that at the time of the sale, and afterwards, all of it was in the actual possession of Hiero T. Wilson, who had a title. *Parsons* v. *Paine*, 26 *Ark.*, 124.

In a proceeding between a purchaser and a person other than the execution debtor, title must be shown in the debtor at the time of the sale. *Rover on Jud. Sales*, 1078; *Hartley* v. *Ferrell*, 9 *Fla.*, 374; *Whalley* v. *Doe*, 10 *Geo.*, 74.

3. "Judges shall not charge juries with regard to matters of fact, but shall declare the law." *Sec.* 23, *Art.* 7, *Const.* The court erred in charging the jury "that the documentary evidence established title in plaintiff," &c., &c.

4. If premises become vacant for a day, the owner will be deemed in the constructive possession by reason of his title—the ouster must be continued uninterruptedly during the whole time. *Dew* v. *Mulford*, 1 *Hayer*, 320; *Pedruch* v. *Searl*, 5 *Sug. & R.*, 240.

5. There was no proof that Spring and his grantees held adverse possession for either five or seven years continuously.

M. H. Sandels, for appellee:

1. The records were shown to have been destroyed by fire, prior to the trial. The certified copy was the best evidence in existence. The record *recites* service on Hiero T. Wilson, which is conclusive of that question. *Gantt's Dig.*,

sec. 4739. Ample foundation for the copy was laid by the testimony of Walker. *Greenleaf on Ev.*, (12 *Ed.*) 509, *and note* 4; *Freeman on Judgments*, (2*nd Ed.*) *sec.* 407, *and note* 2; *Davis* v. *Pettie*, 11 *Ark.*, 359; *Mason* v. *Ball*, 26 *Ark.*, 165.

3. The presumption is that the court acted properly. *Freeman on Judgment*, *sec.* 124.

4. The second objection untenable. *Hughes* v. *Watts*, 26 *Ark.*, 228.

5. The court was right in construing the documentary evidence and charging its effect. *Thompson on Charging the Jury*, *sec.* 12 *and notes.*

EAKIN, J. Pauline G. Spring sued certain tenants in possion, and recovered from appellants who claimed the property in right of the wife, through Hiero T. Wilson, and who came in and defended, the following tracts of land:

S. $\frac{1}{2}$ of S. E. $\frac{1}{4}$,	Sec. 19,	in T. 9,	N.	of	R. 32 W.
S. $\frac{1}{2}$ of S. W. $\frac{1}{4}$,	Sec. 20,	in T. 9,	N.	of	R. 32 W.
N. E. $\frac{1}{4}$,	Sec. 30,	in T. 9,	N.	of	R. 32 W.
S. E. $\frac{1}{4}$,	Sec. 30,	in T. 9,	N.	of	R. 32 W.
And also:					
N. E. $\frac{1}{4}$,	Sec. 29,	in T. 9,	N.	of	R. 32 W.
N. W. $\frac{1}{4}$,	Sec. 29,	in T. 9,	N.	of	R. 32 W.

These lands lie in a body, but it will be necessary to consider the lists separately, the last two being on somewhat different footing.

After a motion for a new trial, and other regular proceedings for the purpose, the defendants prayed an appeal; and bring up the evidence by bill of exceptions.

One of the grounds of the motion for a new trial, and the one most convenient to consider first, is that the verdict of the jury is contrary to the evidence.

Upon both sides, there was some documentary evidence of title, and plaintiff also claimed a title as matured by adverse possession under the statute of limitations. A short abstract of the evidence is essential to a clear understanding of the opinion.

With regard to the first four tracts the plaintiff attempted to deraign title by showing a decree of the Circuit Court in Chancery, rendered in the year 1852, in a certain suit in which Constant A. Wilson was complainant, and Hiero T. Wilson, with others, was a defendant; by which decree the defendants were all divested of their title to these lands, and the complainant clothed with a full title as against defendants. The decree recites all that was necessary to its validity in a collateral proceeding.

Next followed a sheriff's deed to Solomon Clark for these lands, and also for the last two, in section 29, thus embracing the whole body recovered in this suit. The deed was subsequent to the decree above mentioned, but in the same year. It recites a judgment recovered by Bailey against Constant A. Wilson, and an execution in the nature of a *venditioni exponas*, to sell the lands conveyed, issued on the sixteenth day of July, 1853, in which there is a clerical omission of a tract; the levy, which embraces all the subdivision, and the sale to Clark.

Then followed successive conveyances from Clark to Nicholas Spring, on the twenty-eighth of November, 1853; from Spring to William A. Stephenson, in the year 1866, and from Stephenson to the plaintiff, Pauline, on the eleventh of June, 1870. These conveyances embraced all the lands, and seem to have been duly acknowledged. The last, however, had never been filed for record. It was nevertheless admitted against the objections of the defendants, without further proof than the acknowledgment.

The documentary evidence on the part of defendants con-

sisted of two patents from the United States to Hiero T. Wilson, both long anterior to the decree in Chancery, for the N. E. and N. W. quarters, respectively, of said section 29. Also a deed from said Hiero for *the whole* of said body of lands, to defendant, Mary Wilson, executed on the sixth of June, 1871. This deed was duly acknowledged, and was filed for record on the twenty-first day of April, 1873. There was some general oral evidence that Hiero T. Wilson claimed, and had purchased the other lands outside of section 29, but nothing sufficient to show title. For plaintiff there was evidence tending to show an adverse possession for the time required by the statute, and some evidence per contra for defendant.

We do not know the ground upon which the jury based their verdict, and as there was evidence of adverse possession on the part of plaintiff, which they were entitled to consider, and which if they thought it sufficient, would support a general verdict, we cannot say the motion for a new trial on this point should have been granted. The force and scope of the documentary evidence will be considered in noticing other grounds.

The motion objects further, that "the court permitted illegal and incompetent evidence to go to the jury on the part of the plaintiff, over the objection of defendant." What this evidence was is not pointed out in the motion. The briefs of counsel refer chiefly to the admission of the decree in Chancery, but for which it is contended, and we we think rightly, the sheriff's deed could not form a link in the chain of title.

1. EVIDENCE: Decree: when admissible alone.

The point relied upon is that a decree in Chancery, reciting the former proceedings, is not admissible as evidence of title without the introduction of the whole record.

In this case it was shown that the courthouse had been burned, and all the records of the case destroyed. The

existence of the certified copy of the decree itself is not explained. It had, perhaps, been taken out for preservation. Being in existence, however, it was the best evidence attainable, not only of the fact that such a decree was rendered between the parties named, but by its recitals, of the previous proceedings also.

Generally, the authorities say that a judgment or decree, to constitute a link of title, must be accompanied by the whole record. But the rule is not without exceptions, and is at all times limited in its application. For instance, as stated upon authorities, by Mr. WHARTON in his work on *Evidence*, a record deteriorated by time, and imperfect, may be admitted to prove such portions of it as may be attainable; and so also of other fragments of ancient records, when no fuller proof is attainable, provided they have internal evidence of authority.

Besides, the objection to the admission was too sweeping. Decrees or judgments alone, by the general practice, are admissible to prove the fact that they were rendered, and as a basis for subsequent proceedings, where the object is not to make them proof of the facts therein contained. For instance, they are sufficient to support an execution and sale, and a commissioner's or sheriff's deed.

Whilst, therefore, we are clear that, in any view of the law, the peculiar circumstances of this case justified the admission of the decree, without the whole record, and that the court did not err in its ruling, we do not mean to say that it would have been error to admit it without proof of the loss of the other parts of the record. A decree which *proprio vigore* vests title, seems, in our State, to stand in the place of a deed from one party to the other, or of a commissioner's deed on a sale duly confirmed. It operates *in rem*, as it were, upon property within its jurisdiction. It cannot be collaterally attacked for irregularity

Effect of decree vesting title.

in the proceedings, if it be in a case where jurisdiction has attached to the property, and the persons to be affected. The recitals in it, of notice to the person, are evidence of the fact, and the court has general jurisdiction of all the lands in the county. The decree itself is a muniment of title, and may be recorded as such in the recorder's office, without the accompanying proceedings. (*Gantt's Digest, sec.* 3642.)

The rule requiring the introduction of whole records, where jurisdiction has been established, seems, from the reasons usually given, to have been directed to cases in which a judgment was offered as an estoppel as to some facts or conditions necessary to be established in order to sustain it, and was for the purpose of showing by the pleadings and proceedings what facts were really in issue. It can have no reasonable application to a case where a decree *proprio vigore* establishes the status of property, as to ownership, and binds all parties to the suit in that regard, wholly regardless of what the previous proceedings may have been. That is the case now in judgment. What good purpose could the rest of the record serve? The decree is, in any case, admissible to show that it was rendered, and the law gives it effect until reversed or shown to be void. Its recitals show *prima facie* that there was jurisdiction, and it can only be voidable. Its effects, until reversed, are the same, whether the proceedings were regular or irregular, whatever may have been the course of pleading or the nature of proof. Why, then, in such cases, impose upon the litigant the expense of procuring a voluminous record? or upon the court the trouble and delay of examining it, when in any event the *effect* of the decree in divesting and investing title would be the same?

We are not prepared to say, therefore, upon reason and authority, that it would have been error to admit the decree

as *prima facie* proof in a chain of title, without the proof of the loss of the other records.

The tendency of modern rulings is very strong, to uphold the final action of courts of general jurisdiction, and to presume all things in their favor, where the parties have been before the court and there has been no appeal. It would be long to review the many American decisions upon the subject. Many of them, holding the introduction of the whole proceedings to be necessary, have been, with reference to the inferior courts, in favor of which the presumption is less strong, and all have been, so far as they have come under our notice, upon peculiar circumstances, not in conflict with the general views above expressed.

I think it would not be contended that if the Chancery Court had, for good reasons in this case, ordered a sale of the lands by a commissioner, and a deed had been made and confirmed, it would have been necessary to go behind the decree to sustain the deed. The decree itself is as potent as a deed, and performs the commissioner's office.

Before leaving the subject, I think it will make my own meaning clearer, to refer to a decision of HOPKINS, J. in the U. S. Circuit Court for the Northern District of Illinois—the case of *Kibbe* v. *Dunn*, 5 *Bissell*, 233. The question there was whether a decree could be received in evidence, to establish a right, when portions of the record had been omitted—in other words, without the whole record. There was nothing to show that the heirs at law of a certain mortgagor had been made parties. It was held that the court might lawfully, in support of the decree, supply by intendment several *material and necessary facts* which *ought to have appeared* in the record. It was declared to be the policy of the law to *sustain* titles derived through decrees of the court, especially as to old decrees, where parties with opposing interests

have slept upon their rights. The rule was declared to be "that the court will presume everything and act to have been done necessary to give jurisdiction and authority to the court pronouncing the judgment or decree, which the record does not show was *not* done—particularly when the record produced shows that all of the record and proceedings have not heen preserved." The spirit of this decision is that of plain, good sense.

2. EVIDENCE: Unrecorded deed is not, unless its execution be proved on the trial.

The grounds of the motion embrace the objection to the admission of the deed of Stephenson, the immediate grantor of plaintiff.

The deed was not a writing purporting to have been executed by one of the parties, nor was it referred to and filed with the proceedings. It was not therefore within the purview of *sec.* 2495 of *Gantt's Digest*, so as to be read in evidence, unless the genuineness of the signature should be denied by affidavit.

At common law a deed, or other instrument of writing of a private nature, could not be read in evidence without proof of its execution. It did not prove itself. By the Revised Statutes, and by act of Jan. 12th, 1853, (see *Gantt's Digest*, *secs.* 854, 855 and 859,) it was provided that all deeds, duly executed, proved or acknowledged, and recorded as authorized or required by law, should themselves, or by certified copies, be received in evidence, without further proof of execution. This does not apply to a deed which is only acknowledged or proved, and never filed for record. It may be argued with much logical force, that the filing and recording of deeds are mere ministerial acts. That the substantial *proof* of the execution is made by the acknowledgment, and that the certificate of the fact of acknowledgment cannot be collaterally attacked. Why then make the mere *act* of filing, and the actual record, essential to their authenticity? We can give no satisfactory answer,

but "*ita lex scripta est.*" The Legislature has imposed that condition in such plain terms as to leave no room for construction nor grounds to suspect a mistake; and if admissible at all, without further proof, it must be under the statute. We think the court erred in admitting the deed of Stephenson to plaintiff, without further proof of its execution.

3. SAME: Of title to land.

Proceeding to the instructions we find that the first given on motion of the plaintiff to be of extraordinary length. It sets forth the lands sued for, the admissions of defendants that their tenants were in possession, and informs the jury that the only question left for them to try was whether or not the plaintiff was the owner of the premises and entitled to possession. It goes on to recite the documentary evidence of the plaintiff from the decree down, step by step, describing each at length, to the extent of two pages of the transcript, and then instructs them that such documentary evidence establishes a *prima facie* title in plaintiff, sufficient for her right to recover, "unless overturned by the testimony adduced by the defendants."

The instruction is unnecessarily prolix, we think, and like all long instructions, not apt to be well understood by the jury. Besides, it is not strictly corect, and was likely to mislead. It is true, *as law*, that all the evidence admitted, and recited in the instructions, would, and did, show a *prima facie* case of title in plaintiff to the first list of lands—those included in the decree, and to this extent she could recover, unless the *prima facie* case had been overturned. But it is not true, as law, that the documentary evidence showed, *prima facie*, any title to the lands in section 29. In making out title by the party having the onus, he must do so either by force of the statute of limitations, or by showing claim of title from the government, or at least from a source common to both parties, which implies admission of title up

DECREE DIVESTING TITLE: Who bound by.

to that source, on both sides. A decree against Hiero T. Wilson binds him, his heirs, and all who claim under him by subsequent conveyance, unless it be purchasers for valuable consideration, and without notice, after the expiration of a year from its rendition, when it has not been transferred to, and recorded in the Recorder's office under the provisions of the Revised Statutes. The defendants make no such plea, and nothing of the kind is insisted upon by counsel in their brief, and so we may concur in the instruction, so far as it relates to the decreed lands. The chain of documentary evidence, once admitted, makes a chain of title as to them, so far as its *prima facie* aspect is concerned.

But we are unable to see how a purchaser of lands, under an execution sale, or attachment, against Constant A. Wilson, and without any showing of how said Constant himself acquired title, can make a *prima facie* case in favor of one who must succeed upon the strength of his own title, against one who claims from a different source. A deed gives *color* of title, but is not even *prima facie evidence* of title against a stranger without showing title in the grantor, and several successive transfers cannot alter the case. Nor can lapse of time, until aided by the statute of limitations. There is absolutely no proof at all of title in Constant A. Wilson, to the lands in 29, at the time of the levy and sale to Clark.

The first instruction, however, does not stop here, but proceeds to recite the patents issued to Hiero T. Wilson; and his deed to the defendant, Mary, for all the lands; and that there was proof both for and against the seven years possession; of which the jury were to judge. The court thereupon instructed that the documentary evidence established title in the plaintiff to all the premises, *except* the lands in section 29. The meaning of all the foregoing is, that although the plaintiff made a *prima facie* case as to all,

yet after the evidence of defendant, he had succeeded in *establishing* title, by documentary evidence, only to the lands in the decree.

There was therefore no actual error in the result of the instruction prejudicial to defendants. Although the court may have erroneously supposed that the documentary evidence of plaintiff showed a *prima facie* title to the land in section 29, yet the jury were advised that such primary aspect of the case had been changed by the documentary evidence of the defendant. This was made plainer by the second instruction, which was to the effect that the only remaining question for the jury to determine concerned the title to the two tracts covered by Hiero's patent.

5. STATUTE LIMITATIONS: A Statute of title.

The third instruction was, that even if Clark acquired no title to the lands in section 29, by means of the sheriff's deed, yet that he and his grantees, either immediate or in succession, that is Spring and Stephenson, might acquire title by five years adverse possession.

We see no objection to this; and it was correctly followed by a general instruction that if the plaintiff's grantors held adverse possession for seven years, they acquired title which passed to the plaintiff. It is well settled in this State, that the statute is not merely defensive, but confers title which may be asserted by ejectment, and the benefit of the statute enures not only to the purchaser at execution sale, but to his heirs and assigns.

The jury were further instructed that the sheriff's deed made color of title, and that seven years possession under such color, of a part, would establish title to the whole. This is familiar law.

6. ADVERSE POSSESSION: Presumption of its continuance.

Specially the court instructed for the plaintiff, by the eighth instruction, that if the jury found that Nicholas Spring, one of the grantors in plaintiff's chain, went into possession and held through Clark, under the sheriff's deed, that the pre-

sumption would be in favor of the continuance of the possession in himself and grantors, in the absence of proof of the interruption of that possession before the term of seven years expired.

We think the presumption a fair one, that a possession under color of title, once adversely taken, has continued in the grantee, and passed to his grantees in turn, any interruption of it, must be shown by the other party. Otherwise it would be necessary to make some proof of possession each day. If the land had been in fact abandoned, or there had been any interruption of the possession in Spring and his grantees it devolved on defendants to show it.

Reviewing these instructions given for the plaintiff, we find in them no substantial error. They seem fairly to embody the law.

A number of instructions were given at the request of defendant, and two were refused, numbered 4 and 5.

7. ATTACHMENTS: Sale of land not attached, void.

The court by the former refused to instruct; that to sustain the sheriff's deed in the Bailey suit it devolved upon the plaintiff to show a valid levy of an attachment upon the land, a judgment in favor of the plaintiff in attachment, execution and sale of the land; and if the jury find that the writ of attachment was not levied upon any part of the land in controversy, the sale of such part was void, and as to that they should find for the defendants.

It is certainly the well settled rule that at the time of the transactions in question, the court in attachment suits, where there had been only constructive service, acquired no jurisdiction over the person of the defendant, or any other property than that attached, and that a sale of any other, by virtue of a personal judgment, execution and levy would be void. But to have given the instruction would have been submitting to the jury a mere question of law. All the evidence on this point was documentary. The court had

already considered it, and advised the jury that so far as the documentary evidence was concerned, the plaintiff had made out her case as to all the lands save those in section 29.

Upon re-examination of the documentary proof on this point we find that the sheriff's deed does not refer to the suit as one by attachment. It recites that Baily had recovered judgment in the Circuit Court against Constant A. Wilson, on the fourteenth of February, 1851; that an execution issued on the sixteenth day of July, 1852, commanding him to make the amount out of the specific lands, describing them, with a clerical omission, obvious on the face of the papers; that it was levied on the "said" lands, this time describing them truly, and proceeding with the advertisement, sale, &c. This was certainly a good deed *prima facie*. The evidence of the defendants reveals the further facts that it was a suit by attachment, and there had been no personal service. This is done by a certified transcript of the order of publication. It further shows, however, that all the lands in question had been taken in attachment, except that, instead of "S. $\frac{1}{2}$ of S. W. $\frac{1}{4}$ of section 20," there is described the "S. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of sec. 20." The latter tract is not claimed in any way by any of the parties in this suit. The obvious mistake is corrected in the sheriff's recital of the lands against which the execution is directed, whilst at the same time he himself makes another just as obvious, by wholly omitting one of the quarter sections, and afterwards both are corrected in the description of "said" lands which were exposed to sale.

DESCRIPTION OF LANDS: Obvious mistakes should be corrected by the court.

All attorneys and land agents are well aware of the multiplicity of mistakes which take place in the description of land by fractions of sections and by townships and ranges, and base lines and meridian lines. The changes of fractions and numbers and cardinal points are so constant, and in illegible or careless manuscripts mistakes are so frequent with

the most careful, that courts should not hesitate to make the proper corrections where they are indeed obvious. To allow such mistakes, discovered after long years, to defeat a title at law altogether, or to drive parties into chancery for relief, at great expense, would be a very great hardship. Of course courts of law should be well assured of the mistake, but when discovered they should not hesitate in futherance of justice to construe one cardinal point or one fraction for another. This is done sometimes against the letter of statutes, and may be done also in the construction of deeds. The instruction had no sound basis in the evidence. It seems probable upon the face of the documentary evidence, and the judge had the right to determine, that the lands recovered had been, in fact, taken in attachment.

8. CAVEAT EMPTOR: Purchaser at execution sale.

The last error complained of in the instructions is the refusal of the 5th for defendant. It was asked that the court instruct the jury that the plaintiff, having purchased at execution sale, must be held to have had notice of all irregularities in the proceedings. This was not law. Mere irregularities do not vitiate a sale made under execution. If the court have no jurisdiction, or there be any substantial defect rendering the judgment void, the case is different. But that is not the language of the instruction. There was no error in refusing it.

On account of the error in admitting the deed of Stephenson to plaintiff without proper proof, the defendants should have been granted a new trial.

To that end reverse the judgment and remand the case.

CHANDLER v. THE STATE.

1. CONTRACT TO BUILD BRIDGE: *When performed by building levee.* Chandler had a charter from the County Court to build a bridge, and charge certain tolls for crossing it. He built the bridge and it was swept away by the current in high water. This was repeated several times; and finding that a wooden bridge for the whole distance (345 feet) would not stand, he built a strong and sufficient turnpike of earth and rock for most of the distance, and bridged the balance, about ten feet; which, together, answered all the purposes of the bridge. *Held:* That the structure was a substantial compliance with the contract to build the bridge—the essential purposes of the grant were accomplished—and he had not forfeited his charter.

APPEAL from *Montgomery* Circuit Court.
HON. J. M. SMITH, Circuit Judge.

U. M. Rose for appellant:

STATEMENT.

This was a proceeding in the Circuit Court of Montgomery county, in the nature of a *quo warranto*, prosecuted in the name of the State by the prosecuting attorney of the judicial circuit, by authority of the Attorney General, to vacate the appellant's charter for a toll bridge, and seize his franchise to the State. The petition alleges, in substance, that the county court of the county had before then granted to appellant a charter to build a toll bridge along the east side of the Caddo river, at the Caddo Gap Narrows, on the Arkadelphia and Mt. Ida road. That the bridge erected there by the appellant had been washed away, and he had never rebuilt it; but instead, had erected a small structure about ten feet long over a narrow drain, and was continuing

to exact from the traveling public exorbitant tolls for crossing it. That it was not such a bridge as was required by the charter, but was a gross imposition upon the traveling public, was of no public utility, but to the contrary an obstruction to public travel, and should be abolished. The appellant answered, that at the point at which the bridge was located, the Caddo river passes through a narrow gap, between almost perpendicular mountain cliffs of rock, and the road runs through said gap on the north side of the river at the foot of the bluffs, and just above the edge of the water. That at the time the charter was granted the road was far below the high water mark, and was subject to frequent overflows, and frequently impassable. That in pursuance of the charter, he had, at great expense, built a substantial wooden bridge, 345 feet long, along said bank through said narrows, and the great force of the current, in high water, had swept it away. He had, at great expense, rebuilt it six times, and it had every time been carried away by the current. That finding that no wooden bridge would withstand the current in a sudden rise of the river, he had excavated a portion of the bluff, and filled up the space of 335 feet occupied by the bridge, with a good, solid and substantial embankment and turnpike of solid rock and earth, entirely above overflow, leaving a space of about ten feet to be filled by a bridge, in which he had built, and constantly kept in good order and repair, a substantial and sufficient bridge, and had at great expense kept said turnpike in good order and repair. He denies that said bridge is an imposition, and asserted that without it the road would be impassable much of the year. The turnpike is as safe, solid and substantial, as any part of the road in the county. He had taken no toll from any citizen of the county, and none from any other not authorized by the charter.

A demurrer was sustained to this answer and the appellant appealed.

HARRISON, J. As *section* 640 of *Gantt's Digest*, which made it the duty of the county court to require owners of toll bridges to give bond and security for the performance of their obligations to the public, had been, by the act of March 6, 1875, repealed, when the writ was sued out, the failure before the repeal, to give bond as ordered by the board of supervisors, was thereby waived.

We may remark here, that the order of the board of supervisors, from which the appeal was taken, in the case of *Chandler* v. *Montgomery county*, 31 *Ark.*, 25, in regard to the same toll bridge as is the subject of controversy in this case, was made and the appeal taken therefrom to the Circuit Court previous to said repeal.

CONTRACT: When substantial performance.

Whilst it plainly appears to have been the design and intention, when the privilege of establishing a toll bridge at the Caddo Gap Narrows was granted to the appellant by the county court, that it should extend through, and span the entire length of the narrows; yet if it was, as is alleged in the answer, found after repeated efforts, impracticable to build a bridge of that length that would withstand the force of the current, and he to carry out his contract with the county built a shorter bridge, and of inconsiderable length, and for the remainder of the way raised the ground with earth and rock, and by this means the passage through the narrows was made equally as safe and convenient, and answered the public want and necessity as well as if the bridge extended the whole way, as was originally intended, the essential purpose of the grant was accomplished, and the intention thereof, substantially, if not literally performed. Indeed, when it became apparent that a bridge all the way through the narrows, could not be kept up, it

became the duty of the appellant to carry out the object of the grant or charter to him, by other available means; for, where the essential purpose of a contract can be accomplished, and the intention of the parties can be substantially, though not literally executed, such substantial performance is required. *Bish. on Con.*, sec. 627; *White* v. *Mann*, 2 *Maine*, 361: *Williams* v. *Vanderbilt*, 28 *N. Y.*, 217. And so then, if the real object in view was completely attained and the interests of the public as fully subserved by the road, or the small bridge and the approach or approaches to it, constructed by the appellant, as they could have been if there had been a bridge extending all the way, there was not a misuser nor a non-user of the franchise.

The answer we think was sufficient, and the demurrer to it should have been overruled.

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

BRAMBLE v. BEIDLER.

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1. VENDOR AND VENDEE: *Vendee in possession cannot dispute title.*

A purchaser of land who has received a deed with covenants of warranty, and entered into possession, cannot, while he retains possession, deny his vendor's title or refuse to pay the price; and unless a plea in such case avers that the defendant is not in possession it will contain no defense to the action for the purchase price.

2. JURISDICTION OF JUSTICE OF THE PEACE: *Answer raising question of title to land.*

An answer in a justice court to an action for the purchase price of land, setting up a want of title to the land, is not, of itself, sufficient to oust the jurisdiction of the court without evidence on the trial tending to bring the title into question.

APPEAL from *Miller* Circuit Court.
Hon. G. D. ROYSTON, Circuit Judge.

STATEMENT.

Bramble sued Beidler before a justice of the peace, upon a note for $200. Beidler answered that the note was given for the S. W. of the S. W. $\frac{1}{4}$, section 20, T. 15 S., R. 28 W., for which the plaintiff executed to him "a good and perfect deed with full covenants of warranty and seizure, representing that the tract contained forty acres more or less; whereas in fact there were about $33\frac{15}{100}$ acres in the tract belonging to the plaintiff at the time of the purchase, and the remainder belonged and still belongs to the St. Louis, Iron Mountain & Southern Railroad Company. Wherefore said defendant prays an abatement in the amount due on said note to the value of said $6\frac{85}{100}$ acres, at $15 per acre, the amount agreed on per acre for said land, to-wit: the sum of $92.75."

The plaintiff demurred to the answer, and the defendant demurred to the action for want of jurisdiction in the justice's court. The last demurrer was overruled and the first sustained by the justice, and the defendant appealed to the circuit court from the final judgment against him on the note. The Circuit Court, on motion of the defendant, dismissed the action for want of jurisdiction in the justice of the peace, and the plaintiff appealed.

Jno. Cook, for appellant:

1. The action was on the note, and the defendant could not oust the jurisdiction of the justice by putting in a defense of which he had no jurisdiction. *Jakeway* v. *Barrett*, 38 *Vt.*, 317.

2. Even if title to land might have been involved, the judgment was premature. The justice should have inquired into the truth of the defense set up.

3. The relation of landlord and tenant existed, and appellee could not deny appellant's title. *Pintard* v. *Goodloe*, *Hempstead*, 503.

It is not alleged in the answer that appellee is not in possession, hence he will be presumed to be in possession, and he will not be allowed to dispute the title of the vendor. *Lewis and wife* v. *Boskins*, *adm'r*, 27 *Ark.*, 61, and cases cited.

4. The Circuit Court erred in dismissing the whole cause, even if the title to land was involved to the amount of the counter claim of $92.75.

HARRISON, J. It is a well settled doctrine that a purchaser of land, who has received a deed with covenants of warranty and entered into possession, cannot, so long as he retains the possession, deny his vendor's title, or refuse to pay the price. *Lewis and wife* v. *Boskins*, *adm'r*, 21 *Ark.*, 61; *Pintard* v. *Goodloe*, *Hemp.*, 502; *Willison* v. *Watkins*, 3 *Pit.*, 43; *Wilson* v. *Weatherby*, 1 *Nott & McCord*, 373; *Meadows* v. *Hopkins*, *Meigs*, 81.

Therefore, as it was not averred in the answer filed in the justice court that the defendant was not in possession, it set up no defense, and did not put in issue or involve the title of the $6\frac{85}{100}$ acres.

But even had it contained such an averment, it would not, of itself, or without some evidence upon the trial tending to bring in question the title, have been sufficient to deprive the justice or the Circuit Court, upon appeal, of jurisdiction of the case, for, until such evidence should be offered, it could not be seen whether the defense was real or not a mere

sham for the purpose of defeating the jurisdiction. *Nolen* v. *Royston*, 36 *Ark.*, 561; *Fitzgerald* v. *Beebe*, 7 *Ark.*, 305.

And for the same reason, it is obvious that a suit should not upon that ground, be dismissed upon motion.

The court below erred in sustaining the defendant's motion and dismissing the plaintiff's suit, and the judgment is reversed and the cause remanded for further proceedings.

MOORE & CO. v. EMERICK.

1. PLEADING AND PRACTICE: *Defense of another suit pending, &c.*

A plea to an action for a debt that, prior to the commencement of the action, the plaintiff had sued in another State and attached the property of the defendant sufficient to satisfy the debt, and that since the action the property has been sold, and the debt fully satisfied, will not bar a judgment for cost against the defendant in the pending action.

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

Sibley, for appellant:

The costs should have been tendered with the plea. 29 *Ark.*, 544; 1 *Ch. Pl.*, 478, *and notes x and c*; 2 *Bing. N. C.*, 88; 1 *Ib.*, 693; 1 *Ch. Pl.*, 485, *note A*; 4 *B. & C.*, 117; 6 *D. & R.*, (*K. & B.*) 81; 1 *M. & P. Rep.*, (*C. P.*) 138.

If plaintiffs had the right to sue in the courts of this State, and to maintain both actions, (32 *Ark.*, 332,) they had the right to recover costs upon the merits.

See also 1 *Ch. Pl.*, *top p.*, 466; 1 *Tidd's Pr.*, (3 *Am.*, 9

Eng. Ed.) 683; 1 *Harrison's Dig.*, 665; 7 *East*, 536; 3 *Smith*, 554; 6 *Esp.*, 40; *Hobb.*, 6; 1 *Caneys*, 599; 2 *N. R.*, 99; 1 *Taunt*, 341; *G. D.*, 393; 17 *Ark.*, 435; 26 *Ib.*, 662.

EAKIN, J. This appeal involves only a matter of costs. Moore & Co. pending an action of attachment by them against Emerick, in Mississippi, brought also a similar action for the same debt in Lonoke county, and had an attachment there. He appeared and pleaded the proceedings in Mississippi, showing that, before the commencement of this suit, a quantity of property sufficient to pay the debt, had been attached in the Mississippi suit, and the writ returned to the court there, at the April term, 1879, and that the goods had been afterwards sold by order of the court, the proceeds paid to plaintiffs, and the debt satisfied. The answer further denied the grounds of attachment.

The present action was commenced on the eighth day of January, 1879. The answer was filed on the fifth of March, 1880. The court, sitting as a jury, found for the plaintiffs, on the grounds of attachment, and also the facts above set forth with regard to the proceedings in Mississippi, and held that, as the plaintiffs' claim had been satisfied in full out of property, which at the commencement of this suit, had been already attached in another tribunal, they were not "under the circumstances" entitled to costs in this. Judgment was entered accordingly and plaintiffs appealed.

The mere *pending* of a suit for the same cause of action in another State could not be pleaded in abatement or in bar. (32 *Ark.*, 332.) The *satisfaction of the debt* through the former attachment might be shown by plea in the nature of a plea *puis darreign continuance* at common law. It was something which did not exist when this suit began, and

could not be used to show that this suit was wrongfully brought. At common law the plea could not, generally, be interposed as a complete bar to the suit.

It went only to the further continuance of it, conceding that the prosecution of the suit to that time had been proper. *Stephens on Pleading*, 63; *Chitty on Pleading*, *Vol.* 1, *p.* 696.

The plaintiffs should have had judgment for costs accrued up to the time of the plea.

Reversed and remanded for further proceedings.

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LITTLE ROCK & F. S. R. R. CO. v. CLIFTON, ET AL.

1. JURISDICTON: *For killing stock by R. R., local.*

By statute, an action against a railroad company for killing or wounding stock by its trains, must be brought in the county in which the injury occurs.

2. STATUTE: *Construction, Rule of.*

A statute is to be so construed, if possible, as to give sense and meaning to every part; and it is a rule of construction that the expression of one thing sometimes implies the exclusion of another.

APPEAL from *Faulkner* Circuit Court.
Hon. J. W. MARTIN, Circuit Judge.

STATEMENT.

Clifton and Pace recovered judgment against the appellant before a justice of the peace, in Faulkner county, for $35.00, for negligently killing two oxen in the running of their train. The defendant appealed to the Circuit Court,

and on the trial there, it was proved, among other things, and admitted by the parties, that the killing occurred in Pulaski county.

The defendant asked, among others, the following instructions:

2. "That it devolves upon the plaintiffs to prove that the injury complained of occurred in Faulkner county, and if the jury find that it occurred in any other county than Faulkner, they will find for the defendant."

This instruction was refused. There were verdict and judgment for the plaintiffs, and the defendant has brought the case here by appeal.

Clark & Williams, for appellant:

The injury took place in Pulaski county, and the court had no jurisdiction. All suits for damage to stock shall be brought in the county where the injury occurs. *Act. Feb. 3d*, 1875; *Acts* 1875, *sec.* 4, *p.* 133.

HARRISON, J. It was agreed upon the trial, and there was also direct and positive evidence of the fact, that the injury for which the suit was brought occurred in Pulaski county. *Section* 4 *of the act of February* 3, 1875, in relation to the killing or wounding of stock by railroads is as follows: "*Sec.* 4. Any person who owns stock as aforesaid, in his own right, or who has a special ownership therein, having any such horses, mules, cattle, or other stock, killed or wounded by any railroad train running in the State, may sue the company running such train for the damages sustained by such killing or wounding, in any court having jurisdiction of the amount of damages *in the county where the killing or wounding occurred*, at any time within twelve months after the killing or wounding occurred, and recover

such damages as the court or jury trying the case may assess."

Though the statute does not in express terms restrict the suit or action, which would otherwise be transitory, to the county in which the injury occurred, such is its evident meaning and intention; for if it were not, the provision as to bringing the suit in that county, would be useless and meaningless. A statute is to be so construed, if possible, to give sense and meaning to every part, and it is a rule of construction that the expression of one thing sometimes implies the exclusion of another. *Watkins* v. *Wassell*, 20 *Ark.*, 410. The second instruction asked for by the defendant should therefore have been given.

It is unnecessary to consider any other of the exceptions reserved by defendant.

The judgment is reversed and the cause remanded for further proceedings.

GIBSON v. MARTIN.

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1. MORTGAGE OR CONDITIONAL SALE: *When doubtful.*

When it is doubtful whether an instrument was intended as a mortgage or conditional sale, the law will construe it to be a mortgage.

2. MORTGAGE: *What it is.*

A mortgage is not necessarily a security for a debt. It may be for the performance of some acts or an indemnity against some liability of the mortgagee.

3. SHERIFF'S DEED: *Executed by Deputy, good.*

A sheriff's deed of land sold under execution may be executed in his name by his deputy.

4. SAME: *When unimpeachable by evidence.*

A sheriff's deed, regular and valid on its face, and set up in the complaint, and not impeached by the answer, cannot be impeached by evidence.

APPEAL from *Jackson* Circuit Court in Chancery.
HON. R. H. POWELL, Circuit Judge.

STATEMENT.

In January, 1866, J. W. Golightly executed to J. N. S. Gibson, by the name of Spotwood Gibson, the following deed, to-wit:

"JOHN W. GOLIGHTLY
To } Mortgage.
"SPOTWOOD GIBSON.

"*Know all men by these presents:* That I, John W. Golightly, for and in consideration of one dollar, in hand paid, and for the further consideration that Spotwood Gibson has executed, as security for the party of the first part, a promissory note for the sum of seven hundred and eighty dollars, due the twenty-fifth day of December, 1866, payable to William R. Jones, the receipt of which is hereby acknowledged, have granted, bargained and sold to the party of the second part, the following real estate in the county of Jackson, in the State of Arkansas, to-wit: Lots four, five, two and three of the Northwest fractional quarter of Section 19, T. 9, N. R. 2, W., containing one hundred and fifty-eight acres, to have and to hold the same to the said Gibson, party of the second part, his heirs and assigns forever; and the said party of the first part, the title to the above described premises will forever warrant and defend to the said party of the second part, his heirs and legal representatives.

"Nevertheless, the above deed will be void if the said Golightly shall, at or before the maturity of said notes, pay the same in full, and save the said Gibson harmless in regard to liability thereon; and the said Gibson binds himself,

upon the payment of said note by said Golightly, and saving him from liability thereon, to reconvey said lands to said Golightly, if the same shall be necessary to revest the title in him.

"In witness whereof, we have hereto set our hands and seals, this — day of January, 1866.

"J. W. GOLIGHTLY, [SEAL.]"

On the twenty-fourth day of December, 1870, the lands described in the above conveyance were duly sold, under execution, by the deputy sheriff of Jackson county, at public outcry, to satisfy a judgment recovered on the — day of March, 1870, in the Circuit Court of Woodruff county, by the administrators of Tilman Gregory, deceased, against said Golightly, and were purchased by R. W. Martin for $325, which he paid; and after the expiration of twelve months, they not being redeemed, the said deputy sheriff, by deed, conveyed them to said Martin.

In September, 1872, Martin filed in the Circuit Court of Jackson county his complaint in equity against Gibson, alleging the foregoing facts, and exhibiting said deeds and said judgment and execution from the Woodruff Circuit Court, and asserting that the deed from Golightly to Gibson was only a mortgage to secure Gibson from liability on said note to Jones, and leaving in Golightly the equity of redemption of said lands; and that by virtue of his purchase and sheriff's deed, he had acquired all the right and title of Golightly, and was entitled to redeem the lands from said mortgage. That Gibson was and had long been in possession, and had received the rents and profits of said lands, more than sufficient to discharge said note and all taxes and repairs accruing on said lands.

He prays for an account of the amount due on the note, the amount of rents received by the defendant, and the

amount expended by him for taxes and necessary repairs, and offering to pay any balance that may be due him on said note, or for taxes or repairs; prays to redeem said lands, and for possession.

Gibson answered, denying that the deed from Golightly was a mortgage, and asserting that it conveyed to him an estate in fee; that Golightly failed to pay said note to Jones at maturity, and he (Gibson) had paid the whole amount of it to Jones at maturity; for which consideration the title to said lands became invested in fee simple to this defendant; and the said Golightly, and all others claiming under him, were precluded from setting up title to said lands. "That at the time said conveyance was executed the relation of debtor and creditor did not exist between the defendant and Golightly, and it was not executed to secure any debt owing by Golightly to defendant."

The court, upon the hearing, found that the instrument was a mortgage, and ordered a reference for an account; and afterwards, upon final hearing, decreed the title and possession to Martin and Gibson approved. The matter of the account and report of the master are not necessary to an intelligent understanding of the decision of the court.

W. R. Coody, for appellant:

1. The instrument was a *sale*, and not a mortgage. *Jones on Mort.*, *secs.* 256, 258, 263; *Plumm* v. *Shirley*, 16 *Indiana*, 380; *Jones on Mort.*, *sec.* 260; *Henley* v. *Holaling*, 41 *Cal.*, 22. There was no loan—no acknowledgment of a pre-existing debt; no contract for re-payment; no debt or liability; nothing that appellant could enforce against Golightly in a court of law *in rem* or *in personam*. *Blakemore* v. *Byrnside*, 7 *Ark.*, 509.

See also, 7 *Cranch*, 218; *Turner* v. *Kerr*, 44 *Mo.*, 429.

If not a security, it is a conditional or absolute sale. 5 *Ark.*, 321; 3 *Ark.*, 364. See further, *Hickox* v. *Lowe*, 10 *Cal.*, 197; 18 *Cal.*, 117; 45 *Ga.*, 621; 22 *Mich.*, 383; 20 *Barbour*, 370; 2 *Edwards* (*N. Y.*) *Ch'y.*, 143; 19 *Wend.* (*N. Y.*) 518; 7 *Conn.*, 143; 4 *N. H.*, 130; *Jones on Mort.*, *sec.* 265, and authorities cited; 35 *Vermont*, 125–8.

2. A deputy sheriff cannot execute a deed for land sold at execution sale, in the name of his principal. *Gantt's Dig.*, *sec.* 5600. Under this section the deputy may possibly execute a deed, but the power is questionable, and the policy more so. The acts of a sheriff *de facto* may be valid. 25 *Ark.*, 336; but a deputy cannot be an officer *de facto*, and defendant had the right to show that he had not been duly appointed. 3 *Randolph*, (*Va.*) 473. The deputy was not legally appointed. *Gantt's Dig.*, *sec.* 5598, 5599; *Crocker on Sheriffs*, *sec.* 14.

J. M. Moore and Charles Minor, for appellee:

1. The instrument was a mortgage. *Hilliard on Mort.*, *vol.* –, *p.* 2; 5 *Ark.*, 321; 7 *Ark.*, 505; *Flagg* v. *Mann*, 2 *Sumner*, 486; *Daugherty* v. *McColgan*, 6 *Gill. & J.*, (*Md.*) 215; *Dow* v. *Chamberlin*, 5 *McLean*, 281; *Lodge* v. *Turman*, 24 *Cal.*, 385; *Tibeau* v. *Tibeau*, 22 *Mo.*, 70; *Richards* v. *Richards*, 36 *Ill.*, 336; *Wing* v. *Cooper*, 37 *Vt.*, 169; 13 *Ib.*, 341; 19 *Ohio*, 212; 20 *Ohio*, 581.

If it is doubtful whether an instrument is a mortgage or a conditional sale, equity will consider it a mortgage. *Crane* v. *Brown*, 1 *Green.*, 264; *Robertson* v. *Campbell*, 2 *Call.*, (*Va.*) 421; 33 *Cal.*, 329; 1 *Div. Eq. cases*, 373; 39 *Ala.*, 156; 4 *Ind.*, 101. A conditional sale is not a security for money, but a sale in good faith, on condition that the vendor may repurchase, etc., or "is a purchase for a price paid or to be paid." *Hill on Mort.*, *vol.* 1, *p.* 85, *secs.* 1

and 2; *Howard* v. *Harris*, 2 *Wh. and Tud. L. Cas.*, *part II.*, 516, 517.

2. The acts of a *de facto* sheriff, under color of authority, and those of his deputy, are binding upon the community. *State* v. *Carroll*, 9 *Am. Rep.*, 409, from 38 *Conn.*, 449.

3. Under the Code the defendant must put in issue defects, if any exist, in a sheriff's deed, if he desires to avail himself of them at the trial. *Thompson* v. *McDonald*, 2 *Dev. and Bat.*, 471.

HARRISON, J. It is apparent, from the face of the conveyance from Golightly to the appellant, that it was intended as an indemnity to the appellant against his liability in the note to Jones; and the circumstances attending its execution also clearly show that to have been its object and purpose. There is nothing upon its face, or in the attending circumstances, from which it might be inferred that a conditional sale, rather than a mortgage, was intended, and even if there could be a doubt as to which was intended, the law would construe it to be a mortgage, rather than a conditional sale. 1 *Jones on Mortgages*, *sec.* 258.

A mortgage is not necessarily a security for debt; it may be for the performance of some act, or, as in this case, an indemnity against some liability of the mortgagee. 2 *Wash. on Real Prop.*, 36; 1 *Jones on Mort.*, *sec.* 16 (*and note*).

The deed upon a sale of land under execution may be made by a deputy sheriff in the name of his principal. *Freem. on Executions*, *sec.* 327; *Her. on Executions*, 287.

The deed from the sheriff to the appellee was regular and valid on its face, and as its validity was not denied, nor

in any manner called in question by the answer, it was admitted, and evidence to impeach it was inadmissible. *Sec.* 4608 *Gantt's Digest.*

The decree is affirmed.

PREWETT v. MISSISSIPPI COUNTY.

1. PAUPERS: *When Counties liable to support of.*

A county judge has no authority to adjudge an indigent person a pauper, or to contract for his support or medical treatment except in term time, or while he is holding a county court.

APPEAL from *Mississippi* county.
Hon. L. L. MACK, Circuit Judge.

STATEMENT.

R. C. Prewett, a regular practising physician of Mississippi county, presented to the county court of that county a claim against the county for $40, for medical attention and medicines to J. M. Burge, as a pauper. The claim was allowed by the county court, and H. C. Dunavaunt, a citizen and tax payer of the county, appealed for the county to the Circuit Court.

On the trial, before a jury in the Circuit Court, the evidence was, in substance, that Burge was a very poor man, and was, and had been for sometime, sick. The county judge was called to see him, and finding him in need of medical attention, and without any means at all to employ a physician, went to the courthouse and ordered the clerk of the county to enter Burge's name upon the list of county paupers, in a book kept for that purpose, which was done.

The judge then requested Dr. Prewett, who had been doing the pauper practice for the county, to give such attention and medicines to Burge as he needed. Prewett rendered the services to the amount and value of his claim. At the time the judge employed his services, Burge was, in fact, receiving the attention of another physician, but this was not known either to the judge or Prewett.

The court instructed the jury against plaintiff's objection, that the county judge had no authority to declare a person a pauper, in vacation, and unless they found from the evidence that Burge was declared a pauper in term time, before the services were rendered, the county was not liable for them.

And refused to instruct for the plaintiff, that

"If the jury find from the testimony that Burge was a pauper, (whether declared so by the county court in term time or not), that the plaintiff was employed by the county court to attend him professionally, and did so, they will find for the plaintiff if his charges are reasonable."

After verdict and judgment for the county, and motion for new trial overruled, the plaintiff filed his bill of exceptions and appealed.

Palmer & Mathes, for appellant:

Lee county v. *Lackie*, 30 *Ark.*, 764, is not a parallel case. The services here were rendered by direction of the county judge, for a price agreed upon.

Lee Co. v. *Lackie*, *sup.*, only professes to construe *secs.* 669–71–2–3–4–6, *Gantt's Dig.* This case comes clearly within *sec.* 675, *Ib.*, and the allowance of the claim was such an approval as cured any irregularities.

HARRISON, J. It was expressly decided in the case of *Lee county* v. *Lackie*, 30 *Ark.*, 764, that in order to charge the county with the support and maintenance, including of course medical treatment, of poor and destitute persons, they must first be adjudged paupers by the county court.

In that case the court say: We are sensible of the difficulty that must arise upon emergencies, and before time and opportunity can be afforded for the court to act, and that some who deserve protection and care, may for a time be left to suffer, or left to the charitable in the vicinity where they may be found. But unless this question of support and care is determined by some tribunal, and is not left open to be determined by the person called upon to give support or relief, it is evident that a greatly increased and unnecessary charge may be made upon the county, in which such person resides. The law seems to have made provision, not only for the protection and care of the paupers of the county, but has provided a tribunal to ascertain who are the proper subjects of public charge. It has, moreover, charged a class of its officers with the duty of giving information of all such known to them. This duty may be hastened by individuals calling the attention of these officers to such as may have escaped their observation, or any citizen may bring the facts to the knowledge of the county court, whose duty it is to pass upon the condition and circumstances of the subject presented for its consideration, and if found to be a proper subject of charge upon the county to make the necessary order for that purpose. Looking at the evils which may result in individual cases, from delay on the one hand, and the increased burdens which may be imposed upon the county on the other, by extending the right of charge for care and support to all who are supposed to be poor and in need, without the object of such care being first adjudged by the court a pauper and a fit subject for public charge,

we think it safest and most conducive to public good, and in accordance with the spirit and intent of the Legislature, to hold that in order to charge the county with the expenses of the care and support of paupers, they should first be declared such by the county court."

And, see also *Brem* v. *Arkansas County Court*, 9 *Ark.*, 240.

No authority is conferred by law upon the county judge, except in term, or when holding the county court, to adjudge an indigent person a pauper, or to contract for his support or medical treatment.

The evidence shows that the man, when the county judge requested the appellant to visit and attend him, had a physician attending, and there was no necessity or occasion for his becoming a charge upon the county.

The instructions given by the court were correct, and those asked for by appellant were properly refused.

The judgment is affirmed.

CARROLL v. SAUNDERS.

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1. BILL OF EXCEPTIONS: *When to be filed.*

Time cannot be given beyond the term next after the one at which exceptions were taken, to file a bill of exceptions; and a bill of exceptions signed by the judge after the term, where no time was given, or after the next term thereafter when time was given, is a nullity,

2. NEW TRIAL: *Motion for must be in bill of exceptions.*

A motion for new trial is no part of the record, unless made so by bill of exceptions.

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

Carroll & Newton, for appellant:

HARRISON, J. The trial was had and judgment rendered upon the verdict, which was in favor of the plaintiff, at the February term, 1878. A motion for a new trial filed by the defendant is copied in the transcript, and there is a record entry that such a motion was filed and overruled. It does not appear that time after the term was given to prepare and tender a bill of exceptions, yet there is in the transcript what purports to be one, but which was not filed nor signed by the judge until the August term, 1879, and there is no exception in it to the overruling of the motion for a new trial, or any mention of such a motion.

Time cannot be given beyond the next succeeding term to that at which exceptions were taken, in which to prepare and tender a bill of exceptions, and a bill of exceptions signed by the judge after the term at which they were taken, where time has not been given, or after the next term thereafter, though such time were given, is a nullity. *Gantt's Digest*, *sec.* 4694; *Garribaldi* v. *Carroll*, 33 *Ark.*, 568.

Unless made so by bill of exceptions, a motion for a new trial is no part of the record. *White* v. *Pigmore*, 28 *Ark.*, 450; *Nisbett* v. *Brown & Norton*, 30 *Ark.*, 585; *Farquharson* v. *Johnson*, 35 *Ark.*, 536.

The record presents no question for our determination. Affirmed.

BRIZZOLARI V. CRAWFORD, AUDITOR.

1. SPECIAL JUDGE: *Auditor cannot question his services.*
The Auditor cannot enquire into the amount of service rendered by a special judge or the degree of fidelity with which he acts.

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

STATEMENT.

This was a petition by Brizzolari against Crawford, as auditor, for a mandamus to compel him to issue to the petitioner a warrant for his services as Special Judge of the Sebastian Circuit Court for the Fort Smith district. The petitioner alleged that at the July term, 1877, he was duly elected by the attorneys present at the court, as special judge to try the causes in which the regular judge was disqualified; that he served as such special judge for twenty-nine days, from July 31, to September 1st, 1877. That for these twenty-nine days he had been paid. That on said first of September, the special business being unfinished, the court was then adjourned by the regular judge to the third day of December, 1877, and was in session from that day to the eighteenth day of January, 1878, and on that day the special business being still undisposed of, the court was again adjourned by the special judge to the eighteenth day of February, 1878, when it again opened and continued till the twenty-third of February, 1878, on which day it was adjourned till court in course. He files with his petition, transcript of the records of the court, which show that in most instances the court only opened and adjourned; and says, "that while the records in a majority of instances show

that there was no business done, but that the court merely opened and adjourned, yet on those days the fact is, that the attention of the court was occupied in hearing oral testimony or argument of counsel—matters which would not appear of record. He had presented his claim to the auditor for his services for forty-five days, at ten dollars per day, together with a certificate of the clerk of his services for that period; but the auditor refused to allow it, and offered him $150 as a compromise, which he refused to accept." Prayer for mandamus to compel the auditor to allow the account and issue his warrant upon the treasurer therefor.

The auditor, Crawford, answered, alleging:

1. That the July term of the court expired before the days charged for in the petition; the term being limited by law to five weeks from the last Monday in July.

2. That there was no July term afterwards, and the petitioner did not hold the court within the meaning of section 1, Art. VII of the constitution of 1874, and the act of the Legislature entitled "An Act to regulate the salaries of special judges," approved February 23, 1875.

3. That he was informed, and believed, and thereupon charged that the petitioner did not, on the days charged for, perform any judicial function whatever, except to open and adjourn the court, and the record so showed.

4. That the petitioner had no power under the constitution and laws of the State to open and adjourn the court from day to day; and

5. That he is informed and believes, that on the days on which the transcript shows merely opening and adjournment of the court, there were no causes called or tried, nor oral testimony heard, nor business of any kind transacted.

Upon the hearing, the court refused the mandamus and dismissed the petition, and the petitioner appealed.

S. P. Hughes, for appellant:

Fishback v. *Weaver* virtually decides this case. See 34 *Ark.*, 569. The auditor could not enquire into the amount of service performed by a special judge, no more than he could of that performed by a Circuit or Supreme Judge.

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

Fishback v. *Weaver*, 34 *Ark.*, 569, settles the principles involved in this case, and I am *not prepared to say* that the judgment should be affirmed.

EAKIN, J. Application by appellant, for a writ of mandamus to compel the State auditor to audit and allow his claim against the State, for compensation on account of services rendered as special judge of the Circuit Court.

All the principal questions raised by the auditor's answer were discussed in the case of *Fishback, et al* v. *Weaver, et al*, 34 *Ark.*, 569. The claim is for services rendered during the adjourned session of the July term, 1877. It appears from the case above cited, in which the validity of his acts during this period was discussed, that he was properly judge, and it follows that he is entitled to compensation for the number of days upon which he served, at the rate of $10 per diem. (*Act of Feb.* 3, 1875.)

In one paragraph of his response, the auditor says, he is informed and believes, that upon the days named in the transcript from the records of the Circuit Court, when the court was opened and adjourned, there were no causes called or tried, nor any oral testimony heard, or any business whatever transacted.

We think the auditor is mistaken as to his duty in this regard. The record shows that the petitioner was duly

elected to try a great many cases in which the regular judge was disqualified.

The auditor cannot enquire into the amount of service rendered, or the degree of fidelity with which the special judge acts. Few attorneys of much self-respect would accept the position on such conditions.

The Circuit Judge upon the answer of the auditor refused the writ. In this he erred.

Reverse the judgment and remand the cause for further proceedings as usual.

Burris v. The State.

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1. Venue; Change of: *When transfer of jurisdiction is complete.*

Until the transcript of the record and proceedings in a cause, of the court from which the change of venue is taken, is lodged in the court to which the venue is changed, the latter has no jurisdiction to try the cause.

2. Evidence: *Attempts to escape.*

Flight of one charged with a homicide, or his efforts to escape from prison by violence or otherwise, are admissible as evidence against him, but their weight must be left to the jury. They may indicate consciousness of guilt, or may be attributable to other motives.

3. Same: *Of a different offense than the one charged, not admissible.*

Upon trial of one for a homicide it is not competent for the State to read his affidavit for continuance at a former term and then prove by a witness that the facts stated in it are false. One crime cannot be established by proof of another.

4. Same: *Improper, must be excepted to.*

In criminal as well as civil cases, the admission of improper evidence must be excepted to and made grounds of the motion for new trial, in order to make the error available in the Supreme Court.

5. Practice: *Giving instructions.*

In giving a series of instructions relating to the grades of homicide, the court should be careful to make the jury understand which of

them is intended to apply to murder in the first, and which in the second degree.

6. SAME: *Same.*

Where there are mitigating circumstances in a homicide, an instruction that "if the jury believe from the evidence that the defendant had threatened the life of the deceased, and, being armed with a deadly weapon, met the deceased unarmed, and that without any provocation or effort on the part of deceased to take defendant's life, or to do him a bodily injury, the defendant shot deceased, intending at the time to kill him, and did kill him, he is guilty of murder in the first degree," should be so framed as to submit to the jury the consideration of the mitigating circumstances in evidence, or another given with that view.

7. MURDER: *Evidence of: Bare killing.*

Evidence that the accused killed the deceased would not, of itself, make out a case of murder in the first degree under the Statute.

8. MALICE: *Evidence of: Killing with deadly weapon.*

Where there is a homicide with a deadly weapon and no circumstances of mitigation, justification, or excuse appear, the law implies malice. But a killing with a deadly weapon with nothing more will not make out the offense of murder in the first degree under the Statute.

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

The appellant pro se, by Wallace.

1. The evidence was insufficient to support the verdict. *Oliver* v. *State*, 34 *Ark.*, 632. The statements of Burris, if not contradicted nor improbable, will naturally be believed. 1 *Greenleaf Ev.*, sec 218. Testing the evidence by the rule in *Bevins* v. *State*, 11 *Ark.*, 455, there was none to sustain the verdict.

2. The evidence of Rollow and Hogins was not admissible. 35 *Am. R.*, 69. Though not excepted to, it is error apparent upon the face of the record. *Bevins* v. *State*, *supra*; 27 *Am. R.*, 291; 65 *Mo.*, 374.

3. The eighth and twelfth instructions for State misleading. *Palmore* v. *State*, 29 *Ark.*, 248. Also the seventh, ninth, and tenth. The definitions were not accurate, nor were they full enough. *Bevins* v. *State*, *sup.*; 25 *Ark.*, 505; 29 *Ib.*, 248. The evidence did not warrant the thirteenth. 15 *Ark.*, 492; 16 *Ib.*, 628; 25 *Ib.*, 405.

C. B. Moore, Attorney General, *contra*.

1. The evidence is not "so clearly and palpably contrary to the weight of evidence as to shock the sense of justice." *Oliver* v. *State*, 34 *Ark.*, 632.

2. The testimony of Rollow and Hogins was introduced *without objection on part of appellant*, and it is too late now to object. Same as to the motion for continuance.

The instructions, perhaps, might have been fuller, but on law most of them are substantially in the language of the Statute. *Gantt's Dig.*, *sec.* 1252; *McAadms* v. *State*, 25 *Ark.*, 408; *Whorton's Am. Cr. Law*, *Vol.* 1, *sec.* 970.

English, C. J. At the August term, 1881, of the Circuit Court of Yell county, for the Danville District, William Burris was indicted for murdering William Sturdevant, by shooting him with a pistol. On his application, the venue was changed to the Circuit Court of Pope county, where he was tried on plea of not guilty, at the November term, 1881, found guilty, by the jury, of murder in the first degree, as charged, a new trial refused, bill of exceptions taken, and sentenced to suffer the death penalty on the twenty-seventh of January, 1882, which was suspended by appeal prayed below, and allowed by one of the judges of this court.

I. If a transcript of the record and proceedings of the Yell Circuit Court in the case was made out and transmitted to the clerk of the Circuit Court of Pope county, and received by him before the commencement of the trial, he

1. VENUE CHANGE OF: Jurisdiction not transferred till transcript filed.

omitted to note its filing, or if noted, failed to transcribe the file mark in making out the transcript for this court on the appeal. See *Gantt's Dig.*, *secs.* 1877–1879. Until the transcript from Yell was lodged in the office of the clerk of the Circuit Court of Pope and became a record there, there was not a complete transfer of jurisdiction from the one court to the other for the purpose of trial, and the usual and proper evidence of such lodgement is the file mark of the clerk endorsed upon the transcript.

II. Appellant is not represented by counsel here, but in a brief filed in his name, he complains that illegal and incompetent testimony was admitted against him on the trial. Two attorneys were appointed to defend him in the Yell Circuit Court, and they failing to attend the Pope Circuit Court, on change of venue, the court appointed three other attorneys to defend him. It does not appear from the bill of exceptions that his counsel objected to any evidence offered or introduced by the State, or that the admission of any evidence was made ground of the motion for a new trial.

2. EVIDENCE: Attempts to escape.

W. B. Rollow, a witness for the State, testified that he was about the jail in Dover, Pope county, where appellant was confined, on the —— day of October, 1881, and that appellant caught the guard, Mr. Linton, around the waist and endeavored to throw him down in through the trap-door. That he was trying to make his escape. Witness being armed, drew his pistol on him and stopped him.

R. B. Hogins, sheriff of Pope county, a witness for the State, testified that appellant had been in his custody since about the middle of the previous August, and while in his custody sawed the shackles from his legs at two different times.

It was also proved by another witness that after appellant killed William Sturdevant, he fled, and was followed and

captured in Oil Cloth bottom, fifteen miles from Jacksonport.

It is the admission of the testimony of Rollow and Hogins that appellant complains of, as well as the admission of other evidence noticed below.

It was competent for the State to prove that appellant fled after the commission of the homicide, and having been captured and imprisoned, that he attempted to escape by using violence upon the guard; also by sawing off his shackles. But the weight to be attached to such evidence, when admitted, is a question for the jury. Flight and attempts to escape from prison by violence or otherwise, may indicate consciousness of guilt, or may be attributed to other motives. An innocent person may, under some circumstances, consider it necessary to consult his safety by flight, or be impatient under restraint of liberty. See *Wharton's Criminal Evidence, section* 750, and cases cited.

3. ——: Of a different offense than the one charged, not admissible.

III. In the Yell Circuit Court, appellant moved for a continuance for want of testimony of absent witnesses. In the motion he stated that he expected to prove by S. P. Mustian and James Foster, two absent witnesses, that the deceased (William Sturdevant) made threats of personal and bodily violence against him, and that such threats were communicated to him before the time of the alleged killing. The facts stated in the motion were sworn to by him. The motion was overruled, and afterwards, on his application, the court made the order changing the venue to Pope. On the trial the prosecuting attorney read in evidence to the jury the above motion for continuance, and then called James Foster, as a witness for the State, who testified that he never heard the deceased, Sturdevant, threaten appellant, and never told him that deceased had threatened him. He never heard of such a thing, and never had any conversation with appellant on the subject.

This was an attempt on the part of the State to prove that appellant had committed perjury in swearing to the motion for continuance, which was a violation of the rules of evidence in two respects: First, it was an indirect attack upon the character of appellant, which he had not put in evidence; and, second, it was an attempt to prove that he had committed a particular crime other than that with which he was charged in the indictment, and which had no connection with the alleged crime for which he was on trial. *Wharton on Criminal Evidence, secs.* 61–64.

4. ——: Improper, must be excepted to.

This evidence was calculated to prejudice the prisoner in the minds of the jurors. Had the prisoner, or his counsel objected to its admission, it must be supposed that his honor, the Circuit Judge, would have excluded it; and if he had not, according to the well settled rule of practice in criminal as well as in civil cases, the ruling should have been excepted to, and made ground of motion for a new trial, in order to make the error available here.

IV. It was made ground of the motion for a new trial that the evidence did not warrant the verdict. The substance of the evidence follows:

William Satterfield, witness for the State, was present when Burris shot Sturdevant. Met defendant at a debating society, at the Methodist church house, in Chickala village, Yell county, on the sixth of August, 1881, Saturday night. Defendant asked for water, and he and witness went for water. Defendant asked witness if they had had any fusses at school that summer. Witness told him they had some of the boys up. Defendant said, "I was there last summer, and by G—d, I carried them through solid; I guess this will be the last congregation I will be in, in this State." Witness asked him if he was going to leave. He said he was, about Monday. He said he did not know where he would land. About

that time they met Sturdevant, who was riding a mule. He spoke, and gave the road, going toward the church. He went on about twenty steps, and stopped, and said to witness, is that you, Willie? Witness said, yes. He asked witness who was that with him. Witness replied, "it is a pard." He then said, "I think it is a damned poor pard." Defendant said, "by G—d I don't think so." Sturdevant said, "I do." Defendant stepped down the road some three or four steps to where Sturdevant was sitting on his mule. Sturdevant got down, and tied his mule, and started back into the road where defendant was, and said, you are the fellow that threw a block at my little sister. Defendant said, yes, and if you don't mind I will throw one at you. Sturdevant came out into the road toward defendant, who began to back, and put his hand in his front pocket, and said, all I ask of you is to stand back, and keep your hands off me. Sturdevant had his arms folded across his breast, and advanced three or four steps, and stopped. He said to defendant, if you will take that pistol out of your pocket, I will whip you in a minute; I know you have got it. Defendant said, yes, I have got it; I always carry it to keep off damned dogs with, and I expect to do it. He was then standing on one side of the road, and Sturdevant standing on the other side, with his arms still folded across his breast; they were about fifteen feet apart. Sturdevant then stepped out in the road like he was going to cross it, and defendant said stop, and Sturdevant stopped; and defendant shot him standing in the road with his arms folded. Sturdevant hallooed, O Lord! and stooped down in the road. Defendant ran off, and witness thought stopped in the shade of a tree close by. Witness went to church to tell the people. When he returned with them, he saw defendant, and he ran off. When they got to where Sturdevant was, he said, boys, Burris has shot me, and I

am bound to leave you. Some of them told him to lie down, and he fell over, and told them to send for his father and a doctor. He lived about three quarters of an hour after he was shot. The ball struck in his left side about the lower edge of his ribs, and lodged about the same place on the right side. Witness never saw defendant again until he was under arrest at Danville. Sturdevant was shot about an hour after dark. It was a clear evening, and the moon was shining brightly. He was shot about 150 yards from the Methodist church, and about 50 yards from the Christian church, between the two, in the Danville district, etc. A coroner's inquest was held over his body that night about 12 o'clock. There was found in his pockets, or on his person, nothing but a small barlow knife, well worn, and $2.50 in money.

T. S. Haney, witness for the State, testified that he had been living at Chickala village forty years, and was acquainted with the church houses there, and how they were situated. There was a good hitching place for horses where Sturdevant was killed. People usually hitched their horses there. It was difficult to get a hitching place close to the church.

Charles Sumner, witness for State, testified that he heard defendant say, about a year before he killed Sturdevant, that if he prosecuted him he would kill him. He was speaking in reference to being prosecuted for his conduct towards Sturdevant's little sister. And about one month before the killing, witness heard defendant say that if Sturdevant ever crossed his path, or said anything to him, he would kill him.

M. A. Emmons, witness for the State, testified that about three or four weeks, or a month before the killing, he heard defendant say that if Sturdevant ever crossed him he would kill him. Said he was not going to stay there very long any

way, and did not care for anything. Witness did not know whether he was referring to Willie Sturdevant or his father.

W. C. Poole, witness for the State, testified that after the death of Sturdevant, he followed defendant and captured him in Oil *Cloth* bottom, fifteen miles from Jacksonport. Captured him on the night of first September. Started in pursuit of him fourteenth of August, 1881. Arrested him in bed. He denied that his name was Burris, and said he had done nothing. Witness recognized him, and took him up to Mr. Bumpass'; and in about two hours after he was arrested, witness said to him, Burris if you had killed Sturdevant it would have gone pretty hard with you. He then said that he was the boy that had done the work. Before that he said he had never been in Yell county, and denied that his name was Burris. He then stated to witness how the killing took place. Said that he and Satterfield were going to Barnett's for water, and about 150 yards from the church, met deceased riding a mule, and after Sturdevant passed them, he remarked, is that you, Willie? Satterfield said yes. Then deceased said, who is that you have with you? Satterfield said, an old pard. Then deceased said, it is a damned poor pard; and he, Burris, said I don't think so. Deceased said, by G—d, I do; you are the fellow that threw the block at my little sister, and I have wanted to whip you for a long time, and this is as good a chance as I will ever get; and rode to a tree near by, and hitched his mule, and came towards him, Burris, saying if you will put that pistol down, I will whip you in a minute, I know you have got it. He, Burris, said yes, I have, I always keep it to keep the damned dogs off, and keep your distance, and keep your hands off, is all I ask you, if you come on me, I will shoot you. He, Burris, stepped back several steps, and deceased remarked that he did not like to be called a dog, and started to

advance on him, Burris, and came three or four steps in the road, and was advancing when he, Burris, shot.

The testimony of W. B. Rollow and of sheriff R. B. Hogins, in relation to the attempts of appellant to escape from jail, is stated above.

The State introduced the motion for continuance, and called James Foster, who testified about threats as above stated. He also testified that William Sturdevant was about twenty-one years old, and weighed about 150 pounds.

The foregoing is the substance of all the testimony, deemed material, introduced by the State. Appellant introduced none.

Sturdevant was in his grave, and the jury had not his version of the circumstances under which he was slain. Satterfield was the only eye witness, and his statement of the facts attending the homicide differs, in some material points, from that made by appellant to the witness, Poole, on his arrest, which the State thought proper to introduce as a confession. The jury, perhaps, thought appellant made a statement favorable to his defense, and believed the testimony of Satterfield, who was a disinterested and unimpeached witness. They were the judges of the evidence.

Appellant was not charged with any one of the specific Statute murders in the first degree, which are all murders perpetrated by means of poison, or by lying in wait, or in the attempt to perpetrate arson, rape, robbery, burglary or larceny.

But the Statute also makes any other kind of willful, deliberate, malicious and premeditated killing, murder in in the first degree; and appellant's case, if murder in the first degree, must come within the general definition. *Gantt's Dig.*, *sec.* 1253; *Bivens* v. *State*, 11 *Ark.*, 458. All other than the specific murders, or murders falling

within this general definition, are murders in the second degree.

In *Bivens* v. *State*, Mr. JUSTICE SCOTT, after quoting the provisions of the Statute, said: "The distinction between murder and manslaughter is not, however, in the slightest degree altered; nor is the nature, or definition of murder in the least; both remaining as at common law, the Statute but distinguishing one crime by two degrees in the same crime. In making this distinction, the Legislature has enumerated certain specific cases of malicious killing as constituting in themselves, respectively, the first degree of the crime, and conscious that a particular enumeration of all the cases that may happen in the ever varying circumstances in which men may be placed, equally deserving the same punishment, would be altogether impracticable, did, to meet the emergency, declare by general words, that not only these enumerated cases should be ranked in the first degree of murder, but also that any other murder that shall be perpetrated by any other kind of willful, deliberate, malicious and premeditated killing should also be of the same degree; and all murder not being one of the specified cases, and not being included in the general designation, should be murder in the second degree."

Further on, in the same opinion, JUSTICE SCOTT said: "When a given case of malicious homicide is not one of the cases specified in our Statute, in the enumeration of the particular cases designated, as of themselves murder in the first degree, then, in order to bring it under the general description, and thus show it to be murder in the first degree, it is indispensable that the proof adduced shall be sufficient to satisfy the minds of the jury that the actual death of the party slain was the ultimate result sought by the concurring will, deliberation, malice and premeditation of the party accused. The distinctive feature of this particular class of

cases of murder in the first degree being a willful, deliberate, malicious and premeditated specific intention to take life."

And he quotes approvingly a case from 6 *Randolph, Va., R. p.*, 721, as illustrating this general class, where the accused, as he approached the deceased and first came in view of him at a short distance, then formed the design to kill, and walked up with a quick step, and killed him without provocation then or so recently given as to prevent time for reflection, it was held murder in the first degree.

And he puts a case himself, by way of illustration, as "if a man were to raise a gun, take aim and fire and kill another, and these were all the facts proven, there could be no doubt but he intended to kill; and this would be sufficient evidence to authorize the finding of that fact, and the law would intend that it was done with malice aforethought, and it would be *prima facie*, a case of willful, deliberate, malicious, and premeditated killing to be disproved or confirmed by the proof of other attending circumstances."

In *Sweeney's case*, 35 *Ark.*, 585, the accused and the deceased were riding side by side, and suddenly the former gave the latter a mortal cut on the neck with a barlow knife. Before the cut was inflicted, accused was heard abusing and threatening deceased, and there was no proof that the deceased did or said anything at the time to provoke the accused to anger or violence. He was convicted of murder in the first degree, and this court affirmed the judgment.

In *Harris* v. *State*, 36 *Ark.*, 127, the accused was backing from deceased, who was striking at him with a pole when he shot him, and there was no evidence of previous malice; and it was held not to be murder in the first degree, though the accused had provoked deceased by pulling him out of bed.

In this case there were some of the features of murder in

the first degree. There was some evidence of previous malice indicated by threats, and if the witness, Satterfield, is to be believed, the deceased, at the time appellant shot him, was standing with his arms folded across his breast, making no assault or hostile demonstrations. There were mitigating circumstances, however, which will be noticed when we come to remark upon the charge to the jury.

If appellant, in his confession, made a truthful statement of the circumstances of the killing, he was not guilty of murder in the first degree.

V. The court gave to the jury sixteen instructions moved by the prosecuting attorney, to each and all of which the appellant objected, and excepted to the ruling of the court in giving them, and made the giving of them ground of the motion for a new trial.

The first is the Statute definition of murder, which is substantially the same as the common law definition. *Gantt's Dig.*, *sec.* 1248.

The second is the Statute definition of express malice. *Ib.*, 1250.

The third, the Statute definition of implied malice. *Ib.*, 1251.

The fourth is that "The charge of murder in the first degree, as made in the indictment, includes or embraces the lower offenses of murder in the second degree, and manslaughter." *Ib.*, *sec.* 1961.

The fifth that "To constitute the offense of murder in the first degree it must appear that the act of killing was willful, deliberate, malicious, and premeditated."

Such is the Statute definition of murder in the first degree, other than the specific murders named. *Ib.*, *sec.* 1253.

The sixth "To constitute the offense of murder in the second degree, it must appear that the killing was unlawful, and committed with malice aforethought."

The seventh is the Statute definition of manslaughter. *Ib.*, *sec.* 1264.

The eighth, "Every act whereby human life is intentionally taken is either murder or manslaughter, unless the same is justifiable."

The Statute classes killing in neccessary self defense as justifiable. *Ib.*, *sec.* 1279. At common law, it was classed as excusable homicide.

In the ninth, tenth and eleventh, the words "willfully," "malice aforethought," and "felonious intent" used in the indictment are defined.

The twelfth is in the language of the Statute as to the burden of proof. *Ib.*, *sec.* 1252. It was taken from the Revised Statutes, enacted before the passage of the act of seventeenth December, 1838, (*Gantt's Dig.*, *sec.* 1253–4), classing murder in two degrees, and applies to murder as defined at common law.

The thirteenth was taken from *McAdam* v. *State*, 25 *Ark.*, *on page* 408, where it was approved. It was also approved as given in *Sweeney* v. *State*, 35 *Ark.*, 592–3. The same instruction is copied in *Harris* v. *State*, 36 *Ark.*, *on page* 132, where the following remarks were made upon it: "It will be seen by looking at the remarks of the judge who delivered the opinion of the court, (*in McAdam* v. *State*, 25 *Ark.*, 408) from which this instruction is copied, that it was regarded as applying to murder in the second degree, and not in the first degree; and in that view it was approved in *Sweeney* v. *State*, where the elements of murder in the first degree were indicated. It expresses some of the elements of murder in the first degree, as defined by the Statute, which was construed in the leading case of *Bivens v. State*, but not all of them."

5. PRACTICE: Giving instructions.

In giving a series of instructions relating to the grades of homicide, the court should be careful to make the jury

understand which of them are intended to apply to murder in the first, and which to murder in the second degree.

6. SAME: Where mitigating circumstances.

The fourteenth: "If you believe, from the evidence, that the defendant had threatened the life of the deceased, Wm. Sturdevant, and being armed with a deadly weapon, met Sturdevant, unarmed, and that without any provocation, or effort on the part of Sturdevant to take defendant's life, or to do him a bodily injury, defendant shot Sturdevant, intending at the time to kill him, and did kill him, he is guilty of murder in the first degree."

A similar instruction was approved in *McAdam* v. *State*, 25 *Ark.*, *p.* 409. Also in *Sweeney* v. *State*, 35 *Ib.*, 593. But in *Harris* v. *State*, 36 *Ib.*, 133, where a like instruction was given, it was held to be inapplicable to the facts of the case, as there was provocation.

Abstractly, the instruction is law, and if the facts of this case were as indicated in the instruction, it would be applicable. But it seems to ignore the conduct of the deceased, just before he was shot. We stated above that there were some mitigating circumstances in evidence, which would be noticed in remarking upon the charge of the court to the jury.

The deceased probably had a grudge against appellant for throwing a block at his sister. He commenced the quarrel by denouncing appellant to Satterfield, in his hearing. His conduct indicated a purpose to whip appellant. He was twenty-one years of age, and weighed 150 pounds. The indications in the transcript are that appellant is a boy, and from his vulgar and profane language, and his account of his conduct at school, and his wearing a pistol, that he is a bad one. He manifested no disposition to avoid or abandon the quarrel. He did not shoot the deceased on meeting him, as indicated in the instruction, but after he had hitched his horse, and indicated a hostile purpose.

The instruction should have been so framed as to submit to the jury the consideration of the mitigating circumtances in evidence, or another given with that view.

The fifteenth, relating to express malice, etc., and the sixteenth, as to burden of proof and presumption of innocence, appear to be unobjectionable.

VI. The court, of its own motion, gave eleven instructions, numbered from seventeen to twenty-seven; to the giving of the seventeenth and eighteenth of which appellant excepted, and made the giving of them ground of the motion for a new trial.

The instructions excepted to relate to justifiable self-defense, and are substantially in accordance with the Statute—*Gantt's Digest, secs.* 1279, 1285.

7. MURDER: Evidence of.

VII. Appellant moved eight instructions, all of which the court refused except the fourth and seventh, and to the ruling of the court in not giving the others appellant excepted, and their refusal was made ground of the motion for a new trial.

Bare killing.

The first repeats the Statute rule as to the burden of proof, the killing being proven, (*Gantt's Digest, sec.* 1252), which, we have said above, applies to murder as defined at common law, and then adds: "But in order to convict the defendant of murder in the first degree, it is not sufficient to barely prove the killing. The State must also prove, beyond a reasonable doubt, that the killing was done willfully, deliberately, maliciously, and with premeditation of mind."

This is good abstract law. Bare proof of the killing, and nothing more, would not make out a case of murder in the first degree under the Statute. See *Stokes* v. *People*, 53 *New York*, 179.

But in this case the mere killing was not all that was proved by the State. Antecedent threats were in evidence,

and the circumstances, and the manner of the killing, were proved by an eye witness. The question in this case was, whether, upon all the facts and circumstances in evidence, the appellant was guilty of murder in the first degree, or of a lower grade of homicide.

The second relates to justifiable self-defense, and the instructions given by the court of its own motion, on that subject, were sufficient and applicable to the facts.

The third: "The court instructs the jury that while the use of a deadly weapon raises the presumption of malice, unless it appears from the proof on behalf of the State that it was used in necessary self-defense; yet it does not raise the presumption of premeditation and deliberation."

5. MALICE: Proof of:

When it is shown that the killing was done with a deadly weapon, and no circumstances of mitigation, justification or excuse appear, the law implies malice. *Sweeny* v. *State*, 35 *Ark.*, 601.

Killing with deadly weapon.

The use of a deadly weapon may be an element in murder in the first degree; but proof of its use, and nothing more, would not make out the offense as defined by the Statute.

The fifth and sixth relate to justifiable homicide, and the jury, as above remarked, were properly instructed on that subject by the court, of its own motion. And so as to the eighth, which relates to declarations of the appellant introduced in evidence by the State.

VIII. Looking at the whole case, upon all the evidence, and the instructions of the court, as framed, we are not satisfied that the appellant was rightly convicted of murder in the first degree; and think it safer, in favor of human life, to reverse the judgment, and remand the case for a new trial.

FERGUSON ET AL V. FARGASON ET AL.

1. VERDICT: *Excessive, cured by remittitur.*
An excessive verdict is cured by a remittitur of the excess.

2. PRACTICE IN SUPREME COURT: *Bill of Exceptions.*
Unless the bill of exceptions show whether the instructions copied in it were given or refused by the Circuit Court, and what was the ruling of the court upon appellant's right to close the argument in a cause, no question upon the instructions or the right to close the argument is before this court.

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

E. L. Johnson, for appellants:

The complaint, as amended, shows no cause of action in Fargason & Co., and though not demurred to, the objection was not waived. *Newman Plead and Pr., p.* ——. The suit should have been in the name of the real party in interest. No one, under the Code, except trustees, etc., can sue for the use of another. *Gantt's Digest, sec.* ——; *State, use*, v. *Rottaken*, 34 *Ark.*, 144.

A debtor, in the absence of an agreement to the contrary, has the right to direct the appropriation of payments, and it is the policy of the law to apply payments to debts the most onerous. 26 *Ark.*, 517; 30 *Ib.*, 445; 32 *Ib.*, 664; 2 *Curtis Rep. U. S. Sup. Ct., p.* 121.

Defendants, having the onus, were entitled to the closing of the argument. 29 *Ark.*, 153, *and cases cited.*

ENGLISH, C. J. This action was brought in the Circuit Court of Arkansas county, by John T. Fargason, James A.

Hunt and Charles C. Hine, late partners under the firm name of J. T. Fargason & Co., against Austin H. Ferguson and William Ferguson, on the following note:

"MEMPHIS, TENN., Feb'y 10, 1874.

"$1900.00.

"One day after date we promise to pay to the order of Fargason & Clay nineteen hundred dollars, at their office, in Memphis, with interest at ten per cent. from date, value received.

"A. H. FERGUSON,
"W. H. FERGUSON."

The original complaint set out the note, and admitted a credit of $30.05, as of June 30th, 1875, and a credit of $648.55, as of March 25th, 1876, endorsed on the note.

It was also alleged that at the time the note was executed, plaintiff, John T. Fargason, was a member of the firm of Fargason & Clay, and that said firm was, by mutual consent, dissolved, and the new firm of J. T. Fargason & Co. (the plaintiffs) succeeded the firm of Fargason & Clay, and become the owners of the assets of said firm, and were the sole owners of the note sued on.

That since plaintiffs became the owners of the note they had taken into the copartnership R. A. Parker, and were still doing business under the firm name of J. T. Fargason & Co., but that Parker had no interest in the note sued on. Prayer for judgment for balance due on the note.

The defendants demurred to the complaint, on the grounds:

1. Plaintiffs show no legal authority to sue on the note.

2. For want of proper parties in this, that C. C. Clay, one of the payees in the note sued on, is not made a party plaintiff, he being in full life.

3. Variance between the complaint and the note sued on, in this, that the complaint claims interest at ten per cent., and the note bears but six per cent.

The court sustained the demurrer, and an amended complaint was filed in the late firm name of Fargason & Clay, for the use of J. T. Fargason & Co., and in other respects the allegations were the same as in the original complaint.

Prayer that plaintiffs, Fargason & Clay have judgment, for the use of J. T. Fargason & Co., for balance due on the note, with legal interest.

Defendant, Austin H. Ferguson, filed a separate answer, in which he admitted the execution of the note as stated in the complaint, but alleged that it had been fully paid by the proceeds of fifty bales of lint cotton, shipped to plaintiffs by him and his co-defendant, and by plaintiffs sold, and by defendants directed to be applied to the payment of the note.

Defendant, William H. Ferguson, also filed a separate answer, in two paragraphs.

In the first he admits the execution of the note as alleged, but avers that he signed it as surety of his co-defendant; and that in February, 1876, and at divers times during the winter and spring of 1875 and 1876, and when his co-defendant, Austin H. Ferguson, the principal in the note, was solvent, and after plaintiffs' right of action had accrued, he gave plaintiffs notice, in writing, to sue on said note, and that no suit was brought upon the note within thirty days after such notice, as required by law, whereby he was exonerated from all liability on the note, etc.

The second paragraph alleged that the note had been fully paid by the proceeds of fifty bales of lint cotton, shipped to plaintiffs by defendant and his co-defendant, in the years 1874 and 1876, and the proceeds thereof directed by defendants to be applied to the satisfaction of the note, etc.

The issues were submitted to a jury twenty-sixth March, 1880, and a verdict returned in favor of plaintiffs for $2082.36.

Plaintiffs entered a remittitur for $272.36, and judgment was rendered in favor of "plaintiffs, John T. Fargason, James A. Hunt and Charles C. Hine for $1810.00, for their debt and damages, with interest thereon at six per cent. from the rendition of the judgment," etc.

Defendants moved for a new trial on the following grounds:

1. Error in assessment of damages.

2. Verdict not sustained by evidence, and contrary to law.

3. Court erred in refusing instruction numbered two, moved for defendants.

4. In giving instruction numbered three, moved for plaintiffs.

5. In refusing defendants the closing of the argument, the burthen of the proof being upon them in the case.

The court overruled the motion, and defendants took a bill of exceptions and appealed.

I. It is submitted by counsel for appellants, that there is error on the face of the record, for which the judgment should be reversed; in this, that by the amended complaint, Fargason & Clay, payees of the note, were made plaintiffs in the suit, when under the Code practice J. T. Fargason & Co., their successors, the holders and owners of the note, and real parties in interest, should have been plaintiffs.

So the suit was brought originally, but the court sustained a demurrer to the complaint, interposed for appellants, on the ground that Clay, one of the payees in the note, was not made a party plaintiff. Whereupon an amended complaint was filed in the name of Fargason & Clay, for the

use of J. T. Fargason & Co., the owners and holders of the note, in accordance with the practice before the Code.

Appellants did not demur or otherwise object to the amended complaint in the court below.

The final judgment, however, was rendered in the names of the persons composing the firm of J. T. Fargason & Co., the actual, though not the formal plaintiffs, and so in the end there was no substantial departure from the Code practice.

II. The excess in the verdict was cured by the remittitur below.

III. The answers were in confession and avoidance, and the *onus probandi* was on appellants. The testimony was in conflict, appellants swearing in support of the defenses set up in the answers, and Fargason and Parker, the bookkeeper of Fargason & Clay, swearing to the contrary. The jury were the judges of the weight of the evidence, and they found for appellees.

2. BILL OF EXCEPTIONS: Must show rulings of the court at the trial.

IV. The bill of exceptions states that the "plaintiffs moved for the following instructions as the law of the case." Then follow eight instructions; but the bill of exceptions does not state that the court gave any of them. If the court gave any or all of the instructions, it should have been shown by the bill of exceptions, and if appellants excepted to the ruling of the court in giving any of them, it should have been so stated, designating which.

V. So the bill of exceptions states that the "defendants also asked for the following instructions as the law in their behalf, to-wit:" Then follow three instructions; but the bill of exceptions fails to state that any of them were given or refused, or that the court made any ruling upon them.

VI. Nor does the bill of exceptions state that the court refused the defendants the closing of the argument, or that it made any ruling about the argument.

VII. If any question of law was ruled by the court against appellants, the bill of exceptions fails to show it. Counsel must remember that statements, in a motion for a new trial, amount to nothing unless shown by the bill of exceptions to be true.

The judgment must be affirmed.

WORD, ADM'R. v. WEST.

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70 248
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89 71

1. STATUTE OF LIMITATIONS: *On actions accruing to a deceased's estate.*
The Statute of Limitations does not commence to run against an action accruing to an estate after the death of a testator or intestate, until there is a personal representative of the estate competent to sue.

2. WIDOW: *Her allowance in deceased husband's estate; How estimated.*
The value of both the real and personal property of an estate is to be estimated in determining whether it may be vested in the widow under *sections* 6 *and* 7 *of Gantt's Digest;* but if the remainder interest in the homestead and the personal property, are, together, of less value than $800 the widow may retain, absolutely, $300 of the property, and continue her occupation of the homestead.

3. SAME: *When her rights in the estate vest; Incidents of.*
The widow's rights in her husband's estate become absolute upon his death, and upon her subsequent marriage, prior to the act of twenty-eighth of April, 1873, they passed, with the possession, by the marital right, to the husband, and so remained, unless scheduled as her separate property.

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

Pinnel & Gibson, for appellants:

STATEMENT.

EAKIN, J. This is an action by an administrator to recover from the second husband of the widow, after her death, a lot of personal property which had belonged to the first husband, and which she had retained. The property consisted of stock, and their increase, farming implements, and household furniture. There had been no administration on the estate of the first husband until about the death of the widow, some seven years after, when letters were obtained shortly before commencing this suit against the second.

The issues of fact and law were submitted to the court, which found, in addition to what is stated above, that the intestate left two children, and a homestead worth $400, upon which the widow continued to reside; also personal property of the value of $300, which she retained, claiming it absolutely; that the defendant married the widow and continued to hold it in right of his wife. Upon these facts the court declared that the plaintiff could not recover in this action. From this he appeals.

OPINION.

It will serve no useful purpose to criticise in detail the long list of declarations of law asked upon both sides, some of which were given and others refused. The facts as found were well supported by the evidence, and the law, as applicable to them, is as follows:

The action was not barred by the Statute of Limitations. It arose, if at all, after the death of the intestate, and as the Statute had not commenced to run in his lifetime, it would not begin until a personal representative might be in existence competent to sue. *McCustian* v. *Ramsy*, 33 *Ark.*, 141.

The value of the estate was more than $300, as found by the court; for the whole property, real and personal, is to

be estimated in order to determine whether or not it may be retained by the widow under *sections* 6 *and* 7 *of Gantt's Digest*; 33 *Ark.*, 824. The personal property was, itself, worth the full sum of $300, and the remainder interest in the homestead, which was also part of the estate, was worth something more. But altogether it was worth less than $800, and the widow, under the sixth section above cited, was "entitled to retain the amount of $300 of the property at cash price." This right, when exercised, merges her right to retain absolutely, specific articles, such as furniture, provisions, etc., as provided generally, in ordinary cases, but does not preclude her from a continued occupation of the homestead.

The widow retained only what it would have been the duty of the probate court to allow if there had been an administration. In such cases it has been held that she may show the facts in defense, even where no order of the court has been made, the onus, of course, being upon her. *Hampton et al* v. *Physick, adm'r.* 24 *Ark.*, 561; *Harrison* v. *Lamar*, 33 *Ark.*, 824, *cited supra.*

The right in the widow became absolute on the death of the husband, and upon her marriage the second time, it passed with the possession, by marital right, to the second husband. There is no showing that she was married after the act of April 28th, 1873, or that at any time during her life she claimed the property, as separate, by filing a schedule.

No claim is made in this action for the homestead. As for the personal property, it is found that the widow did not retain more than she ought. If she were willing to continue to carry the onus of the proof, it would be hard to require her to diminish her pittance by costs of administration to enable her to retain.

Without reference to the declarations of law made and refused, we think upon the whole case the judgment was right.

Affirm it.

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FRY & CO. v. FORD.

1. PRACTICE IN SUPREME COURT: *Bill of Exceptions; Instructions.*
Unless the ruling of the Circuit Court, in giving or refusing instructions, be excepted to and made ground of the motion for new trial, it cannot be reviewed in the Supreme Court.

2. LANDLORD: *His rights in crop as against Mortgagee.*
When a tenant abandons his crop and fails to perform the terms of his lease, the landlord may gather, gin and bale the cotton cultivated by him and take out of it and retain against the tenant's mortgagee of the crop, the expenses of preserving it from waste and preparing it for market, as well as the rent.

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

Valentine, for appellants:

The court erred in refusing the second instruction for plaintiffs. *Upham* v. *Dodd*, 24 *Ark.*, 545; *Robinson* v. *Kruse*, 29 *Ib.*, 575.

The second instruction for appellee should not have been given. If there was an agreement that Ford should take the cotton, and he and Fry & Co., and Robinson should share it according to their respective rights, then Ford had the right of election to account for it, to return it to the mortgagees, or keep it himself; and so long as the matter

was in abeyance, the action did not accrue. 16 *Ark.*, 104; 20 *Ib.*, 583.

If there was no agreement, Ford was either a bailee for Fry & Co., and held subject to their rights, or a purchaser, and no right of action accrued until demand and refusal. Ford was not a purchaser, because no price was agreed on.

Pindall, for appellee:

The crop having been abandoned, the landlord had a right to re-enter. 1 *Wash. Real Est.*, 479; and having abandoned before severance from the soil, the tenants never acquired a legal estate in the crop, and their mortgagees had no greater interest. If plaintiffs acquired any interest, they took subject to the landlord's lien, which was superior to the mortgage. The landlord was entitled to rent, mule-hire, expenses of gathering and advances procured from Ford for them. *Hamlett* v. *Tallman & Graves*, 30 *Ark.*, 505; *Acts* 1875, 330, *March* 6, 1875.

Plaintiffs had full notice, as Fry copied one of the contracts.

The bill of exceptions does not show that objections were made to the two instructions for defendant. *Johnson* v. *Terry*, 35 *Ark.*, 224. The second, for plaintiff, properly refused. *Hamlett* v. *Tallman, etc., supra.*

The evidence shows that the action was barred, and this court will not disturb the verdict on the mere weight of evidence.

English, C. J. This action was commenced in the Circuit Court of Chicot county, on the eighth of December, 1879, by Reuben M. Fry and Mark Valentine, merchants and partners, under the firm name of R. M. Fry & Co., against William W. Ford.

The complaint alleged, in substance, that on the seventh of March, 1876, certain Chinamen, named John Fung, Boc. Year, A. Moun, A. Sing, A. Young, A. Hook, Chin Jack and Bow Sing, for and in consideration of the sum of $26.60, which they then owed plaintiffs, for money and goods, as well as for the further consideration of goods, wares and merchandise, thereafter to be furnished them by plaintiffs before the first of February, 1877, executed a mortgage, by which they transferred to plaintiffs all their interest, of every kind and nature whatsoever, either as the same was then held by them, or as it might thereafter be acquired, in a crop of cotton then being raised by them on the Drennondale plantation, on Chicot lake, in Chicot county, Arkansas. That said mortgage was duly acknowledged and filed for registration in the recorder's office of Chicot county, twenty-sixth of March, 1876, and recorded, etc. That by reason of said mortgage, and the security therein given, plaintiffs advanced to said mortgagors, in money, goods, etc., previous to the first of February, 1877, the sum of $178.47, which, with interest, remained due and unpaid to them.

That on said seventh of March, 1876, certain other Chinamen, named Henry Gibson, Charley Chow, Wang Wing, Johnnie Join, Ju Wah, Wong Shu, John Fook, John Join and Young Dick, for and in consideration of the sum of $126.37, for money advanced, and goods, etc., theretofore sold to them by plaintiffs, as well as for the consideration of further advances of money, goods, etc., thereafter to be furnished them by plaintiffs, previous to first of February, 1877, executed to plaintiffs their certain deed of mortgage, by which they bargained, sold and conveyed to them their entire interest, of every kind and nature whatsoever, in a certain crop of cotton then being raised by them on the Drennondale plantation, on Chicot lake, etc. That said

mortgage was duly acknowledged, and on the twenty-fifth March, 1876, filed for registration in the recorder's office of Chicot county, and recorded, etc. That by virtue of said mortgage, and the security therein given, plaintiffs advanced to said mortgagors, in goods, etc., previous to first of February, 1877, the sum of $238.65, which, with interest, was due and unpaid to them.

That said mortgagors raised on said Drennondale plantation, during said year, 1876, an amount of cotton more than sufficient to pay the plaintiff's mortgaged indebtedness thereon, and that William W. Ford obtained possession of said cotton so mortgaged to plaintiffs, to an amount more than sufficient to pay off said indebtedness, and afterwards, to-wit: on the second day of February, 1877, converted the same to his own use, and refused to account to plaintiffs for said cotton, etc.

Prayer for judgment against defendant for said sum of $178.47, and for said sum of $238.65, with interest, etc.

Defendant answered, in substance, that he was a merchant doing business at Lord's landing, Chicot county, and furnished supplies to planters, etc. That early in the year 1876, James F. Robinson, then owner of the Drennondale or Durfield plantation, arranged with defendant to furnish supplies to him, and on his account and personal credit, for the hands on that plantation. That for the convenience of himself and Robinson, accounts were kept against the laborers so furnished on the books of defendant, by names, though the accounts were really against Robinson, and so regarded, treated and understood by him, the laborers and defendant. That all the supplies so furnished to laborers or tenants on said plantation, except Lucas Welchman and William Johnson, were, during the year 1876, furnished under said agreement with Robinson.

That among the hands so furnished by defendant were

certain Chinamen, being the same, as defendant was informed, as mentioned in the complaint. That he received from Robinson a large amount of cotton raised on said plantation during the year, 1876, in way of payment on said accounts for supplies so furnished him during that year. That all the cotton, so received from Robinson, was credited to him, there being no credit account kept with any of the laborers or tenants so furnished at the request of, and through and for Robinson as aforesaid. That the cotton received from Robinson for his said account, as aforesaid, according to the recollection of defendant, was all received prior to the first day of December, 1876. That the gin-house of Robinson was burned in November, of that year, and defendant received no cotton from him after the burning of the gin-house, except four bales, received on the fifteenth February, 1877, three of which were raised by said Wm. Johnson, and defendant did not know who raised the other bale. Denies that he received any other cotton so raised on said plantation on the second day of February, 1877, or at any other time thereafter—neither the cotton raised by said Chinamen nor any one else—under the arrangement aforesaid with Robinson. Denies that he received any cotton raised by said Chinamen at any time within three years next before the bringing of this suit, and sets up the Statute of Limitation of three years as a bar to the recovery of the value of any of the cotton so received by him from said Robinson, that may have been raised by said Chinamen on said plantation, during the year 1876.

The case was submitted to a jury on the above pleadings, evidence introduced by the parties, and instructions of the court; the jury returned a verdict in favor of defendants; the plaintiffs moved for a new trial, which was refused. There was a final judgment discharging defendant, and plaintiffs took a bill of exceptions, and appealed.

I. It was made ground of the motion for a new trial that the court erred in giving two instructions for defendant. The bill of exceptions states that the defendant asked the court to give two instructions as the law of the case, which are copied, and then states that the court gave them, and this is all that is said about them in the bill of exceptions. It is not stated that plaintiffs objected to them, or excepted to the ruling of the court in giving them.

1. PRACTICE IN SUPREME COURT: Bill of exceptions:

When the court gives instructions objected to, or refuses such as are asked, it is the proper and settled practice to except to the ruling of the court, and make it ground of the motion for a new trial, in order to have it reviewed on appeal or writ of error. *McKenzie* v. *State*, 26 *Ark.*, 342; *Cheatham* v. *Roberts*, 23 *Ib.*, 651; *Berry* v. *Singer*, 10 *Ib.*, 483; *Benton* v. *State*, 30 *Ib.*, 336; *Henry & Co.* v. *Gibson, et al*, 26 *Ib.*, 519; *Peterson* v. *Gresham*, 25 *Ib.*, 383.

Instructions.

II. A further ground of the motion for a new trial was, that the court erred in refusing to give the second instruction moved for plaintiffs.

2. LANDLORD: His rights to crop as against mortgagee of tenants.

The bill of exceptions shows that the plaintiffs asked three instructions; that the court gave the first and third, and refused the second, and that plaintiffs excepted to the ruling of the court in refusing it.

The instruction refused follows: "The contracts introduced in evidence, by defendant, between Mary P. Robininson and the Chinamen who mortgaged to plaintiffs, have no other effect than to prove that the relation of landlord and tenant existed between Mrs. Robinson and said Chinamen, and are not to be considered as conveying to Mrs. Robinson any other right as against plaintiffs, than the right to enforce her statutory lien for her rent, provided she does the same in the time and manner required by law."

It appears from the evidence that James F. Robinson cultivated the Drennondale plantation in the year 1876, and he and other witnesses examined, spoke of it as belonging to him; but it seems that the rent contracts made between him and the Chinamen were, for some reason not explained, and about which no question was made in the court below, signed by Mrs. Mary P. Robinson, as lessor, and the Chinamen as lessees.

James F. Robinson testified that the Chanamen, who executed the mortgages read in evidence by plaintiffs, worked on his place in 1876, under written contracts which were filed and endorsed under the Statute, but not recorded, and that they were lost and could not be found. The recorder also testified that they could not be found in his office, and defendant then read in evidence the entries made by the recorder in the index, and proved by James F. Robinson the contents of the contracts. He stated that there were two or three, or perhaps more, of the written contracts, and they were all alike as to terms, he thought. They leased, in all, about one hundred and fifty acres of land, and provided for rent at $10 per acre, and for rent of mules and implements. He thought they provided for a lien for the rent. Did not recollect whether a lien for supplies was reserved in them or not, but thought it was, as he usually wrote his contracts in that way.

From the indications in the recorder's index, read in evidence, they were filed before the execution of the mortgages read in evidence by plaintiffs.

R. M. Fry testified that about the time he took the mortgages from the Chinamen he examined their lease contracts on file in the clerk's office. There were three of them, he thought, all alike as to the terms of lease. He read them all, and, fearing they might be lost or mislaid, he afterwards

made a copy of one of them, which he got the clerk to certify. The others were exactly similar as to terms.

Plaintiff then read in evidence this copy. It is dated twenty-ninth February, 1876, and purports to have been executed and acknowledged on the same day, by Mrs. Robinson as lessor, and the nine Chinamen named in the complaint as having made the second mortgage therein described. It appears to have been filed in the recorder's office and indexed March 2, 1876. By it, the lessor, in consideration of the covenants and agreements thereinafter mentioned, to be kept and performed by the lessees, etc., demises to them a part of the Durfield plantation described, containing seventy-five or eighty acres, more or less, from the date of the lease to the first of January, 1877. The lessees covenant, on their part, to pay $10 per acre rent for said tract of land and any other land they may work on said plantation, the same to be paid out of the first cotton said lessees may pick and gin off said tract of land, to be paid or delivered on or before the first day of November, 1876, at the gin-house on the plantation. The lessor agrees to give them the use of the gin free of charge, they paying engineer and pressman, and furnishing their own wood. They also agree to pay $20 per head for any mules they may rent from the lessor, to be paid at the same time and place as the rent of land, etc. The lessor also agrees to let the lessees have the use of necessary farming implements, including a wagon; the mules, implements, and wagon to be kept in good order and repair by them, and returned, etc. Also the privilege to cut from the back of the plantation necessary fuel for the use of their houses and to gin with. The lessees agree not to sublet or assign their lease without the consent of the lessor, and to surrender possession of land and houses occupied by them on the first of January, 1877, with the understanding that they may thereafter until first of Febru-

ary of same year gather any of their crop not picked by the first of January.

Such is the substance of the contract of lease read in evidence by plaintiffs, and it seems the other contracts were like it as to terms.

R. M. Fry also testified that James F. Robinson was planting on the Drennondale plantation and told him he had a number of Chinamen on the place, and at his urgent request he agreed to supply them. Robinson was so enthusiastic about the benefits of Chinese labor that witness believed he would have released his lein to him if he had asked it. He agreed, however, to supply them, and took from them the two mortgages described in the complaint. He supplied them until the overflow came in April, to the amount named in the complaint, and bills of particulars attached. During the overflow, Henry Gibson's squad came to him and wanted thirty-six barrels of rice at one time; he refused to let them have so much. They got mad and never came after any more supplies, except, perhaps, a few little articles. He never refused to supply them to a reasonable extent.

It was in evidence that when plaintiffs quit furnishing them, James F. Robinson made the arrangement with defendant Ford to furnish them with supplies on his personal credit, as stated in his answer.

It was also proved that the Chinamen abandoned their crop before the picking season commenced, when the cotton began to open, and that James F. Robinson had their cotton gathered, ginned, baled and prepared for market. He testified that he paid the expenses of picking, ginning, and baling the cotton, which cost about one-third of its value, and that there was not enough of the cotton to pay the rent and the expenses of preparing it for market.

Mrs. Robinson seems to have been a mere nominal party to the lease contracts made by her husband, James F.

Robinson, with the Chinamen. He no doubt was the planter, and in the management and control of the Drennondale or Durfield plantation.

When tenant abandons crop, landlord may gather, etc.

Appellants took their mortgages from the tenants subject to the rights of the landlord under the lease contracts. Upon every principle of justice, after the Chinamen abandoned the crop, and failed to comply with the terms of their contracts, Robinson had the right to gather, gin, bale and prepare for market the cotton cultivated by them, and so abandoned in the fields at the commencement of the picking season, and to take out of it the expenses of preserving it from waste, and preparing it for market, as well as the rent.

Upon the facts in evidence the court did not err in refusing the instruction above copied.

III. It was made a further ground of the motion for a new trial, that the verdict was contrary to law and evidence. Under this assignment may be noticed the defense of the Statute of Limitation set up in the answer of appellee.

The action is in the nature of the common law action of trover. The gist of the complaint is that plaintiffs had title as mortgagees to cotton which came to the possession of defendant, and by him converted to his own use.

Of course the Code pleader tells the whole story, alleging not only principal facts, but also setting out matters of evidence. The complaint and answer were drafted in that way, which is common among Code pleaders, though not in accordance with the views of commentators on Codes.

The court instructed the jury, on motion of plaintiffs, "that to maintain the action they must prove, 1st, ownership in the cotton in controversy, either general of special; 2nd, that it was converted by defendant to his own use within three years next before the bringing of this suit, that is, since the eighth day of December, 1876; and 3rd,

that the value of the property was equal to the amount claimed by plaintiffs, and if the jury believed from the evidence that plaintiffs had valid and duly recorded mortgages upon said property, and that it was converted by defendant, and was worth as much as plaintiffs' claim, they must find for plaintiffs, unless defendant proved title in himself superior to theirs."

James F. Robinson testified that after he picked, ginned, and baled the cotton raised by the Chinamen, he delivered about seventeen bales of it to defendant, Ford. That he delivered it to him before his gin was burned, (about the twenty-fourth of November, 1876,) in payment of the debt he owed him for supplies.

Defendant testified that he considered the cotton his from the time Robinson delivered it to him.

Plaintiffs' mortgages were upon record, and there are indications in the evidence that defendant in fact knew before, and at the time Robinson delivered the cotton to him in payment of his debt, which was more than the value of the cotton delivered, that plaintiffs had taken the mortgages from the Chinamen. Defendant purchased the cotton regardless of the claim of plaintiffs, and treated it as his own from the time of the purchase. What became of the cotton afterwards is not disclosed by the evidence.

Upon the facts in evidence the jury were warranted in finding that defendant converted the cotton to his own use by purchasing it from Robinson, and at once treating it as his own property, which was more than three years before the commencement of the suit. 2 *Greenleaf on Evidence*, (*Redfield Ed.*,) *sec.* 642.

Appellants attempted to show that appellee deluded them into a delay of suit by making the impression upon them that he would have a settlement with them about the cotton, but nothing was proved that would legally prevent the run-

ning of the Statute, or remove the bar. They also claim that Robinson acted in bad faith with them about the gathering and disposal of the cotton cultivated by the Chinamen, but this is not a suit between appellants and him.

Nor need we enquire, in this case, whether Robinson should have filed a bill in chancery against the Chinamen, after he gathered and baled the cotton abandoned by them, to enforce the payment of rent and expenses incurred in preserving it, and preparing it for market. If he had no right to sell the cotton to appellee, and was a wrong-doer in selling it, it only made a strong case of conversion by appellee, and a clearer defense under the Statute of Limitation.

Upon the record the judgment must be affirmed.

HALL v. TRUCKS.

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1. FORCIBLE ENTRY AND DETAINER: *What necessary to maintain the action.*

The *Act of March* 2, 1875, is a re-enactment of chapter 72, title, "Forcible Entry and Detainer," of *Gould's Digest*, and the action of forcible entry and detainer can be maintained only in a case of a forcible entry, or a turning out by force, or where the plaintiff has parted with the possession under some contract or agreement, express or implied, that the possession shall be restored to him. It is not intended to take the place of the action of ejectment, but to restore possession forcibly or unlawfully detained, without regard to the ownership or title to the property. Force is the gist of the action, and must be actual and hostile. Implied force, as where the entry is peaceable, but unlawful, is not sufficient.

APPEAL from *Dorsey* Circuit Court.
Hon. T. F. SORRELLS, Circuit Judge.
32–38

STATEMENT.

Trucks sued Hall in an action of forcible entry and detainer for a tract of land in Dorsey county, alleging that he was the owner, and entitled to the immediate possession of it, and that Hall, on the —— day of ———, 1878, "did forcibly enter upon it, and now unlawfully detains and withholds the same from his possession." Hall answered, claiming title in himself, and denying that he forcibly entered upon the land, or unlawfully detained it. The proof showed that Trucks was the owner of the tract, and Hall owned the tract immediately west of it; that a former county surveyor had run and marked the line between the two tracts, as he supposed, but in fact, had put the line on Truck's land. Hall, supposing this to be the true line between the tracts, built his house on the land, about thirty yards east of the surveyor's line, believing the building was on his own land. When the house was nearly completed, Trucks had the line re-surveyed by the field notes, and developed the mistake. He then notified Hall, in writing, to get off of it, which he refused to do, and this action was then brought.

Against the objections of the defendant the court gave for the plaintiff the following instructions to the jury:

1. "If the jury believe that the defendant lawfully and peaceably obtained possession of the land in question, and refused to surrender it to the plaintiff, after demand therefor in writing, and that plaintiff was entitled to the possession of said land at the commencement of this suit, they may find for the plaintiff."

3. "It is not necessary to show that the defendant entered by actual force. If the entry was unlawful, force is implied. A peaceable entry may be unlawful, and in legal contemplation unlawful."

The verdict and judgment were for the plaintiff. The defendant filed his motion for a new trial; which, being overruled, he filed his bill of exceptions and appealed.

D. H. Rousseau, for appellant:

The *Act of March* 2, 1875, is a literal re-enactment of *Ch.* 72 *Gould's Dig.* The proof fails to show a forcible entry, or that Hall used force or violence in holding possession. Plaintiff failed to show that he ever was in actual possession, or that the relation of landlord and tenant existed. The verdict was not only contrary to law, but without a particle of evidence to support it. *McGuire* v. *Cook*, 13 *Ark.*, 449; *Bradley* v. *Hume*, 18 *Ib.*, 284; *Smith* v. *Lafferty*, 27 *Ib.*, 46; *Dortch* v. *Robinson*, 31 *Ib.*, 297.

F. W. Compton, also for appellant:

HARRISON, J. The *Act of March* 2, 1875, under which this action was brought, is, as was remarked in *Dortch et al* v. *Robinson et al*, 31 *Ark.*, 296, a re-enactment of *Chapter* 72 —title, "Forcible Entry and Detainer"—*of Gould's Digest;* and it was decided in *McGuire* v. *Cook*, 13 *Ark.*, 448, that the remedy provided by it is not intended to take the place of the action of ejectment, but its object is to restore possession forcibly taken or unlawfully detained, without regard to the ownership or title to the property. It can only be resorted to in the case of a forcible entry, or a turning out by force, or when the plaintiff parted with the possession under some contract or agreement, express or implied, that the possession should be restored to him.

Force is the gist of the action for a forcible entry and detainer; but implied force, as when the defendant entered

peaceably, though unlawfully, is not sufficient; it must be actual and hostile. *McGuire* v. *Cook*, (*supra.*)

The second section of the act is as follows:

"SEC. 2. If any person shall enter into or upon any lands, tenements, or other possessions, and detain or hold the same with force and strong hand, or with weapons, or by breaking open the doors and windows, or other parts of the house, whether any person be in or not, or by threatening to kill, maim or beat the party in possession, or by such words and actions as have a natural tendency to excite fear or apprehension of danger, or by putting out of doors or carrying away the goods of the party in possession, or by entering peaceably and then turning out by force, or frightening, by threats or other circumstances of terror, the party to yield possession; in such case every person so offending shall be deemed guilty of a forcible entry and detainer within the meaning of this act."

The first and third instructions given for the plaintiff were erroneous, and as there was no proof that the defendant entered into and held possession of the premises with force and strong hand, the verdict was not supported by the evidence; and the motion for a new trial ought to have been granted.

The judgment is reversed, and the cause remanded.

McDEARMAN, EX. v. MARTIN ET AL.

1. MARRIAGE CONTRACT: *For a child's part of the husband's estate; Effect of.*

A wife who has entered into an ante-nuptial contract with her husband for a child's part of his personal estate upon his death, stands on the footing and with the same rights and remedies of a distributee. She is not a creditor and can take nothing until the debts are paid.

2. ADMINISTRATION: *When distributive shares are payable.*

An Executor or Administrator can not pay legacies or distributive shares until two years after the date of his letters, unless ordered to do so by the probate court; and such order can not be made unless it appear from his settlement that the assets are sufficient to pay all demands against the estate.

APPEAL from *Stone* Circuit Court.
HON. R. H. POWELL, Circuit Judge.

STATEMENT.

On the fifth of December, 1879, Tabitha Martin and her husband, T. D. Martin, filed in the Stone county Circuit Court their complaint at law against the executors of Wiley McDearman, deceased, and their sureties, alleging, in substance, that in 1875, while sole, she and her former husband, Wiley McDearman, entered into a written marriage contract, whereby they agreed to marry, and upon the marriage she was to retain all the property then owned by her, and he was to pay all debts she then owed, and if she survived him, she should have a child's part of all the personal estate he should own at the time of his death; and in consideration therefor she should have no dower in any real property he should then own; that afterwards, they were, in consummation of said contract, duly and legally married,

and lived together as husband and wife until his death, about the fifteenth day of February, 1878. That after his death the defendants, John T. McDearman and William W. McDearman, had qualified as executors of his will, and entered into bond as such, with J. M. Gray, J. M. Case and T. M. Hess as their sureties, (reciting the conditions of the bond); that as such executors they had received personal property of the deceased which they had sold, and received the proceeds to the amount of five thousand dollars. That the deceased left him surviving three children, but said executors had refused to allot to her any portion of the property or its proceeds, and she had received no dower in his personal or real property. That since the death of the said Wiley McDearman, she and the said T. D. Martin had intermarried, and that she was entitled to the one-fourth of the proceeds of said personal property, amounting to $1250; for which sum she prayed judgment against said executors and their sureties. A certified copy of the marriage contract from the recorder's office was filed as an exhibit with the complaint.

A demurrer to the complaint was overruled. The plaintiffs then dismissed it as to the sureties, and John T. McDearman, the sole surviving executor, refusing to answer, judgment was rendered against him in his representative character for $1250 and cost, and he appealed.

Clark & Williams, for appellant:

1. Appellee was put upon the footing of a distributee, and not a creditor, and before she could sue must show a final settlement in the probate court, and a balance subject to distribution, and order to pay it. 2 *Ark.*, 382; 5 *Ib.*, 468; 9 *Ark.*, 244; 11 *Ib.*, 14; 21 *Ib.*, 405; 22 *Ib.*, 6.

2. If we treat appellee as a creditor, she has failed to

authenticate her claim as required by Statute. *Gantt's Dig.*, *sec.* 102.

3. The probate court had exclusive jurisdiction. *Sec.* 34, *Art.* 7, *Const.* 1874.

Butler & Neill, for appellees:

1. This action is founded upon a claim against an estate and may be prosecuted either in the probate or Circuit Court. *Rezan* v. *Leman*, 7 *Ark.*, 78.

2. The claim of appellee is *not* dower but a pecuniary provision *in lieu* of dower; by ante-nuptial contract she *barred* her right to dower, (*Sec.* 2220, *Gantt's Dig.*,) and if the suit should have been in Chancery, instead of at law, this was not ground of a demurrer. 32 *Ark.*, 562, *and cases cited*; *Gantt's Dig.*, *sec.* 4461 and 4464.

3. The claim required no authentication, (14 *Ark.*, 254; 22 *Ib.*, 537–8,) and if it did, the want of it cannot be raised by *demurrer*. 14 *Ark.*, 237; *Ib.*, 246; 19 *Ib.*, 443; 20 *Ib.*, 440.

4. Appellee was not heir or distributee, and an ascertainment of the amount of the estate by the probate court was unnecessary; nor was her interest subject to the payment of the debts of decedent.

HARRISON, J. As the claim of Mrs. Martin under the ante-nuptial contract is for a child's part, or a distributive share of the personal property, she stands on the footing, and with the same rights and remedies in respect thereto as a distributee of the estate. She is not a creditor of the estate, nor entitled by the contract to any portion of it unless the personal assets are more than sufficient to pay the debts.

The case, we presume, would have been different, if her agreement had been, instead of a child's part, to receive a specific sum of money.

An executor or administrator is not authorized to pay legacies or distributive shares until two years after the date of his letters, unless ordered to do so by the probate court; and such an order cannot be made until it appear, upon a settlement, that there are sufficient assets to pay all demands against the estate; and then the legatee or distributee must give bond with security to refund his proportion of any debt which may afterwards be established against the estate. *Gantt's Digest, secs.* 157, 158, 165.

It follows that no cause of action was shown in the complaint, and that the demurrer to it should have been sustained.

The judgment is reversed.

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STRYKER v. HERSHY.

1. MORTGAGE: *Conditional sale; Intention of the parties; Evidence.*

In the absence of extrinsic evidence, the intention of the parties in executing an instrument is to be determined by the instrument itself, and a conveyance reserving to the grantor the privilege of "redeeming" the estate within a specified time will be a mortgage if given to secure a debt, otherwise it will be a conditional sale.

APPEAL from *Sebastian* Circuit Court.
Hon. J. BRIZZOLARI, Special Judge.

STATEMENT.

On the second of May, 1878, Hershy filed in the Circuit

Court, at Fort Smith, his complaint in equity against Stryker and others, alleging in substance, that on the twenty-ninth day of January, 1867, Wood B. Rogers was entitled to the one-sixth part of the estate of his late father, John Rogers, and on that day sold and conveyed the same for $5000 paid in land, notes and money, to John B. Latham, by the following deed, viz:

"Know all men by these presents, that I, Wood B. Rogers, of Sebastian county, in the State of Arkansas, for and in consideration of the sum of five thousand dollars to me in hand paid by John B. Latham, of the city of Fort Smith, in said county, the receipt of which is hereby acknowledged, have this day granted, bargained, sold, delivered, released and conveyed and quit claim unto the said John B. Latham and his heirs, all my right, title, claim and interest in and to my individual portion or share, as heir at law of John Rogers, deceased, late of said city, hereby releasing and confirming unto the said John B. Latham and his heirs and assigns, all my interest in and to all lands belonging to said estate, together with all interest in all debts and choses in action of every description whatsoever: To have and to hold the above and foregranted portion, interest or share in the said estate to the said John B. Latham, his heirs and assigns forever, to his and their own proper use and behalf.

"Witness, etc., this twenty-ninth day of January, 1867.

"WOODS BUCKNER ROGERS, [SEAL.]"

That at the same time said Rogers and Latham executed the following agreement, to-wit:

"Articles of agreement made and entered into this twenty-ninth day of January, 1867, between Woods B. Rogers and John B. Latham, both of the city of Fort Smith, county of Sebastian, State of Arkansas, WITNESSETH: That I, Woods B. Rogers, of the first part, do acknowledge to have

sold unto John B. Latham, of the second part, all my right, title and interest acquired or hereafter to be acquired in all real estate, bonds, notes, accounts, rents, profits, or other evidences of debt, and all and every other interest whatever of mine in and to the estate of my late father, John Rogers, deceased, and do hereby further and effectually confer upon the said John B. Latham all that I, the said Woods B. Rogers, possessed over such interest, whatever they may be, of every description; and I further obligate myself to execute to the said John B. Latham a good deed to such interest, and that his title is good and unincumbered, and that I will defend the same against all claimants for and in consideration of five thousand dollars, to me paid by him in the following manner, to-wit: Two hundred and fifty acres of land in Sebastian county, Arkansas, be the same more or less, known as the John Allen farm, and for which the said John B. Latham binds himself to make to me, the said Woods B. Latham, a good deed; and the said John B. Latham further says that his title is good and unincumbered, and that he will defend the same against all claimants. The said Woods B. Rogers agrees to allow the said John B. Latham for the same, the sum of two thousand dollars, and to accept an order on H. E. McKee & Co., merchants and traders of said city, for fourteen hundred dollars, payable in merchandise, and also merchandise of John B. Latham, to the amount of six hundred dollars; and also to receive of said John B. Latham, bonds, notes and accounts for one thousand dollars, making in all, five thousand dollars. It is, however, further stipulated by said Latham, that if said Rogers fails to collect the whole or any part of said bonds, notes, or accounts, he, said Latham, will pay the whole or any part remaining unpaid six months from this date, with ten per cent. interest per annum. It is further stipulated by said Latham, his heirs assigns,

administrators, etc., that the said Woods B. Rogers, in his own behalf only and not any assignee, heir, legatee, administrator or other person whatever, can, and the said Latham grants to him the privilege of redeeming said interest in his father's estate, at any time within two years from this date, on the following condition: that the said Rogers should pay to the said Latham, his heirs, assigns, administrators, etc., five thousand dollars, with interest at ten per cent. per annum from this date, and the said Latham agrees that, in making such payments, said Rogers may, if he so wishes, put in the two hundred and fifty-five acres of land at $2000, with ten per cent. per annum; the same to be unincumbered, with all improvements that may have been put thereon, without any allowance for the same. The parties hereto each hereunto set their hands and seals, this twenty-ninth day of January, 1867, and bind themselves to faithfully carry out this contract; and the failure of either party to comply with it shall entitle the other to recover damages to the amount of not exceeding twenty-five hundred dollars.

"WOODS B. ROGERS, [SEAL.]"
"JOHN B. LATHAM, [SEAL.]"

That afterwards, on the twenty-second of May, 1867, Meador & Co., merchants, recovered judgment in the Circuit Court of the United States for the Western District of Arkansas, for $776, against Latham and his partner, Brooks, under their partnership name of Brooks & Latham, and all the real estate acquired by Latham from Rogers was duly levied on by the marshal of the district to satisfy an execution issued on said judgment, and was duly sold to the plaintiff, at public sale, on the first day of November, 1869, and conveyed to him by the marshal on the twenty-fourth day of May, 1870. The real estate levied on and sold embraced a large number of city lots in Fort Smith, which

are described in the complaint, and in the marshal's deed, which is exhibited with it.

That on the fourth day of June, 1868, Latham granted, sold and conveyed all his interest in the one-sixth part of the estate of said John Rogers, deceased, to the defendant, John Stryker, and afterwards, on the twenty-first of July, 1870, said W. B. Rogers quit-claimed to Stryker all his interest in and to the estate. That these conveyances were the result of a conspiracy between Latham and Stryker to defraud Hershy of the property.

That afterwards, the defendant, Stryker, and the heirs of John Rogers, deceased, who are made defendants, united in a deed of partition, partitioning the real property of said John Rogers between themselves, allotting to said Stryker, in severalty, certain described lots as his one-sixth interest derived from said W. B. Rogers.

That this deed was also a fraud upon the plaintiff, and a cloud upon his title.

The complaint further alleges that at the time of the sale and conveyance by Rogers to Latham, there was no indebtedness of Rogers to Latham. That the judgment under which Hershy purchased said property was a lien upon it. The property had never been redeemed, and by his purchase and marshal's deed, he had acquired a good title to it.

Prayer that the said conveyances from Latham and W. B. Rogers to Stryker be declared fraudulent and void, and be cancelled; that the title vested in the lots set apart to him by the deed of partition be divested out of him and vested in the plaintiff, and for other proper relief.

The heirs of John Rogers made default; Stryker answered, denying the alleged frauds in the several conveyances under which he claimed title; denying that Latham had any title at the time the judgment was rendered, or that said judg-

ment was a lien upon the property, and asserting that the instruments above copied, together, constituted a mortgage, and not a sale of the property; that the plaintiff had acquired no title by his purchase under the judgment, and the defendant had acquired W. B. Rogers' equity of redemption by his quit-claim deed, and had redeemed from Latham, and had good title.

All the deeds referred to in the pleadings were exhibited, and were the only evidence produced at the hearing.

The court decreed as prayed in the complaint, and the defendant appealed.

W. A. Compton, for appellant:

The deed and written agreement, taken together, constituted a mortgage, and not a conditional sale. 17 *Ohio* 356; 2 *Story Eq. Juris.*, *sec.* 1019; *Doughty* v. *McColgan*, 6 *Gill. & J.*, 275; *Flagg* v. *Mann.*, 2 *Sumner*, 486; 3 *J. J. Marsh*, *Ky.*, 354; *Jones on Mortgages*, *vol.* 1, *secs.* 241, 244, *et seq*; *Shelber* v. *Robinson*, 7 *Otto*, 724; 13 *Ark.*, 116. Because the agreement limits the time to redeem, and the right of redemption is limited to the mortgagor alone, *does not make it any less a mortgage. Jones on Mortgages*, *vol.* 2, *secs.* 1039, 1041, *et seq.*

Wm. Walker and W. A. Compton, for appellant:

The conveyance was a mortgage. The use of the word "redeem" in the defeasance, instead of re-purchase or re-sale, is conclusive, but it is immaterial whether a mortgage or conditional sale, the judgment lien, which was general, and not special, could not prevail against prior equities.

A judgment lien is a mere contingency. Equitable mort-

gages, and even agreements for a mortgage, entitle the mortgagee to a preference over subsequent judgment creditors. *Delaine* v. *Keenan*, 3 *Dessaur's Rep.*, 70; *Foster* v. *Foust*, 2 *Sug. & R.*, 11; *Hurt* v. *Hurst*, 2 *Wash. Ct. Ct. Rep.*, 69.

See also, "*In the matter of How and wife*, 1 *Paige Ch.*, 124; *Burnie* v. *Main*, — *Ark.*, ——

Duval & Cravens and U. M. Rose, for appellee:

The deed and instrument were a conditional sale. *Porter* v. *Clements*, 3 *Ark.*, 384; *Johnson* v. *Clark*, 5 *Ib.*, 321; 2 *Wash. on Real Prop.*, 4 *Ed.*, 67, (*Marg. p.* 492, *vol.* 1 *of 1st Ed.*) *Jones on Mortgages, secs.* 256 *to* 281; *Bispham on Equity, sec.* 154; 2 *Lead. Cases in Eq.*, 4 *Am. Ed.*, *p.* 1997; *Conway* v. *Alexander*, 7 *Cranch*, 218; *Glover* v. *Payn*, 19 *Wend.*, 518.

But if a mortgage, upon failure to redeem within the time limited, the mortgagee might maintain ejectment. *Jones on Mortgages, sec.* 719. There was no tender. *Ib.*, *sec.* 901; *Thomas on Mortgages, p.* 312. Even if there had been a tender, the time for redemption had elapsed. *Maynard* v. *Hunt*, 5 *Pick.*, 240.

HARRISON, J. The only question in this case for our consideration is, whether the deed from Rogers to Latham, and the agreement between them, which, as parts of the same transaction, must be construed together, constitute a conditional sale or a mortgage; and as no extrinsic facts or circumstances have been shown, the intention of the parties by which it is to be determined is to be ascertained from the instruments alone.

If intended as a security for money, or a debt, as is contended by the appellants, the contract was a mortgage; if

not, it was a conditional sale. *Johnson's Ex'r.* v. *Clark*, 5 *Ark.*, 321; *Porter* v. *Clements*, 3 *Ark.*, 364; 1 *Jones on Mort.*, 265; 2 *Wash. on Real Prop.*, 63.

No mention is made in the agreement of any note or other evidence of debt; and the only word found in it that is the least suggestive of the idea of the existence of a debt is that of *redeem*, which, in its connection in the instrument, might appropriately have been used as synonymous with *re-purchase*.

We can see nothing on the face of the agreement, or of both instruments as construed together, from which the inference may be drawn that a security for money was intended. On the contrary, the conclusion is clear, not only from their language and purport, but also from the absence of any mention or proof of any indebtedness, that the contract was a conditional sale, and not a mortgage.

The decree is affirmed.

COLE, AS SHERIFF AND COLLECTOR v. BLACKWELL.

1. SCHOOLS: *Levying tax for special school districts: Injunction.*

So much of *section* 5524 *of Gantt's Digest* as authorized the board of supervisors to levy the district school taxes in cities and towns organized into single school districts, upon the estimate of the board of school directors, and without a vote of the electors of the district, was abrogated and repealed by section 3, Art. XIV, of the Constitution of 1874, and the collection of a tax so levied may be enjoined.

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

STATEMENT.

James M. Blackwell, for himself and other resident tax-payers of Dardanelle special school district, in Yell county, filed his complaint in equity in the Yell Circuit Court for the Dardanelle district, against the appellant, to enjoin the collection of a special school tax levied by the county court for the maintenance of a free school in the district, alleging that at an election held by order of the board of directors on the — day of —— 1879, in the town of Dardanelle, to determine whether a special tax should be levied for the support of a free school in said district, for the year 1880, a large majority of the voters voted against such levy, but that the board of directors of the district had, nevertheless, made to the county court an estimate of the amount necessary for such school, and the court had upon such estimate, and the recommendation of said directors, levied a tax of two and a half mills on the dollar of the taxable property of the district, which said collector was proceeding to collect. That the plaintiff was a resident tax-payer of the district, and the tax was illegal and oppressive, etc. Prayer for injunction to restrain the collection of the tax. The injunction was ordered by the circuit judge in vacation, and was issued and served upon the defendant, and at the return term he answered that the district was a special school district, organized under an act of the Legislature approved February 4th, 1879, entitled "An Act for the better regulation of public schools in cities and towns," and embracing the town of Dardanelle, and was acting under the provision of *sections* 5513 *to* 5537, *Gantt's Digest*. That at a regular meeting of the board of directors, held in pursuance of *section* 5524, *Gantt's Digest*, said board made and certified to the county court an estimate of the amount necessary to support a free

public school in said district, for the year 1880, in addition to the amount that would be received from the State, and the court had, thereupon, levied said tax of two and a half mills on the dollar of the taxable property of the district; and thereupon said board of directors had employed teachers, who had then been teaching seven months, and the citizens of the district had had the benefit of their services, and they should be paid; and he denies that there is any law authorizing an election by the qualified electors of a special school district, organized under the act first above mentioned, to determine as to levying a school tax; and asserts that under that act when the board of directors, who numbered six, shall make and certify the estimate to the county court, the court has no alternative but to levy the tax; and he insists that the injunction should not, at any rate, have been applied to any other than the property of the plaintiff. He prays for its dissolution and the dismissal of the complaint.

The cause was heard upon the pleadings, and the Chancellor, holding that the levy of the tax without the authority of a vote of the electors of the district, was illegal, made the injunction perpetual, and the defendant appealed to this court.

W. N. May, for appellant:

Argues that *sec.* 5524 and other sections *Gantt's Dig.* were not abrogated or repealed by *sec.* 3, *Art.* 14, *Const.* 1874, but were still in full force and effect. Sec. 3 manifestly referred *alone* to the *common* school districts where there were only three trustees, and not to *special* school districts with six directors under the school law for cities and towns.

Clark & Williams, contra.

HARRISON, J. So much of *sec.* 5524 *of Gantt's Digest* as conferred authority upon the board of supervisors, (now county court,) to levy the district school tax in cities and towns, organized into and established as single school districts, upon the estimate of the board of school directors and without a vote of the electors of the district, was abrogated and repealed by *section* 3, *of Art. XIV.*, of the present Constitution, which is as follows.

"Section 3. The General Assembly shall provide by general laws for the support of common schools by taxes, which shall never exceed in one year two mills on the dollar on the taxable property of the State, and by an annual *per capita* tax of one dollar, to be assessed on every male inhabitant of this State, over the age of twenty-one years; *Provided*, The General Assembly may, by general law, authorize school districts to levy, by a vote of the qualified electors of such district, a tax, not to exceed five mills on the dollar in any one year, for school purposes; *Provided, further*, That no such tax shall be appropriated to any other purpose, nor to any other district than that for which it was levied."

It is thus seen that the power to levy the tax now belongs to the district and is exercised by a vote of the electors, and belongs to all districts alike, and that the levy of such tax is not within the jurisdiction of the county court.

The tax sought to be enjoined, having been levied by the county court, and not by the electors of the district, was, therefore, illegal and void. *Hodgkin* v. *Fry, collector*, 33 *Ark.*, 716; *Worthen, county clerk*, v. *Badgett et al.*, 32 *Ark.*, 496; *Cairo & Fulton R. R. Co.* v. *Parks, Ib.*, 131; *Murphy* v. *Harbison et al.*, 29 *Ark.*, 340.

The decree is affirmed.

HUGHES v. ROSS, COLLECTOR.

1. COUNTY SCRIP: *Tender for taxes.*

When county warrants tendered in payment of taxes levied to pay county indebtedness existing at the adoption of the constitution of 1874, afford no evidence that the allowance upon which they were issued was for county indebtedness prior to the adoption of that constitution, and are subsequent thereto, and are drawn upon the fund appropriated for county expenditures, the collector should refuse them.

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

STATEMENT.

Hughes filed in the Dallas Circuit Court his petition against Ross, as collector, alleging that the county court of said county, at the October term, 1879, levied a tax of two mills on the dollar to pay the idebtedness of the county existing at the ratification of the constitution of 1874. That the petitioner was a citizen tax payer of said county, and the amount of his tax to pay said indebtedness was $20.$\frac{60}{100}$, and that on the thirteenth day of February, 1880, he had tendered said sum to said collector in Dallas county warrants, duly issued upon an allowance or judgment made against said county by the county court at its January term, 1875, for indebtedness existing against said county at the ratification of the constitution of 1874, and said collector had refused them. That though said warrants were issued since the adoption of said constitution, they were issued upon a judgment of said court for indebtedness existing against the county before its adoption.

The scrip is exhibited in form as follows:

No. 59.

STATE OF ARKANSAS, }
DALLAS COUNTY. }

Treasurer of the County of Dallas pay to J. L. Cheatham, or bearer, ten dollars out of any money in the treasury appropriated for county expenditures, fees State v. David Rogers.

Given at Princeton, this ninth day of January, 1875.

E. M. HARRIS, Clerk.

Prayer for mandamus to compel the collector to receive the scrip in payment of said county tax.

A demurrer was sustained to the petition and the petitioner appealed.

U. M. Rose for appellant.

The Act Dec. 14, 1875, (*Acts* 1875, *p.* 151,) simply provides that "nothing in this act shall *authorize* the collector to receive scrip issued since the adoption of the constitution in payment of the tax levied to pay the indebtedness existing before the adoption of the constitution." It contains no prohibition, and leaves the question in this case wholly unaffected.

The term, "indebtedness," as used in *Sec.* 9, *Art.* 16, *Const.*, necessarily includes all indebtedness, whether passed upon by the county court or not. The scrip held by appellant was part of that very indebtedness for the payment of which the tax was levied. It would be absurd to compel appellant to pay in currency and then apply the sum so paid to the satisfaction of his own warrants. *Askew* v. *Columbia Co.*, 32 *Ark.*, 270; *State* v. *Rives*, 12 *Ib.*, 721.

If the collector refused to accept the warrants as payment

he could be compelled to do so by mandamus. *English* v. *Oliver*, 28 *Ark.*, 317.

The judgment of the county court being in appellant's favor he could not appeal. The Statute does not require that the order of allowance should state when the services were rendered.

R. T. Fuller and *T. B. Martin*, for appellee:

In support of the demurrer cites: *Chicot Co.* v. *Tilghman*, 26 *Ark.*, 462; *Hudson* v. *Jefferson Co.*, 28 *Ib.*, 351; *Desha Co.* v. *Newman*, 33 *Ark.*, 88; *Bracken* v. *Wells*, 3 *Tex.*, 88; *High Ex. Seq. Rem.*, *par.* 39; *U. S.* v. *Com's Dubuque*, *Morris*, 42; *Peck* v. *Booth*, 42 *Conn.*; *Com's of Yorktown* v. *People*, 66 *Ills*, 339; *State* v. *Bridgman*, 8 *Kan.*, 458; *Mansfield* v. *Fuller*, 50 *Mo.*, 338.

HARRISON, J. The warrants tendered the appellee afforded no evidence that the allowance upon which they were issued was for indebtedness of the county existing at the time of the adoption of the present constitution. They were dated subsequent thereto, and drawn upon the fund appropriated for county expenditures.

Had they been issued previous to its adoption, or though issued after, been drawn on the fund to be raised by the tax for the payment of the antecedent indebtedness, it would have conclusively appeared that they were of that class of the county's indebtedness. But the dates and the fund upon which they were drawn plainly indicated the contrary, and the appellee could determine only from their face the class of indebtedness to which they belonged, and he was prohibited by the *proviso* in the act of December 14th,

1875, to prevent discrimination in county warrants, from receiving them in payment of the tax for which they were offered. *Loftin* v. *Watson*, 32 *Ark.*, 414.

The judgment is affirmed.

WATSON v. BILLINGS.

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1 INFANCY: *Infant married woman cannot relinquish dower.*

Marriage of an infant female gives her no power to contract; and her relinquishment of dower, while under lawful age, is voidable; and her institution of suit to avoid it, in a reasonable time after the death of her husband, is itself a disaffirmance of it.

2. ACKNOWLEDGMENT OF DEEDS: *Certificate of, When evidence.*

An officer's certificate of the grantor's acknowledgment of the execution of a deed is not evidence of the execution, unless the deed and certificate have been filed for record.

3. EVIDENCE: *Signature; When a mark is.*

The mark of one who cannot write, made since the adoption of the Civil Code, is not a signature or subscription, unless the person writing his name writes his own name as a witness to it.

APPEAL from *Jackson* Circuit Court in Chancery.
Hon. R. H. POWELL, Circuit Judge.

U. M. Rose, for appellant:

Every presumption is in favor of the regularity of official acts, and unless misconduct of the officer is plainly and conclusively proved, his acts will be upheld. *Wharton on Ev.*, *sec.* 1318. The unsupported evidence of appellee would not justify a decree cancelling the deed. Opinion, TREAT, J. *Morrison* v. *McKee et al*, *St. Louis Ct. Ct.;*

Sawyer v. *Hovey*, 3 *Allen*, 331; *Bispham's Equity*, *sec.* 470; *Northwest Mutual Life Ins. Co.* v. *Nelson*, *Albany Law Journal*, *vol.* 23, *p.* 336, *reported* 13 *Otto.*, 544.

The burden rests on the moving party to overcome the strong presumption arising from the terms of the written instrument. The acknowledgment of a deed can only be impeached for fraud, and the evidence must be clear and convincing. *Howland* v. *Blake*, 97 *U. S.*, 624; 15 *Otto.*, 544.

Coody, for appellee:

1. Appellee was under twenty-one years of age, and a minor (*Gantt's Dig.*, *sec.* 3034) and had seven years to avoid the deed. 21 *Ark.*, 592; 1 *B. Mon.*, 76; 2 *J. J. Marsh*, 359.

2. The certificate of acknowledgment, though *generally prima facie* evidence of the facts stated within the range of the officer's official duty, may be contested by the parties. *Wharton on Ev.*, *sec.* 1052; 7 *Bush.*, 156 and 222: 4 *Johnson*, (*N. Y.*,) 161.

3. A signature by mark is no signature, unless attested by the party writing the name. *Gantt's Dig.*, *sec.* 5625.

4. The deed was never filed for record.

5. The decree should be affirmed, under the rule laid down in *Venable* v. *Brown*, *page* 567, 31 *Ark.*

EAKIN, J. This is a bill by appellee for dower in a certain tract, and a share of the rents. Appellant sets up a relinquishment, by complainant, in her husband's lifetime, and exhibits the deed. It bears date of March 6th, 1871; contains her relinquishment of dower; is signed by her with her mark, her husband joining; and appears, by the certificate of a justice of the peace, to have been next day duly acknowl-

edged in substantial compliance with law. It was never filed for record. She also claims improvements, in case dower should be allowed.

There was no reply to the cross-claim for improvements; and the cause was heard upon the pleadings, exhibits and depositions. The evidence is mostly directed to the validity or invalidity of the supposed relinquishment.

There was a decree for dower of half the lands for life, there being no children. Commissioners were appointed to assign it, and a master to take an account of rents upon one hand, and taxes paid and improvements made on the other. At this stage the defendant appealed.

1. INFANCY: Infant wife cannot relinquish dower.

The proof shows that the complainant was married in 1868, and that she was then seventeen years of age. There is nothing to contradict this, save that the justice who took the acknowledgment deposes that when making it she told him she was over twenty-one years of age. If a minor, in any case, could estop himself, or herself, from disaffirmance by representations as to his or her age, to the person with whom the transaction was had, the doctrine would not apply to such declarations made to a third person, without proof that they were communicated to the party to be affected, and formed the inducement to the contract, or mislead him to enter freely upon it. There is in this case no proof of that. In 1871 females were not of full age under twenty-one years. By act of April 22nd, 1873, they were made of full age, for all purposes, at eighteen. Marriage gave them no capacity to contract or convey which they would not have had if sole; and we can, in this respect, see no difference between a conveyance and a relinquishment of dower. *Scrib. on Dower, vol. II, p.* 283. The instrument, if executed, was as to her, in the absence of fraud, voidable; she was not twenty-one years of age. She became discovert by the death of her husband in 1872, and this

action was begun in 1873. There is nothing from which an affirmance, during the intervening period, can be inferred; and the beginning of the suit within a reasonable time is of itself a disaffirmance. *Scrib. on Dower*, (*supra.*)

Upon the question of fraud we have already touched. The justice, taking the certificate, testifies that when the acknowledgment was made he noticed the very youthful appearance of the woman and her husband, and questioned her as to her age. Whereupon she told him she was of full age. The complainant deposes under oath that she never made any acknowledgment, at all; but, taking the testimony of the justice to be true, it would not amount to a fraudulent representation to the defendant. The justice was not his agent, and there is no proof that the declaration was made in order that it might be reported to him and induce him to make the purchase from her husband. Both parties were interested in the completion of the contract, and the apparent object of the declarations was not to induce the defendant's consent thereto, but to induce the justice to proceed in an act essential to its form.

It has been decided by this court that neither infants nor other persons under disability of alienation, can *acquire* rights by their own fraud or as the fruits of the fraud of others. *Lyttle et al* v. *the State, etc.*, 17 *Ark.*, *at p.* 640. It does not follow, however, that infants, even by their own false representions to those with whom they contract, can denude themselves of the protection thrown around them by the policy of the law, so as to be bound by their alienation of rights already acquired, or by contracts for the future. They cannot, by their own acts, acquire any ability to contract. (See *Robinson's Practice*, *Vol. III.*, *p.* 219; *Kent's Commentaries*, *Vol. II.*, *p.* 241—*mar.*,) and cases cited. It is well said by Mr. KENT that "infants would lose all protection, if they were bound by their contracts made by

improper artifices in the heedlessness of youth, before they had learned the value of character and the just obligation of moral duties." We are, therefore, of opinion that the complainant was not bound by her release of dower, even if the same had been made.

2. EVIDENCE: When acknowledgment of deed is.

We deem it proper, also, to allude to another element in this case. The deed containing the release was never filed for record. It has been decided by this court, at the present term, in the case of *Wilson and wife* v. *Spring*, *ante*, *p.* 181, that, in such case, the certificate of the officer taking the acknowledgment is not evidence of its execution. Although when properly before the court, according to the current of authorities, it is almost conclusive as to the facts therein contained, and can be attacked only on the ground of fraud or mistake, yet it can have no such effect until filed for record. The proof, as to the execution, is conflicting. She says positively that she did not execute the release and acknowledge it. The justice says as positively that she did. The onus was on the defendant to show the release. The probability of distinctness of recollection can never be in two witnesses exactly the same. It was an act which, if she had done it, she would not have been apt to forget. The justice, with regard to an act merely formal, usually done in the course of routine, and which is calculated to make little impression on the mind of the officer, might, four years afterwards, when his testimony was given, really confuse in his memory persons and events. It appears, too, by his testimony, that there were others present, and no reason is given why they were not called to corroborate his statement. We cannot think the burden of proof well carried.

3. SAME: Signature: when a mark is.

The case presents still another question which is urged by counsel for appellee, and which we do not feel authorized to pretermit, although what is above said is sufficient to sup-

port the decree. The Civil Code, in laying down rules of construction, (*Gantt's Digest, sec.* 5625) provides "that the word 'signature' or 'subscription' includes '*mark*' when the person cannot write, his name being written near it and witnessed by a person who writes his own name as a witness." This was not necessary at common law to constitute a signature by mark. We can see obvious reason for the provision, however, in the thousands of uneducated persons, without any experience in business or habits of preserving property, who had recently been clothed with all the rights of citizenship. Whilst the acknowledgment by the grantor, before a proper officer, and the filing for record to make it evidence may, perhaps, be considered as an adoption of the written name as a signature, regardless of the mark, yet in the case of an instrument which had not been both acknowledged and filed, the mark should not be considered a signature without the name of the person writing the grantor's name being also subscribed.

We find no error in the decree.

Affirm it and remand the cause for further proceedings in its execution.

Carroll v. Pryor.

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1. Bill of Exceptions: *When must be filed.*

The time for filing a bill of exceptions is limited by the Statute to the next succeeding term, and cannot extend beyond it, and ought not, as a matter of sound discretion. to extend beyond the time fairly necessary to allow the attorney, with reasonable diligence, to prepare it.

Courts of Chancery are competent to relieve against any hardships arising from accident, mistake, or fraud, if from any such cause the bill could not be presented in the time allowed.

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

R. C. Newton and *J. Carroll*, for appellant:

EAKIN, J. The bill of exceptions in this cause was not signed and ordered to be made matter of record until the second term after the motion for a new trial. Time had been given until the next term, but it was not filed then, nor is there even the barest suggestion of any reason why it was not. At the time of signing, a record entry was made reciting that the attorneys on both sides conceded that the facts therein stated were true; and explaining that the judge of the court had signed it then, to give the parties the benefit of the adjudication of this court upon the matter. It is expressly stated, however, that the signing and admitting the bill to record was without consent.

Originally, bills of exceptions were required to be taken, reduced to writing, signed, and made matter of record during the trial; upon the spot—"*dum fervet opus.*" It is much the safest way; but for convenience, the practice obtained of giving time, at first during the term, and afterwards to a later day. Any considerable time after trial, is still unsafe, although permissible. It cannot be expected of a judge of ordinary memory, trying many cases, to carry in his mind a perfectly clear conception of all the material evidence in any case. Slight changes of expression give different shades of meaning. Nor will it do to allow bills of exception to be, at any time, made up and filed by agreement of attorneys. It would not only be unsafe to litigants, but might lead, if encouraged, to the practice of bringing matters here for adjudication upon questions never before the court of original jurisdiction at all.

The Statute has limited the time which a judge may give for reducing a bill of exceptions to writing. It *cannot* extend beyond the succeeding term, and *ought* not, as a matter of sound discretion, to extend beyond the time fairly necessary to allow the attorney, with reasonable diligence, to prepare it. Courts of Chancery are competent to relieve against any hardships arising from accident or mistake, or fraud, if from any such cause the bill could not be presented in the time allowed.

Disregarding the bill of exceptions, we find no error in the record.

Affirm.

HUGHES v. JOHNSON, TRUSTEE.

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1. MORTGAGE: *Effect of assignment of, as collateral security for mortgagee's debt.*

A mortgagee does not lose his interest in the mortgage by assigning it to his creditor as collateral security for his own debt, though he stipulates in the assignment to forfeit all interest in the mortgage if he fail to pay his debt by a specified day, and fails to pay it. The agreement for forfeiture amounts to nothing in a court of equity.

2. MORTGAGE: *Parol agreement to extend to other debts.*

A mortgage of lands cannot, by parol agreement, be made to cover any other debt, or any larger amount of debt than that expressed in it. (The case of *Bell, Trustee,* v. *Radcliff,* 32 *Ark.,* 635, reviewed and explained.)

3. APPLICATION OF PAYMENTS: *Running accounts; Election of parties; Mortgages*

In running accounts only the debtor has the election to apply payments to any particular items of the account; and if he make no application the law will apply them to the earliest items on the account. The whole is one debt, and the creditor has no election. But even in case of a mortgage, the debtor may authorize the application of the fruit of part of the mortgaged property to unsecured items in the account, if no rights of others have intervened. The proof of such authority is upon the party alleging it.

4. SAME: *Time for creditor to elect.*

When the creditor has, by law or consent, the right to make the application, he need not do so at the time of payment, but may at any time before settlement.

5. MORTGAGEES: *Reimbursed for advances to preserve mortgaged property.*

One having an interest in a security may advance what is fairly necessary for its preservation, and retain such advances out of the proceeds before crediting anything on his debts. (In this case necessary advances for picking a mortgaged cotton crop, and for a gin to gin it, were allowed out of the first proceeds of the crop, as necessary expenses to preserve it.—REP.)

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

STATEMENT.

On the twenty-ninth of May, 1876, W. G. Hughes and his wife executed to Moss & Bell, merchants at Pine Bluff, a mortgage upon certain lands and personal property, and fifty bales of cotton, to be raised on their place and the Holcomb place, in Jefferson county, that year, conditioned:

"That, whereas, the said Hughes and wife are indebted to the said Moss & Bell in the sum of two hundred and fifty dollars ($250), for goods, wares, merchandise and supplies, furnished to them during the year 1876, and also in the further sum of one thousand dollars ($1000), for goods, wares and merchandise, furnished and to be furnished during the year 1876, the exact amount to be ascertained from the books of the said Moss & Bell, and which sums ($1250) are payable and due on or before the first day of November, 1876. Now, if the said Hughes and wife shall well and truly pay or cause to be paid to said Moss & Bell, on or before the first day of November, 1876, the full amount of such indebtedness as may be found due, then and in that case this conveyance shall be null and void; but

if default be made in the payment of such sum or sums as may be due, or any part thereof, at maturity, then said Moss & Bell may take possession" and sell and pay off the sums found to be due, and cost, etc.

On the twenty-seventh of June, 1876, Moss & Bell transferred this mortgage, by the following endorsement upon it:

"PINE BLUFF, ARK., June 27, 1876.

"For value received we transfer the within mortgage to W. D. Johnson, as the trustee of McGehee, Snowden & Violette, of New Orleans, La., to be held as collateral security for the payment of certain indebtedness to them; to be paid on or before the first day of January, 1877, or we forfeit all our interest in or to the annexed mortgage.

"MOSS & BELL."

On the second of March, 1878, W. D. Johnson, as trustee for McGehee, Snowden & Violette, filed in the Jefferson Circuit Court his complaint in equity against Hughes and wife, setting up and exhibiting the foregoing mortgage and transfer, and exhibiting an account of Moss & Bell against Hughes for two thousand six hundred and sixty-four dollars ($2664); of which sum the complaint alleged that the sum of one thousand one hundred and twenty-five dollars ($1125) was due and unpaid, and prayed judgment for that sum against Hughes; that it be declared a lien upon the mortgaged lands, and the lands be sold for its payment, and for general relief.

The account embraced sales of goods and supplies, and money advanced, at different dates, extending from March 23, 1876, to July 3, 1877, inclusive. The credits, amounting to one thousand five hundred and thirty-eight dollars ($1538), were principally for cotton, delivered and sold at different dates, from December 14, 1876, to March, 14, 1877.

On the sixth of November, 1878, Hughes and wife answered, admitting the mortgage, and that the account exhibited was correct and just; but denying that they, or either of them, then owed the alleged balance of one thousand one hundred and twenty-five dollars ($1125), and alleging that a large portion of the account, including said balance, was made in the year 1877, and after the maturity of the mortgage for the year 1876, and that said balance was secured by another mortgage, executed in 1877, upon thirty bales of cotton, to be raised by them that year, and for the express purpose of securing the supplies of that year; and which mortgage, together with various transfers of rental notes and other debts, was sufficient to secure said supplies for that year, including said balance; and that said supplies for 1877, including said balance, had been fully paid off by the proceeds of crops raised under said mortgage for 1877.

They knew nothing of the transfer of the mortgage of 1876 to the plaintiffs, and alleged that they had, out of proceeds of crops of that year, fully paid all that was due, not only to first of November, 1876, but to first of January, 1877, and for the latter year had made arrangements with Moss & Bell, as above stated. That the mortgage for 1876 was fully paid, and should be satisfied on the record.

They made their answer a cross-bill against Moss & Bell, and further claimed that the goods, supplies, etc., sold to them by Moss & Bell, after the transfer of the mortgage on the twenty-seventh of June, 1876, were sold and delivered on open account, without any security whatever, and that by virtue of said transfer, the lien of said mortgage became extinct as to all supplies and advancements made after that date; and they prayed that said mortgage be declared satisfied, and for other proper relief.

Moss & Bell answered, denying that any part of the account

had been paid, except what was credited on it, and alleged that the advancements in excess of the mortgage, were made at the express request of Hughes; that finding that the one thousand dollars ($1000) called for was not sufficient to complete and gather his crop of cotton, they furnished an additional sum at his special request, to pay for picking the cotton, and balance due on it to the hands, and an item of two hundred and eighty-two dollars ($282) for a gin to gin the cotton, and with the assurance of the defendants that there would be enough cotton to pay said advances, and also the sums secured by the mortgage, and with his agreement, that when delivered, it should be first applied to the payment of said additional advances; and about the first of January, 1877, not being ready to deliver the cotton, the defendants requested said Moss & Bell to continue to sell him goods on account of the mortgage until the cotton could be delivered, shipped and sold, assuring them that the cotton would be sufficient to pay the whole, and if not, it should be applied, first, to payment of the excess above the mortgage, and the lands be held to secure what the cotton failed to pay; and on this express agreement they furnished the goods, etc., on said mortgage, up to July 3d, 1877.

They denied that the defendants, (Hughes and wife) ever executed to them any mortgage for their purchases for the year 1877, and alleged that on the second of July, 1877, Hughes made an arrangement with them to supply tenants on his place, and mortgaged thirty bales of cotton to be raised on it, and delivered to them rent-notes to secure the supplies to be furnished them; but this had no connection with the matters in the account sued on.

They transferred the mortgage of 1866, as alleged, with the agreement to supply the said Hughes, as agreed in it, and had done so.

The cause was heard upon the pleadings, exhibit, and depositions of the parties. There was a decree for the plaintiffs and the defendants appealed.

For the particulars of the decree and the evidence pertinent to the issues, see the opinion.

N. T. White and F. J. Wise, for appellant:

In relation to the increase of the mortgage debt beyond the amount specified in the mortgage, as claimed by appellee under the case of *Bell, Trustee*, v. *Radcliff*, 32 *Ark.*, 645. No such mortgage here, but same is on real estate, and cannot be enlarged beyond the amount specified. See *Franklin, Trustee*, v. *Meyer, Trustee*, 36 *Ark.*, 97.

The mortgage itself is a limitation of the mortgage debt, and any effort to tack on another debt under a parole agreement, is void. *Jones on Mortg., vol. 1st, sec.* 360; *Johnson, et al*, v. *Anderson*, 30 *Ark.*, 745; *Walker* v. *Snediker*, 1 *Hoff.*, 146; *Nally* v. *Rogers*, 22 *Ark.*, 227; *Whiting* v. *Beebe*, 12 *Ark.*, 428.

The contract itself is the best evidence of the agreement of the parties, and no parol agreement is admissible to explain or alter the same.

A mortgage cannot be extended so as to render it a security for subsequent advances by a parol agreement to that effect. *Ex-parte Hooper*, 19 *Vesey*, 477; *Jones on Mortgages, vol.* 1., *sec.* 360. It would be in violation of the Statute of Frauds, requiring a writing to charge lands. 1 *Leading cases in Equity*, 862; *Am. note*, 4 *Edition*; *Dean* v. *McLauglin*, 2 *M.*, 599; *Walker* v. *Snediker*, 1 *Hoff.*, *Chan. Rept.*, 147. It is the settled rule in England, as well as in this country, that a mortgage cannot be extended by parol agreement. 4

Kent, 198; *Craig* v. *Tuppin*, 2 *Sam'l*, *Chan. Rep't.*, 82; *Bank of Utica* v. *Finch*, 3 *Bart.*, *ch.* 204.

Moss & Bell had no right to make an agreement with Hughes by which their advances made after Jaunary 1st., 1877, should be secured under the mortgage of McGehee, Snowden & Violette.

As to the doctrine of appropriation of payments, see *Chitty on Cont.*, 582. No right of election exists unless two or more accounts exist. *Johnson, et al* v. *Anderson*, 30 *Ark.*, 745. When only one account exists between debtor and creditor, payment goes to oldest item in the account. 1 *Story*, *Eq. Jurisprudence*, 459; 1 *Parsons*, 633; and this is the rule whether the first items in the account are secured or not. 44 *M.*, 121; 28 *Vt.*, 498; 31 *M.*, 497; 10 *Burt.*, 198; 13 *Denio*, 293; 22 *M. E.*, 138; 9 *Watts*, 386; 9 *Wheaton*, 737; 10 *Conn.*, 175, and in those States where the civil law prevails, the credit is applied to the debt most burdensome to the debtor. *Forstall* v. *Blanchard*, 30 *Ark.*, 745; 28 *Ark.*, 440.

The payments should have been applied in liquidation of the first item in the account, and those items went to make up the mortgage debt. *Cross & Co.* v. *Johnson*, 30 *Ark.*, 399; 2 *Jones on Mortgages*, 907; *N. Y. Ins. Co.* v. *Howard*, 2 *Standf.*, (*N. Y.*,) *ch.* 183. The court allowed appellees to make the application of the payments up to and at the time of the decree. As the appellees had made the application generally, upon the account, they had no right to change the same after the controversy had begun. See 9 *Wheaton*, 720, 737; 12 *Vt.*, 246, 349; 10 *Conn.*, 283; 31 *Vt.*, 706; 31 *M. E.*, 500. Nor after the presentment and approval of the account. 11 *Barb.*, 80; 3 *Denio*, 291; 2 *Wash.*, *C. C.*, 47; 5 *Watts*, 544, 545; *Harrison* v. *Johnson*, 27 *Ala.*, 445; *Story's Equity Jurisprudence*, *sec.* 459.

The books of Moss & Bell are conclusive against them. 5 *Denio*, 470; 30 *Ark.*, 745.

Bell and Elliott, for appellees:

The only question in this case is the appropriation of payments. There are no intervening claims or rights of third parties. It is well settled that a mortgage cannot be extended by parol to subsequent liabilities, but it is equally well settled that the mortgagee is authorized to advance additional supplies to gather and prepare the crop for market; in other words to protect the mortgaged property. *Bell, Trustee*, v. *Radcliff*, 32 *Ark.*, 635.

1. MORTGAGE: Effect of assignment of, as security for mortgagee's debt.

EAKIN, J. The mortgagees did not lose their interest in the instrument by its assignment to the complainant, as trustee, on twenty-seventh of June, 1876. They themselves owed McGehee, Snowden and Violette, and it was then and remained a beneficial security for their own claim against the mortgagors, inasmuch as its enforcement would inure to their benefit. The clause of forfeiture in a court of equity amounts to nothing.

It is further clear from the proof that the New Orleans firm left the whole management in the hands of Moss & Bell, who agreed to go on after the assignment and perform the conditions upon which the mortgage was given, by continuing to furnish supplies. Moss & Bell were the real owners of the mortgage throughout. The trustee is not a purchaser for valuable consideration, and he must work out all his equities through Moss & Bell. The case was properly considered as if the contest were between the original parties.

2. SAME: Parol agreement to extend to other debts.

It is true that no mortgage of lands can, by parol agreement between the parties, be made to cover any other debt or any larger amount of debt than that expressed. This is

no longer an open question in this State. (*Johnson & Goodrich* v. *Anderson, Trustee*, 50 *Ark.* 745.) The case of *Bell, Trustee*, v. *Radcliff*, 52 *Ark.*, 645, might seem in conflict with this principle. It was there announced that where, upon the face of the mortgage or deed of trust, it clearly appears that the advances of money or supplies were to be made for a specific purpose, and that purpose was the *controlling object* of the mortgage, although a particular sum might be named, it might be presumed that the parties regarded the purpose rather than the amount. In that view it was announced that the instrument would stand good as a security for all advances necessary for the purpose, although the amount might exceed that named. There were other elements in the case quite sufficient to support the decision. It was an effort by a second trustee, expressly subordinate to the first, to confine the security of the first to the amount named, and to take from him the property included in both deeds, after satisfaction of the first to that extent.

It appeared in evidence that the additional advances made by the beneficiaries of the first trust deed had been, at first, refused, but were afterwards made, upon the solicitation of the beneficiary in the second, and upon his express agreement to be responsible for their payment. This, as between the parties, was a clear case of equitable estoppel against the second, and the ultimate decision of the court would have rested on firm grounds without any reference to the controlling purpose, although that, too, came in aid of the decision. The seemingly exceptional principal, although correct, where the controlling inducement is unmistakable upon the face of the instrument, so much so as to make it clear that the parties regarded the *object* more than the *amount*, is, nevertheless, to be applied with great caution, so as not to interfere with the general principle in *Johnson & Goodrich* v.

Anderson, (*supra*), as supported by other decisions of this court therein cited. Mortgages might, else, become very much perverted from their legitimate use, and cease to be reliable as written evidence of the real intentions of the parties. Besides, the operation of the doctrine in *Bell* v. *Radcliff*, (*supra*), might, if not well guarded, work great injustice to subsequent purchasers, or incumbrances of the same property. The naming of a particular sum would be a snare, unless it were so plain upon the whole instrument that the parties intended to secure enough, in any event, to accomplish the object, as to put strangers about to deal with the property upon inquiry as to what actually had been, or might necessarily, be required to be advanced. The case of *Bell* v. *Radcliff* has no application to this, where the controlling purpose of, or inducement to the transaction is not prominently put forward, and it is very certain that no application could be sustained to foreclose the mortgage for a greater amount than $1250, with accrued interest, upon any parol agreement that the mortgage should stand good for further advances also. The bill does not seek that, but asks a foreclosure for a less sum.

3. APPROPRIATION OF PAYMENTS: Running accounts.

The real and only question is, has the mortgage ever been satisfied in whole or in part? That must be determined by the proper application of the payments. They were made from time to time. The debt secured by the mortgage was a part of an account running through a period of nearly sixteen months, the debts amounting, in all, to more than twice the sum stated in the mortgage. The question of the application of payments to the secured or unsecured portions of the debt is quite distinct from that of the power of the parties to increase by parol, the *amount* for which the security is to be valid. Unless something is shown to prevent it, the law will apply the payments, as made, to the oldest items of the account, working off the

whole debt, as it were, from the bottom strata. As the part secured by the mortgage is, in this case, composed of the oldest items, and the aggregate payments exceed its amount, it will follow that it has been discharged, unless the defendant can show, affirmatively, that the payments have been rightfully applied to other purposes.

Election of parties: Mortgages

The power to make the application to the earlier or later items of the account rested wholly with the debtor. A running account, although composed of items partly secured and partly not, is in so far one debt, that the creditor has no election as to which items he will credit and which not, in the absence of any appropriation by the debtor. For this, also, see case of *Johnson & Goodrich* v. *Anderson*, (*supra*). The payment goes, by the force of law, to the oldest items. It has never been questioned, however, but that the debtor himself has the power to authorize the apropriation by the creditor to any item. Nor as between the parties themselves, where no rights of others have intervened, can it reasonably make any difference, in this respect, that the payments are made out of part of the mortgaged property left in the control of the mortgagee. Such a transaction would amount, in effect, to a mutual agreement, that a portion of the property should be released from the mortgage, upon the consideration that it be applied to another item of the creditor's claim for which he has no security. In such case there is no objection, which can be reasonably urged, to allowing the mortgage to stand for its full amount, as expressed upon its face, with regard to the remainder of the property, as a security for all the original debt remaining unpaid. In case of subsequent encumbrances it would be different, but amongst the original parties, they being alone interested, they may do as they please with their own. The cases are very numerous which hold that a mortgagee does not lose his security for its full amount against the prop-

erty remaining in the hands of the mortgagor at the time by releasing a portion, always presuming that he has no actual or constructive notice of alienations or encumbrances, before that time, made by the mortgagor of the portions not released.

4. SAME: Time for creditors to elect.

When the creditor, by law or by consent, has the right to make the appropriation, he need not do so at the time of the payment, but may at any time before settlement. Mr. Jones in his work on mortgages, section 908, quotes Lord Hardwicke as saying upon this point there is an abundance of cases.

5. MORTGAGEES: Reimbursed for advances to preserve mortgaged property.

It is further, a well settled principle in equity, that one who has an interest in a security may advance what is fairly necessary to its preservation, and may retain the advances out of the proceeds before crediting any portion of his debt. There can at least be no doubt of that, where such advances are made by the consent of all parties interested in the property or fund. That was a strong element in the case of *Bell* v. *Radcliff*, (*supra*). This is not upon the idea that the security of the mortgage is thereby extended to other advances, but rather upon the consideration that the proceeds of the property have been diminished by the expenses of preservation.

It remains, by way of preliminary remark, to allude again to the fact that the money, concerning which the questions of application arise, was the fruit of the mortgaged property. Although, as has been said, all parties might agree to have it applied to the unsecured items, yet as that is a diversion from the original intention, the onus of showing such agreement is upon the party claiming it.

In the light of these principles the finding of the facts by the chancellor, and the decree as to the law, must be reviewed.

The cause was heard alone upon the pleadings, and the

depositions of the parties, Bell, Moss and Hughes. The decree recites, as its basis, the execution of the mortgage upon the land and the crop of 1876, and that it was *to enable* the *mortgagor to raise a crop*, and its assignment to complainant on the twenty-seventh of June, 1876. That Moss & Bell continued to furnish the supplies required by the mortgage; that on the first of November, 1876, the full amount of supplies named in the mortgage not being sufficient to complete the crop and gather it, the mortgagees furnished additional supplies at Hughes' request; that on the first of January, 1877, they amounted to $1953, and had been necessary to gather and protect the property from loss. Further that the crop had not been delivered and sold until after the first of January, 1877; that it was after that date agreed that Hughes should continue to purchase goods on account, and that the cotton received should be applied first to the payment of *said* account, and the balance to the credit of the mortgage account; and that Moss & Bell *did* so apply the cotton received after the first of January. Further: That the goods furnished up to the fifth of March, 1877, were so paid for by cotton received and sold up to that time, leaving, by this mode of statement, then due upon the mortgage of principal and interest, the sum of $759.30.

For this amount a decree was rendered, with the usual order of sale for foreclosure. As to the items of account after the fifth of March, 1877, the bill was dismissed without prejudice.

If the recitals are sustained by the evidence, the decree was correct, in so far as it holds that the payments might be applied to the advances made after the mortgage was due, and beyond its amount.

To determine whether the facts were properly found, as recited, a review and analysis of the evidence seems important to any value this case may hereafter have, as a prece-

dent. There is no contest as to any other matter than the application of payments, and we will only notice the evidence which seems relevant to that.

Moss says: That the statement of the account, in evidence, is correct, and that it had been shown several times to Hughes, who did not object. The credits of cotton were not entered until the cotton was sold and returns of sale had. The account to which he alludes is a running one, made an exhibit in the pleadings. The debits begin with the twenty-third of March, 1876, and end with the third of July, 1877, aggregating $2664.15. The credits begin with the thirteenth of May, 1876, and end with the second of May, 1877, aggregating $1538.96. Balance, $1125.19, which is the sum for which suit was brought. The list of credits composed very largely of cash and proceeds of cotton, shows that of the latter, the first was received on the twenty-second of December, 1876, and the last on the fifth of March, 1877.

In explanation of the fact that the account was kept running after the first of January, he says: That they did so on the repeated request of Hughes, "who always stated that we had a mortgage on his lands, and that would be good for the amount." They told him repeatedly, he says, that the cotton he had delivered would not pay the account of 1876, and that which he was making in 1877; and requested him to give them another mortgage, which he declined to do, basing his refusal on the ground that his land was already bound for the account, and would be good for any balance that might be due.

Further he says, that in July, 1877, Hughes gave them an additional mortgage on thirty bales of cotton; that the cotton received, under that, went to Hughes' running account for 1877, as he continued to buy goods afterwards. He got credit for all the cotton received by

them on the last mortgage. Further he says, the last cotton of 1876 was delivered to them in March, 1877, at which time Hughes notified them that there was no more. Upon cross-examination Moss says that they had shipped cotton on account of Hughes before the first of January, which, at that date, was undisposed of. Don't know the number of bales. It was shipped to McGehee, Snowden, & Violette, for whose benefit this suit was brought. They first learned that Hughes would not be able to pay his account, comparing his debits and his cotton, in February or March. Witness first approached Hughes in January, 1877, on the subject of securing his account for the current year.

Bell testifies that when the mortgage became due Hughes had not taken up the full amount for which it provided. He came in and stated that he was compelled to have money and supplies to pick the crop or it would all be lost, and he had no other means of procuring them. Thereupon they furnished him money and supplies during the months of November and December, and on until the crop was brought into market and turned over to them. Most of it was not delivered until after the first of the year 1877. About that time they had a conversation with Hughes, calling his attention to the fact that the year had run out, and expressing a doubt as to whether they would be justified in furnishing anything else under the mortgage. Hughes, to use the language of the witness, then stated "that as the cotton was not all in, and that what cotton we had received had not been sold, and that, as he understood it, the mortgage we had and the cotton we had received and were to receive, which he had on the place, was sufficient to pay for all the goods he might require until the crop of 1876 was arranged and settled for, and that the cotton which we were to receive after that date was, to the best of my remembrance, to be applied to the payment of whatever he got from us

after that date." Hughes also stated "that he was willing that the mortgage we held on the crop and other property should hold good until such time as we should get accounts of sales of the cotton, and have a final settlement for the year 1876, when he would give us a new mortgage to cover the supplies he was to get during the balance of the year 1877." None of the items in this account are contained in that for which the mortgage of July, 1877, was given. With regard to the items of cash, he says that they were all advanced on Hughes' orders for picking cotton, except $280, which was paid for a gin to gin the crop of 1876. Upon cross-examination he says that they furnished whatever Hughes required, and cannot state what items of the account were essential to make and to save the crop and what not.

The defendant, Hughes, testifies that the cotton credited was the cotton covered by the mortgage of 1876. Does not know what the items of cash were for. The cotton, when turned over, was to be shipped and applied to his account. He gave no directions as to the application. He denies that anything was ever said to him by Moss & Bell about the excess of the account over the amount named in the mortgage until some time in April, 1877; also that either Moss or Bell ever said anything to him about applying the cotton received by them, first to the excess of the account, and holding the land as security for the amount of the mortgage. He says that when he made the thirty-bale mortgage, in July, Mr. Moss remarked that the land mortgage would not hold good, and for that reason he desired the additional mortgage. He says further that the account does not give him credit for all the cotton received from him by Moss & Bell, claiming that he also turned over to them seven bales more of an inferior grade of cotton, of the last picking, worth thirty or thirty-five dollars a bale. He testifies, also, that all the crop of 1876 was gathered before Christmas,

after which time he used no money in picking, and about that time he notified Moss & Bell that he was through. All the cotton, he thinks, was delivered to Moss & Bell before the first of February. Upon cross-examination he says that Moss & Bell did not advise him of the returns from the cotton until a long time after it was delivered. He continued to run his account until about the first of April, because they had had no settlement of the account of 1876, Moss & Bell excusing themselves for the delay on the grounds that they had no returns from the cotton.

This is substantially all the evidence pertinent to the points in question.

It does not appear from any expressions on the face of the mortgage, nor does it appear from the nature of the items of the account, that the controlling purpose of the mortgage was to enable Hughes to make a crop in 1876. To bring a case within the principle of *Bell, Trustee,* v. *Radcliff*, something more definite is necessary than to show that the most part of the items of the account were proper for use in cropping, and were so actually used. That case cannot be extended beyond the peculiar circumstances which environed it, or those of like nature, without danger of rendering all limitations of amount in mortgages a vain and useless thing. So far as the decision of the Chancellor may have proceeded on that principle, it had no sufficient foundation in the instrument or the evidence.

The account exhibited, the correctness of which is, on both sides, admitted, shows that the debits were, on the first day of November, slightly in excess of the mortgage, but they had been reduced by credits before that date to a balance of $1160.13. Partly upon that day, however, and altogether within ten days afterwards, the measure of the mortgage was filled by increased debits of goods and cash. The terms of the mortgage, and the circumstances justify

the supposition that these further advances, to complete the sum of $1250, were contemplated, and it may be considered that the mortgage debt was complete to the full amount on the first day of November. It is in evidence that between that time and the twenty-fifth of December, the mortgagees advanced cash to save and pick the cotton, and to purchase a gin to gin it. These advances may come under the head of expenses incurred by the mortgagees for the preservation of the mortgaged property, and they are entitled to reimbursement out of the first money which came into their hands from the proceeds of the crop with six per cent. interest, before appropriating any of it to the credit of the mortgage. So far their equities are clear.

The onus was upon Hughes to show that he was entitled to an additional credit of seven bales, or their value. This he did not sustain by a preponderance of evidence. There wase counter-proof that all the cotton received had been included in the credits. The claim was properly disallowed.

The main question remains: Did Hughes authorize the mortgagees to appropriate the first proceeds of the cotton to the unsecured excess of the account? The onus as to this is upon Moss & Bell.

It is not shown by the testimony of Moss. That tends only to show that Hughes endeavored, by parol declarations, to extend the security of the land mortgage over the whole running account, so as to make it binding to supplement what the cotton might fail to discharge. This he could not do.

This leaves a direct conflict between the depositions of Bell and Hughes, the former swearing that such authority was given, the latter denying it, positively. Neither of the witnesses was before the court to indicate anything by their manner. Neither is impeached. Both are interested. The

testimony of Bell is less positive than that of Hughes. He qualifies it by adding, upon this point alone, the words, "to the best of my remembrance." There is reason to suspect that he may have honestly mistaken a promise to extend the mortgage for an authority to apply the proceeds of the mortgaged property first to unsecured items of a debt. We have shown that they are really distinct, and that the latter is necessary to avoid the application in due order.

We are constrained, upon a view of the whole testimony, to believe that the Chancellor erred in finding that Moss & Bell had sufficiently sustained the onus of proof on this point, as well as in holding that the controlling purpose of the mortgage was to enable Hughes to make a crop. We think he erred in the decree, and that the appellant, Hughes, is entitled to have applied, in satisfaction of his mortgage, the proceeds of the crop diminished by the cash advanced by the mortgagees for picking and purchasing a gin.

We have in the transcript all that is necessary to determine a proper decree. To that end, and that the same, when rendered, may be certified to the court below, and the cause remanded for its execution, let the decree be reversed, and the matter be referred to the clerk of this court as master, with the following

DIRECTIONS UPON REFERENCE.

To state from the evidence and exhibits in the transcript an account between Hughes and Moss & Bell, charging the former with the full amount of the mortgage on the first day of November, 1876.

Crediting him with the sums successively received by Moss & Bell, as shown by the account in evidence, and upon the dates indicated; after allowing them first to retain, by way of reimbursement, with six per cent. per annum interest, all cash advanced by them up to December 25, 1876,

from the time when the debits in November, after deducting credits to the first, reached the sum of $1250; the mortgage debt to bear interest at six per cent. per annum for any balance up to the time of full satisfaction, or until the time of the report, if it be not satisfied.

The matter of costs will be reserved, as well as the other matters essential to a final adjustment of the rights of the parties, until the coming in of the report.

GREEN v. THE STATE.

38 304
58 371
38 304
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61 103
62 496
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74 258
38 304
89 570

1. CRIMINAL PRACTICE: *Discharging prisoner.*

A prisoner convicted of murder in the second degree when he should have been convicted of murder in the first degree, cannot claim to be discharged upon the ground that he has been acquitted of the crime of which he was actually guilty.

2. MURDER: *Motive, proof of, not essential to conviction.*

Proof of a motive for committing a murder is not essential for the conviction of the murderer in a case depending upon circumstantial evidence.

3. PRACTICE: *Giving papers to Jury.*

It is the better practice not to give to the jury in a criminal case, upon retirement, an indictment on which is endorsed a verdict of guilty at a former trial.

4. INSTRUCTION: *Reasonable doubts, etc.*

An instruction "That in cases of circumstantial evdence, before the jury can convict, the guilt of the accused must be made out not only beyond a reasonable doubt, but to the exclusion of every other reasonable hypothesis," should not be given; either one is sufficient.

5. BILL OF EXCEPTIONS: *Its province.*

It is the province of a bill of exceptions not only to bring upon the record facts which would not otherwise appear, but rulings of the court on questions of law, and exceptions to them, in order to have them reviewed in the Supreme Court.

6. PRACTICE: *Order of argument, etc.*

The order of argument where several counsel are engaged, the subjects, length, and range, of their discourses before a jury, must necessarily be left to the discretion of the presiding judge, and unless the bill of exceptions shows an abuse of the discretion, it will not be reviewed here.

7. SAME: *Furnishing prisoner with list of jurors.*

The Code of Criminal Practice makes no provision for furnishing to the prisoner a list of the jurors before going into the trial.

8. SAME: *Evidence of a deceased witness.*

The evidence of a witness on a former trial, since deceased, may be proven on a subsequent trial for the same offense.

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

Blackwood & Williams, for appellant:

1. The jury, from the evidence, should have found appellant guilty of murder in the first degree or acquitted him. If appellant murdered the deceased at all, it was a malicious premeditated murder *by lying in wait*, and was *murder in the first degree* under our Statute.

2. It was error to overrule the motion for continuance. The discretion of the court below was a *legal* discretion, and when *abused* will be reviewed by this court. *Thompson* v. *The State*, 26 *Ark.*, 327. The motion showed all the law required. *Acts of* 1879, *p.* 26.

3. The testimony of Garner and Cavin should have been excluded. Evidence of a conversation, said to have taken place long prior to the homicide, was incompetent and irrelevant. No foundation was laid for the evidence of Cavin.

4. Crabbe's testimony relating to what Haskins said about the tracks should have been excluded. Extra judicial confessions, made by silence or acquiesence, are dangerous and liable to the greatest abuse. Even *admissions* by

acquiesence, in civil cases, are regarded as the weakest kind of evidence, and received with great caution. 1 *Greenleaf Ev., secs.* 197, 199, 213, 214. Crabbe was contradicted by Turnbough in every material particular.

5. It was error to permit the prosecuting attorney to cross-examine Amanda and Toney Green on matter not called out or referred to in their examination in chief. 1 *Greenleaf Ev., sec.* 445; *Phil. & Trenton R. Co.* v. *Stimpson*, 14 *Peters*, 448, 461.

6. The jury should not have been allowed to take with them the papers mentioned in the motion for a new trial. *Sec.* 1972, *Gantt's Dig.* The former verdict is not to be used in *evidence* or *referred* to in argument. No papers should go to a jury except such as are produced in evidence. 16 *Ark.*, 290; 29 *Ib.*, 268; *Kilten* v. *Sistrunk*, 7 *Ga.*, 294; *Benson* v. *Fish*, 6 *Greenl.*, 141; *Sargent* v. *Roberts*, 1 *Peck*, 337; *Lott* v. *Macon*, 2 *Strobh.*, (*S. C.*,) 178; *Newkirk* v. *State*, 27 *Ind.*, 3; *Stewart* v. *B. & M. R. Co.*, 11 *Iowa*, 62; *Lonsdale* v. *Brown*, 4 *Wash.*, (*C. C. Rep.*,) 157; *Pond* v. *State*, 43 *Ga.*, 88; *Whitney* v. *Whitman*, 5 *Mass.*, 404; *State* v. *Smith*, 6 *R. I.*, 33; *Merrell* v. *Mary*, 10 *Allen*, (*Mass.*,) 416; *Farrar* v. *State*, 2 *Ohio*, (*N. S.*,) 54–8, 77; *Durfee* v. *Eveland*, 8 *Barb.*, (*N. Y.*,) 46; *Cook* v. *State*, 4 *Tex.*, *app.*, 265; *Devries* v. *Phelps*, *etc.*, 63 *N. C.*, 57. It is sufficient to show that defendants rights may have been prejudiced. *McElrath* v. *State*, 2 *Swan*, (*Tenn.*,) 378; *McLain* v. *State*, 10 *Yerger*, (*Tenn.*,) 24. The irregularity being shown, the court will presume the defendant was prejudiced. 26 *Ark.*, 328, and the *State* must prove that no prejudice resulted or the verdict will be set aside. *Ib.*

7. Comments on facts not in evidence is good ground of reversal. 25 *Ga.*, 24; *Ib.* 225; 15 *Ib.*, 399; 41 *N. H.*,

324; 77 *N. C.*, 503; 65 *Ib.*, 506; 64 *Mo.*, 595; 66 *Mo.*, 167; 10 *Ga.*, 522; 2 *Lansing*, 309; 56 *Ind.*, 182.

8. The prosecuting attorney had no right to read law to the jury not given by the court, nor read by counsel for defense and intersperse it with commments, in the *closing* argument. 1 *Leigh*, 588; 15 *Gratt*, 457; 19 *Geo.*, 398; 5 *Gratt*, 664.

9. There being more than one counsel on either side, it was error not to permit them to speak alternately. *Gantt's Dig.*, *sec.* 1937; 29 *Ark.*, 153.

10. Defendant was not served with a copy of the venire. *Gould's Dig.*, *ch.* 52. *sec.* 156. Nor did he waive it. All exceptions were saved by agreement of counsel. *Sec.* 4694, *Gantt's Dig.*; 19 *Ark.*, 211.

C. B. Moore, Attorney General, and *F. T. Vaughan*, for appellee:

1. The instructions were fair and just to the defendant, and similar ones have often been approved by this court. *Benton* v. *The State*, — *Ark.*, —; *Edmunds* v. *The State*, 34 *Ib.*, 721. The verdict does not shock a sense of justice. 34 *Ark.*, 653.

2. The motion for continuance was properly refused. 26 *Ark.*, 327.

3. Crabbe's testimony was properly admitted. *Edmunds* v. *The State*, 34 *Ark.*, 721.

4. The court did not abuse its discretion in allowing the State to examine witnesses on matters not called out by defense.

5. It was not error for the jury to take the transcript with them. *Gantt's Digest*, *secs.* 1877 *and* 1879. This transcript was a substitute for the indictment, and defendant's counsel did not object. Argues that cases cited by

counsel for appellant are not applicable to this case. Not being objected to, defendant cannot now avail himself of it. *Friel* v. *State*, 21 *Ark.*, 213.

6. There was no objection to the range and scope of the argument of the prosecuting attorney. It was the duty of the judge to stop him, if he was making an objectionable argument. *Berry* v. *State*, 10 *Ga.*, 552. The cases cited by counsel were *none of them reversed* on this ground. *Ford* v. *State*, 34 *Ark.*,649, settles this matter against appellant.

7. There was no objection to the reading law to the jury. This is a matter within the discretion of the court, and is not subject to review unless grossly abused. 32 *Ark.*, 551; 34 *Ib.*, 737; 36 *Ib.*, 292.

8. As to the *order* of the argument, see *Acts* 1877, *p.* 30–31.

9. Defendant was not entitled to copy of venire. 29 *Ark.*, 116, 118, 119; 30 *Ark.*. 328, 344–5; *Gantt's Dig.*, *secs.* 1895, 3673–4–7–8, 3694; *Acts* 1887, amending same.

English, C. J. Appellant was indicted for murder, in the Circuit Court of Lonoke county, at the September term, 1880; the indictment charging, in substance, that "said Jackson Green, on the third day of June, 1880, in the county of Lonoke, etc., did feloniously, willfully, and with malice aforethought, and with premeditation and deliberation, kill and murder one Benjamin Bowling, then and there being, by shooting him, the said Bowling, with a gun then and there loaded with gunpowder and a leaden ball," etc., etc.

The Lonoke record shows that the defendant was served with a copy of the indictment on the eighth of September, the day it was returned into court by the grand jury, and that on the same day he was arraigned and pleaded not guilty.

On the eleventh of September, upon his application, the venue was changed to Pulaski.

On the twenty-sixth of October, 1880, the trial of the prisoner was commenced in the Circuit Court of Pulaski county, and on the twenty-eighth of the same month the jury returned a verdict, finding him guilty of murder in the first degree.

Motions in arrest of judgment and for a new trial were filed by his attorneys; and afterwards (tenth December, 1880), on a suggestion that the transcript of the record from Lonoke did not correctly show the proceedings had by the court there, in the matter of the arraignment of the prisoner, the court ordered that further proceedings on the motion for a new trial be continued until the next term, and that final judgment be suspended until then, in order that in the meantime, the record of the Lonoke Circuit might, in all things, be made to speak the truth.

At the March term, 1881, of the Lonoke Circuit Court, the prisoner being present, the prosecuting attorney filed a motion, stating that the record entry of the eighth of September, 1880, showing the arraignment of the prisoner, was incorrect, and that in fact he, on the suggestion of his attorney, waived formal arraignment, and asking that the error be corrected by a *nunc protunc* entry.

The court, upon affidavits filed *pro and con*, found the record entry in question, showing the arraignment of the prisoner to be incorrect, and that in fact he was not formally arraigned, and did not waive such arraignment, and ordered the entry to "be expunged from the record," and that the record be so amended as to show that there was no arraignment or waiver thereof.

A transcript of these proceedings was certified to Pulaski.

Afterwards, on the fifth of May, 1881, in the Pulaski

Circuit Court, the motion in arrest of judgment was sustained, and the verdict of the twenty-eighth of October, 1880, "quashed, set aside, and held for naught," and a new trial granted the prisoner.

On the first of June, 1881, he was formally arraigned upon the indictment, and pleaded not guilty; was put on trial, and the jury failing to agree, were discharged by consent of parties.

He was again put on trial the twenty-fifth of October, 1881, after motion for a continuance overruled, and on the twenty-eighth of the same month the jury returned a verdict that they found him guilty of murder in the second degree, and recommended him to the mercy of the court.

His attorneys filed a motion to discharge him, a motion in arrest of judgment, and a motion for a new trial, all of which the court overruled, and sentenced him to the penitentiary for twenty-one years. A bill of exceptions was taken, and an appeal prayed, which was allowed by one of the judges of this court.

1. CRIMINAL PRACTICE: Prisoner convicted of murder in 2d degree when guilty in 1st.

I. The motion to discharge appellant was upon the ground that he was acquitted of murder in the first degree, and that there was no evidence to convict him of murder in the second degree.

The evidence showed an atrocious murder, and if the jury believed that it was perpetrated by appellant, as, from their verdict they did, they should have found him guilty of murder in the first degree. They had the power, however, to return a verdict for murder in the second degree; and, for some reason not declared, they did it. But that was no legal cause for discharging appellant. The jury having failed to fix any punishment, the court properly sentenced appellant to imprisonment in the penitentiary. *Gantt's Dig.*, *sec.* 1981. The term of imprisonment to be fixed for murder in the second degree, between five and twenty-one

years, was within the sound discretion of the court. *Ib.*, *sec.* 1263. The jury recommended him to the mercy of the court, but the court perhaps thought that inasmuch as they, by their verdict, had, in legal effect acquitted him of murder in the first degree, and thereby secured him from the infliction of the death penalty, his claim to mercy had been fully met, and that public justice demanded that he should suffer the full measure of imprisonment prescribed by law for the degree of murder, of which the jury found him guilty.

II. The motion in arrest of judgment was upon the ground that the indictment did not state facts sufficient to constitute a public offense within the jurisdiction of the court.

No particular objection to the indictment has been indicated by counsel for appellant here, and none is perceived. It is substantially in good form, and has the merit of being short, and yet avers the material facts, and employs apt words to constitute a charge of murder in the first degree.

III. In the motion for a new trial twenty causes were assigned; the first, second and third, being that the verdict was contrary to law and the evidence, and against both.

At the time Benjamin Bowling was killed, second of June, 1880, he was a tenant, and appellant, Jackson Green, was a share-hand on Stephen Galligan's farm, in Lonoke county. A cross-fence divided their fields, and their houses, both near Indian bayou, which runs west of their fields, were not far apart. Bowling's wife was appellant's sister. East of Bowling's field, fifteen or twenty steps from his back fence, was a sand mound covered with bushes and vines. On the morning of second of June, he was harrowing new ground in his field, it having rained the night before, and his wife was walking by the side of the horses leading or guiding them. Between nine and ten o'clock,

when they were from twenty-five to fifty steps from the back fence, (the witnesses varying as to the distance) moving towards the west, Bowling was shot in the back, the ball passing through his body and coming out in front. He exclaimed to his wife that he was shot, walked a few steps, fell and died very soon. The indications in the evidence are that he was shot with a rifle from the thicket on the mound back of his field. The witnesses judged, from the hole through his body, that the ball was of the navy size.

Some of the near neighbors, who heard the report of the rifle and the screaming of his wife, gathered in, and commenced a search for traces of the murderer.

Appellant wore a pair of large brogan shoes, No. 10, larger than worn by any other person in the community, except one man, upon whom no suspicion fell. Appellant's right shoe was run down at the heel, and had nails in toe and heel. The searchers found the track of such a shoe among the bushes on the mound, a black sandy soil, and traced it from there into a thicket in the corner of appellant's field, and thence on through plowed ground to his house. The shoe prints indicated that the wearer ran from the sand mound. There was nothing noticeable in the track made by the left shoe, only it corresponded in size with the right. Appellant's rifle was found at his house, appeared to have been recently fired off, and carried a ball of the navy size.

After appellant was found and arrested, he was taken to the field, and his shoes compared with the tracks found there, in the plowed ground, and found to correspond. He was asked to put his right shoe in a track which bore indications of a rundown heel, with prints of nails in heel and toe. He manifested a reluctance to do so, and put down first the heel and then the toe of his shoe, but finally was induced to put it flat down, and it fitted the track exactly.

He admitted that the tracks were his, but said he made them when out in the morning hunting a heifer.

His sister, Amanda Green, and a brother of his, thirteen years of age, testified that he fired his rifle off early in the morning at a board, and left it at the house when he went to hunt the heifer. But he stated, when arrested, and charged with shooting Bowling, that he shot his rifle off the evening before, and had not had it in his hands since.

A witness was at his house between nine and ten o'clock, when he was not there, heard the report of a rifle back of Bowling's field, went in that direction, heard Bowling's wife screaming, she called him, and when he got to her he found Bowling had been shot and was dead.

There was some evidence that appellant had several times said that if Bowling ever whipped his wife (appellant's sister), or whipped her again, he would kill him. It was not proven, however, that he had whipped her.

Such are the leading facts tending to prove that appellant murdered Bowling. It would serve no useful purpose to state all the little circumstances in evidence tending in that way, or to detail the exculpatory circumstances put in evidence by the defense.

A case was made for the jury; it was their peculiar province to judge of the evidence. They found defendant guilty of the homicide; his honor, the circuit judge, who saw the witnesses and heard all they said on both sides, refused to set aside the verdict, and there the matter must rest.

IV. The bill of exceptions states that after the argument was closed and the court had charged the jury, his honor, the judge, handed to them the entire transcript of the proceedings from Lonoke, including the application for a change of venue, the affidavit of defendant, the corroborating affidavits of his mother, Mary Green, and Margaret Bowling, and the orders made upon the application, the ver- 3. PRACTICE: Giving papers to jury.

dict of guilty of murder in the first degree, rendered by the jury at the October term, 1880, being written on the back of the transcript in violet colored ink, and the jury carried the transcript with them to the jury room.

The handing of this transcript, so endorsed, to the jury by the judge, to take with them where they retired to consider of their verdict, though no objection was made to it at the time, was assigned as the fourth ground of the motion for a new trial.

There was nothing in the transcript that could have been prejudicial to appellant. The jury, perhaps, saw the verdict of the former jury, which was endorsed upon it. If they could have been influenced by it they would have returned a verdict for murder in the first degree instead of the second. It was, doubtless, a matter of public notoriety that appellant had been before tried, convicted of murder in the first degree and obtained a new trial, and the jury, perhaps, knew that before they saw the verdict endorsed upon the transcript, if they saw it.

It has been the custom in this State to hand the jury the indictment when about to retire to consider of their verdict, and they have usually returned their verdict endorsed upon it. The transcript from Lonoke contained a copy of the indictment on which appellant was being tried, and for that reason, no doubt, it was handed to the jury, as it had been to the former jury.

Had an objection been made, no doubt the judge would have withheld it from the jury; and, though none be made, the better practice is not to give a jury an indictment or a transcript on change of venue, on which a former verdict appears.

V. The fifth ground of the motion for a new trial was that the court erred in refusing the first, second, third, and fourth instructions asked for by appellant.

The first was: "The court instructs the jury that where verbal admissions or declarations of a defendant are given in evidence, he is entitled to have all the declarations made by him at the same time taken together, as well what he said in his favor as against him."

But the court decided the law to be, and so instructed the jury, "that where verbal admissions or declarations of a defendant are given in evidence, he is entitled to have all the declarations made by him at the same time, considered together by the jury, as well what he said in his favor as against him; it is for the jury to say how far they believe the one or the other."

The instruction as given by the court was a proper modification of that moved for appellant. *Howard* v. *State*, 34 *Ark.*, 433.

2. MURDER: Motive: Proof of not essential to conviction, etc.

The second was: "That in case of circumstantial evidence, before the jury are justifiable in finding the defendant guilty, they should be satisfied beyond a reasonable doubt, that the State has proved a motive for the murder."

It is certainly competent for the State to prove that one accused of murder was influenced by some motive to commit the crime, (*Wharton Criminal Evidence, sec.* 784, *etc., and notes*), and where the guilt of the accused is to be established by circumstances, and not by eye witnesses, proof of some particular motive may strengthen the case. But the purpose or motive of the criminal may be so artfully concealed as to put it out of the power of the prosecutor to discover or prove it. *Burrill on Cir. Ev.*, 126, *etc.*

It is not therefore true, as a legal proposition, that the State must prove a motive for the murder, in a case of circumstantial evidence, as assumed in the above instruction moved for appellant, and refused by the court.

It is sufficient for the State to prove the *corpus delicti*, and to establish by circumstances the guilty agency of the

accused. If it appear from the evidence that there was no motive on the part of the accused to commit the crime, this may be urged before the jury as an argument in favor of his innocence.

"Motives," (says Mr. BURRILL, p. 296,) are made use of, like other evidentiary circumstances, not for their own sake, or from any views of speculative curiosity, but simply as means of arriving at the knowledge of an ultimate fact. They are resorted to as elements of evidence, not from any supposed necessity of accounting for, or explaining the reason of a criminal act which has been clearly proved and fixed upon the accused, however strange or inexplicable such act may in itself appear, but from the important aid they always render in completing the proof of the commission of such act by the party charged, in cases where it might otherwise be thought to remain in doubt. With motives, in any speculative or psychological sense, neither the law, nor the tribunal which administers the law, has any proper concern. The outward *acts* of men are all that they profess, or are called upon to regulate and punish. * * * * Where a man, in his senses, deliberately plunges a knife into the breast of another, or strikes with a weapon, which he knows must kill, the law does not stop to inquire into the intent, but justly infers it from the act itself, which shows, upon its face, a will or design to take life. Much less does it attempt to go further back in the inquiry, by seeking for the *motive* which may have originally prompted the act," etc.

4. INSTRUCTIONS: Reasonable doubt

The third instruction moved for appellant was: "That in cases of circumstantial evidence, before the jury can convict, the guilt of the defendant should be made out, not only beyond a reasonable doubt, but to the exclusion of every other reasonable hypothesis."

The court refused to give the instruction as so framed, but declared the law to be: "That in cases of circumstantial evidence, before the jury can convict, the guilt of the defendant should be made out to the exclusion of every other reasonable hypothesis."

It was putting it very strong to require the State not only to prove the guilt of the accused beyond a reasonable doubt, but to go further, and prove it to the exclusion of every other reasonable hypothesis. Either would be sufficient.

The court expressed the rule sufficiently strong, and as to the law of doubts, fully instructed the jury in its general charge.

The fourth instruction moved for appellant, was: "That statements made to or about defendant, not in his immediate presence or hearing, and when and where he did not have an opportunity to reply, or when he was under duress or imprisonment, are not evidence and are not to be taken to his prejudice."

The court refused the instruction as so formulated, but declared the law to be: "Voluntary conversations with others, by the defendant in regard to the crime charged, and statements made by others in his immediate presence and hearing in relation thereto, are competent evidence to go to the jury. It is for them to determine, under all the circumstances, what effect, if any, such evidence produces towards establishing the main issue of guilt or innocence. Of course defendant should not be prejudiced by any such statements made by others and not heard by him."

The instruction, as so framed, was applicable to some features of the evidence, and substantially in accordance with the ruling in *Ford* v. *State*, 34 *Ark.*, 650.

VI. The sixth ground of the motion for a new trial was that the court erred in its entire charge to the jury. The

general charge of the court to the jury was full, clear and fair, alike to the prisoner and the State, and not even a general objection was made to it below, when given; at least the bill of exceptions shows none, and counsel for appellant, in their brief, have pointed to no feature or clause of the charge as objectionable.

VII. Counsel for appellant have manifested good taste in not urging here the seventh ground of the motion for a new trial—"That the indictment charges that Ben Bowling was murdered on the third day of June, 1880, and all the evidence shows it was on the second day of June, 1880."

Order of argument to jury.

VIII. The eighth assignment is that—"The court erred in not allowing and compelling counsel to speak alternately, there being more than one counsel for both the State and defense."

The bill of exceptions shows that Mr. Benton opened the argument on the part of the State, that Mr. Blackwood and Mr. McLaughlin followed for the defense, and Mr. Vaughan, the prosecuting attorney, closed the argument. It is not shown that the court made any ruling, or was asked to make any, as to the order in which the attorneys should speak.

The plea was, not guilty; the burden of proof was upon the State, and her counsel had the right to open and conclude the argument. *Acts* 1877, *p.* 30.

There being but four attorneys engaged in the case, two on each side, if the court had been asked to require them to alternate, and so ruled, there would necessarily have been three speeches on the side of the State, in order to allow her right to open and close the argument, and two on the part of the defense. The order of debate having been arranged as it was, apparently by the counsel themselves, but four speeches were made, which was an economy of time.

5. BILL OF EXCEPTIONS: Its province.

IX. The bill of exceptions fails to show that the court made any rulings whatever, or was asked to make any, on the matters complained of in the ninth, tenth, eleventh and twelfth assignments in the motion for a new trial. They complain that Mr. Benton, who began the argument for the State, did not fully open the case, and that the prosecuting attorney, in his closing argument, commented on matters not in evidence, and animadverted severely on the conduct of Mary Green, mother of appellant, who had removed her seat near to the jury, and indulged in weeping, and on the fact that she had not been examined as a witness for the defense; and that in reading a note from GREENLEAF on Evidence, he had interspersed comments, etc. These matters, as stated in the motion for a new trial, are repeated in the bill of exceptions, but it is not shown that the defense desired Mr. Benton to make a longer argument, or more fully to open the case on the part of the State, or that the court was asked and refused to require him to do so. Nor that any objection was made at the time to the manner or range of argument indulged in by the prosecuting attorney, or that the court was asked to rule him to order, and declined to interfere; nor do we know, except from conjecture, the latitude of argument indulged in by the counsel for the defense who preceded Mr. Vaughan.

It is the province of a bill of exceptions not only to bring facts upon the record that would not otherwise appear, but rulings of the court on questions of law, and exceptions to them, in order to have them reviewed here. The order of argument, when a number of counsel are engaged, the subjects, length and range of their discourses to the jury, must necessarily be left to the sound discretion of the presiding judge; and unless the bill of exceptions shows, as it does not in this case, that such discretion was abused in making, or refusing to make rulings in relation

to the argument, it is not the subject of review here. *Ford* v. *State*, 34 *Ark.*, 658; *Dobbins et al* v. *Oswalt, Ex'r.*, 20 *Ib.*, 619.

X. The thirteenth ground of the motion for a new trial was, that the court overruled appellant's motion for a continuance.

In the motion it was stated that a number of witnesses were absent, for whom appellant had caused subpœnas to be issued, etc. That on the two former trials attempts were made to impeach Margaret Bowling and Mary Green, two of his material witnesses; and he expected to prove by some of the absent witnesses named, that their reputations for veracity and morality were good. And that he expected to prove by others of the absent witnesses named, that about the year 1877, in Jefferson county, deceased, Ben Bowling, ran away with the wife of one House, and that said House was very much angered, and made threats that he would follow Bowling until he killed him.

The bill of exceptions shows that Margaret Bowling, widow of the deceased, was introduced and examined by the State at the last trial, and, of course, there was no attempt on the part of the State to impeach her; and appellant did not cross-examine her. The bill of exceptions also shows that Mary Green, mother of appellant, was present at the trial, but not examined by him. She appears to have taken no part in the trial except to place herself near the jury and weep when Mr. Vaughan commenced his argument, which he seems to have regarded as a scene devised by the ingenuity of the counsel for the defense, and let loose the thunder of his eloquence against it in not very guarded or prudent language.

The story of Bowling's theft of House's wife, and his ire and threats, would not have been relevant evidence if the absent witnesses had been present to prove them. Passing

over the question of diligence, appellant does not appear to have been prejudiced by the refusal of the continuance, which was a matter within the sound discretion of the court.

7. SAME: Furnishing list of jurors to prisoner not required.

XI. The fourteenth assignment was, "that appellant was not furnished with a list of the jurors before going into trial.

This court has repeatedly decided that the present criminal code makes no provision for furnishing such list before trial, as was done under the former practice. *Benton* v. *The State*, 30 *Ark.*, 344; *Wright* v. *State*, 35 *Ib.*, 648.

XII. The fifteenth assignment was, "that the court erred in permitting the testimony of John Gainer to go to the jury.

John Gainer testified, among other things not objected to, that about a month before the killing he heard defendant say that if Bowling ever whipped his (defendant's) sister again he would kill him.

This was competent for what it was worth, as tending to prove malice.

8. SAME: Evidence of a deceased witness may be proved.

XIII. The sixteenth assignment was that the court erred in allowing the State to prove what J. S. Cavin had sworn to on a previous trial of the case. It was proved that J. S. Cavin had been sworn and examined as a witness at the previous term of the court on the trial of this case, and had since died. After laying the foundation the State proved that he testified on that trial that he had heard defendant say that if Ben Bowling mistreated his sister again he would kill him—that if he did not quit he would leave him where he found him.

The testimony of a deceased witness, examined on a former trial of a caiminal charge, may be proved on a second trial for the same offense. *Pope* v. *State*, 22 *Ark.*, 372.

XIV. Witness N. B. Crabbe, was one of the persons who

found the tracks on the sand mound, traced them to appellant's house, and afterwards, on the same day, found and arrested him. On attempting to arrest him he ran across a bayou and made tracks in the mud. They halted him by firing their guns, captured and brought him back over the bayou. Kit Haskins, one of the party, remarked, when they were crossing the bayou with defendant under arrest, "that the shoe that made that track was on the man that killed Bowling," to which defendant made no reply. It was objected on the part of the defense that the remark of Haskins about the shoe track was not competent evidence, as defendant might not have heard it. But the court, after hearing the statement of witness Crabbe, as to the tone of voice in which Haskins made the remark, and the distance defendant was from him at the time, remarked that it could go in, and said to the jury that they could say whether the defendant heard it or not. This was made the seventeenth ground of the motion for a new trial.

The silence of the prisoner, when the remark was made about the shoe track, if he heard it, which was left to the jury, was worth but little as a tacit admission, but it has been ruled that such evidence is admissible for what it is worth. *Ford* v. *State*, 34 *Ark.*, 649.

XV. The eighteenth assignment was that the court erred in permitting the State's attorney to cross-examine Amanda and Toney Green on matters not brought out on the examination in chief.

The bill of exceptions shows that Amanda Green was introduced as a witness for, and examined by defendant, cross-examined by the State, and re-examined by defendant.

It also shows that Toney Green was introduced and examined by defendant, cross-examined by the State, re-examined by defendant, and re-cross-examined by the State. And at the close of his examination by both parties, the bill of

exceptions states that, "Defendant excepted to all examination on new matter in the cross-examination of Amanda and Toney Green, not responsive to examination in chief;" but it is not shown that any part of their testimony was admitted which was objected to by defendant, or that the court made any ruling about it.

XVI. The nineteenth assignment was, that "The court erred in not allowing defendant to prove by Hardy Jones and others, that they knew from general reputation and hearsay, that Ben Bowling had seduced one Sallie Strange, in the neighborhood where the killing of Bowling took place."

Counsel for appellant have not submitted here that the court erred in excluding such evidence. It is no defense to show that the person slain was an immoral or bad man. *Whart. Cr. Ev., sec.* 68.

XVII. The twentieth and last assignment was, "That the jury were permitted to come from the jury room at night, and spend the night and part of the next day in the court room, while deliberating upon their verdict, where there were law books and loose papers pertaining and relating to the case."

There is not a word in the bill of exceptions to show the truth of this assignment.

Thus we have noticed every assignment in the motion for a new trial, and found no substantial error in them to the prejudice of appellant. At last, under our practice, they resolve themselves into one main question: did the court err in overruling the motion for a new trial? We think not, and upon the whole record, the judgment must be affirmed.

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Brown v. Brown.

1. Divorce: *Indignities, charge of must be specific.*

The indignities assigned as cause for divorce must be specified in the complaint, that the court may see whether they be such as to render plaintiff's condition intolerable, or sufficient for a divorce; but uncertainty in the charge can be availed of only by motion to make the charge more specific—not by demurrer.

2. Habitual Drunkenness: *Charge of in pleading.*

The charge in a bill for divorce "that the defendant has deen addicted to habitual drunkenness for the space of one year," is sufficiently specific.

3. Divorce: *Evidence of parties.*

The evidence of the parties in a suit for divorce is admissible, but will not sustain a decree unless corroborated.

4. Indignities: *During intoxication ouly, not sufficient.*

Ill treatment by a husband, during spells of intoxication only, and proceeding from it, without evidence of a fixed purpose to treat her amiss, or that he no longer entertained affection for her, does not constitute the indignities which justify a divorce.

5. Habitual Drunkenness: *What constitutes.*

Habitual drunkenness is not exactly definable; but it may be said that one is addicted to habitual drunkenness who has a fixed habit of frequently getting drunk; and he may be so addicted, though not oftener drunk than sober, and though sober for weeks.

6. Alimony: *What it is.*

The court should not decree absolutely a certain and specific sum of money as alimony. Alimony is not a sum of money, nor a specific proportion of the husband's estate given absolutely to the wife, but is a continuous allottment of sums, payable at regular intervals, for her support from year to year, and continuous only during the joint lives of the parties, or in case of divorce from the bonds of matrimony, until the wife marries again, and should be a reasonable and certain sum, having in regard her state and condition in life, and the estate and income of her husband, and be payable at stated and proper times.

APPEAL from *Sharp* Circuit Court in Chancery.
Hon. R. H. POWELL, Circuit Judge.

STATEMENT.

Ida Brown filed in the Sharp county Circuit Court, at the August term, 1880, her complaint in equity against her husband, James Brown, for divorce, alleging as causes therefor, that "for a period of more than one year last past he had commenced and pursued a course of unkind, harsh and tyrannical treatment towards her; that he treated her with uniform unkindness and great harshness, which continued with little intermission until their separation. That he frequently used opprobrious epithets and language towards her, and for years had been in the habit of offering such personal indignities towards her as rendered her condition intolerable. That in consequence of his cruel and barbarous treatment, and unfeeling and insulting conduct towards her, and the miserable life she led, she was compelled to leave his house and seek the residence of her father for a home."

2. "That he has been addicted to habuitual drunkenness for the space of one year, by reason of which she believes her life in danger," and that the causes for divorce occurred within five years last past, and in the State of Arkansas; and "she has been residing in said county of Sharp for more than one year next before filing her complaint."

She then set out the character and amount of his estate, specifying articles of personal property received by him from her, and prayed for divorce and alimony.

The defendant answered, denying the alleged causes for divorce.

Upon the hearing the defendant objected to reading

plaintiff's deposition as evidence. The objection was overruled.

The court found the value of the defendant's estate to be the sum of $900, and rendered a final decree for divorce and for $300 alimony, to be paid in annual installments of $100 each. The defendant appealed.

The character of the evidence, which was very voluminous, is sufficiently stated in the opinion.

W. M. Davidson, for appellant:

1. The drunkenness must not only be habitual for one year, but, under the marital state, intolerable. *Rose* v. *Rose*, 9 *Ark.*, 509.

2. Plaintiff failed to allege and prove, in addition to the cause of divorce, the first, second and third subdivisions and causes under *sec.* 2201 *Gantt's Dig.*

3. The testimony of witnesses that defendant was a habitual drunkard, was a statement of a *conclusion of law*, of which the court alone is the judge. *Horne* v. *Horne*, 1 *Tenn. Ch'y.*, 259–60.

4. The Chancellor erred in overruling defendant's demurrer, and permitting plaintiff to amend her complaint; it changed, substantially, the defense, and did not conform to the facts proven. *Sec.* 4616 *Gantt's Dig.*

5. Husband and wife are not competent witnesses for or against each other. 33 *Ark.*, 816, *L. R. & F. S. R. R.* v. *Payne*; *Collins* v. *Mack*, 31 *Ark.*, 684.

6. The court erred in decreeing a certain and specific sum of money as alimony.

J. S. Abernathy, for appellee:

The evidence supports the decree, and the case of *Rose* v. *Rose*, 9 *Ark.*, is decisive of the case.

HARRISON, J. The plaintiff, in her complaint, charged the defendant with habitual drunkenness for one year before the commencement of this suit, and with having offered to her person such indignities as render her condition intolerable. She also charged him with cruel and barbarous treatment, but no particular acts of cruelty or barbarity were stated, nor was it alleged to have been such as to endanger her life, and no proof of cruel or barbarous treatment was offered.

1. DIVORCE: Indignities: Charge of must be specific.

The indignities of which she complained should have been specifically set out, that it might have been seen whether they were such as to render her condition intolerable as alleged, or a sufficient cause for the divorce she sought. *Bowers* v. *Bowers*, 19 *Mo.*, 351; *Rie* v. *Rie*, 34 *Ark.*, 37; *Horne* v. *Horne*, 1 *Tenn.*, *Ch.*, 259; 2 *Bish. on Mar. and Div.*, *sec.* 684. The objection, however, could only have been taken by a motion to require the charge to be made more definite and specific, and was not a ground of demurrer.

2. DRUNKENNESS: Charge of.

The charge of habitual drunkenness was in the terms of the Statute, and as specific as it could well be made. 2 *Bish. on Mar. and Div.*, *sec.* 684, *b*.

3. Testimony of the parties admissible, but insufficient for decree.

It is now the practice in this State, as we said in the case of *Rie* v. *Rie*, *supra*, to admit the depositons of the parties in suits for divorce, though the divorce will not be granted upon a party's uncorroborated testimony; the plaintiff's deposition was, therefore, properly admitted. 1 *Whart. on Evidence*, *sec.* 432.

4. Indignities from drunkenness only; insufficient.

The finding of the court that the defendant had offered to the person of the plaintiff indignities that rendered her condition intolerable, was not sustained by the evidence. His ill treatment of her appears to have been only during his spells of inebriation and to have proceeded from it, and there was no evidence of a fixed purpose on his part to treat

her amiss, or that he no longer entertained affection for her. Besides, the testimony of the plaintiff as to this charge was uncorroborated.

5. HABITUAL DRUNKENNESS What constitutes.

Habitual drunkenness, or the degree, or course of intemperance that amounts to it, cannot be exactly defined. We may, however, say in general terms, that one is addicted to habitual drunkenness who has a fixed habit of frequently getting drunk, and he may be so addicted though he may not oftener be drunk than sober, and may be sober for weeks. 2 *Bish. on Mar. and Div.*, *sec.* 813; *State* v. *Pratt*, 34 *Verm.*, 323; *Ludwick* v. *The Commonwealth*, 18 *Penn., St.*, 172; *Commonwealth* v. *Whitney*, 5 *Gray*, 85.

The plaintiff, in her testimony in regard to the defendant's habitual drunkenness and for the time alleged, was corroborated by other witnesses, and that charge in her complaint and cause for the divorce was clearly established.

But the court erred in decreeing to the plaintiff, absolutely, a certain and specific sum of money as alimony.

6. Alimony.

"Alimony is not a sum of money, nor a specific proportion of the husband's estate, given absolutely to the wife, but it is a continuous allotment of sums payable at regular intervals for her support from year to year." *Bouv. Law Dict.*; 2 *Bish. on Mar. and Div.*, *sec.* 427. And it continues only during the joint lives of the parties, or when there is a divorce from the bonds of matrimony until the the wife marries again.

The decree as to the divorce is affirmed; but so much thereof as relates to the matter of alimony is reversed, and the cause is remanded with the instruction to the court below to order and direct that the plaintiff be paid as alimony by the defendant, a reasonable and certain sum of money, having regard to her state and condition in life and the estate and income of the defendant, at stated and proper times.

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BLOOM v. MCGEHEE.

1. ATTACHMENT: *Interpleader.*

An interpleader may present his claim to the attached property as an independent proceeding, without reference to any controversy between other parties; and the determination of it does not affect the right of property as between him and the defendant in the attachment, or other person.

2. TENDER: *Of rent no discharge of landlord's lien.*

A landlord's lien is not released or discharged by a refusal to accept a tender of the rent; and to make a plea of such tender good the money must be paid into court.

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

STATEMENT.

In February, 1878, Mrs. McGehee sued Thompson before a justice of the peace, in Jefferson county, for rent for the year 1877, and had a landlord's attachment issued and levied upon eight bales of cotton produced by him on the rented premises.

Bloom claimed the cotton, and upon delivering to the constable the affidavit and bond to interplead, required by the Statute, was permitted to retain it. In due time he filed his interplea, and Thompson filed a general denial of the allegations in the affidavit for attachment, and a plea of set-off as to part, and tender of the balance of the demand. On the trial there were verdict and personal judgment against Thompson for $136, the amount tendered. There was no finding of the landlord's lien, nor order condemning the cotton to sale. Afterwards the interplea was tried by

the justice, and his finding and judgment were for the interpleader, and Mrs. McGehee appealed to the Circuit Court. Upon the trial of the appeal in the Circuit Court, Bloom read as evidence a mortgage from Thompson to him, executed in March, 1879, on all the cotton he should produce that year on the McGehee land, to secure indebtedness to him; and it was agreed for evidence that the cotton attached for rent and claimed by the interplea was produced on the McGehee land that year, and that the land was rented from the plaintiff and the rent was unpaid.

It was further agreed that before the commencement of the suit, and while the cotton was on the premises, Bloom offered and tendered to Mrs. McGehee $136 in satisfaction of the rent; that she refused it, and afterwards Bloom took possession of the cotton and removed it to Pine Bluff, and that on the day of the trial of the main case in the justice's court, and before the trial, he brought the money into court and again tendered it for Thompson, in satisfaction of the rent, and it was again refused, and thereupon "the money was withdrawn and the tender not received."

The proceedings and judgment in the main case in the justice's court were also read as evidence.

The court refused the following instructions asked by the interpleader:

1. "That the right to have the attached cotton condemned for the payment of the rent was an issue properly determined on the trial of the main case in the justice's court, and the judgment rendered by him on the issue made in that case is conclusive between the parties here."

2. "That the judgment of the justice does not condemn the attached cotton for the payment of the plaintiff's judgment against Thompson."

3. "That the pleadings in the interplea in this case puts in issue, 1st, the interpleader's ownership of the cotton,

and 2nd, that it was not liable to the attachment in this case; the last of which issues could be as well determined in the trial of the cause between the plaintiff and defendant as in this trial, and when so determined is conclusive against both parties; and in the first of these issues the plaintiff is confined to the judgment in the original case, if his right of lien has been submitted, and if the property has not been condemned by the judgment, he cannot set up his lien to defeat the interpleader's right to recover in this interplea."

4. "The tender of the full amount due from the defendant to the plaintiff, at the time it was made, by the interpleader, who held the junior lien upon the cotton, destroyed the plaintiff's lien and left the cotton liable to the interpleader's debt."

And the court, of its own motion, gave the following:

1. "The verdict in the main case being general, and for the plaintiff, is not a finding for the defendant on the issue of the attachment, but is such a verdict as would authorize the attached property (if found to be the property of the defendant) to be condemned to the payment of the judgment."

2. "The failure of the justice to condemn the cotton to the payment of the judgment pending the trial of the interplea, dees not discharge the attachment or release the cotton, it having been bonded by the interpleader and not in the possession of the defendant.

3. "That the judgment does not condemn the cotton attached, for the payment of the judgment, neither does it discharge the attachment or release the cotton."

4. "The tender of the full amount due from the defendant to the plaintiff, at the time of the tender, by the interpleader who held the junior lien, destroyed the plaintiff's lien and left the property liable to the interpleader's debt,

but if the interpleader relies upon his tender he must make the tender good."

There were finding and judgment against the interpleader, and he appealed.

N. T. White, for appellant:

1. The court could not render judgment against appellant and his sureties without first having the cotton attached condemned for the payment of the judgment in the original case. *Adams* v. *Hobbs*, 27 *Ark.*, 1; *secs.* 472 and 473 *Gantt's Dig.*

2. The tender by appellant of the full amount of the debt, before suit brought, released the landlord's lien. *Brown* v. *Craft*, 18 *John.*, 110; 21 *Wend.*, 467; 21 *N. Y.*, 343; 5 *Lane*, 153; 4 *E. D. Smith*, 46; *Co. Lit.*, *Note to sec.* 335; *C. Cow.*, 728.

The case of *Hamlett* v. *Tallman*, 30 *Ark.*, 505, is not applicable to this case, even if its harsh doctrines be law. Appellant brought the money into court and offered to pay.

A landlord's lien is neither *jus in re* nor *a jus in rem*, but only a charge upon property. 31 *Ark.*, 597. It gives him no right or title, but simply a right of satisfying his claim out of the property. 24 *Ark.*, 545; 29 *Ib.*, 575.

OPINION.

HARRISON, J. As the justice, upon the trial of the interplea, found in favor of the claimant, and that the property was not subject to the attachment, as a matter of course he could not order a sale of it, or condemn it for the satisfaction of the judgment rendered by him against the defendant.

In *Hershey* v. *The Clarksville Institute*, 15 *Ark.*, 128, a case in all respects similar to the present, Chief Justice WATKINS said: "According to what seems to be the proper construction of the Statute concerning attachments, the claimant, other than the defendant, of personal property, seized under the writ, and who has not been summoned as garnishee, may present his claim to the property as an independent proceeding, and without reference to any controversy between other parties; the determination of it not affecting the right of property as between the defendant in the attachment and the claimant, or third persons. *Mitchell* v. *Woods*, 11 *Ark.*, 180.

There can be no doubt that the plaintiff was entitled to appeal to the Circuit Court from the justices judgment on the interplea.

We held in *Hamlett* v. *Tallman & Graves*, 30 *Ark.*, 505, that a landlord's lien is not released or discharged by a refusal to accept a tender of the rent, and that to make a plea of such tender available, the money must be paid into court.

It would be manifestly unjust, we think, that the appellant should keep the cotton and not pay appellee her rent.

There was no error in the instructions given, and none in refusing those asked by the appellant.

The judgment is affirmed.

HANGER ET AL V. EVINS & SHINN.

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1. PRACTICE: *Giving instructions.*

Where the length, intricacy or number of instructions asked by the parties may be confusing to the jury, the court should reject both lists, and give such, applicable to the facts, as will clearly present to the jury the main points of law governing the case.

2. EVIDENCE: *Parol, inadmissible to enlarge contract.*

When a written contract of sale contains no warranty, or an express warranty, parol evidence is inadmissible to show a warranty in the first case; or in the second, that there was another or larger warranty than the one expressed. A warranty is a contract provable only by the contract; but an intentionally false and misleading representation, which induces the contract to the other's injury, is a tort, outside of the contract, and is provable by parol.

3. FALSE REPRESENTATIONS: *When actionable.*

A false representation, to be actionable, must not only mislead, but must be made fraudulently, and with that intent. No one can be held liable for a false representation who honestly believed it when made, however false it may be; but he is liable if he knew it to be false, or knowing nothing about it, asserted it to be true.

4. WARRANTIES: FALSE REPRESENTATIONS: *Patent defects.*

Neither warranties nor false representations bind the maker, regarding things patent to any observer who would take the trouble to examine the article, where the aggrieved party has the opportunity of seeing it. But where one of the parties declines the examination on the grounds of his want of experience and judgment, and expressly declares that he confides in the judgment of the other, this imposes upon the other, if he accepts the trust, the duty of fair representations, even as to matters which might easily have been seen by one well acquainted with the subject of the negotiation; but even then he is bound only for a fair exercise of his judgment, and not for an honest mistake.

5. ADMISSIONS: *Of satisfaction with an article before discovery of defects.*

An expression to the vendor of satisfaction with the article purchased, after using it, will not preclude the purchaser from afterwards setting up real defects then existing, but unknown, and subsequently discovered.

6. RECISSION: *Of purchase, for fraud, what necessary.*

When a purchaser is entitled to rescind a purchase for fraudulent misrepresentations of the seller, his offer to return the property is equivalent to a return; but the offer, to be effective, must be promptly made upon the discovery of the fraud, and accompanied with an offer of compensation for intermediate use; and the condition of the article should be substantially as good as wheu received.

7. FRAUD: *Diverting purchaser's attention from defects.*

If a vendor, experienced in the manufacture and use of an article, knows that the purchaser is without experience in such things, and that there are material defects in it, which are not apparent to ordinary observation, and he deceitfully induces the purchaser not to enquire into its condition, he is guilty of a fraud, for which the purchaser may recover.

8. SAME: *False representations.*

If a vendor knows the purposes for which an article is intended by the purchaser, and so represents to him, and also knowingly and fraudulently represents that he knows the purchaser's business, and that the article is well fitted for it, and the purchaser rely on such representation, in making the purchase, and they are untrue, it is a fraud, for which he may recover.

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

W. G. Whipple and W. C. Ratcliffe, for appellants:

The court erred in ruling out all evidence of a warranty by Evins, and that appellants were concluded by the bill of sale, inasmuch as no warranty was therein expressed. While parol evidence is inadmissible to contradict or vary a written agreement, yet "it is well established that a substantial collateral agreement may be substantiated by parol." *Weaver* v. *Fletcher*, 27 *Ark.*, 510; *Plant* v. *Condit*, 22 *Ib.*, 404; *Hooper* v. *Chism*, 13 *Ib.*, 498; *Tune* v. *Rector*, 21 *Ib.*, 284. The warranty was the inducement to the acceptance of the bill of sale, the latter being the mere transfer of the title, and not purporting to embrace the whole agreement.

Hanger was justified in relying upon the warranty, rather than his own judgment. *Parsons on Cont.*, *vol.* 1, *p.* 575, *note H.*

Dodge & Johnson, for appellees:

1. The question of fraud was one purely of fact. The jury were the sole judges of this question, and they found there was no fraud.

2. The instruction of the court, that there being no warranty of quality in the bill of sale, defendants are estopped from setting up any before that made by parol or verbally, was correct. *Benjamin on Sales*, *sec.* 202. Whatever may have been the previous conversations, if they at last reduced their agreement to writing, this will be looked upon to contain all that the parties intended should form any part of their bargain, and everything said in previous conversations, not incorporated into the written agreement, will be considered as intentionally rejected. *Roane* v. *Green*, 24 *Ark.*, 210; *Waymack* v. *Heilman*, 26 *Ib.*, 449; *Weaver* v. *Fletcher*, 27 *Ib.*, 510; *Chitty on Cont.*, (11 *Am. Ed.*), 153, *note* (*u.*); *Carter* v. *Hamilton*, 11 *Barb.*, 147; *Ridgway* v. *Bowman*, 7 *Cush.*, 268; *Hakes* v. *Hodgkiss*, 23 *Vt.*, 231; *Pitcher* v. *Hennessy*, 48 *N. Y.*, 415; *Small* v. *Quincy*, 4 *Greenl.*, 497; *Taylor* v. *Riggs.*, 1 *Peters*, 591; *Clark* v. *Ins. Co.*, 7 *Lansing*, 322; *Eden* v. *Blake*, 13 *M. & W.*, 614–7–8; *Stoops* v. *Smith*, 100 *Mass.*, 63–65; *Groot* v. *Story*, 44 *Vt.*, 200.

If the contract of sale is reduced to writing, and contains no warranty, parol evidence is not admissible to show one orally made at the time of sale. *Story on Sales*, *sec.* 358 *and notes;* 1 *Greenl. Ev.*, *sec.* 275.

3. The plea that the contract was made on Sunday was abandoned below.

4. The judgment was properly against Peter Hanger. He signed as guardian without anthority, and thus made himself personally liable.

5. It was proper for the court, in the exercise of a wise discretion, and in furtherance of justice, to throw aside the instructions formulated by both parties, and instruct the jury as to the law applicable to the case. The questions of fraud, deceit and misrepresentation, were for the jury, and their verdict will not now be disturbed.

EAKIN, J. The notes in suit were given by appellants, Fred and Peter Hanger, in the purchase of an old ferry boat, for which they took a bill of sale without warranty. It was intended for use at a ferry over the Arkansas river, at Little Rock, which was understood by all parties at the time of the purchase. They set up, by way of defense, that the vendors, through Evins, who conducted the transaction, made to Fred Hanger false and fraudulent representations with regard to the condition of the boat, upon which said Hanger relied; and that afterwards, when the condition of things was discovered, they offered to rescind the contract, and to pay for the use of the boat whilst they had it. They set up the same matter in a separate paragraph, by way of counter-claim, for damages. In both they allege that the boat was comparatively worthless; that Hanger had no experience with, nor knowledge of boats, and so told Evins; and that Evins having experience, and knowing the boat to be of little value, misled Hanger into its purchase. The circumstances of the alleged fraud, and the misrepresentations are set forth in detail, and they make the only issue in the case, which we deem it important to notice.

A long list of instructions was asked upon each side; eleven by the plaintiffs, and nine by the defendants. They

3. PRACTICE: Giving instructions.

were elaborately drawn, and, it seems, not readily intellible in all their bearings by ordinary jurors. The court rejected both lists, and gave instructions of its own motion. There is no objection to this practice. It is the best, where the length, intricacy, or number of instructions asked by parties may be confusing. It is very necessary to any useful effect they may have on the minds of jurors, that instructions should be as few, and short, and pointed as may consist with the object of giving clear ideas to the jury of the main points of law governing the case as applied to the facts.

It is made one of the grounds of the motion for a new trial that the court erred in refusing the nine instructions asked by defendants, and in giving the first and second of those given in lieu of them by the court.

Before proceeding to an examination of the instructions, it may be well to announce some elementary principles, which after much discussion, may be now considered as settled by the courts. It is especially desirable that the distinction between a warranty and false representation inducing a contract, be ever kept in view.

Warranty is a contract.

A warranty is a contract. It may be made expressly, or it may be presumed from the circumstances, that the parties intended it—that it existed in their minds as a contract at the time of the transaction, as one of that class of things that go without saying. The old form of action upon it was *ex contractu*. In abolishing forms the Code has not changed the underlying ideas of any actions, which determine their nature.

2. EVIDENCE: Parol, of warranty or false representation when in writing, inadmissible.

It follows that where the parties have by bill of sale, as in this case, or any other instrument, reduced the contract of sale to writing, and have not provided for any warranty, or have incorporated express warranties, no parol evidence can be heard to show in the first case that there was a warranty,

or in the second, that there were other or wider warranties than those expressed. The written instruments are held to contain everything of a contractual character which the parties finally intended should be binding, regardless of all previous negotiations.

In Mr. BENJAMIN'S work on *Sales*, *sec.* 261, this principle is clearly stated, and supported by numerous authorities cited in notes. It is illustrated in the text by reference to the case of *Kain* v. *Old*, 2 *B. & C.*, 627. That case has many points in common with this. It concerned a bill of sale of a vessel, in the usual form, without warranting her to be copper-bottomed. There had been a previous *written* representation by the vendor that she was. This was held no warranty.

It is thus obvious from the record of this case, that no question of warranty can arise in it at all. The bill of sale, and the notes contain all the contract, and they show none.

3. FALSE REPRESENTATIONS: When actionable

Deceits, and false representations, intentionally made, regarding material matters, for the purpose of misleading another to his injury, are not contracts in any direct sense. Every one may be presumed, indeed, to agree that he will regulate his conduct by the laws of his country and the rules of fair dealing, and will abide the consequences of failure and detection. But in no other sense are they contracts. They are torts, for which, heretofore, lay actions on the case for deceit. The Code action, or counter-claim, being the old recoupment, is based upon the idea of some turpitude of conduct in the transaction by which the party has been injured. They differ from warranties in two very material points. The latter cannot, when the contract of sale has been reduced to writing, be supplied by parol proof. The former can be shown by parol, for they are torts outside the contract. Warranties bind, if untrue, without any regard to the good faith of the warrantor. This arises

Fraudulent representations are outside of the contract, and provable by parol.

from their contractual character. He takes the risk of their truth and means to bind himself to make a recompense if they are not. But false representations must not only mislead, but must have been made *fraudulently* and with that intent. No one can be held liable for them who honestly believed them when made, however false they may be. He is liable, if he knew them to be false, or knowing nothing about them, asserted them to be true. The questions raised by the paragraphs of the answer, were those of false and fraudulent representations of facts regarding the condition of the boat, misleading the defendants through their agent, Fred Hanger, and inducing the purchase to their injury. In such cases the counter-claim or old recoupment stands on the same ground with the action for deceit, and any evidence otherwise proper, may be adduced to prove the deceit whether oral or written; and notwithstanding there may be a written warranty.

4. WARRANTIES: REPRESENTATIONS: Patent defects.

There is, in this case, another element which might affect the verdict of a jury. Neither warranties nor false representations bind the maker, regarding things patent to any observer who might take the trouble to examine the article, and where the party claiming to be aggrieved had the opportunity of seeing it. This is upon the ground that, with regard to such things, it is not to be presumed that the warranties or representations were intended, upon either side, to apply. The case is different, however, where one of the parties declines an examination, upon the grounds of his want of experience and judgment; and expressly declares that he confides in the judgment of the other. This imposes upon the other, if he accepts the trust, the duty of fair representations, even as to matters which might easily have been seen by one well acquainted with the subject of the negotiation. He will not be excused for want of candor and good faith with regard to such matters, and will be held responsi-

ble for false representations, not made in good faith, believing them to be true. He is bound only to a fair exercise of his own judgment in behalf of the other party, and not for an honest mistake. If the other party desires greater assurance he should demand an express warranty.

We come now to examine whether any of the nine instructions, refused by the court for the defendants, contained any matter which they were entitled, under the evidence, to have impressed upon the jury, and which was not covered by the instructions given on its own motion by the court.

The first, second, third and ninth, ask the court to instruct the jury that false representations made by the defendants, under the circumstances which the evidence tended to prove, and which the instructions detail, would amount to a warranty, if found by the jury, and fix the rule by which damages should be assessed. This was misleading, and the refusal to give them was proper. Whether in ordinary cases, the sale of a boat for the purposes of a ferry would or would not amount to a warranty that it was fit for the purpose, cannot in this case be determined. There was a contract in writing with no such warranty included, and whatever may have been their previous conversations, it must be presumed that the parties waived such warranty when the final agreement was closed. The defense and counter-claim, after proof of the written contract of sale, could only cover damages for a tort committed in the course of the transaction through deceit, by false and fraudulent representations.

5. ADMISSIONS: Undiscovered defects.

The fourth instruction is to the effect that the defendants would not be bound by a certain letter, in evidence, written a short time after the transaction by Fred Hanger to plaintiff, Evins, in which he said the boat was working well and expressed his satisfaction; if at the time of writing, he had not discovered any defects. That if defects really existed,

such expressions of satisfaction are not conclusive, but are to be taken and weighed by the jury for what they are worth. This might well have been given, in connection with other instructions, explaining that the defects referred to were such as had been falsely and fraudulently represented not to exist. As a matter of law, the instruction was correct, although it is somewhat difficult to imagine how the defects complained of could have gone unnoticed by any one competent to run a ferry.

6. RESCISSION OF PURCHASE What necessary.

The fifth asks the court to instruct the jury that, if they found such fraud in the sale as would authorize defendants to rescind it, then an offer by defendants to return and restore the boat would be equivalent to a return.

That instruction presented a correct general view of the law in the abstract, but as applicable to the evidence, was not carefully qualified. To effect a rescission under the circumstances supposed, the offer to return must be promptly made upon the discovery of the fraud, and should be attended with an offer of compensation for intermediate use, and the condition of the article should be such as to enable the purchaser to restore it, substantially, in as good condition as received. Otherwise he must rest upon his remedy by action for the deceit. The proof tends to show that the boat was purchased for temporary use, whilst a new one was being built, and that the defendants, after the defects were known, continued to use it for several months, until the new boat was ready and then laid it up. The defects charged were such as in their nature would reveal themselves at once, at least to the extent of excessive leakage and difficulty of management, in which principally it is urged the unfitness of the boat for its purposes consisted. The instruction would have been misleading.

7. FRAUD: Diverting purchaser's attention from defects.

The sixth instruction is to the effect that if the plaintiff, Evins, was found to be a man experienced in building and running boats, and well acquainted with the machinery per-

taining thereto, and the defendant, Hanger, was wholly inexperienced in matters of that kind, which Evins knew, and that there were material defects in the boat, not apparent to ordinary observation, but known to Evins, and he deceitfully induced the defendant not to inquire into the condition of the boat, it would be a fraud, for which defendants might recover. Certainly the proposition of law is correct, but it is not the case made by the evidence. The proof does not tend to show any artifice by Evins to divert Hanger from as full an examination of the boat as he desired to make. It rather tends to show that Hanger, from the first, disclaimed all knowledge of boats and threw himself upon the judgment and honesty of Evins. That, as we said, imposed upon Evins the duty of the utmost frankness and candor, and any failure to reveal material defects known to himself would be fraudulent, although they were such as might have been patent to one versed in the business. But that was not the instruction asked.

SAME: False representation.

The seventh instruction is simply, in effect, that if Evins knew the purposes for which the boat was intended, and so represented to defendant Hanger, together with the representation that he knew defendant's business, and that the boat was well fitted for it, and that defendant relied on those representations in making the purchase, and they were untrue, then defendants should recover.

This instruction ignores the distinction between warranties and false representations. As there was a written contract, the warranty, as to fitness, did not exist, and the mere falsity of representations does not create a liability. If the instruction had added that the false representations were made knowingly and fraudulently, it would have been good.

The eighth instruction remedies the defect, and is, in effect, what the former would have been with the additions above suggested. It might well have been given.

All the foregoing instructions were refused, together with the eleven asked by plaintiff. The refusal of those which we have noted, in passing, as unobjectionable will be considered as erroneous, unless we find that the court did not abuse its discretion in discarding all the instructions and framing a set of its own with the design of presenting the whole matter more plainly to the jury.

The first given by the court clearly discarded all consideration of the question of warranty. This was correct.

The second concerns damages for false and frandulent representations, as follows:

"Now the court instructs the jury upon this point, that, for the purpose of determining whether any such fraud was perpetrated, you have a right, and it is your duty, to weigh all the facts and circumstances connected with the the transaction from beginning to end, including the Sunday contract and acts, and if there has been any actual fraud perpetrated by the plaintiffs, in such sale, the defendants have a right to relief in this suit to the extent the evidence shows them to have been injured by the same; and in determining this the jury should consider the relative position and character of the parties to the transaction, the character of the property sold, the means of examining and ascertaining any defects, and how far, as men of reasonable prudence and caution, the defendants had a right, under the circumstances, to rely on, and how far they did rely on the statements of the plaintiffs."

"A purchaser, when he makes his contract, has a right, if he so requires it, to demand an express warranty of the quality of the goods bought, and, in the absence of such warranty, he is presumed to rely upon his own judgment and examination of the property; and, though he may make a bad bargain and pay more than the property is worth, he cannot claim to be relieved from the consequences of his

own imprudence or carelessness, merely on that account. But if, in the making of the contract, the vendor or seller makes use of any artifice or device, or such fraudulent and false representations in regard to the material facts, of which he has special means of information, and knows the buyer is purchasing on the strength of his statements about matters of which he has peculiar means of information, and difficult of access to the buyer, and by such false and fraudulent representations, in such a matter material to the trade, he designedly prevents the purchaser from making examination and induces him to buy in ignorance of such defects, known to plaintiff; then the defendant would be entitled to be relieved to the extent of injury shown by the evidence to have been suffered by him by reason of such false and fraudulent representations. In the absence of any express warranty, the rule of *caveat emptor*, that the purchaser must look out for his own interest, prevails, and he is required by law to exercise a reasonable discretion and prudence to inform himself and discover the quality of the article he buys; and he is not supposed to rely upon any mere ordinary puff or commendation of his goods, made by the seller in the course of the trade, but he may claim relief for any deliberate fraud practiced upon him by the plaintiff seller."

This instruction seems to us to contain a more careful, elaborate, commonsense statement of the law upon the subject of fraud in sales than is generally found practical in the pressure of *nisi prius* business. It is easily intelligible by average jurors, selected to sit in civil cases. It is very favorable to the defendant, as touching the most important matter with regard to which a correct instruction was asked in his rejected series. This concerned fraud in representing the boat as fit for the ferry purposes. Under the instructions of the court, it would have been impossible for the jury to have found for the plaintiffs, if they had believed that they

falsely represented any facts forming an inducement to the purchase, including representations of fitness, as well as others.

The instructions given by the court supply, we think, all that was refused to defendant, which he had a right to ask. Although they may not be, as to every point of evidence exhaustive, they meet all that should have been given to enable the jury to do justice between the parties.

What will constitute fraud by any kind of deceit, whether by means of concealment, reticense concerning matters of which the party should speak, false representations, or artifices of any kind, must always be determined by the particular circumstances. The criterion is the good sense of the jury, estimating the character of the transaction by applying to the evidence their general knowledge of human motives, and their sense of dealing. Fraud is manifold in its devices, and its ingredients cannot be so defined as to include all cases, save by such general statements as must, after all, refer the question to the judgment of the jury upon the facts. Twelve men, taken from the mass of citizens, will rarely fail to detect a fraudulent intent, if any such existed, from all the circumstances. This they were instructed they might do, in terms broad enough to cover all the points. The instructions were correct and sufficient, and the verdict is not against evidence.

Affirm.

CLARK ET AL V. STANFIELD ET AL.

1. WILL: *Construction of; Limitations over, when not too remote.*

Henry Gregg's will contained the following provision, viz:

"I give and bequeath to my beloved wife, Esther Gregg, the following tract of land, to-wit: The S. W. 1-4 Sec. 26, T. 2, N., R. 7, W., in Prairie county, Arkansas. Also, after all legal demands against my estate are paid, I give, bequeath and desire that all moneys (specie excepted) and personal property, that I may possess at my death, in Arkansas, go to and vest in said Esther Gregg and *my bodily heirs*, the issue of said marriage, to have and to hold forever; the said Esther Gregg to have the use and benefit of said land, and full control of said personal property, to be disposed of as she may think best, in the way of supporting the aforesaid parties, and educating said heir or heirs, so long as she may remain a widow, or until the maturity of said heir or heirs. Should said Esther marry again, or at the maturity of said heir or heirs, the aforesaid land, with all the personal property that may be on hand, to be divided equally between said Esther and said heir or heirs; and should said heir or heirs die before maturity, all of their part of said property to revert to said Esther. And should said heir or heirs die, before maturity, and said Esther die without other lawful issue, then said property, both real and personal, to revert to my heirs at law."

Held: 1st. That the testator made a distinction between his descendants, the issue of his marriage with said Esther, and his heirs generally, and did not intend that the latter class should take anything until the former class had all died before maturity, and his wife, Esther, had died without other lawful isssue.

2nd. That the limitation over upon the death of Esther, without lawful issue, meant lawful issue living at the time of her death, and not an indefinite failure of issue, and was not too remote.

APPEAL from *Prairie* Circuit Court.
Hon. J. M. SMITH, Circuit Judge, (by interchange).

Hughes, for appellants:

Plaintiffs failed to show that the heirs of Henry A. Gregg,

the issue of his marriage with Esther, had died before maturity, and that she died without other lawful issue. A plaintiff in ejectment must recover on the strength of his own title.

Was not the provision, under which plaintiffs claim, a limitation upon an indefinite failure of issue, and void? 23 *Ark.*, 199; 3 *Ib.*, 146; 2 *Washburn*, 250; bottom of lateral paging; latter part of *secs.* 23 *and* 24; *sec.* 8, *lateral p.* 344; 2 *Wash.*, *Real Prop.*, *sec.* 22, *p.* 355; *Ib.*, *sec.* 14, *p.* 359–60; *Ib.*, *sec.* 7, *p.* 361; *secs.* 9 *and* 10, *p.* 366; *sec.* 4, *p.* 380; 4 *Kent.*, 283. "A devise of an estate for life, with an unqualified power to appoint an inheritance, makes the whole an equitable fee." 16 *Vesey*, 135; 4 *Kent.*, 319, *lat.*; *Ib.*, 320. By will is a common law mode of alienaation. *Bl'k. Com.*, *book* 2, 373; *sec.* 2, *p.* 271. 2 *Wash. R. P.*

T. B. Clark, on death of Esther, by whom he had issue capable of inheriting, became tenant by the curtesy, without her will. 1 *Wash. R. P.*, *lat. p.* 131.

See also 1 *Wash. R. P.*, 57, (*side*).

THE WILL. EAKIN, J. In June 1870, Henry A. Gregg made his will. In one of its provisions, in consideration that his wife, Esther Gregg, had by marriage contract renounced any interest in his estate, save what he might give her, he says: "I give and bequeath unto her, and desire that she have, the following tract or parcel of real estate, to-wit: The S. W. ¼ Sec. 26, Township 2 North, Range 7 West, 160 acres; it being the tract or parcel of land on which my farm is situated, being in the county of Prairie, State of Arkansas; also, after all legal demands against my estate are paid, I give, bequeath and desire that all moneys, (specie excepted) and personal property that I may possess at my

death, lying and situated in the State of Arkansas, go to and vest in said Esther Gregg and *my bodily heirs*, the issue of said marriage, to have and to hold forever. The said Esther Gregg to have the use and benefit of said land, and full control of the personal property, to be disposed of as she may think best, in the way of supporting the aforesaid parties, and educating said heir or heirs, so long as she may remain a widow, or until the maturity of said heir or heirs. Should the said Esther Gregg marry again, or at the maturity of said heir or heirs, the afore-described real estate, with all the personal property that may be on hand, to be divided equally between the aforesaid Esther Gregg and heir or heirs; and should said heir or heirs die before the years of maturity, all of their part of said property, both real and personal, to revert to the aforesaid Esther Gregg; and in case (or should) the aforesaid heir or heirs die as above described, and the aforesaid Esther Gregg die without other lawful issue, then the afore-mentioned property, both real and personal, to revert to my heirs at law."

To the same persons, and in the same manner, were given the value of some improvements upon other lands given to other devisees, which were to be appraised. Other provisions in the will do not touch this controversy.

Henry A. Gregg afterwards died, and his widow, Esther, having intermarried with Thomas B. Clark, died also, leaving no children of the second marriage. The lands passed into possession of Wm. Clark, against whom, the appellees as the heirs at law of said Henry, brought ejectment for the special tract above described.

Thomas B. Clark was, upon his own motion, made defendant.

They say, in their answer, that after the marriage of said Esther with said Clark, she had issue which lived four years,

and that by her will, which they exhibit, she devised the land in fee simple to her husband.

The bill of exceptions shows that the cause was submitted to the judge, sitting as a jury; upon the complaint, answer, both wills, and the admission of the defendants that they denied any right whatever in the plaintiffs. There was no other evidence.

The judgment of the court was in favor of the plaintiffs for an undivided interest of four-fifths of the land. A special finding of facts by the court was waived. There was a motion for a new trial, which was overruled, and the defendants appealed.

Construction of.

Upon a careful examination of the complaint, answer and the two wills, we fail to find sufficient facts to support the judgment as rendered. The testator, Henry A. Gregg, evidently made a distinction between his descendants, the issue of his marriage with said Esther, and his heirs generally, and did not intend that the latter class should take anything in the land in question, unless, and until the former class had all died before maturity, and Esther herself had died without other lawful issue, than those of the marriage between herself and the testator. We do not think the limitation over to the heirs general in case of the death of said Esther without lawful issue, other than that above indicated, too remote. The testator evidently meant living at the time of her death, and not an indefinite failure in the future.

Limitation over, not too remote.

But we are not advised by the record of the existence of the former class. Who were the issue of Henry and Esther Gregg? Was there one or more, and how many? What were their names and sex? When did they die? or are they yet living? Doubtless the judge and attorneys knew these facts, but the record does not disclose them. The plaintiffs are heirs general, and their rights so much depend on the answer to these questions, that in our ignorance, we cannot

say the judgment of the court was correct. We cannot see that the condition of things had occurred to vest any rights in the plaintiffs. Nor can we understand why the court gave them the particular fractional interests of four-fifths.

We can imagine conditions which would make the will very difficult of construction, but prefer not to anticipate them before they may have been originally considered and adjudicated below, and brought fully to our notice.

Upon the facts disclosed the judgment was erroneous.

Reverse and remand for a new trial, and other appropiate proceedings.

BERMAN v. WOODS & CO.

38 351
59 259

1. RESCISSION OF CONTRACT: *Failure of consideration: Agency.*

Berman ordered of Woods & Co., of Boston, a small printing press, based upon the representations of its value and efficiency contained in their circular or catalogue. Upon arrival it was visible to the eye, or could have been easily ascertained by measurement, that it was smaller and of less capacity than represented. Berman was concerned in the purchase with a clerk in his store, who first commenced the negotiations for it, which were afterwards taken up by Berman, and the press was intended for the use of both. When received, Berman was absent, and the clerk, who was to work the press, unpacked and set it up, and partly worked it. Four days after Berman returned, and about a month after it was shipped from Boston, he reshipped the press to Woods & Co., who refused to accept it, and sued Berman for the price.

Held: 1st. That the jury might well conclude that Berman had authorized the clerk to unpack, set up, and work the press, and might find that by such acts of his agent, and his own delay to return it after his return home, he had lost the right to rescind.

2. WARRANTY: *Puffing: False representations in circulars, etc.*

A purchaser of an article cannot rely upon all statements and assertions made by the maker in circulars concerning it, as a warranty that it will do what is stated. It is folly to rely upon them when made by

unknown dealers. Purchasers should examine for themselves, or seek the advice of competent disinterested parties. Such statements should not come even within the rules of false representations, but if they do, they require the same promptitude in the rescission of the contract.

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

Clendenning & Sandels, for appellant:

1. "An instruction given with reference to facts hypothetically stated in it, the existence of which there is no evidence to show, is calculated to mislead the jury and erroneous." 41 *Miss.*, 131–339–240; 2 *George*, 464; *Burgwyn's (Md.) Digest, Title "Law and Fact;"* 1 *Marshall, (Ky.)*, 460; 3 *Ib.*, 98; 1 *B. Mon.*, 213; 7 *Ib.*, 371.

2. There was a total lack of evidence to sustain the verdict.

J. A. Yantis, for appellees:

EAKIN, J. Appellees, a Boston firm, engaged in the manufacture and sale of printing presses and material, sued Berman before a justice of the peace, upon an account for the purchase of a small press, type, etc., amounting, in all, to $66.33. They recovered judgment there, also in the Circuit Court, upon appeal by the defendant. After motion for a new trial and a bill of exceptions, the defendant now appeals here.

No new questions of law are presented by the record, and the attorneys make few points. We will only notice those upon which the appellant insists.

RESCISSION OF CONTRACT Failure of consideration: Agency.

The purchase of the press, etc., was made by order sent from Berman to the firm, based upon the representations regarding the value and efficiency of the press, given in its catalogue or circular. He was concerned, in its purchase, with a young clerk in his store, for whose benefit it was partially intended, although Berman, who was a merchant, expected benefits from it, in the way of advertising, hand bills, and the like. There is no question as to other matters save the press, which, the defendant contends, was inferior in size and capacity to the representations of the circular. It certainly proved inefficient in the hands of the purchasers; whether from their want of mechanical skill and experience as printers, or from the bad material and structure of the press itself, is a question not free from doubt, nor material to be settled. In about a month after it was shipped from Boston to Fort Smith, the defendant having refused to pay for it, shipped it back to plaintiffs, who declined to accept it. Meanwhile it had been received, set up, and partly worked by the young man, in the absence of defendant, who had been absent when it arrived. The reshipment was about four days after the defendant's return. There is evidence, also, to show that defendant, after the press was shipped, but before he was advised of it, countermanded the order, saying he had made other arrangements in St. Louis.

Appellant contends that the court gave instructions to jury on the hypothesis that the clerk was the agent of the defendant, and thereby made his acts of acceptance in defendant's absence bind him. We think there was evidence upon which the jury might find the facts, as thus hypothetically stated, and that such an instruction was altogether proper. The young man was a clerk in his store, attending to his business. The negotiations for the press were first begun by the young man, and afterwards taken up by Berman, partly for his own benefit and partly to aid the

the clerk. The latter was to work the press, and the jury might well conclude that defendant had authorized him to unpack, set it up and use it.

In one material respect, the size of the form which it would print, the press did not fulfill the representations of the vendors, in their correspondence, and if it had been promptly returned, without injury, the defense might, on correct principles, have been made. But it seems to have been retained an unreasonable time. The defect was visible to the eye, if it existed, or might have been ascertained by the use of a carpenter's rule. Nevertheless the press was set up and used for profit, and the chase broken before its return. The jury, on sound principle, might find that defendant, by the act of his agent, and his own delay after his return from St. Louis, had lost his right to rescind.

2. PUFFING: False representation in circulars, etc.

As for the glowing representations, with regard to the merits of their press, made by plaintiffs in their circulars, they are the usual artifices of enterprise and competition. If false or exaggerated, they are reprehensible, in strict morals, but the law supposes that prudent people should estimate them at their usual worth. It is folly to rely upon them when made by unknown dealers, and they do not amount to warranties of every sale which they induce. Purchasers should either examine for themselves or seek the advice of competent and reliable persons who may be indifferent. Perhaps in this age of sharp competition in all branches of trade, few sales would bind, if this class of commendations could afford ground of rescission. Mr. PARSONS in his work *on Contracts*, *vol.* 1, *p.* 588, well says that a purchaser "cannot rely upon all statements and assertions made by the maker, in circulars concerning the article, as a warranty that it will do what is stated." For this he cites *Prideux* v. *Bennett*, a recent English case reported in 1 *C. B.*, (*N. S.*) 615. Upon principle, considering how little

reliance may generally be placed upon them, they should not even come within the rules of false representations, but if they do, they require the same promptitude in the rescission of the contract.

The instructions given and refused, accord substantially with the views above expressed, and the elementary doctrines of the text books. They contain no new principle, and it would serve no useful purpose to discuss them. We think the jury justified by the evidence in finding that the contract of purchase was not rescinded in a reasonable manner and time, and that a new trial was properly refused.

Affirm the judgment.

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF ARKANSAS

AT THE

MAY TERM, 1882.

38 357
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38 357
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ST. LOUIS, I. M. & S. RAILWAY CO. v. HECHT, SURVG. PART.

1. PLEADING: *Allegation of title: Denials.*

In an action for the destruction of property the allegation of ownership in the plaintiff is material, and a failure to deny it in the answer is an admission of its truth.

2. INSTRUCTIONS: *Modifications; Bill of exceptions must show.*

When modifications to instructions are excepted to, the bill of exceptions must show the modification, and what the instructions are, as amended; otherwise this court cannot tell whether they are right or wrong.

3. NEGLIGENCE: *Placing burning cars near another's property.*

A railroad company has the right to detach burning cars from the train and run them off on a spur of the track so as to save the train and main track, unless damages to the property of others are apparent, and the probable result; but if in doing so they stop them near the property of another and it is consumed, they are liable for the injury if by proper care under all the circumstances it could have been avoided.

4. SAME: *Contributory negligence.*

Though a burning railroad car which is run off on a switch to save the train and main track, is negligently stopped so near another's property as to ignite and consume it, the company is not liable for the injury, if the owner of the property, or his agents, or employees, having charge of it, are present and can save it, but refuse to do so; or if they arrive after the property is on fire they must save what they can, or that omitted to be saved will go in mitigation of the damages; but agents or employees of the owner in other business not connected with the property, are under no legal obligation to protect it, and *their* omission to do so is not contributory negligence on the part of the owner.

APPEAL from *Clay* Circuit Court.
Hon. L. L. MACK, Circuit Judge.

Geo. H. Benton, for appellant:

1. Plaintiff failed to prove ownership of the spokes. The allegation of ownership is not such an allegation as the Statute calls material, and requires to be specially denied by the answer. The denial of an allegation of ownership is covered by the general issue. *McClintock* v. *Lacy*, 23 *Ark.*, 215. As the general issue made by defendant's answer was not objected to by motion to make more specific, plaintiff should have proven under the Code all that was necessary to sustain his case under the old practice.

2. There is no proof of negligence, nor of any act or omission which can be construed as such. The employees had a right to use the spur for the purpose they did to the end, and this use was reasonable under the circumstances, and "a party is not answerable in damages for the reasonable exercise of a right, unless upon *proof* of negligence, unskillfulness or malice." *R. Co.* v. *Yeager*, 75 *Penn.*, *st.* 121.

The onus to prove negligence was on plaintiff. This is not a parallel case to *Milwaukee R. Co.* v. *Kellogg*, 44 *U. S.*, 469. The burning of the spokes was not "a result reasonably to be expected" from switching the cars. See *Ryan* v. *R'y*, 35 *N. Y.*, 210; *Kerr* v. *R'y*, 62 *Penn.*, 353.

3. As to errors in instructions given and modified, see 27 *Ga.*, 481; *St. L., I. M. & S. Rw'y* v. *Freeman*, 26 *Ark.*; *Milwaukee R'y* v. *Kellogg*, *supra.*, *Thompson on Neg.*, *Vol.* 1, *p.* 153; *Toledo etc.*, *R'y* v. *Pindar*, 33 *Ills.*, 457. Plaintiff's employees guilty of contributory negligence. *Wharton on Neg.*, *secs.* 301, 877; *Sher. & Red. on Neg.*, *sec.* 335; *Ill. Cent. R'y* v. *McClelland*, 42 *Ills.*, 355; *Ward* v. *R. R.*, 29 *Wis.*, 144.

U. M. & G. B. Rose, for appellees:

1. There being some evidence, the verdict will not be disturbed. 31 *Ark.*, 163; *Ib.*, 196.

2. The testimony shows the grossest negligence, perhaps, willful destruction of property.

3. It was not the duty of defendant to save its own track regardless of injury to others. *Sic utere tuo ut alienum non laedas.*

4. Plaintiff not responsible for failure of his agents employed in other departments of his business to save the spokes. Their acts could only bind him within the scope of their agency.

Henderson & Caruth, also for appellees:

The question of negligence was properly submitted to the jury. *Milwaukee R. R.* v. *Kellogg*, 94 *U. S.*, 469. "The care must be proportionate to the danger." *Thomp. on Neg.*, *Vol.* 1, *p.* 153. The loss was the result of careless-

ness, and might have been foreseen. *Toledo, etc., R.* v. *Pindar*, 53 *Ill.*, 457, *and cases cited.*

There was no contributory negligence. The instructions were too rigid against plaintiff. *Vaughan* v. *R. Co.*, 5 *Hurl. & N.*, 679; 73 *Penn., st.*, 121; 23 *Ib.*, 373; 31 *Iowa*, 176; 7 *Kan.*, 308; 15 *Conn.*, 124; 41 *Wis.*, 78.

English, C. J. I. The first ground of the motion for a new trial was, that the plaintiff failed to prove his ownership of the spokes.

The action was brought against the St. Louis, Iron Mountain and Southern Railway Company by Levi Hecht, surviving partner of the mercantile firm of Hecht & Brother, composed of plaintiff and Samuel Hecht, deceased.

The complaint alleged, in substance, that on the twenty-seventh of November, 1879, plaintiff was the owner of about 40,000 sawed spokes, of the value of $480.00, which he had placed on a spur switch belonging to the defendant corporation, in the town of Corning, preparatory to having the same shipped to a market. That on said day two cars loaded with cotton, belonging to one of defendant's trains, caught fire, and defendant, by its servants and agents, caused said burning cars to be switched or placed on said spur switch, and by the negligence and unskillfulness of defendant, its agents and servants, said burning cars were allowed to run against said spokes, whereby they were destroyed.

The suit was for the value of the spokes.

The answer of defendant denied that 40,000 were destroyed at the time and in the manner stated by plaintiff. Denied that said sawed spokes alleged to have been destroyed, were worth $480.00, as stated in the complaint. Denied that the loss of the spokes was caused by defendant's negligence or unskillfulness of its servants or agents. Denied that said property was destroyed through any fault

of defendant, but alleged that said property, if destroyed, was so destroyed by the negligence and carelessness of himself or his servants or agents.

The answer did not deny the allegations of the complaint that plaintiff was the owner of the spokes.

1. PLEADING: Allegation of title: Denials.

At common law, in actions for trespass for injuries to property, the plea of not guilty was a general traverse, and put in issue the allegations of title in the plaintiff. But in the Code pleading there is, strictly, no general issue, and material allegations of the complaint, except as to value and amount of damage, not specifically controverted by the answer, are admitted. *Gantt's Dig.*, *sec.* 4608.

The allegation in the complaint that the plaintiff was the owner of the spokes, was material, for without general or special property in them, he had no right of action for their destruction. The failure of the answer, therefore, to deny the allegation of property in the plaintiff, was an admission of its truth, and he was not required to prove it, as he would have been had it been denied.

There was some proof, however, that the spokes belonged to Hecht & Brother, and it was admitted on the trial that plaintiff was surviving partner of his deceased brother.

2. INSTRUCTIONS: Modifications: Bill of exceptions must show.

II. The second ground of the motion for a new trial was that "the court erred in giving instructions third and fourth asked by plaintiff, against the objection of the defendant."

The bill of exceptions states that "the plaintiff asked for the following instructions." Then they are copied; after which the bill of exceptions further states that "the defendant objected to the giving of the second, third and fourth instructions; the court sustained the objection as to the second, and partially as to the third and fourth, to which ruling of the court, as to the overruling of the defendant's objection to the third and fourth, and giving the same as amended, the defendant excepted."

This is all that the bill of exceptions shows about the instructions asked for plaintiff. What modification the court made in the third and fourth, or how they read as amended and given, does not appear. It is impossible for us to decide whether the court erred in giving the two instructions, as modified, without having them before us in the amended form in which they were given to the jury.

No objection was made by defendant to the first instruction asked for plaintiff, and given by the court. It was, that "If the jury find, from the evidence, that certain cars of defendant, loaded with cotton, caught fire, and that its agents, servants or employees, ran said cars into the spur switch, or side track, for the purpose of allowing the same to burn there, and negligently managed said cars, and that plaintiff's spokes were destroyed in consequence, they will find for plaintiff."

The court refused the second instruction moved for plaintiff, which was, in effect, that if the jury found that the property was destroyed by a fire set from defendant's burning cars, negligence on the part of defendant would be presumed, and it is for defendant to rebut such presumption by evidence of due care.

The third instruction, as it appears by the bill of exceptions to have been moved for plaintiff, was, that "The jury are instructed that the defendant would be liable if they find that defendant had no right to destroy the property of others merely to save its own."

Whether the defendant had the right to destroy the property of others merely to save its own, was a question of law for the court, and not for the jury. It appears from the bill of exceptions, as above shown, that the court modified this instruction, but in what form it was given is not stated. But it does appear, in an after-part of the bill of exceptions, as will be particularly shown below, that the

court charged the jury that it was the paramount duty of the employees of defendant in charge of the train to save the rest of the train and the main track from destruction and damage, if they could *do so* without damage to the property of others, etc.

The counsel for appellant admits that the objection to the fourth instruction moved for plaintiff, and given in some modified form not appearing, was removed by the eighth instruction given by the court of its own motion.

So we find nothing in the second ground of the motion for a new trial.

III. The third ground of the motion for a new trial was, that the court erred in modifying instructions second, third and sixth, and in refusing the fourth and seventh asked by defendant.

3. NEGLIGENCE: Placing burning cars near another's property.

Before considering these instructions, and others given by the court of its own motion, the giving of which was made the *fourth* ground of the motion for a new trial, it is proper to state the substance of the evidence, introduced on the trial, to which the instructions related.

It appears from the evidence that the spur switch, mentioned in the complaint, started from the west side of the main railway track, north of the depot at Corning, and ran south, near to Harb's factory. The witnesses for the plaintiff stated that it was from one hundred and fifty to one hundred and seventy-five feet long. Pierce Galvin, witness for defendant, and section foreman at Corning, stated, on his examination in chief, that it was about one hundred and twenty feet long, but, on cross-examination, he said it would hold about seven cars. The length of flat cars used for carrying cotton was proven to be twenty-eight feet. If the switch would hold seven of them it must have been one hundred and ninety-six feet long. It had a slight down grade from the main track. It was used for loading spokes,

staves and lumber, from Harb's factory, for putting off freight, and for taking cars from and putting them on the main track.

Hecht & Bro. directed to be piled, for the convenience of shipment, about 31,618 wheel spokes, sawed at Harb's factory; on the west side of the spur switch, the pile commenced below the end of the switch and extended up to it toward the main track, about twenty-five feet, was, say five feet high, and six feet distant from the west side of the switch. The pile was in four separate lots, stacked near each other and in the same line.

About three o'clock of the night of the twenty-seventh of November, 1879, a north bound freight train of the defendant corporation had stopped at Corning, waiting for orders. It was on the main track, near a hotel. It seems the two rear flat cars were loaded with cotton. When the conductor discovered one of them to be on fire, he caused the train to be moved forward on the main track to the spur-switch, and the two cotton cars to be backed on to, and down it until the hind trucks of the end car went over the terminus of the switch, where the two cars aflame, were left and burned. The spokes caught fire from the blazing cotton cars, and were all burned, except about three or four thousand, which were saved by employees of the defendant and of Hecht & Bro. At the time the conductor discovered the cotton to be on fire, he regarded the hotel and adjacent buildings, as well as the main track, to be in danger, and hence caused the burning cars to be put on the switch, and detached from the train there. The wind was blowing, and there were indications of a storm. Had the burning cars been stopped by brakes, or "chunking," as some of the witnesses said might have been done, after they cleared the main track, both it and the pile of spokes would have been safe from the fire.

The jury found a verdict in favor of plaintiff for $300. Other features of the evidence will be noticed below.

The defendant moved for seven instructions, the first of which the court gave, and which was as follows:

(1.) "If the jury find from the evidence that the employees of defendant, after discovering that the cotton was on fire, were not guilty of negligence in their effort to switch the burning cars into the spur of the railroad, but used ordinary caution in doing the same, under the circumstances at the time, to prevent any unnecessary damage, they will find for defendant."

The second instruction moved for defendant follows:

(2.) "In order to hold defendant liable in this case, the jury are instructed that the burden of proof is on the plaintiff to show that the employees of defendant were guilty of negligence at the time of the occurrence, directly causing or contributing to the injury; and the negligence which will make the defendant liable is such negligent conduct on the part of the employees of the defendant at the time, knowing that the property of the plaintiff was in danger, as would amount to the performance or omission of some act which directly caused the damage alleged by plaintiff, and which a prudent business man, under all the circumstances at the time, would not have done, or omitted, and not the performance or omission of any act which subsequently, on reflection, might be supposed to have been possible in order to avoid the damages."

The court overruled part of this instruction, and gave it in a modified form as follows:

"In order to hold the defendant liable in this case, the jury are instructed that the burden of proof is on the plaintiff, to show that the employees of the defendant were guilty of negligence at the time of the occurrence, directly causing or contributing to the injury; and the negligence which will

make the defendant liable, is the performance of, or the omission of some act, (with a knowledge of danger to which property was liable on account of such act or omission,) which no man of ordinary prudence would perform or omit under all the circumstances existing at the time."

The instruction as given, as far as it goes, is substantially the same as that asked for defendant. As given, it embodies two propositions: First, that the burden of proving negligence was on the plaintiff; and second, that negligence is the performance of, or the omission of some act (with knowledge that another's property is liable to danger) which no man of ordinary prudence would perform or omit, under all the circumstances existing at the time.

This definition of negligence, as applicable to the case before the jury, was substantially correct and sufficient. *Bizzell* v. *Booker et al*, 16 *Ark.*, 308.

Negligence has been variously defined.

Says Mr. Cooley, (*Cooley on Torts*, *p.* 630): "All the circumstances are to be taken into account when the question involved is one of negligence; for negligence in a legal sense is no more nor less than this, the failure to observe, for the protection of the interest of another person, that degree of care, precaution and vigilance which the circumstances justly demand, whereby such other person suffers injury."

Negligence has been briefly defined to be, the absence of care, according to the circumstances. *Philadelphia, Wilm. & Balt. Railroad Co.* v. *Stinger*, 78 *Penn.*, *State*, 225.

The court omitted the last clause of the instruction as asked for defendant, which was, in effect, embraced in the definition of negligence, as given.

(3.) The third instruction as moved for defendant, was as follows:

"The jury are instructed that it was the paramount duty

of the employees of the defendant, in charge of the train, to save the rest of the train and main track from destruction and damage, and that they had a right to use the spur for that purpose—to switch off on it the burning cars; and that subject to this duty was that of avoiding unnecessary damage to the property of the plaintiff, knowing it to be on the side track or spur."

The court refused this instruction as asked, but gave it in the following modified form:

"The jury are instructed that it was the paramount duty of the employees of the defendant, in charge of the train, to save the rest of the train and the main track from destruction and damage, if they could do so without damage to the property of others, being apparent and the probable result."

The instruction, as given, was more in harmony than as asked, with the maxim, *sic utere tuo ut alienum non lædas*—enjoy your own property in such a manner as not to injure that of another person.

Though a man do a lawful thing, yet if any damage thereby befalls another, he shall be answerable, if he could have avoided it. *Broom's Legal Maxims, p.* 275–6.

The rest of the train might have been saved by detaching the two burning cars and leaving them on the main track, after they had been moved forward far enough to place the hotel and other adjacent property out of danger. But the evidence conduces to prove that it would have been a greater loss to the company and inconvenience to the public for the two cars to burn on the main track and destroy part of it than to switch them off on to the spur and to allow them to burn there as was done. The spur belonged to the defendant, and its agents had the right to place the burning cars on it for the purpose of saving the main track, unless, as the court charged the jury, damage to the property of others was apparent, and the probable result. For though the spur

belonged to defendant, it appears that it had been run out near to Harb's factory for the purpose of taking on and putting off freight there, and plaintiff's spokes, sawed at the factory, had been piled near the spur for convenience of loading on to the cars, and it is not shown or claimed that they were wrongfully placed there. Moreover, the evidence conduces to prove that the two burning cars might have been placed on the spur, clear of the main track, and far enough from the spokes to save them from the fire. So, though the defendant's agents had the right to use the spur to save the main track, yet defendant was answerable for damage thereby caused to plaintiff's property, if by proper care, under all the circumstances, it could have been avoided.

(4.) In lieu of the fourth instruction moved for defendant, the court gave the following:

"The fact that the cars ran off at the end of the track (spur) is not sufficient of itself to make defendant liable. But to render defendant liable, that circumstance must have been the result of carelessness or neglect of those having charge of the cars or train, and must have contributed to the burning of the spokes."

It is not submitted here that the court erred in giving this instruction instead of the fourth as asked.

It was in evidence that there were cross-ties piled at the end of the spur-switch for the cars to "bunk" against, and that these were forced away by the trucks of the car, which went over the end of the switch, and this brought the two burning cars a little further along the line of the pile of spokes than they would have been if they had been stopped at or before reaching the end.

(5.) The court gave the fifth instruction as moved by defendant, which was:

"The jury are instructed that the plaintiff, in placing his spokes along the track or spur of the railroad, assumed all

the risk of damage to them occasioned by unavoidable accident or mischance, and that if the jury believe they took fire from the burning cars, accidentally and unavoidably, and without negligence of defendant, they will find for the defendant."

(6.) The sixth instruction moved for defendant, was: 4. ——: Contributory negligence of employees

"The jury are instructed that it was the duty of the plaintiff, or of his agents or employees, when the danger was discovered by them, to which the spokes in controversy were exposed, to save them if possible; and if the jury believe that they could have saved them by the exercise of ordinary care and diligence, they will find for the defendant, even if they find the defendant guilty of negligence."

This instruction was given by the court in a modified form, as follows:

"The jury are instructed that it was the duty of the plaintiff, or his agents or employees, *having the care or charge of said spokes, if present*, when the danger was discovered by them, to which the spokes in controversy were exposed, to save them if possible; and if the jury believe that they could have saved them by the exercise of ordinary care and diligence, they will find for defendant, even if they find the defendant guilty of negligence." Who are employees

It will be observed that the only modification made by the court of the instruction, as moved, was by the insertion of the words "*having the care or charge of said spokes, if present*," between the word "*employees*" and the word "*when*."

This was a proper modification of the instruction, in view of the evidence before the jury. The two cars loaded with cotton, on fire, were switched on to the spur and left there, about 3 o'clock at night, when there were no persons present but such as were in charge of the train. It was not shown that the plaintiff, or any agent of his in care of the

spokes, was present when the burning cars were put on the spur and left alongside of the pile of spokes.

There was evidence that some of the employees of plaintiff were afterwards present.

The bill of exceptions states that the court orally explained the sixth instruction as given to mean, "that the employees of plaintiff, about any other business, were not obliged to do anything to save the spokes;" to which defendant excepted.

In *Illinois Central R. R. Co.* v. *McClelland*, 42 *Ill.*, 356, McClelland sued the Illinois Central Railroad Company for the burning of a certain rail fence, and the grass and hay upon twenty acres of meadow adjacent to the railroad track.

There was evidence that in July, 1864, a passing engine of defendant set fire to the grass on the right of way near plaintiff's meadow fence. That at the time the son of the plaintiff, and in his employ, saw the fire while on his way to the house, and that forty or fifty minutes afterwards he returned and found the fire had got into the meadow.

The circuit judge refused to charge the jury, that "If the son and servant of the plaintiff saw the fire in time to put it out, while it was on the right of way, before it reached the plaintiff's meadow, it was his duty to do so. And if, through his negligence in not doing so, the fire consumed the property of the plaintiff, the defendant would not be liable therefor."

On error, the Supreme Court held that this instruction should have been given. Justice Bruse, who delivered the opinion of the court said: "It was a proper subject of inquiry by the jury: Could the plaintiff's son and servant, by the exercise of reasonable diligence, have prevented the spread of the fire? He saw the fire in time to arrest its progress, or at any rate in time to make some effort to that end, but did not choose to do so. He left the scene and was absent near an hour, and on his return the fire had

reach the meadow. Common prudence required he should have made some effort to prevent this, and it was negligence on his part, for which the plaintiff is answerable, that he did not. The fire in the meadow in July may be charged to the negligence of the plaintiff's son, who was in a position to have prevented it." Cited in *Wharton on Negligence*, *sec.* 877.

It appears that one or two persons in the employment of Hecht & Bro., and others in the employment of defendant, saved such of the spokes as were not burned, by removing them from the pile after it took fire from the burning cars. It is probable that more of the spokes could have been saved if the employees in charge of the train had remained after the burning cars were switched on to the spur, and engaged in removing the spokes. It also appears that some persons in the employment of Hecht & Bro., came to the fire after the alarm was given, and while the spokes were burning, who might have saved some of them if they had engaged in removing them, but like other bystanders who had collected there, they did nothing.

Hecht & Bro. had a store at Corning, and George Huntly was employed by them to attend to receiving and weighing cotton. He lived about four hundred yards from Harb's factory. Awaked by the alarm of fire, about 3 o'clock in the night, he supposed the factory was on fire; ran down to it, and found the two cotton cars all ablaze on the spur, and the engine and the rest of the train on the main track. The fire from the blazing cars was rolling up "awful high." He said to the men around there, "we ought to try to get the cotton away." When he got there, a man he took to be an employee of defendant was standing on the pile of spokes, and heard him say he "would not give a damn if they did burn," and he got down and went to the engine. Witness tried to get men to help save the spokes, but was

told the railroad company would be responsible for burning them anyway. The spokes' business did not concern him at all. He was employed to receive and weigh cotton. He thought he was not responsible for the spokes. He could have thrown away from the fire as many as he had a mind to. Did not know whether he could have saved any by hiring or getting men there to save them or not. He did not see any one else in the employment of Hecht there.

Another witness, A. J. Harb, got to the spur after the train had left, and when the spokes were on fire, and they continued to burn up to 8 o'clock in the morning. He was of the firm of Harb Brothers, and went to work carrying away their stock, which was saved. Mr. Imboden, employed in Hecht's store at Corning, was at the fire when he got there. He also noticed there Morris Hecht, nephew of plaintiff, and in charge of the business at Corning. It was about 4 o'clock when witness got there. There were four lots in the pile of spokes, piled close together. The first lot had burned up, and the second was on fire when he got there. Imboden and Morris Hecht did nothing. A great many spokes might have been saved after witness got there. There were many men standing there, and witness never saw men less lively at a fire. They would not do anything at all.

It was no doubt the duty of Morris Hecht, who was perhaps in charge of the general business of Hecht & Bro., at Corning, to do anything in his power to save such of the spokes as might have been saved after he got to the fire, even if the negligence of the employees was the proximate cause of the pile of spokes being set afire. It may be said that the spokes were in his care or charge as the general business agent of plaintiff, and his deceased partner; and in the sixth instruction, as given, the court charged the jury that it was the duty of plaintiff, or his agents or

employees having the care or charge of the spokes, if present, etc., to save them if possible, etc.

Employee in other business not bound to diligence.

But was it the legal duty of George Huntley, employed to attend to receiving and weighing cotton, and of Imboden, employed in the store of Hecht & Bro., at Corning, to engage in the labor of removing and saving spokes when they got to the fire, and was the plaintiff chargeable with contributory negligence by reason of their failure to do so?

We think not. They were no doubt under a moral obligation to do anything in their power to save the spokes of their employers, and the by-standers were under a neighborly obligation to do so.

Huntley and Imboden did not sustain the same relation to plaintiff, as to the spokes, that the son and servant of the Illinois farmer did to his father and his fence and meadow, nor are the facts of this case and that alike.

The court did not err in orally explaining the sixth instruction, as stated in the bill of exceptions, and above shown.

The pile of spokes was probably on fire when Morris Hecht got there, and if on fire by the negligence of the employees of defendant, his failure to labor to save as many of the spokes from burning as he could, was not the proximate contributory cause of the fire, and did not excuse defendant from liability, but was matter in mitigation of damages to the extent of the value of such of the spokes as he might have saved by the care incumbent on him under the circumstances. How many spokes he might have thrown away from the encroaching fire after he got there, had he been active instead of idle, does not appear. Not as many, perhaps, as the employee of defendant whom Huntly found on the pile when he got there, and who, it seems abandoned the spokes with an oath that "he did not care a dam if they did burn," and left.

(7.) The seventh instruction moved for defendant, was: The jury are instructed that if the plaintiff placed his spokes too near the track of the defendant's railroad, and in this way exposed them unnecessarily to danger and loss, and left them without a watchman or proper agent to care for them, these circumstances will enable the jury to determine whether the plaintiff was guilty of contributory negligence, and if they find the plaintiff guilty of contributory negligence, they will find for defendant, unless the jury find that the defendant, after discovering the danger to which they were exposed, could have avoided the injury by the exercise of ordinary care."

The court substituted for this instruction the following: "In considering the question of contributory negligence on the part of the plaintiff, the jury will look to all the circumstances, the time of the day or night the fire occurred, and if the plaintiff had no watchman, or other person in care of his spokes; if not, whether a man of ordinary prudence would have had some one there in charge at that time, and under such circumstances, if so, were the spokes lost thereby; if plaintiff or his employees, in charge of the spokes were present, did they use proper diligence to save the spokes? These are all questions for the jury under all the circumstances in proof."

The question of contributory negligence on the part of the plaintiff, as well as the one of negligence on the part of defendant, was for the jury under all the facts and circumstances in evidence. The instruction as moved for defendant indicated but two hypothetical facts to be considered by the jury in determining the question of contributory negligence; while that given by the court submitted the question to them upon all of the facts and circumstances in proof, which was proper.

IV. The fourth ground of the motion for a new trial was

that the court erred in giving instructions of its own against the objection of the defendant, instead of instructions four and seven asked for by defendant.

We have above considered the instructions given by the court instead or in modification of four and seven, asked for defendant.

(8.) Instruction numbered eight, which was given by the court of its own motion, and which was not objected to by defendant, was:

"If the jury find the defendant guilty of negligence, they will find for the plaintiff the value, on the ground at the time, of such part only of the spokes as were burnt and destroyed by the negligence of the defendant, and which the plaintiff could not have saved by the exercise of ordinary care."

Upon the whole, looking at all of the instructions, as given by the court, the questions of negligence, contributory negligence, and damages were fairly submitted to the jury without error prejudicial to defendant below, and appellant here.

V. The fifth ground of the motion for a new trial was that the verdict was contrary to law, and not supported by the evidence.

As above indicated, there was evidence conducing to prove that the employees of appellant might, by ordinary care, and the use of usual means, have switched the burning cars on to the spur and stopped them, after they had cleared the main track, far enough from the pile of spokes to save them from the fire, as well as the main track. Instead of doing this, it is probable that they were forced back, by the engine moving the train, to and over the end of the spur and left alongside of the upper end of the line of the pile of spokes, which caught fire from them.

The spokes, recently sawed at the factory, had been piled there for the convenience of loading, as was usual, to be sent

to market on appellant's cars. The pile, in four contiguous lots, commenced below the end of the spur and extended up along it about twenty-five feet, and about six feet from it. The middle of the pile was about the end of the spur, and the spokes caught fire there.

We cannot say that there was not evidence to warrant the verdict.

VI. The sixth and last ground of the motion for a new trial, that the verdict was excessive, has not been noticed in the brief of appellant's counsel.

Looking at the evidence as to the number of spokes in the pile, the value of them on the ground at the time, the probable number burned, and the amount of damages assessed, the jury, perhaps, made some abatement for the value of such spokes as Morris Hecht might have thrown from the burning pile, had he engaged in that work.

Interest to be added as damages.

We find in the evidence no clear ground on which we could award a new trial for excess in the verdict. In estimating damages the jury might have allowed interest on the value of the spokes from the time they were burned to the date of the verdict, which does not appear to have been done.

Affirmed.

MEYER v. GOSSETT.

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1. DOWER: *How relinquished by wife.*

Where a husband's deed of conveyance is followed by a paragraph relinquishing dower on the part of the wife, and then follow the signatures of both husband and wife, this is such a joining with the husband in the deed as is required by the Statute for the relinquishment of dower in his real estate.

2. ACKNOWLEDGMENT OF DEED: *False certificate of; Burden of proof.*

The burden of proof that a certificate of acknowledgment of a deed is false, and that no acknowledgment was, in fact, made, is upon the party alleging it.

3. SAME: *Certificate of; When and of what evidence.*

When there is no appearance before an officer to acknowledge the execution of a deed, and no acknowledgment of it, in fact, his false certificate of acknowledgment is void *in toto;* but where there is an appearance and acknowledgment of it in some manner, then the official certificate of the acknowledgment is conclusive of every fact appearing on its face; and evidence of what passed at the time of the acknowledgment is inadmissible to impeach the certificate, except in case of fraud or imposition in obtaining the acknowledgment, and where knowledge or notice of the fraud or imposition is brought home to the grantee.

APPEAL from *Ouachita* Circuit Court in Chancery.
Hon. J. K. YOUNG, Circuit Judge.

STATEMENT.

Mrs. Gossett and her minor children, the heirs of John Gossett, deceased, filed in the Ouachita Circuit Court their complaint in equity against Meyer, alleging in substance, that in 1875, her husband, the said John Gossett, to secure a debt he owed to Meyer, had executed to him a deed upon certain stock and a tract of land in Nevada county, called the Beard place. That afterwards Meyer agreed to release said

stock, and reconvey said land to said Gossett, in consideration that he would secure said debt and other indebtedness on their homestead tract in Ouachita county; and on the first of May, 1876, Gossett executed a deed of trust to one R. B. Tunstall, on said homestead tract, with power to sell and pay the debt, if not paid by the first of the following January. To this deed there was added a relinquishment of dower, and she and her husband signed it at their home, and then went together to a justice of the peace in the neighborhood, and her husband handed it to the justice, at his yard gate, telling him "there was that deed;" and the justice took it into his house, and soon returned with his certificate of their acknowledgment of its execution attached to it, and delivered it to her husband; but that in fact she did not acknowledge it, nor did the justice examine her separate from her husband, or say anything to her about her execution of it. That since then said Meyer has had the lands sold under said deed, and purchased them. Her husband is now dead, and she is entitled to and prays for dower in the lands.

A further statement of the pleadings and proceedings in the Circuit Court is unnecessary. The opinion sufficiently states them.

Compton, Battle & Compton, for appellant.

1. To impeach and set aside the deed of a married woman, regular on its face, the rule is that the proof of fraud in its procurement, or of the falsity of the certificate of the acknowldgment, should be *clear and satisfactory*. *Montgomery* v. *Hobson*, *Meigs*, (*Tenn.*), 437; *Williams* v. *Robinson*, 6 *Ohio St.*, 510–515; *Holt* v. *Moore*, 37 *Ark.*, 148.

2. Appellant was a purchaser in good faith, and for a

valuable consideration without notice, and *even if fraud and coercion were found, and the certificate shown to be false,* appellee cannot avoid the deed as to him. *Holt* v. *Moore, Sup., Schrader* v. *Decker,* 9 *Bar.,* (*Penn.*) 14; *Singer Mf'g Co.* v. *Rook,* 84 *Penn.,* 442; *Louden* v. *Blythe,* 4 *Harris,* (*Penn.*) 532; *Baldwin* v. *Snowden,* 11 *Ohio St.,* 203; *Harkins* v. *Forsyth,* 11 *Leigh,* 249; *Stone* v. *Montgomery,* 35 *Miss.,* 83; *Lowden* v. *Blythe,* 3 *Casey, Penn.,* 22; *Hartley* v. *Frost,* 6 *Tex.,* 208; *Kerr* v. *Russell,* 69 *Ill.,* 666; *White* v. *Graves,* 107 *Mass.,* 325; *Johnson* v. *Wallace,* 53 *Miss.,* 331.

3. No fraud or coercion being proved, the certificate of acknowledgment is conclusive, and parol evidence not admissible to show that it is false. 3 *Casey,* 22; 11 *Ohio St.,* 203; 6 *Tex.,* 208; 11 *Leigh,* 294; 35 *Miss.,* 83, *cited supra.*

G. M. Barker, for appellees:

Wife can only relinquish dower by joining in the conveyance with her husband, and acknowleding same in the mode prescribed by law. *Gantt's Dig., secs.* 839, 2225, 2238; 31 *Ark.,* 576, *etc.* The name of Mrs. Gossett nowhere appears in the body of the mortgage as a party; this is not such a joining as is contemplated by the Statute. *Gantt's Dig., sec.* 839; *Stidham* v. *Matthews,* 29 *Ark.,* 659. An acknowledgment taken, as the proof shows this to have been, though good in form, does not bar her right of dower. 27 *Ark.,* 339; 29 *Ib.,* 650.

Appellee was entitled to the mansion and farm attached until dower assigned. *Gantt's Dig., sec.* 2227; *Russell* v. *Umphlet,* 27 *Ark.,* 339, 342, and to rents.

OPINION.

English, C. J. The court below decreed Mrs. Gossett

dower in the land embraced in the deed of trust of first of May, 1876, executed by her deceased husband, sold by the trustee, and purchased by appellant, Henry W. Meyer, on the ground that though she signed the deed she did not acknowedge it in the manner prescribed by the Statute. It is submitted here for her, that she did not join her husband in the deed, and therefore her relinquishment of dower, if properly acknowledged, was invalid, and the decree, on that ground right.

1. DOWER: How relinquished

I. To make a valid relinquishment of dower, by the wife, in the real estate of the husband, she must join him in the deed of conveyance, and acknowledge it in the manner prescribed by the Statute. *Gantt's Dig.*, *sec.* 839.

If she does not join him in the deed the acknowledgment is of no validity. Nor if she join him in the deed, is there a valid relinquishment of dower without a proper acknowledgment of its execution by her. Both are requisite to complete the conveyance on her part. *Stidham and wife* v. *Matthews*, 29 *Ark.*, 659; *Witter* v. *Biscoe et al*, 13 *Ib.*, 423; *McDaniel* v. *Grace*, 15 *Ib.*, 465.

Form of deed.

The name of Mrs. Gossett is not mentioned in the commencement of the deed as one of the parties to it, but the deed closes with the following paragraph: "And I, Elizabeth F. Gossett, wife of said John Gossett, for the consideration aforesaid, do hereby release and relinquish unto said Robert B. Tunstall, trustee, all my right or claim to dower in and to said lands." Then follow the signatures and seals of John Gossett and Elizabeth F. Gossett. It is true that the signature of the husband appears above the closing paragraph of the deed, as well as below it, but it is probable that he signed above by inadvertence, and again subscribed his name at the conclusion of the deed. In the bill and in her deposition, Mrs. Gossett admits that she and her husband signed the deed on the day it bears date; and it was

not delivered to Meyer, the beneficiary, until after the certificate of acknowledgment was appended to it by the magistrate, which bears date tenth of May, 1876, and on the next day it was filed in the recorder's office for registration. On the face of the deed, therefore, it sufficiently appears that she joined with her husband in its execution, and there is nothing substantial in the objection submitted as above.

2. ACKNOWLEDGMENT OF DEED: False certificate of:

II. The deed of trust appears by the magistrate's certificate to have been acknowledged by both husband and wife in the manner prescribed by the Statute. When delivered by the husband to Meyer, the beneficiary, for a valuable consideration, it appears to have been signed and properly acknowledged by husband and wife, and it was shown in evidence that neither Meyer nor the trustee named in it, was present when it was subscribed or when it was acknowledged.

In *Holt* v. *Moore*, 37 *Ark.*, 148, JUSTICE EAKIN said: "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 a valuable consideration, who was himself ignorant of the falsity of the facts and had no participation 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, 1 *Bish. on Married Women, sec.* 591.)"

Burden of proof.

In the bill, Mrs. Gosett alleges, in effect, that she did not acknowledge the deed. This was denied on information and belief in the answer of Meyer, who, it appears, accepted the deed on faith of the magistrate's certificate. The deed, appearing by the certificate appended to it to have been

properly acknowledged, had been registered, and if it was permissible to show that the certificate of acknowledgment was false, a mere fabrication of the officer, and that no acknowledgment was in fact, made by the complainant, the *onus probandi* was upon her. *Watson* v. *Billings*, *ante*. 278.

3. Certificate of acknowledgment: when and of what evidence.

Mrs. Gossett admits in her deposition that she and her husband signed the deed at home, and that she afterwards went with him to the house of James B. Gunter, the justice of the peace, who made the certificate of acknowledgment, for the purpose of acknowledging the deed, but states that he asked her no questions; that he did not examine her apart from her husband; that she did not acknowledge the deed, and that his certificate was false. She admits that neither Meyer nor the trustee was present when the deed was signed, or at the house of the justice when the certificate was made, and that she had no communication with them. There is no evidence that either of them had any knowledge, at the time the deed was accepted, that there was any fault in its acknowledgment on the part of Mrs. Gossett.

Gunter, the justice, deposed, in substance, that Gossett and wife came to his house, each riding a separate horse, on the day his certificate bears date, and stopped at the gate in front, and he went out to them. Gossett handed him the deed, saying it was ready for acknowledgment, and acknowledged that he had signed it for the consideration and purpose therein mentioned. Then Gossett rode away and left Mrs. Gossett at the gate, and he took her acknowledgment, and she acknowledged that she had signed the deed for the consideration and purposes therein set forth; and he then went into his house and made the certificate appended to the deed.

Harrington, another witness, deposed that he saw Gossett and wife at the gate, on their horses, six or eight feet apart, that Gunter came out to where they were, remained

about a minute, returned to the house leaving Gossett and wife at the gate, remained in the house about ten minutes, then returned to the gate where Gossett and wife were, and they rode off. He was not near enough to hear what was said, nor did he see any papers pass between them.

The Chancellor did not find, upon all the evidence, that Mrs. Gossett did not acknowledge the deed at all, that the certificate of the justice was entirely false, a mere fabrication, but found as recited in the decree, that her acknowledgment was taken by the justice without making the privy examination in the absence of her husband, as required by law.

It was held in *Johnson* v. *Wallace*, 53 *Miss.*, 331, that where the wife never appeared before an officer to acknowledge the deed, but he falsely certified that she did, his act is wholly without authority of law, and void *in toto*. All must be subject to the risk of an occasional forgery by officers authorized to take acknowledgments. But a deed having been signed by husband and wife, and she having appeared before an officer competent to take her acknowledgment, and having acknowledged in some manner, and he having certified on the deed that she had acknowledged on a private examination separate and apart from her husband, and that she had executed the deed freely and voluntarily, without any fear, threats, or compulsion on the part of her husband, the truth of the certificate as to its statements cannot be questioned as against a *bona fide* purchaser.

That case is similar to this, and the decision is in harmony with the rule as announced in *Holt* v. *Moore*, *sup.*

The rule seems to be very well settled that the official certificate of acknowledgment is conclusive of every fact appearing on the face of the certificate, and that evidence of what passed at the time of the acknowledgment is not admissible to impeach the certificate, except in cases of

fraud or imposition in obtaining the acknowledgment, and where knowledge of it, or of some circumstance sufficient to put him on enquiry, is brought home to the grantee.

III. The heirs at law of John Gossett, deceased, minors, joined their mother in the bill, but no notice of them was taken in the decree, nothing decreed to them, and they did not appeal.

After Meyer had purchased the lands embraced in the deed of trust of first of May, 1876, at a sale made by the trustee, he contracted to re-sell and convey to John Gossett, on terms and conditions specified, in the written contract, but Gossett died before any payment was made. What right his heirs may have to pay for the lands under that contract, and to have the rents appropriated in payment of the purchase money, and what right they may have to redeem the lands in Nevada, known as the Beard place, mentioned in the bill, are not questions presented on this appeal.

The court below erred in decreeing to Mrs. Gossett dower in the lands embraced in the deed of trust of May 1st, 1876, and in the rents thereof, on the ground that she had not relinquished her dower right therein, and the decree must be reversed and the bill dismissed here, without prejudice to the heirs at law of John Gossett.

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LANE ET AL V. HALLUM ET AL.

1. LIEN: *Attorney's, for his fee.*

By Statute an attorney has a lien upon and interest in the judgment recovered by him for his client in a court of record; and if the judgment be for the recovery of property, the lien amounts to an interest to the extent of it, in the property recovered, and may be enforced in a court of equity.

2. SUBROGATION: *Purchaser of encumbered property paying the encumbrance.*

Where a judgment creditor purchases, under his judgment, the land of his judgment debtor, on which there is a subsisting attorney's lien against the debtor for services in recovering the land for him, and such purchaser afterwards pays off the lien, or the land is sold to satisfy it, he is entitled to be subrogated to the rights of the attorneys to an execution on their personal judgment rendered against the debtor for their fee.

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

STATEMENT.

In February, 1879, Hallum & England, partners in the practice of law, filed in the Lonoke Circuit Court their complaint in equity against Lane, alleging that as practising attorneys of said court, they had, at the employment of Lane, instituted and prosecuted a suit in equity for him in said court, against one Everett, for the recovery of a certain tract of land in said county, (which they described) and for rents; and that they were successful—had recovered the land and rents, and were reasonably entitled to a fee of one hundred and forty dollars for their services, for which sum they claimed a lien against the land, and had filed their claim of

lien in court as required by law; and they prayed that the land be sold to pay it.

Silas B. Fields, showing an interest in the land, was allowed to be made a defendant, and answered, alleging in substance, that since the recovery of the land for Lane he had purchased the land under a judgment and execution, recovered by him against Lane; had purchased through the plaintiff, Hallum, as his agent, and under the representation from plaintiffs before then that their lien was only $80; and that plaintiffs had frequently, since then, represented to him that their lien was $80, and he asked that not more than $80, if anything, be allowed. He exhibited several letters written by plaintiffs to him since his purchase, in which they claimed a fee and lien of $80. He also filed with his answer a demurrer to the complaint.

Lane made no defense.

The cause was heard upon the complaint, answer, demurrer, and an agreed statement of facts. This statement showed that Fields purchased the land at the amount of his judgment against Lane; that the statement in the letters to Fields, that the amount of the lien was $80, was an honest mistake of the plaintiff, Hallum, which was subsequently corrected, and that the clerk in recording the lien upon the margin of the record had made it $100 instead of $140.

The court found that the plaintiffs were entitled to a fee of $100 for their services, and rendered a personal judgment against Lane for that amount, and decreed it a lien upon the land, and ordered that the land be sold to satisfy it if it was not paid in sixty days. Fields appealed.

Blackwood & Williams, for appellant:

1. A lien is neither a *jus in re*, nor a *jus in rem*, *proper-*

ty nor *debt*, but a right to have satisfaction out of property. *Roberts et al* v. *Jacks*, 31 *Ark.*, 601.

There was no contract for a certain fee, no liquidated amount agreed on, and the mere filing of a lien in the clerk's office did not liquidate the amount. To so hold would allow one party to be a judge in his own cause. Appellees do not show that they have exhausted their remedy *at law*. *Bish. Eq.*, *sec.* 37; *Story Eq.*, *sec.* 33, and authorities cited in Cummins and Garland's brief in *Hanger* v. *Fowler*, 20 *Ark.*, 668. This question was raised in the court below by Field's demurrer. *Sexton* v. *Pike*, 13 *Ark.*, 193.

2. No solicitor's lien attaches in Chancery proceedings. *Hanger* v. *Fowler*, *supra.*, *Smalley* v. *Clark*, 22 *Vermont*, 598.

3. Appellees were attorneys for Field, and induced him to buy the land, and are estopped from setting up greater claim than $80. *Bish. Eq.*, *sec.* 282, *et seq*; 1 *Green Ev.*, *secs.* 22, 27.

HARRISON, J. By an express provision of the Statute an attorney has a lien upon and an interest in a judgment which he may have recovered in a court of record for his client, and which lien, when the judgment is for the recovery of real or personal property, amounts to an interest to the extent of it in the property so recovered. *Gantt's Dig.*, *secs.* 3622, 3624.

The right of the appellees to resort to a court of equity to enforce their lien was, we think, unquestionable. *Gist* v. *Hanley*, 33 *Ark.*, 233.

There was no evidence that when Field purchased the land at the sale, under his execution, through the appellee, Hallum, as his agent, he had then been told by the appellees that their lien was for only $80, as averred in his answer, or

that he was in any way deceived or mistaken as to the amount of it. Nor does it appear that their statements afterwards to him concerning it, in anywise so influenced his action in the matter as to estop them from claiming any more than that amount.

The finding of the court as to the amount due the appellees was warranted by the agreed statement of facts or evidence in the case.

If Lane should fail to pay the plaintiffs the sum found by the decree to be due, and Field should pay the same, or the land be sold under the decree, he would, as a matter of course be entitled to be subrogated to their right, and to an execution upon the decree against Lane.

The decree is affirmed.

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GRIDER, AD., v. APPERSON & CO.

1. APPEAL FROM PROBATE TO CIRCUIT COURT: *Affidavit for: Statement of transcript.*

The statement in an appeal transcript from the probate o the Circuit Court, that an affidavit for the appeal, as required by law, was filed, will not be countervailed by the fact that such affidavit was not filed with the other papers in the case in the Circuit Court. If the statement be false the record should be corrected in the probate court, and then carried to the Circuit Court by *certiorari.*

2. PRACTICE: *Notice served on Sunday.*

The objection that notice of the proceedings was served on Sunday must be made before answer or the hearing of the cause on its merits, or it will be considered as waived.

3. ADMINISTRATION: *Petition for sale of land in litigation, for payment of debts.*

The fact that creditors petitioning the probate court for the sale of a decedent's lands for payment of his debts to them, are themselves suing the estate for an undivided half of the lands, is no ground for the denial of their petition; but the court may, in its discretion, suspend the proceedings until the litigation about the title is ended.

4. APPEALS FROM PROBATE COURT: *Practice in Circuit Court.*

Upon appeal from the probate court the Circuit Court tries the case *de novo*, and makes such orders as the probate court should have made, and may order a sale of land to pay a decedent's debts where the Probate Court has improperly refused to do so.

5. ADMINISTRATION: *Probate sale of lands; Credit.*

The credit in probate sales of land for payment of debts is not limited to six months as in other judicial sales, but is left to the sound discretion of the court.

APPEAL from *Crittenden* Circuit Court.

J. N. CYPERT, Judge, in exchange with L. L. MACK, Circuit Judge.

STATEMENT.

On the eighth day of February, 1880, Apperson & Co., having a probated claim of about eight thousand dollars ($8000) against the estate of Isaac W. Burgett, in Crittenden county, caused notice to be served on Grider, the administrator of the estate, to file with the clerk of the probate court, within twenty days, an application to the ensuing term of the court for the sale of the deceased's land for the payment of his debts, or upon his failure to do so they would, as creditors, file the application themselves. Grider failed to file the petition within the time, and thereupon Apperson & Co. gave notice of their intended application, and themselves petitioned at the following April term of the court, stating the above facts in the petition and showing, the unpaid debts of the estate, and that the personal assets were exhausted, and particularly describing the lands sought to be sold, and praying that the administrator be required to sell Burgett's interest in them.

Grider, the administrator, answered, objecting: 1st, that the notice was served on him on Sunday. 2nd, that there

was then pending in the Federal Court, at Little Rock, a suit involving the title to half of the lands sought to be sold, and a sale of them pending that suit would result in their sacrifice; and 3rd, that there were suits pending in said court against said estate for large sums, which if successful, would be entitled to a *pro rata* distribution in the estate.

Upon the pleadings and evidence the court refused the petition and the petitioners appealed to the Circuit Court. In the Circuit Court the administrator moved to dismiss the appeal because no affidavit for appeal was filed, and the appeal was illegal and irregular. The motion was overruled and upon hearing of the cause *de novo*, on the pleadings and evidence, the Circuit Court ordered the administrator to sell the lands for payment of the debts, on a credit of six, twelve and eighteen months, and to report his proceedings to the next term of the probate court after such sale. The administrator appealed.

Green & Adams, for appellants:

1. No affidavit for appeal was filed. *Acts* 1874–5, *p.* 268–9; 4 *Ark.*, 444; 7 *Ib.*, 232, 386; 25 *Ib.*, 275; 31 *Ib.*, 236, 489.

2. The Circuit Court had no authority to fix a day certain, with amount due, but should have certified the order to probate court. *Art.* 7, *sec.* 34, *Const.* 1874; 29 *Ark.*, 500; 35 *Ib.*, 515; 34 *Ib.*, 128; 10 *Ib.*, 541; 22 *Ib.*, 584.

3. The sale should have been on a credit of not *less than three*, nor more than six months. *Acts Ad. Sess.*, *sec.* 6, *page* 101; *Gantt's Dig.*, *sec.* 4708; 27 *Ark.*, 292; 31 *Ib.*, 299.

4. No appeal lies from the order of the probate court refusing a sale of real estate of a deceased person in favor of a creditor. See *Act Feb'y*, 15, 1877; *sec.* 3, *p.* 5 *and* 6,

which provides that *if the facts will warrant* the probate court may order, etc. It is the sole and exclusive judge of such facts, and of their sufficiency.

5. The court erred in decreeing sale of the *whole* of the lands, and in decreeing that Millin's claim be paid out of the proceeds. The court trespassed upon the jurisdiction of the probate court. See *Sheegog* v. *Perkins*, 34 *Ark.*, 128.

6. The judgment of the probate court was "warranted by the facts," and it is error to sacrifice $35,000 worth of property, renting for $2,500 a year, to pay debts of *less than one-third* of its value.

B. C. Brown, for appellees:

HARRISON, J. The motion to dismiss the appeal was properly overruled.

1. APPEAL FROM PROBATE TO CIRCUIT COURT: Affidavit for: Statement of transcript.

The record of the probate court states that an affidavit for the appeal, as required by law, was filed; which statement is not countervailed by the fact that such an affidavit was not filed with the other papers in the case in the Circuit Court, and must be taken as true. If such an affidavit had not been filed the record should have been amended, and the transcript in the Circuit Court corrected by *certiorari*.

2. PRACTICE: Notice served on Sunday.

The objection to the notice to Grider, because the same was served upon him on Sunday, if valid, as to which we express no opinion, should have been made before the hearing of the petition, and was waived by the failure to do so, and the answer to the merits. *Newman Plead. and Prac.*, 493.

That the personal estate of the intestate was not sufficient for the payment of his debts, and that the appellees were

creditors and entitled to proceed under the act of February, 15th, 1877, for a sale of the land clearly appears.

3. ADMINISTRATION Application to sell land in litigation, for payment of debts.

They could not, because they claimed and had a suit pending for an undivided half of the land, be denied the remedy or the means provided by the Statute for obtaining payment of their claim probated against the estate. Their rights in that regard were the same as those of any other creditor. The court might, no doubt, in its discretion have suspended the proceeding until the litigation about the title was ended, but it did not do so, and we cannot, from the evidence, conclude that its discretion was not rightly exercised.

4. APPEALS: Practice in Probate Court.

The Circuit Court, upon an appeal from the probate court, tries the cause *de novo*, and renders such judgment or makes such order as the probate court should have rendered or made. *Act of March 24th*, 1875, *sec.* 4. It was not error therefore for the Circuit Court to make the order for the sale.

5. Credit in probate sales of lands.

The credit to be given upon a sale of real estate by an executor or administrator, for the payment of debts, is not limited by law to six months as in other judicial sales, but is left to the sound discretion of the court. *Sec.* 172, *Gantt's Digest.*

Affirmed.

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McCreary v. Taylor.

1. Appeal: *From final judgment in principal branch of case.*

An appeal will lie from a final judgment on the merits in the main branch of a cause, though there is no final action in the attachment proceedings, which are ancillary to it; but upon such appeal errors in the attachment branch of the case which is unfinished will not be considered.

2. Administratrix: *Removal from the State.*

The removal of an administratrix from the State does not *eo instanti* vacate her letters. This requires the action of the court, on motion.

3. Pleading: *Form of complaint; Indebtitatus assumpsit*

The old form of *Indebtitatus Assumpsit* is a sufficient statement under the Code, except when the action is in the nature of the old *quantum meruit* or *quantum valebat;* and even in the excepted cases a more definite statement can be obtained only by motion, and not by demurrer.

APPEAL from *Sebastian* Circuit Court.
Hon. J. H. Rogers, Circuit Judge.

William Walker, for appellant:

1. The order reinstating the lost writ of summons was irregular, unwarranted, and unsupported by sufficient proof.

2. The demurrer reached back to the complaint, and should have been sustained. The statement of the cause of action for rent is not an issuable fact—a mere conclusion of law. It was necessary to allege an express agreement for sufficient consideration, or that defendant occupied or received the rents and profits. *Green's Plead. and Prac.*, *sec.* 352, and cases cited. Plaintiff was bound to set out the agreement.

No demand was alleged. *Ib.*, *sec.* 616.

Duval & Cravens and U. M. Rose, for appellee:

The objection that there was no service on the original defendant, cannot be considered, as the lost summons has been restored.

EAKIN, J. This case comes up on the appeal granted in obedience of a *mandamus* from this court. See case of *McCreary, adm'x, etc.* v. *Rogers, Judge*, 35 *Ark.*, 298. The questions now presented are those of error in the proceedings of the court up to the time of and including the judgment against appellant, who was defendant in the action.

1. Appeal from final judgment in principal branch of case.

It appears that on the first day of December, 1879, the jury, upon trial, found for the plaintiff in the sum of two hundred and eighty-nine dollars and seven cents, for which sum, with costs, a judgment was rendered against the defendant as administratrix. No disposition was made of the attachment, nor was there any order then made as to the garnishees, or the fund in their hands. Afterwards, upon the filing of the answers of the garnishees, in obedience of a rule for the purpose, the defendant prayed an appeal from the judgment, and insisted upon the right to prosecute it, suspending, meanwhile, all further proceedings under the attachment. This court, being unwilling to interfere with the course of practice which she was advised to pursue, recognized that right and enforced it by mandamus. No proceedings, save those of a *nunc pro tunc* character, had after the application for an appeal, can be now noticed. There has been no final adjudication with regard to the attachment branch of the action, and any appeal to correct errors in that branch would be premature. The judgment upon the merits, between the original parties, stands upon its

own grounds, and is not affected by errors in the prosecution of the attachment proceeding, which is only ancillary. The judgment is final to fix and define the liability of the estate, and, therefore, the subject of immediate appeal. If there be no error in the proceedings affecting the merits, it must stand as *res judicata* between the original parties for the future. If, at the same time, there have been errors in the proceedings under the attachment, they cannot vitiate the judgment upon the merits. They affect the means of satisfaction, and, perhaps, the rights of garnishees, and may, also, be corrected on appeal; but with regard to them, as with regard to all other judicial controversies, where this court has no original jurisdiction, there must first be some final action by the court below. Where errors in both branches are complained of, and it be desirable to have all considered on one appeal, it may be done by awaiting the final action of the court in both, reserving all proper exceptions. Or, as in this case, either party may appeal from the judgment upon the merits in what we may call the main branch of the case. But this precludes all enquiry by this court as to errors in the other branch which remains suspended.

2. ADMINISTRATRIX Removal from the State.

Hence we cannot enquire whether or not the court erred in refusing the discharge to the garnishees, or to permit the grounds of attachment to be put in issue; or in any other matter not connected with and leading to the judgment on the merits. The defendant refused, through her counsel, to await the final action of the court regarding the attachment and garnishments, and to renew her appeal afterwards even with the assurance of the judge that the fund would be protected. We cannot question the right nor criticise the policy of the course pursued, but the defendant must stand upon the ground she had been advised to take. There

is no bill of exceptions and we must look for errors alone to matters which are, and rightfully should be of record.

The papers originally filed and those substituted for what had been lost show personal service upon the intestate before his death. It was revived against defendant as his administratrix, who appeared and answered, setting up nine grounds of defence. To four of these the plaintiff demurred. Overruling the demurrer as to three of them, the court sustained it as to the other. This set up her non-residence at the time of the publication of the warning order against her, and since, alleging that she had removed to California before that time, and that her powers and authority as administratrix had thereby ceased.

There was no error in sustaining this demurrer, and it seems to be so conceded in the briefs. The administratrix was a resident when appointed. Her removal from the State did not *eo instanti* vacate her letters. It required the action of the court for that purpose, on motion. (*Gantt's Digest, sec.* 17.)

3. PLEADING: Form of complaint *Indebitatus Assumpsit.*

It is contended, however, that the demurrer reached back to the complaint, and that it should have been noticed by the court as insufficient. It is in effect the old form of *indebitatus assumpsit* "for the rent for the years 1874 and 1875, of certain real estate, with the improvements thereon, of the said plaintiff by the said defendant, under a parol agreement and contract to pay the plaintiff at the rate of five dollars per acre for the same, and also in the sum of ten dollars for money paid out, by the plaintiff, for the use of the defendant at his special instance and request." A bill of particulars is stated to be thereunto annexed, which afterwards by leave of court was filed. There was an allegation of non-payment, and that the debt was still due. There was no demurrer to the complaint, nor motion to make it more definite and certain.

The old form of statement of the cause of action in *indebitatus assumpsit* is sufficient under the code, except where the action is in the nature of the old *quantum meruit* or *quantum valebat*, and even in the excepted cases, a more definite statement can only be obtained by motion. *Ball et al* v. *Fulton Co.*, 31 *Ark.*, 379. The want of it is not ground of demurrer. The same ruling has been made in most of the States which have adopted the new system of proceedure, as may be seen by reference to any of the recent text books on Code pleading. This is especially the case where the Code requires a bill of particulars to be filed. The object of such a provision being, obviously, to supply any want of certainty in the general terms of the complaint. With such aid the defendant may, generally, be considered sufficiently advised of *the facts* which are relied upon to charge him with liability, and which he is required to answer. Exceptional cases, of course, require more definite statements.

We find no error in the record with regard to any matter which may be considered on this appeal.

Affirm the judgment, and let the cause be remanded for further proceedings in accordance with law.

BONNER v. LITTLE ET AL.

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1. CHANCERY PRACTICE: *Non-resident defendants.*

It is the duty of the court without any demurrer, to see that a complaint against a non-resident who is represented only by a guardian *ad litem*, appointed by the court, states a cause of action within its jurisdiction, before rendering a decree against him.

2. SAME: *Non-resident infants must defend by guardian.*

It is not correct practice to appoint an attorney *ad litem* for non-resident infants; they must defend by guardian.

3. SAME: *Specific performance for part, and compensation for residue.*

Where a vendor cannot convey all the lands he has contracted to, the vendee may have specific performance for the part he can convey, and as an incident to the suit, compensation for the residue; but courts of equity will not assume jurisdiction for the sole purpose of awarding damages for a breach of contract to convey, where the vendee knows at the institution of the suit that the vendor cannot convey.

4. SAME: *Specific performance; compensation.*

The plaintiffs filed their complaint in equity against Oliver Bonner and his minor son, James, alleging that Oliver had sold them several tracts of land and executed to them his bond to convey upon payment of the purchase price; that they had paid, but said vendor could convey only a part of the lands, having no title to the residue; that both defendants were non-residents; that the vendor owned another tract of land in the county, and to escape liability on his title-bond, and defeat plaintiffs' recovery of compensation, had fraudulently conveyed it to said minor son. Prayer for specific performance as to the tracts he had title to, and compensation as to the residue, and that the tract conveyed to the minor son be sold to pay it. The defendants were notified by warning order: A demurrer to the complaint filed by an attorney *ad litem* appointed by the court was overruled, and a guardian *ad litem* for the infant defendant filed a formal answer to the complaint.

Held: That the answer was no waiver of the demurrer; that the complaint was sufficient as against the vendor, but not as against the defendant, James; the plaintiffs having no judgment against the vendor, and no attachment upon the land conveyed to the son.

5. ATTACHMENT: *In Equity*

An attachment against a non-resident lies in equity as well as at law.

6. SPECIFIC PERFORMANCE: *Compensation for deficiencies; how measured.*

Where a vendee of land by title-bond elects to take under the contract the part which the vendor can convey, and compensation for the residue, the price should be abated in the same *proportion* to the whole amount as the value of the *whole tract* is diminished by the deficiency.

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

J. T. Harrison, for appellant:

The claim of appellee, was unliquidated, not ascertained by judicial proceedings, not even a debt by contract, merely a claim for supposed fraud. A judgment for damages is a *personal judgment;* so is a decree for title. *Monroe & Harlan's Ky. Dig., vol.* 1, *sec.* 18, *p.* 569; *sec.* 179, *p.* 581. No personal judgment could be rendered against O. H. Bonner without service, and no decree for damages can operate as a demand against the land of appellant, where the tract of land had nothing to do with original contract. See 31 *Ark.*, 235.

To set aside the sale to James Bonner, there must be clear proof of fraud. *Secs.* 41–2–4–5–6–7, *Rose Digest, title* FRAUD; *Ib., title,* FRAUDULENT CONVEYANCES, *secs.* 1, 8, 9, *p.* 369; *secs.* 17, 18, 19, 20, 29, 35, 39. The burden was on plaintiffs. *Ib., sec.* 38, *p.* 775; *Gantt's Dig.*, 4578.

There was no sufficient failure of title; 19 *Ark.*, 102; and if there was, the failure can only be the average price per acre. 21 *Am. Rep.*, 317, 320; see also, *M. & H. Ky. Dig., secs.* 41, 48, *title,* EQUITY.

Appellant is damaged for every dollar of the judgment, if his land is to be seized, and it was error to measure the damages at one-half the gross purchase money. The true rule was the *average price per acre. Hill* v. *Hamel*, 19 *Ark.*

The parties were improperly joined, and the rule that equity having got hold of a case for one purpose, can adjudicate all matters between the parties, does not apply. A court cannot first make parties defendants, whether proper parties or not, and then having got them, proceed to settle controversies that would otherwise have to be settled at law. An action to recover land, and damages for a breach of contract, cannot be joined. See *Notes to sec.* 111, *Ky. Code, Myers' Ed., p.* 308–9–10–11–12 *and* 13.

Duval & Cravens, for appellees:

The general rule that a creditor at large, before he obtains judgment, is not entitled to proceed to set aside fraudulent conveyances, does not apply where the debtor resides out of the jurisdiction of the court, so that judgment cannot be obtained against him. *Drake on Attachment, sec.* 225; *Scott* v. *McMillen*, 1 *Littell, Ky.*, 302; *Williams* v. *Ewing*, 31 *Ark.*, 229; *Henry* v. *Blackburn*, 32 *Ark.*, 445; *Gantt's Dig.*, *secs.* 4530, 4725–6.

The measure of damages is the actual value of that part to which the title fails. *Sedgwick Meas. Dam.*, *p.* 182; 4 *Kent.*, *p.* 564–5; *marg.*, 477–8.

Bonner cannot contradict the terms of his bond by parol evidence. *Webb* v. *Rice*, 6 *Hill* (*N. Y.*), 219; *Stevens* v. *Cooper*, 1 *John. Ch.*, 425.

A vendee is bound to know what land is contained in the description in the contract, and fraud may be predicated upon representations that the description covers land not actually included therein. *Wiswell* v. *Hill*, 3 *Paige*, 31.

EAKIN, J. This is a bill by purchasers, under a title bond, against the vendor, who had no title to a part of the lands sold. It has three objects: First, to compel specific performance as to the part which the vendor can convey; second, to obtain compensation for the deficiency; and third, to subject to the payment of that compensation a separate and distinct tract of land of the defendant lying in the county, which was not in any manner the subject of the contract, but is all the property he has in the State. To sustain the last branch of the full relief, it is alleged that the vendor has become a non-resident of the State, and that since the sale to complainants of the first tract, he

has, to elude his liability on his title bond, and to defeat complainants of their compensation, made a fraudulent conveyance of the second tract, without consideration, to his son, who, also, is a non-resident and a minor. The money upon the purchase has been almost all paid by complainants, leaving a small balance. There was constructive service upon both father and son. The former never appeared; the latter defended by guardian *ad litem*. Relief upon all points was granted as prayed. Title was decreed in the purchasers of so much as the vendor had the right to convey; the compensation was fixed, and declared to be a lien on the second tract, which, after a day given for payment, was ordered to be sold, as in case of a foreclosure. The defendant, who is the son, appeals.

1. CHANCERY PRACTICE: Non-resident defendants.

Before the appointment of a *guardian ad litem*, for the minor, a demurrer to the complaint had been filed in his behalf, by attorney, who was, we may presume, the *attorney ad litem*, who had been appointed for the non-resident defendants. This was not the correct practice, as the Statute does not contemplate the appointment of an attorney *ad litem*, for minors, whether resident or not. They must defend by guardian. (*Williams et al* v. *Ewing and Fanning*, 31 *Ark.*, 229.) Still in analogy with the ruling in the case of *Henry* v. *Blackburn*, 32 *Ark.*, 445, the demurrer may be regarded as enough to have caused the court to question the sufficiency of the bill. As held, in that case, it is the duty or the court, even without any demurrer, before rendering a judgment or decree against an absent defendant, to see that there is a cause of action within its jurisdiction. The demurrer was overruled, and a guardian *ad litem*, subsequently appointed, put in the formal answer prescribed by the Code. This was no waiver of the demurrer, and our first enquiry must be as to whether the bill

2. INFANTS *must defend by guardian*

discloses upon its face any equities within the scope of the powers of the court to protect or enforce.

3. ——: Specific performance for part and compensation for residue.

The cause of action as against the vendor is one within the ordinary jurisdiction of a Court of Chancery. Where there is a sale of lands, and a contract to convey the legal title, which, as to part, is impossible, the vendee may, if there be nothing else in the case to defeat his equity, elect to have performance, so far as the vendor may be able, and may apply to a court of equity to compel it; and the court taking jurisdiction for this purpose, will retain the cause for the incidental purpose of awarding compensation for the deficiency. This is given, however, more for the purpose of adjusting the equities between the parties, with regard to the subject matter, already properly before the court, than as actual damages for non-performance. With regard to the latter they are more properly within the jurisdiction of courts of law, and courts of equity will not assume jurisdiction for the sole purpose of awarding damages for a breach of contract to convey, where it was known to the complainant, when the suit was brought, that a performance was impossible. (*Parsons on Contracts*, vol. 3, *p.* 401 *and notes*; *Willard's Equity*, *p.* 291; *Hatch* v. *Cobb*, 4 *John.*, *Ch. R.*, 559; *Kempshall* v. *Stone*, 5 *Ib.*, 193; *Story Eq. Jurisprudence*, *sec.* 799.) This is not such a case. As to a large portion of the land the vendor could convey, and the complainants had the right to invoke the aid of the court to effect that by divesting the vendor of the legal title, and investing the purchaser with it. The vendor being out of the jurisdiction of the court could not be compelled, personally, to execute a conveyance. The jurisdiction to adjust the equities by abatement of the price, attached as an incident, although no personal judgment could be rendered against the non-resident for what may have been overpaid. The court might ascertain it, however, for the

purpose of enforcing it against such property as might be properly brought within its grasp. The bill was therefore good as against the vendor.

But at the time when the objection to the sufficiency of the complaint was interposed, by the attorney *ad litem*, it did not appear that there was any cause of action against the non-resident minor, James Bonner. He was a stranger to the contract, and the lands held by him were not at all affected by it. No lien had been fixed upon them in any manner either by judgment and levy, or otherwise. There was no original *nexus* between the two tracts arising from the contract, nor had any judicial proceedings been taken to draw his tract within the jurisdiction of the court. The mere facts of the non-residence of the principal defendant, his want of other property, and the fraudulent conveyance of the other tract to his son, did not of themselves create a lien. Something more was necessary to draw the last tract within the jurisdiction of the court for the purpose of driving away the cloud from the title, and subjecting it, to afford the means of compensation. There could, of course, be no personal judgment against the vendor and levy so as create a lien; but the Statutes regarding attachments fully supplement this deficiency in the remedy. The claim against the vendor is one arising upon contract, and an attachment against a non-resident lies in equity as well as at law.

5. Attachment in equity.

Before some such proceeding had been taken, the defendant, James Bonner, could not be called to answer as to his good faith in obtaining title; although if the property had been properly brought within the reach of the court, he might well, in the same suit, have been required to do so, so that complete justice might be done at once, by selling a good marketable title. The demurrer, so far as the bill affected James Bonner, should have been sustained, and no

further proceedings should have been taken to bind him until the land he claimed should be seized by attachment.

If the principle be admitted, that a bill like this, which is, in all that concerns James Bonner, a creditor's bill, can be maintained without any judgment to ascertain a debt, or proceedings to fix a lien, it will be far-reaching, and altogether too wide in its application. It will apply to all damages arising upon contract, as there is nothing peculiar in a contract to convey *some* land to make it affect *others*. It will utterly discard, with regard to non-residents, the well settled policy of Chancery Courts, under which they refuse to entertain creditors' bills until the debts have been ascertained at law, or the property brought within the grasp of the court. It seems that such confusion and want of harmony in the application of equitable rules would be an evil much to be deprecated.

So much of the decree against Oliver Bonner, the vendor, as vests the title in complainants to so much of the land as he could convey, is fully sustained by the evidence and pleadings, and may be affirmed.

So much of it as fixes the compensation for failure of title as to the lands north of the Petit Jean, so far as it can affect the interests of said Oliver alone, might, if the matters were well separable, be affirmed also, as he does not appeal. But they are not separable. This part of the decree cannot well affect Oliver, at all, as there can be no personal judgment or execution. It immediately affects James Bonner, or may do so if proceedings be taken to subject the lands held by him to its payment, and he is to be bound thereby. Whether the conveyance to him be held fraudulent or not, he may, at worst, pay the compensation, and hold the land. The amount of it he has the right to contest, if the lien be fixed upon his property, and he

should have day in court for the purpose, after he is properly brought in.

As the cause must be remanded, we deem it well to declare the principles upon which the amount of compensation is to be determimed. As above stated, it is not given strictly as damages, but rather as an adjustment of equities arising out of the particular transaction, and the measure is not in every case the same. It might not be fair to measure the compensation by the actual value, abstractedly considered, of the land to which the title failed, at the time the contract should have been performed.

6. Compensation for deficiency.

A more equitable adjustment, where the vendee elects to take under the contract, and not to sue at law for the breach, is to abate the price in the same *proportion* to the whole amount, as the value of the *whole tract* is diminished by the deficiency.

Let so much of the decree as fixes the amount of the compensation, and makes it a lien upon the lands claimed by James Bonner, be reversed, and let the decree be otherwise affirmed. Remand the cause for further proceedings, with leave to complainant, if he be so advised, to sue an attachment in the suit; and if he should decline, with directions to dismiss the suit as to James Bonner, and in that case to let the amount of compensation stand as now fixed.

STATE V. GRISBY AND WIFE.

1. PARENT AND CHILD: *Chancery jurisdiction over infants.*

The jurisdiction of a Court of Chancery extends to the care of the person of an infant so far as necessary for his protection and education; and whenever it appears that a father is guilty of gross ill-treatment or cruelty towards his infant children, or that he is in constant habits of drunkenness and blasphemy, or low and gross debauchery, or that he professes atheistical or irreligious principles, or that his domestic relations are such as tend to the corruption and contamination of his children, or that he otherwise acts injuriously to their morals or interest, in every such case a Court of Chancery will interfere and deprive him of their custody and appoint them a suitable guardian to take care of them and superintend their education; and this jurisdiction is not taken away by the like power conferred by Statute on the probate court.

APPEAL from *Scott* Circuit Court in Chancery.
Hon. J. H. ROGERS, Circuit Judge.

Clendenning & Sandels, for the State.

The bill was properly brought in the name of the State, and sufficiently states the case. 2 *Story Eq. Jur., sec.* 1341 *et seq. and notes.*

STATEMENT.

ENGLISH, C. J. The bill in this case was brought in the name of the State, on the Chancery side of the Circuit Court of Scott county, against James Grigsby and wife, Emma, by Mr. Little, the prosecuting attorney of the twelfth judicial district, assisted by Mr. Sandels, a member of the bar.

The bill alleges, in substance, that defendants are now and have been for years past, residents of Scott county.

That about — defendant James Grigsby, being a widower, and father of a male child, then and there still living, intermarried with defendant, Emma, who, with her said husband, has had the care and supervision of said child since said marriage.

The said child is only six years of age, and defendants are amply able to provide for all its wants, not only food and raiment, but also its mental culture.

That shortly after said marriage, defendant Emma, conceived extreme hatred, disgust, and loathing for said infant, and at divers times, without reasonable cause, inflicted upon it cruel and inhuman chastisement. That, tiring of this method of venting her hatred, and fertile in the contrivance of torture, she began to starve it in many ways, sometimes refusing it food for two or three days, then giving it insufficient and unsuitable food for a short period; next depriving it of water or other drink, until parched or famished, it would steal away to distant neighbors to seek and receive the nourishments denied it at home by its unnatural parents. That, discovering the occassional visits of the child to neighboring houses, defendant Emma would tie it, sometimes in the house, sometimes in the yard, and there keep it until its sufferings became intolerable, or until it gnawed in two the strings that bound it. That in hot weather she would tie said child in the hot sun, and in midwinter she would place it where it was exposed to all the rigor of the climate. These and many other tortures have been and still are inflicted upon the child, until, without disease, it has become wan, haggard and emaciated, with barely life in its famished body.

That defendant James Grigsby is cognizant of and consents to this treatment of the infant.

That the life of the child has been, for months past, and

still is, in jeopardy by reason of the inhuman tortures aforesaid. That several persons, able and willing to raise and protect said infant, have offered to take it from its parents without charge or recompense and give it a comfortable home, but defendants refuse to permit any interference in the premises.

Prayer that a guardian for the person and the property of the infant be appointed by suitable orders of the court.

That defendant be required to deliver up the said child to said guardian, and that they be enjoined and restrained from exercising or attempting to exercise any control or supervision over it, or in any manner intermeddling or interfering with the possession and control of such guardian in the premises.

That defendant be required to deliver up the child to the care and custody of some suitable person to be designated by the court as custodian thereof pending the suit, and for general relief.

On the filing of the bill, defendants entered their appearance, and not then being prepared to contest the application for the appointment of a custodian for the infant, (William Grisby,) pending the suit, consented to such appointment, and, by order of the judge, Moses Pennington was appointed such custodian, and defendants were ordered at once to deliver the child to him and enjoined from interference with his possession of the child until the further order of the court.

It was further ordered that if defendants failed to deliver up the child to the interlocutory custodian, the sheriff should take it from them and deliver it to him, and that a copy of the order so made should be his authority to proceed in the premises.

At the next term the defendants demurred to the complaint on the following grounds:

1. Defect of parties, plaintiff, and defendant.

2. The court has no jurisdiction of the parties or subject matter of the complaint.

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

The court sustained the demurrer and dismissed the bill. Plaintiff appealed.

OPINION.

1. Chancery jurisdiction to care for infants.

The jurisdiction of the Court of Chancery extends to the care of the person of the infant, so far as necessary for his protection and education, and as to the care of the property of the infant, for its due management and preservation, and proper application for his maintenance. It is upon the former ground, principally, that is to say, for the due protection and education of the infant, that the court interferes with the ordinary rights of parents, as guardians by nature, or by nurture, in regard to the custody and care of their children. For, although, in general, parents are intrusted with the custody of the persons, and the education of their children, yet this is done upon the natural presumption that the children will be properly taken care of, and will be brought up with a due education in literature, and morals, and religion, and that they will be treated with kindness and affection. But whenever this presumption is removed; whenever (for example) it is found that a father is guilty of gross ill-treatment or cruelty towards his infant children, or that he is in constant habits of drunkenness and blasphemy, or low and gross debauchery, or that he professes atheistical or irreligious principles, or that his domestic associations are such as tend to the corruption and contamination of his children, or that he otherwise acts in a manner injurious to the morals or interests of his children; in every such case, the Court of Chancery will interfere, and

deprive him of the custody of his children, and appoint a suitable person to act as guardian, and to take care of them, and to superintend their education. But it is only in cases of gross misconduct that parent's rights are interfered with. 2 *Story's Eq. Juris.*, 20*th Ed.*, *sec.* 1341.

The jurisdiction thus asserted, to remove infant children from the custody of their parents, and to superintend their education and maintenance, is admitted to be of extreme delicay, and of no inconsiderable embarrassment and responsibility. But it is nevertheless a jurisdiction which seems indispensible to the sound morals, the good order, and the just protection of a civilized society. On a recent occasion, after it had been acted upon for one hundred and fifty years, it was attempted to be brought into question, and was resisted, as unfounded in the true principles of English jurisprudence. It was, however, confirmed by the House of Lords, with entire unanimity, and on that occasion was sustained by a weight of authority and reasoning rarely equalled. *Ib.*, *sec.* 1342, *and note.*

The jurisdiction of Chancery to appoint a guardian, and if necessary for that purpose, to interfere between a father and his children, is undoubted, and has been settled by the highest authority in England, and by many cases in this country. Thus, where the habits and mode of life of the father, or his treatment of his child, are such as to affect injuriously the child's health, or morals, or endanger his property, the custody will be committed to a person to act as guardian. *Bispham's Equity*, 486 *and note.*

The general theory upon which Chancery assumes jurisdiction over the persons and estates of minors is, that, by proper proceedings, the infant has been constituted a ward of court. *Ib.*, 484.

As to the manner in which a minor may be appointed a ward of court, it is not necessary that there should be any

suit actually pending or bill filed; the object may be attained by petition. *Ib.*, 485.

In England the prerogative of the crown as *parens patriæ* is exercised by the Court of Chancery. In this country the State takes the place of the King, and protects infants through Chancery. *Ib.*, 483.

In *Cowls* v. *Cowls*, 3 *Gilman*, (*Ill.*) 435, it was held that a Court of Chancery is vested with a broad and comprehensive jurisdiction over the persons and property of infants, and their parents, who are bound for their protection and maintenance, and will take such action in relation to the charge of their persons, or the management of their property, as circumstances may require. That where infants are taken from the custody of the father by a Court of Chancery, and have no property of their own, the father being bound for their support, may be required by order of court to contribute to their maintenance, the court itself, or through a master, enquiring into his condition and circumstances.

In *McCord* v. *Ochiltree*, 8 *Blackford*, 15, it was said that the necessity for the existence of a power to the protection of minors, was obvious, and would be implied from a general legislative or constitutional grant of Chancery powers.

In *Maguire* v. *Maguire*, 7 *Dana*, 181, the court, incidentally remarked, that the protection of infants from brutal treatment, by their parents, formed a part of the original jurisdiction of Chancery, and as such might be exercised in this country as well as in England.

In the *State* v. *Stegall*, 2 *Zabriskie's Rep.* 286; the court cited and relied upon 2 *Story's Equity*, *sec.* 1341, quoted above, as sustaining the same proposition.

There are many cases cited in *Leading Cases in Equity*,

White & Tudor, *vol.* 2, *part* 2, 4 *American Ed.*, *by J. I. Clark Hare*, *page* 1487 *to* 1521, sustaining the same proposition.

Jurisdiction not ousted by probate court jurisdiction.

By *Statute*, *Gantt's Dig. sec.* 3036, the probate court may appoint a guardian for a minor, where the parents are adjudged incompetent or unfit for the duties of guardian; but this does not interfere with the jurisdiction of a Court of Chancery to take from the control of the father, the natural guardian, an abused and ill-treated infant, and make it the ward of court by placing it in the custody and care of some competent and humane person, to be appointed by the court.

The bill or petition, in this case, whatever it may be called, discloses a tale of horror, shocking to humanity, and no doubt, presented a subject matter within the jurisdiction of the court below, sitting in chambers. See *Bowles* v. *Dixon*, 32 *Ark.*, 96.

On what particular ground the court sustained the demurrer to the bill does not appear, and appellees are not represented by counsel here.

If the court was of the opinion that the bill was improperly brought in the name of the State, instead of in the name of the abused infant, by some person as its next friend, which is no doubt the usual and better practice, the bill for such informality should not have been dismissed. Mr. Little and Mr. Sanders were no doubt prompted by motives of humanity in bringing the matter before the court, and might, on suggestion of the court, have assumed, by an amendment of the bill, the attitude of its next friend, or one of them might have done so, or if both had declined, any other suitable person might have been substituted.

At the time the demurrer was sustained the court not only had jurisdiction of the subject matter brought to its notice by the bill, but of the defendants who had entered their appear-

ance, and the child had been placed in the custody of a person to take care of it pending the suit, and until the further order of the court.

To dismiss the bill for mere mistake in making the State a formal plaintiff, on demurrer, without enquiry into the truth of the grave charges made against the parents of the child, and permit it again to be restored to them by the interlocutory custodian, was an error, for which the decree of dismissal must be reversed and the cause remanded for further proceedings.

KNOX v. HELLUMS.

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1. PRACTICE: *Exceptions; Motion for new trial.*
Exceptions to the rulings of the court in excluding testimony are considered abandoned unless the rulings are made grounds for new trial.

2. REPLEVIN: *Evidence of title; Possession.*
In an action for the conversion of personal property, the mere facts of lawful possession in plaintiff, and wrongful taking by the defendant, are sufficient. Proof of the transfer by which the plaintiff acquired title is unnecessary. The possession is presumed lawful until the contrary appears.

3. SAME: *Landlord's Lien.*
A landlord's lien will not sustain replevin for the crop. He must enforce it by attachment or bill in equity.

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

D. H. Rousseau, for appellant:

The first instruction for appellee erroneous. It assumes

that if a wrongful, or any kind of taking, from appellee by appellant, is disclosed by the testimony, the burden of proof devolves on appellant to show that he had as good or better right than appellee, and if such taking was without the consent of appellee, it was *prima facie* evidence of title in him. *Chap. CXV. Gantt's Digest* merely supplants the old remedy of replevin and detinue without changing its incidents. See New York decisions under a similar Code provision. *Nichols* v. *Michœls*, 23 *N. Y.*, 264; *Roberts* v. *Randall*, 3 *Sand.*, (*N. Y.*) 707; *Rockwell* v. *Sanders*, 19 *Barb.*, 481–82.

Under either form of action the *onus* was on plaintiff to show that he was the owner, or had a special ownership, and that it was wrongfully detained. *Neis* v. *Gillum*, 27 *Ark.*, 185, *and authorities cited; Sec.* 5035 *Gantt's Digest, 3d and 4th subdivisions.*

The second and third instructions for appellant should have been given, as the proof clearly showed that the cotton had only been turned over, if at all, for the purpose of securing the rent.

The second instruction given by the court was misleading. There was no evidence of a delivery of the crop to Hellums, and the whole evidence shows that the rent was paid long before Blair hauled the cotton to the gin.

The mortgage was sufficiently definite to create a lien on two bales of cotton of the first picking of any crop that Blair might cultivate for the year 1879.

J. M. Cunningham, for appellee:

There being a conflict of testimony, the jury were the judges of its preponderance. 11 *Ark.*, 630; 14 *Ib.*, 530.

Appellee, having a lien for rent and the possession, had the better right. *Benjamin on Sales*, 597.

Peaceable possession, when shown, makes a *prima facie* case, and the *onus* is on defendant, and he must show title, or at least better title than the plaintiff. *Hilliard on Torts, vol.* 1, 495; 2 *Greenleaf Ev.*, 637.

The marking of the cotton by Hoke in Knox's name did not pass the possession, unless done by Hellums' consent or ratified by him. *Benjamin on Sales*, 28 *and* 29.

The second instruction asked for appellant, though good in the abstract, was not applicable to the case.

The other instructions are obviously correct.

ENGLISH, C. J. J. P. Hellums sued J. C. Knox, in replevin, before a justice of the peace of Lincoln county, for a bale of cotton. The judgment was against Hellums before the justice, and he appealed to the Circuit Court, where, on a trial *de novo*, the verdict and judgment were in his favor; a new trial was refused Knox, and he took a bill of exceptions and appealed to this court.

1. PRACTICE: Exceptions must be in motion for new trial.

I. On the trial, defendant offered a mortgage in evidence, which the court excluded, and he excepted, but the ruling of the court in excluding the mortgage was not made ground of the motion for a new trial, and this exception was thereby abandoned under a well settled rule of practice.

II. The first and second grounds of the motion for a new trial were that the verdict was not sustained by the evidence, and was contrary to law.

It is sufficient to say of the evidence that it was in conflict, and it was the province of the jury to weigh and determine on which side the preponderance was. The evidence will be further noticed in considering the instructions.

2. REPLEVIN: Evidence of Title: Possession.

III. For plaintiff, and against the objection of defendant, the court instructed the jury "that if the evidence shows that plaintiff was in possession of the property (the cotton in controversy,) and that it was taken by defendant without his

consent, this is *prima facie* evidence of title in plaintiff, and then the burden of proof is on defendant to show either that plaintiff had no title, or to show a better title in himself."

The giving of this instruction was made the fourth ground of the motion for a new trial.

Hellums testified, in substance, that early in the year, 1879, he rented to William Blair part of his place, in Lincoln county, for $55.00, the rent to be paid in the fall of that year. That about October, Blair turned his whole crop over to him to pay rent and a supply account he had against him, amounting in all to about $140.00. Afterwards, and in the same October, while he was at Lincoln Circuit Court, Blair took enough of the cotton to Hoke's gin-house to make a bale, the bale of cotton in controversy. On the next day after Blair hauled the cotton to the gin, witness went there, and found the bale marked in defendant's name; he put the initials of his own name upon it, and on the same day removed it to his place of residence. He gave Blair no authority to get the cotton and haul it to the gin. A short time after witness had taken the cotton from the gin to his residence, defendant came there, in his absence, and took the cotton away It was in evidence, that after Blair had taken the cotton to the gin, he sold it to the defendant.

In an action for the conversion of personal property, the mere facts of lawful possession in plaintiff, and wrongful taking by defendant, are sufficient. Lawful possession is sufficient evidence of title without proving the transfer by which plaintiff acquired title; and possession is presumed lawful, unless the contrary appears. *Abbott's Trial Evidence*, 623.

It is undeniable that possession of personal property is

prima facie evidence of title. *Hutchinson, ad.*, v. *Phillips et al, ad.*, 11 *Ark.*, 279.

Had nothing more been proven than that plaintiff was in possession of the bale of cotton sued for, and that defendant went to his residence in his absence and took it away, plaintiff's title would have been made out. But it was proven, also, that plaintiff went to Hoke's gin, found the bale of cotton there marked in defendant's name, that he marked it in his own name, removed it to his place of residence, and defendant took it from there. If this had been all the evidence, possession shown to have been so obtained by plaintiff would not have been *prima facie* evidence of title in him.

But this was not all the evidence. Plaintiff testified that Blair was his tenant, owed him for rent and supplies, and turned his whole cotton crop over to him to pay the rent and supply account, and afterwards, without his consent, and in his absence, took part of the cotton to Hoke's gin and sold it to defendant. If this was true, if the cotton was so turned over to him, Blair had no right afterwards to take it and sell it to defendant, and he acquired no title by the sale.

IV. The third ground of the motion for a new trial was that the court erred in refusing the second and third instructions moved for defendant.

Defendant asked five instructions, the court gave the first, fourth, and fifth, and refused the second and third.

By the first the court charged the jury, in effect, that plaintiff must prove ownership, general or special, of the bale of cotton, that he was entitled to possession of it, and wrongful detention by defendant.

The second, which the court refused, was, "if the proof should show the fact that the plaintiff has a lien on the bale of cotton for rent, it gives him no right to recover it in this

action, and he had no right to take possession of it under such lien."

3. REPLEVIN: Landlord's Lien

If the proof had been that plaintiff had nothing but a landlord's lien on the cotton, this instruction would have been applicable and *law*. In such case, he would have to resort to attachment or bill in Chancery to enforce his lien, But the instruction ignores the evidence that the cotton was turned over to plaintiff by the tenant to pay the rent, etc., and was properly refused. *Flash, Lewis & Co.* v. *Gresham*, 36 *Ark.*, 529.

The fifth instruction which the court gave, was, in effect, the same, and in better form in view of the evidence, than the third, which the court refused.

The court gave the fourth instruction, which was that "if the jury find from the evidence that Blair had paid plaintiff the rent, and that the cotton was only turned over to him as a security for the rent, they will find for defendant."

Blair admitted in his testimony, in effect, that he had turned his crop of cotton over to plaintiff for rent, but denied that he had turned it over on account of supplies as well as rent, and testified that he had paid the rent before he sold the bale of cotton in suit to defendant, which plaintiff denied in his testimony. The fourth instruction submitted this conflict in evidence to the jury.

V. The last ground of the motion for a new trial was that the court erred in giving instruction numbered two of its own motion.

This instruction was substantially the same as instruction numbered four, moved for defendant, and above copied.

Upon the whole, there was no substantial error to the prejudice of appellant in the instructions.

Possibly, from all the evidence, Blair may not have turned

his cotton crop over to plaintiff on account of supplies as well as rent, and possibly he may have paid the rent in the manner stated by him before he removed and sold the cotton in suit to defendant, but, as before said, these are questions for the jury.

Affirmed.

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TONEY ET AL V. MCGEHEE ET AL.

1. FRAUDULENT CONVEYANCES: *When impeachable by subsequent creditors.*

   A voluntary conveyance may be impeached by a subsequent creditor on the ground that it was made in fraud of existing creditors; but to do so, he must show either that actual fraud was intended, or that there were debts still unpaid which the grantor owed at the time of making it.

2. FRAUD: *Not presumed.*

   Fraud will not be inferred from an act which does not necessarily import it. It is never presumed, and circumstances of mere suspicion, leading to no certain results are not sufficient proof of it.

APPEAL from *Ouachita* Circuit Court in Chancery.
Hon. J. K. YOUNG, Circuit Judge.

STATEMENT.

In 1877, McGehee, Snowden & Violette, merchants and partners, filed in the Ouachita Circuit Court their complaint in equity against James R. Toney, R. M. Green and J. M. Pace, alleging that they had recovered judgments against said Toney in said court in 1875, for about ten thousand dollars ($10,000), upon which executions had been issued, and returned *nulla bona.*

That in 1866, Toney and William T. Stone jointly owned valuable town lots in Camden (describing them), and on the twenty-second day of October, 1866, conveyed them to one John Brown. That this conveyance was, as to Toney, without consideration, and was made by him to cheat and defraud his creditors.

Afterwards, on the tenth day of July, 1867, Brown conveyed to H. K. George, a cousin of Toney, and his partner in business, for the pretended consideration of seven thousand dollars ($7,000), none of which was ever paid. That this conveyance was procured by Toney to enable him to regain possession of the property, and at the same time place it beyond the reach of his creditors. That afterwards, on the twenty-fourth of February, 1871, George conveyed the property to defendant, Toney; and afterwards, on the fifteenth of February, 1873, Toney conveyed to the defendant, Green, who was his son-in-law, for the pretended consideration of six thousand and three hundred dollars ($6,300), no part of which was paid. That these several conveyances was a scheme on the part of defendants, Toney and Green, and knowingly participated in by said Brown and George, to enable Toney to cheat and defraud his existing creditors, and on the part of Toney and Green to contract further debts, and cheat and defraud future creditors. That at the time of contracting the debts on which the plaintiffs' judgments were rendered, and long before then, Toney was in possession of the property, which contained a brick store-house, as the ostensible owner, paying taxes on it, and claiming and holding it out to the world as his own; and they never pretended that it belonged to Green until the plaintiff's said suits were instituted.

About the first of January, 1874, said store-house was leased by Green to defendant, Pace, and he was still occu-

pying it under the lease, at an annual rent of one hundred and fifty dollars ($150).

Prayer that the deed to Green be cancelled as fraudulent and void, and the property be sold to satisfy their judgments, and in the meantime a receiver be appointed to collect the rents then due and subsequently to accrue, etc.

Toney and Green answered separately; Toney admitting the execution of the deeds, but denying the alleged fraudulent intent or purposes. He denies that the consideration of the deeds was colorable, but was, in fact, paid. He explains how he paid George for his deed, and says that for the consideration for his deed to his son-in-law, Green, Green gave his note for six thousand three hundred dollars ($6,300). Afterwards one thousand and eight hundred dollars ($1,800) of this note was paid by cancelling his indebtedness to his daughter, Green's wife, for that sum, and the note was then delivered up to Green, making him a present of the balance of it, in consideration of their relationship. He says that if he was indebted at all at this time, it was in a very small amount, and he was in a prosperous mercantile business, and able to pay all his debts on demand, and did pay them all before surrendering the note to Green. That this was before he knew the plaintiffs, or had contracted any debt with them; and the conveyance was not made to defraud existing or subsequent creditors.

Green also denied, in his answer, all fraud in the transaction and all knowledge of Toney's indebtedness, and asserts that since the conveyance to him he had used and controlled the property as his own, paying the taxes and renting out and receiving the rents for himself.

Pace made no answer.

THE EVIDENCE.

H. K. George deposed that in 1867, the defendant, Toney,

John George and himself formed a mercantile partnership, and carried on business in the firm name of H. K. George & Co., in one of the store-houses mentioned in the complaint. Soon after putting the goods in the horse Toney told him the house belonged to him, but the title was in John Brown, who was getting old, and he wanted the title made to witness, and requested witness to go to Brown's office and Brown would deliver him a deed for the store-house, and if any one asked him anything about it to tell them he paid seven thousand dollars ($7,000) for it. That he went as requested and Brown delivered to him the deed, and Toney paid for recording it. Witness held the property until 1871 or 1872. That about 1867, Toney went into bankruptcy, and after his discharge the firm name was changed to George & Toney, and while this firm was in operation Toney went to Philadelphia and purchased a stock of goods to set his son-in-law up in business in Arkadelphia, in the name of C. C. Scott & Co., and informed the parties from whom he purchased the goods that the firm of George & Toney were going in as partners. Witness repudiated the transaction as soon as he heard of it, and refused to have anything to do with it. In a short time C. C. Scott & Co., were burned out and failed. That when their creditors threatened to sue Toney, he said he would deed the store to R. M. Green, and requested witness to convey the property to him. Toney and he did so without any consideration whatever. Toney said he was going to convey to Green so that the Philadelphia creditors would get nothing. Green was without visible means, and largely indebted at the time.

James D. Pickens deposed, that in 1872 or 1873, Toney became involved in a law suit by some parties in Philadelphia against his son-in-law, Kitt Scott, himself and others, and told witness of the suit, and his apprehensions of the

result, and said he would sell his brick store-house in Camden to R. M. Green, to secure it from the parties in the event of their success. Witness was present and drew up the note executed by Green for the property. Toney went to Philadelphia to attend the taking of depositions there in the case, and on the day he started witness saw him and Green in close conversation; and Green called witness back into the office of J. R. Toney & Co., and handed him a $1000 dollars to pay Toney on the note. He was surprised to see Green have so much money, as he was hard pressed, and not accustomed to handling much money—was always behind with Toney and others, and Toney had told him that Green was a heavy burden on him. Witness was thoroughly conversant with Toney's business at the time, and thought he borrowed the money for a short time to enable Green to make the payment.

There was no other testimony except the deeds exhibited with the complaint.

The court found the deed to Green fraudulent both as to prior and subsequent creditors, and ordered the property sold to satisfy the plaintiff's judgments, and also appointed a receiver to collect the rents, and apply to the judgments. Toney and Green appealed.

H. G. Bunn and B. B. Battle for appellants:

Appellant had a right to dispose of his property in any way he saw fit, provided in so doing, he defrauded no one.

To entitle plaintiffs to set aside the deed, because of fraud, "It is necessary to show that they have a valid, unsatisfied judgment upon a cause of action *which accrued before the conveyance of his property;* that they have issued process upon their judgment, and have been unable to find property of defendants, free from incumberance, out of which to

make the debt; that the defendant was possessed of property out of which the debt might in part or in whole be satisfied; that he has conveyed the property with the intent of defrauding his creditors." Judge WALKER in *Clark* v. *Anthony*, 31 *Ark.*, 548.

"A sale to be fraudulent *as to creditors* must be made with the intent to hinder, delay or defraud them, in which purpose the purchaser must participate by purchasing with the view and aim to aid and forward it." 9 *Ark.*, 482; 23 *Ib.*, 258; 31 *Ib.*, 417–556; 32 *Ib.*, 255.

A voluntary conveyance to wife or child, is *prima facie* only, and not conclusively fraudulent as to *existing creditors*. *Bertrand* v. *Elder*, 23 *Ark.*, 505. There must be creditors at the time of the conveyance. *Sexton* v. *Wheaton*, 8 *Wheat.*, (*U. S.*) 229; *Haskell* v. *Bakewell*, 10 *B. Mon.*, 230; *Bennett* v. *Bedford Bank*, 11 *Mass.*, 421; *Parker* v. *Proctor*, 9 *Mass.*, 390; *Waterson* v. *Wilson*, 1 *Grant's* (*Pa.*) *Cases*, 74; *Cole* v. *Varner*, 31 *Ala.*, 244; *Converse* v. *Hartley*, 31 *Conn.*, 372; *Cosbey* v. *Ross*, 3 *J. J. Marsh*, 290; *Ender* v. *Williams*, 1 *Met.* (*Ky.*,) 346; *Ward* v. *Hollins*, 14 *Md.*, 158; *Thatcher* v. *Finney*, 7 *Allen*, (*Mass.*,) 146.

A subsequent creditor may avoid a voluntary deed on the ground that it was made to defraud existing creditors, but in order to do so he must show debts still outstanding which existed when the deed was made. *Claffin* v. *Mess*, 31 *N. J. Eq.*, 211; *Lush* v. *Wilkinson*, 5 *Vesey*, 387; *Kidney* v. *Conssmaker*, 12 *Vesey*, 156.

A trifling indebtedness, where the grantor retains under his control property enough to meet all demands, will not avoid the conveyance. *Jackson* v. *Peck*, 4 *Wend.*, 302; *Mateer* v. *Hissim*, 3 *Pa.*, 160; *Burkey* v. *Self*, 4 *Sneed*, (*Tenn.*,) 121. See also 8 *Ark.*, 470; 21 *Ib.*, 375.

Fraud must be proven. 9 *Ark.*, 452; 31 *Ib.*, 556; 23 *Ib.*, 123. The proof of prior debt must be specific, accom-

panied by proof of inabilty to pay debts. *Smith* v. *Green*, 3 *Humph.*, 118; *Loeschigh* v. *Hatfield*, 5 *Robt.*, (*N. Y.*,) 26; *S. C.*, 4 *Abb.*, *Pr. N. S.*, 210; *S. C.*, 51 *N. Y.*, 660; *Wilbur* v. *Fradenburgh*, 52 *Barb*, 474; *Hutchinson* v. *Kelley*, 1 *Rob.* (*Va.*,) 123; *Pope* v. *Wilson*, 7 *Ala.*, 690.

The fact that a grantor was in failing circumstances, or indebted at the time of the execution of a deed, or the grantor was his son, does not prove the deed fraudulent. 22 *Ark.*, 146; 24 *Ib.*, 123.

The deed was recorded, and notice to the world.

"A fraudulent conveyance of land made for the purpose of preventing its being subjected to the payment of *an existing debt*, but with no view to defraud subsequent creditors, will not be set aside in equity upon application of a creditor after the deed was made and *recorded*. *Lynch* v. *Raleigh*, 3 *Ire'd*, 273; *Horn* v. *Volcanic*, *etc.*, *Co.*, 13 *Cal.*, 62; *Kibb* v. *Hanna*, 2 *Bland*, (*Md.*,) 26; *Wright* v. *Henderson*, 8 *Miss.*, (7 *How.*,) 539.

U. M. & G. B. Rose, for appellees:

The court is not confined to a consideration of the execution of the deed to Green, but may regard the other conveyances made by Toney, which tend to show fraud, etc. *Bigelow on Estoppel*, 478; *Lincoln* v. *Claflin*, 7 *Wall.*, 132: *Butler* v. *Watkins*, 13 *Ib.*, 464.

Appellees had recovered judgment, issued executions, which had returned *nulla bona*, and then properly brought this suit to subject this property.

Green held the property, as trustee, for Toney's benefit, and the creditors of the latter, prior or subsequent, can subject it.

Appellees are entitled to be subrogated to the rights of

prior creditors whose claim they paid off. *Savage* v. *Murphy*, 3 *N. Y.*, 508; *Wilson* v. *Buchanan*, 7 *Gratt*, 334; *Castor* v. *Cunningham*, 3 *Strobb*, 59; *Paulk* v. *Cook*, 39 *Conn.*, 566.

When a conveyance is actually fraudulent, it may be impeached by creditors, prior or subsequent. The fact that a conveyance is made with the intent to defraud antecedent creditors is *prima facie* evidence of an intent to defraud subsequent creditors, and when, at the time of the execution of the deed, the donor is insolvent, the conveyance is void as to subsequent creditors. *Lowry* v. *Fisher*, 2 *Bush.*, 70; *Wadsworth* v. *Haven*, 3 *Wend.*, 411; *Carpenter* v *Roe*, 10 *N. Y.* 227; *Hurdt* v. *Courtiway*, 4 *Metc.*, (*Ky.*,) 139; *Iley* v. *Niswanger*, 1 *McCord*, 518.

OPINION.

HARRISON, J. The conveyance to Green was, as is clearly shown by the depositions of George and Pickens, voluntary, and made by Toney to defeat the claim of the creditors of C. C. Scott & Co., who were suing him as a silent partner of the firm; but whether they ever recovered judgment against him does not appear, and there was no evidence that he had, in fact, ever been indebted to them.

It does not follow that because his object in making the conveyance was to place the property conveyed beyond their reach, should they recover judgment against him, if he was not indebted to them, that the conveyance was fraudulent. Certainly they had no ground to complain, for they were not thereby injured, and no fraud was committed upon them.

Except the statement in Toney's answer, which should be taken and considered as a whole, that he was only indebted

to an inconsiderable amount which he had ample means to pay, and did in fact pay before he had any dealings with the plaintiffs, there was no proof that he owed any debts at the time the conveyance was made.

1. FRAUDULENT CONVEYENCES: When impeachable by subsequent creditors.

A voluntary conveyance may be impeached by a subsequent creditor, on the ground that it was made in fraud of existing creditors; but to do so, he must show either that actual fraud was intended, or that there were debts still outstanding, which the grantor owed at the time he made it. 1 *Stor. Eq. Jur.*, *sec.* 361; *Clafflin* v. *Mess*, 30 *N. J. Eq.*, 211; *Pope* v. *Wilson*, 7 *Ala.*, 690; *Smith* v. *Greer*, 3 *Humph.*, 118; *Reade* v. *Livingstone*, 3 *Johns. Ch.*, 480.

2. FRAUD: Not presumed.

Fraud will not be inferred from an act which does not necessarily import it. It is never presumed, but must be proven; and circumstances of mere suspicion, leading to no certain results, are not sufficient proof of it.

There was no proof of any outstanding debt when the plaintiffs' suit was commenced, nor when Toney became indebted to them: none that when he conveyed to Green he owned no other property, or was not possessed of ample means besides, or was insolvent; and except the statement in his answer, before referred to, none that he was to any extent or at all in debt.

The fraud charged in the complaint was not therefore sufficiently proven. The decree is reversed.

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d87 347

MILLION AND WIFE v. TAYLOR.

1. FRAUD: *Confidential relations: Dealings between brother and sister.*

Ordinarily, about ordinary matters, if there be nothing in the circumstances showing dependence and trust on the one hand, and the assumed duty of protection and counsel on the other, equity will not compel a brother to treat a sister with more tenderness in their dealings than other women; yet, though this relation differs generally in its confidential nature from that between parent and child, guardian and ward, etc., it has been held to assume a confidential character, not only a to brother and sister, but between any near relatives dealing with regard to inheritances or distributive shares of estates coming to them jointly; many authorities exacting under such circumstances *uberrima fides*, with the duty of full disclosure of everything affecting value and each others interest in the subject matter. Blood relations so dealing are under a mutual obligation, not merely to say or do nothing to mislead, but to give such counsel as would presumably proceed from a third person who was equally concerned for all. Such contracts are wholly different from family compromises for peace and harmony. Courts of equity are as earnest to support the latter as to look upon the former with distrust and suspicion.

APPEAL from *Hempstead* Circuit Court in Chancery. Hon. J. K. YOUNG, Circuit Judge.

Dan. W. Jones, for appellant:

The relation of brother and sister, the confidence reposed, her ignorance of the value, etc., appellee's knowledge of the value, quality, etc., and the false representations thereof, etc., furnish the strongest grounds for equity interference. *Story's Eq. Juris.*, *vol.* 1, *sec.* 190 *et seq.*, 193 *et seq.*; 30 *Ark.*, 535.

Williams & Battle, for appellee:

As to misrepresentations, etc., see 11 *Ark.*, 58; 19 *Id.*,

522; 26 *Id.*, 30; 31 *Id.*, 170. No fraud is shown or proven.

EAKIN, J. This is a bill by an heir to recover of another heir, who is her brother, an interest in the lands of their deceased grandfather, and to cancel a deed for her interest which she had executed to the defendant, alleging that it had been obtained by fraud and misrepresentation. This is denied, and is the only issue. The court below refused the relief.

The parties lived in Bradley county, Tennessee, and the lands are in Hempstead county, Arkansas. It is shown by the pleadings, together with the preponderance of evidence, notwithstanding some conflict, that the complainant, being yet a girl under age, agreed, verbally, for ten dollars, to sell her interest, being one eighteenth, in these lands, to a cousin, Alfred Taylor, who, as well as the defendant, was engaged in the speculation of buying up the interest of the other heirs. This to begin with, was dealing with a child in a very reprehensible manner. The defendant says as he is informed, that this payment was not made to her as a *purchase* of her interest by Alfred, but as "hush money," to induce her to conceal her interest in the lands until he could effect a sale of them. This is worse, as it would be an effort to make her a party in craft and duplicity. The defendant disclaims, also, any interest in the purchase so made, if it were a purchase, but we find that, after his sister, the complainant, became of age, he approached her on the subject, and without any additional consideration paid at the time, obtained from her a deed of conveyance, in which her husband joined. This was in 1876.

The account given by herself and her husband of this transaction, which is in many points strongly corroborated by other witnesses, is, that her brother claimed the deed on

account of the ten dollars paid by Alfred, representing that he was entitled to it, because he had furnished Alfred the money, and the purchase had been made by Alfred for him. He says there was an additional payment also, to-wit, a saddle worth twelve dollars, and her part of the cost for making a certain grave yard fence, worth thirteen dollars, and that he was to pay her the balance of the consideration expressed in the deed, which was in all forty dollars, when he got possession of her interest in Arkansas. She says, on the other hand, that the saddle and cost of the fence were otherwise paid for out of monies of her own in her brother's hands. The proof tends to show that at the time the conveyance was made, she believed the lands to be worthless and of no value. The defendant seems to have been an older brother, and from indications in the transcript was an intelligent man of business. He knew at the time that the St. Louis, Iron Mountain and Southern Railroad had run through or near the lands, and although he denies that he represented them as worthless, he does not show that he took any care to advise his sister as to their real value, or as to her best interests in any manner. She seems to be a woman of no knowledge of business affairs beyond that of other women in the common walks of life.

He came to Arkansas with this deed to obtain possession, and afterwards the complainants heard, first through others, and then from himself, that the interests they had conveyed were worth thousands of dollars. His own lowest estimate of the value is $1200. They demanded a reconveyance, which he refused. Finally, as they testify, he agreed to give it up if they would give him a power of attorney to act for them with regard to the lands. They consented and executed the power in 1878. He, then armed with both papers, refused to reconvey the lands, but recorded the power. They afterwards revoked the power in 1879, mak-

ing the revocation matter of record. He then caused the original conveyance to be recorded, and claims under that. The object of the bill is to cancel it.

The defendant, in his deposition, as well as his answer, denies that he agreed to reconvey when he obtained the power of attorney, but says he gave complainant, his sister, an additional compensation for the power of attorney, which he wished to have to avoid the champerty laws, as he had been advised they were here in force. He says he gave her some old pieces of furniture, which cost over a hundred dollars, at first, but had been worn. If this testimony could avail the defendant, at best, we incline to think the preponderance of testimony, and reason itself is against it. The sister had then learned the value of her interest, and had perhaps an exaggerated estimate of it. If she were willing to renounce it for the *douceur* of the present enjoyment of a few pieces of second-hand furniture, she was not competent to contract, at least with her brother, concerning parts of a common inheritance. What should we think of a brother who would advise a sister to make such a contract with third parties? There is no definite showing that the lands were in litigation, or that the title was in danger. The whole of the lands had been once sold by order of court for partition, but they had been bought in by the agent and guardian of all the parties, who is not shown to have set up any adverse title. The defendant does not show how much he expended to clear the title, or whether anything, or what he did besides coming to Arkansas and "working at it" about a year. The sort of work is left wholly to conjecture. There is some vague showing of a compromise with parties claiming, but it is not definite. The values of the interests are fixed upon the net outcome.

It is true that all persons are bound by their contracts, intelligently made, however improvident they may be, if

they deal at arms length as strangers, under no obligations of protection or confidence. And it is *generally* true that the mere relation of brother and sister does not impose that confidence of itself. Ordinarily, about ordinary matters, if there be nothing in the circumstances showing dependence and trust on one hand, and the assumed duty of protection and counsel on the other, equity will not compel a brother to treat a sister with more tenderness than other women. These things belong to the imperfect duties, which even equity cannot undertake to enforce. Yet, conceding that this relation differs, generally, in its confidential nature from that between parent and child, guardian and ward, attorney and client, principal and agent: it has been held to assume a confidential character, not only as to brother and sister, but between any near relatives, dealing with regard to inheritances, or distributive shares of estates, coming to them jointly. There are many authorities exacting under such circumstances *uberrima fides;* with the duty of full disclosure of everything affecting value, and each other's interest in the subject matter.

In Mr. Hare's notes to the case of *Hugnemire* v. *Boseley*, in the second part of *vol. II*, of the *4th Edition of Leading Cases in Equity*, *p.* 1213, he lays down this principle as the result of the authorities, and speaking of blood relations so dealing, he says, "They are consequently under a mutual obligation, not merely to say or do nothing that is calculated to mislead, but to give such counsel as would presumably proceed from a third person, who was equally concerned for all."

The numerous cases to which he refers, although, many of them resting upon the peculiar circumstances, involving imbecility, or weakness of intellect, or special confidence, which would equally apply to strangers in blood, nevertheless support the declaration in its full extent. It will be

noted, however, that contracts with regard to the purchase of interests stand, wholly, upon different grounds from family compromises for peace and harmony. Courts of equity are as earnest to support the latter as to look upon the former with distrust and suspicion.

In the case of *Dunn* v. *Chambers*, *4th Barb.*, 376, 381, HARRIS, J, said: "The double relationship which the parties bore to each other as kinsmen, and joint recipients of their grandfather's bounty, should have prompted the defendant, instead of profiting by the recklessness and improvidence of his cousin, to take measures more effectually to secure the property for his benefit." The sentiment finds a ready echo in every breast, and when it comes to be applied to dealings concerning common inheritances, it becomes a moral duty, which courts of equity *can* enforce, as effectually as in cases of mutual confidence.

A leading English case, tending in this direction, is that of *Dunnage* v. *White*, 1 *Swanston*, 138. There was no proof of fraud or undue influence. Yet the court set aside the conveyance by an heir to distributees and devisees of the same estate because of its improvidence, and general unfairness. The heir had not retained for himself more than, under any circumstances, he could have claimed, and had abandoned important interests he might have claimed. He was addicted to drink, and had low tastes, but was not mentally imbecile. The decision rests simply on the grounds of an unfair advantage taken of ignorance, and improvidence, by relations claiming benefits in the estate.

In the case of *Stuart* v. *Stuart*, 7 *J. J. Marshall*, 183, the court cancelled an instrument executed by a widow to an illegitimate son of deceased, by which for a small consideration, she abandoned important interests in the estate. There was evidence of very indelicate conduct in asserting claims during the freshness of her grief, in a violent and

offensive manner, and some evidence of fraudulent concealment, but the court placed its opinion upon broader grounds, to-wit: that the consideration of the contract was trifling; that for a very inconsiderable portion of the property devised to her, she had given up the balance worth twenty times as much. *Upon the whole case* the contract was held to come within the class which are so *unreasonable* as to require the interposition of the Chancellor.

The expressions of the Supreme Court of Alabama in the case of *Boney et al* v. *Hollingsworth et al*, 23 *Ala.*, 690, are very pertinent to this. That, too, was a case where a conveyance had been by a sister to her two brothers of an interest in the estate of the father, and which her heirs, after her death, sought to cancel. The circumstances of the case in several respects resemble this, and the indications of actual fraud were no greater. The deed was cancelled. Some idea of the grounds assumed by the court may be derived from the following extract from the opinion: "Until some inducement is shown, the law must always regard with suspicion an act by which a sister divests herself of a valuable interest in favor of a brother. There may be no fraud, everything may be honest and fair. But until the act is satisfactorily accounted for, the inference of fraud, artifice, or abuse of confidence is so strong, that we think equity should always relieve against it."

Why multiply citations of precedents? This contract now under consideration is shocking to our sense of fair dealing. It is attended with numerours marks and indications of craft and over-reaching. The gross inadequacy of price; the advantage taken of the old promise during minority, the attempt to conciliate with old furniture; the defiant attitude taken when the papers were at last obtained, all indicate the shrewd trader seeking his own advantage at the expense of a sister's interests.

The court erred in dismissing the bill. It should have taken an account of what he had actually paid in value, and her proportionate part of the *necessary* expenses in getting her title defined and established, and allowed him that, making it a lien on the land, and should have cancelled her conveyance.

Reverse the decree and remand with usual directions.

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DAVIS ET AL V. WHITTAKER ET AL.

1. PRACTICE: *Appearance; What the record should show.*

When there has been service on the defendant, the record should show it. Where there has been none, it should show an appearance; and where there are several defendants, it is not sufficient that the record state that the "defendants" appeared. Such a term applies only to those who, by service or appearance, have already been made parties, and does not include all who have been named in the complaint.

2. WILLS: *Ademption, by gifts in life of testator.*

The application of the doctrine of *ademption*, by gifts during life, is confined to specific legacies; or to general legacies of definite amounts in money, or something of the same nature. It is not applied to the bequest of a residue or part of a residue.

3. WILLS: *Construction of*

(For the construction in this case, see the opinion. The will is construed as a whole, and is too long to be formulated into a syllabus.—REP.)

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

W. W. Smith and Tappan & Hornor, for appellants:

Davis was not in possession of the land, nor under any obligation to pay taxes at the time of the tax-sales. He was

a mortgagee, and eventually acquired the equity of redemption by fair purchase. *Sec.* 5234 *Gantt's Digest* does not affect the validity of the tax-sale, it only lets in the remainderman to redeem.

Mrs. W.'s remedy was by ejectment. *Gantt's Digest, secs.* 2259–60–62; 27 *Ark.*, 157; 26 *Id.*, 647. Partition did not lie. The lands were held adversely, and the title was in dispute. *Story Eq. Jur., sec.* 650, *note; Freem. Cot. and Part., sec.* 446; 27 *Ark.*, 77. Common law courts are competent to construe wills.

Argued on the construction of the will; Mrs. R. was invested with an unlimited power of disposal, and many cases hold that such a power carries the fee. See *Attorney General* v. *Hall, Fitzgibbon* 114; *S. C.* 8 *Viner*, 102; 10 *Johns.*, 19; 13 *Id.*, 356; 21 *M'e.*. 288; 21 *Pick.*, 416; 41 *Conn.*, 607; 2 *Barb.*, 537; 17 *Id.*, 533; 15 *John.*, 169; 22 *Wend.*, 137; *McDonald* v. *Walgrove, Sandf. Chy.*, 174; 25 *Mich.*, 461; 68 *M'e.*, 34; 5 *Mass.*, 500; 100 *Id.*, 343, 468; 47 *Iowa*, 607; 18 *Ala.*, 132; 48 *Penn. St.*, 466; 12 *Gray*, 376; 27 *Cal.*, 439. If she took the fee, there could be no remainder to Mrs. W. *Sandford Chy.*, 274, *sup.* Nor can it be supported as an executory devise, because liable to be defeated by the act of the first taker. 3 *Ark.*, 147; 23 *Id.*, 356.

Another construction: Mrs. R. took estate for life, or widowhood, with power to defeat remainder by consuming the *corpus* of the entire estate, in payment of the testator's debts, education, maintenance, etc., of his family; in case not so consumed, then with power to appoint remainder amongst children, with remainder over to children, if the power of appointment not exercised. *McGavock* v. *Pugsly, Cooper Tenn. Chy.*, 410; *Cockrill* v. *Many*, 2 *Id.*, 49; 10 *Hum*, 588; 1 *Swan*, 185; 5 *Cold.*, 229; 5 *Madd. Chy.* 123; 52 *N. H.*, 267; 125 *Mass.*, 453. Under this view Davis

acquired Mrs. R.'s life interest under execution sales, and the remainder by conveyances from the children.

On twelfth clause of will see *Blatchford* v. *Newberry*, *Sup. Ct. Ill.*, *June*, 1878, *Cent. L. J.*, *vol.* 7, 172; also, 3 *Littell*, 415; 7 *B. Mon.*, 13; 15 *Id.*, 808; 17 *Id.*, 735. Mrs. R. could, under ninth clause, prefer some of the children and exclude others. 18 *Gratt*, 541; 3 *Wall*, *Jr.*, 32.

Mrs. R. certainly had a life estate, and to hold that the remainder was accelerated by any act of hers, is to do violence to the plain intention of the testator. 23 *Ark.*, 89; 31 *Id.*, 145.

The legacy to Mrs. W. was adeemed by subsequent provision. *Story Eq. Jur.*, *secs.* 1111 *to* 1117; 2 *Lead. Cas. in Eq.* [*315 *to* *333]; 2 *Redf. on Wills*, 440 *to* 443; 5 *My. & Cr.*, 29; 7 *H. of L. Cas.*, 728; 3 *Conn.*, 31; 15 *Pick.*, 133; 5 *Randolph*, 577; 3 *Stockton Chy.*, 158.

Mrs. Sarah E. Whittaker's children fail to show that the contingency upon which they were to take has happened.

John C. Palmer, for appellees:

1. Mrs. Rabb permitted the land to be sold for taxes, and failing to redeem, under *Sec.* 142, *Act March* 25, 1871, her life interest became forfeited to the remainderman.

2. At the time of the tax-sales Davis had such an interest that he could not acquire a tax-title. Mrs. Rabb was only a trustee of a specific trust, and could not encumber the property for her private purposes, nor was it subject to her private debts. 31 *Ark.*, 580.

3. The evidence and surrounding circumstances show that the gift to appellees was not intended as an ademption. The doctrine of ademption only applies to *specific*, and not residuary legacies. *Moggridge* v. *Thackerell*, 1 *Ves. J.*, 473; *S. C.*, 3 *Bro. C. C.*, 517; *aff'd.* 13 *Ves.*, 416; 3 *Atk.*, 183; 2 *Atk.*, 215.

EAKIN, J. John Rabb died in 1856, leaving a will which had been executed in 1854. This suit is brought by his daughter, A. Cecilia Whitaker and her husband, against his widow, who is also executrix; the other children, and persons who hold portions of the property, claiming ownership.

2. PRACTICE: What the record should show as to appearance of defendants.

J. Cole Davis, one of the purchasers and claimants of the property, is the only one who made active defense, or who is clearly shown to have made an appearance. There are several entries of record showing that "the defendants" came by solicitor, etc., etc., but it also appears that this term is used in many cases where the motion or proceeding was by Davis alone. There was no summons, actual or constructive, and we might well hold that there is a fatal defect of parties, but that the attorneys make no point of this; and there are, in the case, indirect indications that all essential parties are cognizant of the proceedings and prepared to abide the result. Such concessions, however, on the part of this court, to carelessness in entries, have already gone too far, and cannot be safely continued. At present, while proceeding to dispose of this case, we remark that it is of the greatest importance that the record of every case should show clearly, and beyond doubt, for all future time, who were parties and bound by the proceedings. Where there has been service the record should show it. Where there has been none, it should show an appearance; and where there are several defendants it does not suffice to say that "the defendants" appeared. Such a term applies only to those who have already, by service or appearance, been made parties, and does not include all who are named in the bill or complaint. It is better to name the parties defendant, who come by attorney, at least once, after which the term "defendants" in subsequent entries may include them.

The object of this suit is to obtain a construction of the will; to have the rights of the complainant under it defined; and, if she be entitled to such relief, to have a partition, with a receiver as to the lands adversely held by the purchasers. Such suits, with regard to the administration of trusts, are within the ordinary jurisdiction of courts of equity. They are commonly entertained at the suit of the executor or trustee seeking the advice, aid and protection of the court in the execution of the trust, but may be brought by any one claiming an interest in the fund, or the execution of powers.

In limine, the complainant was met by a motion to dismiss, based upon *sections* 2267 *and* 8, *Gantt's Digest*, setting forth that defendant, Davis, had purchased the lands to which the motion applied at a tax-sale, and had made valuable improvements upon them, and near them, for their benefit; and that before beginning this suit the complainants had not filed an affidavit in the clerk's office showing that they had tendered the purchaser the full amount of said taxes with costs, with interest thereon at the rate of one hundred per cent. upon the amount first paid therefor, and twenty-five per cent. upon all costs and taxes paid on said lands thereafter.

In opposition to the motion it was shown that the purchase was made by agreement with a number of the devisees under the will, the land to be held subject to redemption by the owners. The motion was properly overruled.

Although the complainant was not a party to the agreement, she was entitled to share in all the advantages with regard thereto which inured to her co-devisees, or those claiming to be such. The lands were clothed with a trust, to which the Statute, above cited, has no application.

The Statute in question has been held constitutional by this court in *Craig* v. *Flanigan*, 21 *Ark.*, 319; *Pope et al*

v. *Macon et al*, 23 *Ib.*, 644; and *Haney* v. *Cole et al*, 28 *Ark.*, 299. These seem to be cases where the sales were proper, or only irregular, and where the purchasers could not be affected with a trust. It does not follow that the Statute, although constitutional in some respects, may not have unconstitutional applications, to be considered when they properly arise.

The provisions of the will requiring consideration are as follows:

1. He appoints his wife, Harriet Ann, executrix, "under the restrictions, limitations, and provisions hereinafter written."

2. He makes her the guardian of his four sons, John N., Henry C., James W., and Daniel F., and of his daughter, Pete Ann, during their minority, in case she should live and continue unmarried. If not, he directs that the guardianship be conferred upon his brother, to continue until they reach the age of twenty-one years, or, as to the daughter, until she may marry. Further, he enjoins that each of his said children shall receive the best education that the circumstances of his estate will justify, to be paid out of the estate, "as hereinafter to be provided."

3. He bequeaths and devises to his said executrix, all his property, of every kind, real, personal and mixed;" to be, by her, retained, or disposed of "as she may deem most expedient for the payment of my debts, education of my children, and for the support and maintenance of my said wife and my *said* children." She was authorized to sell or dispose of the property, or any portion of it, "as she may think best for the interest and welfare of my said estate." By the 4th clause, the same authority was expressly given with regard to lands; and by the 5th, a general authority was conferred to compromise, renew and collect debts, and

to do any act with regard to the assets, which the testator might do, if living.

6. He directs that all his estate, not disposed of by virtue of the authority above given, shall go, after her death or marriage, to be equally divided between the children above named, and his daughter, Adeline Cecilia, (complainant) "subject to the contingencies hereinafter specified."

7. He provides that the bequests, devises and powers of guardianship conferred upon his wife, shall be dependent upon her continuing unmarried, and shall be forfeited by marriage. In which event he confers upon his brother "the same power as executor and guardian, which I have, hereinbefore, conferred upon my said wife."

8. He makes an alternative provision for his wife, in case of her marriage; and directs that the residue of his estate shall pass, *instanter*, to the four sons and two daughters, above named; or to their guardian for them, "under the law and express provisions of this my will."

9. He empowers his wife, if she may so desire, after payment of his debts, to give either of said children such portion of the estate " as she may deem such child entitled to;" and in doing that, if she should not deem it advisable that any or either of said children should receive control of his or her *portion*, he directs that she invest "the portion of such child" in such way that she or her husband shall receive only the "use, income, or produce of the same." By the 10th clause, she is relieved from the necessity of giving bond.

11. He recites that another daughter, Sarah Elizabeth Whitaker, has already received a portion in property, valued at $8000. He gives her one dollar, and provides that each of the four sons and two daughters, shall receive a like amount, before Sarah shall participate. The surplus to be equally divided amongst all seven.

12. He provides that when the property "herein devised to my said daughters" shall be given to them by the person then having control of the estate, it shall be so placed as not to be wasted by the husbands, or taken for their debts. He expressly declares it to be his intention to give to his said daughters, "for their exclusive use, support and maintenance, so long as they may live, and then to vest in the heirs of their bodies;" and should either of them die without heirs of their bodies, her interest is to vest in the survivor or survivors of his children, their heirs, "as hereinbefore provided, in equal shares."

13. He reiterates the desire that in case of his widow's marriage, his brother shall become executor and guardian; and in that event, gives to him "all the power and authority hereunder conferred upon my wife as executrix." The 14th and 15th clauses are either reiterations, or unimportant in this controversy.

One of the sons, John N., died after the father, intestate, and without issue. The property left on hand, at the time of the suit, consisted of two plantations, the "Front" and "Back" Rabb plantations. The widow, Harriet Ann, is still alive and unmarried. Sarah Elizabeth died during the suit, and her two children have, on their application, been made parties complainant, to claim any benefit which may be accorded them under the construction of the will.

The defendant, Davis, claims title to the "Back" Rabb place, and a small interest in the "Front" place, in various ways. He sets up in his answer several purchases under executions against the widow, in her individual capacity, and also a purchase under a trust deed, executed by her; also, the purchase under the tax-sale, made the subject of his motion; and purchase of the remainder interest from four of the children, (not including the complainant), to whom the widow had previously executed a deed. He insists that

this last mentioned deed was made by Mrs. Rabb, in execution of the power conferred upon her to give off such portions as she might deem advisable, to any of the children, and that it divests complainant of all claim to the particular land. He sets up, also, a gift of nine slaves, made to complainant by her father, in his lifetime, after the execution of the will, and the use of a tract of land in Mississippi, allowed to her and her husband, which, it is claimed, effected an ademption of the legacy.

Depositions were taken touching the ademption, and upon the hearing the Chancellor decreed upon the construction of the will that Harriet Rabb was appointed executrix with certain powers, to be exercised for the benefit of herself and the children of the testator, "named in said will," as well as for the protection of the estate confided to her; that she was entitled to an interest in the property of her testator for her support and maintenance in common with *the six children exclusive* of *Sarah E. Whittaker*, for a certain specified period, not yet expired, and that there could be no partition at the present time. The portion of the bill praying relief was dismissed, and it was ordered that the costs be paid out of the estate. Both parties appealed.

It will be observed that this construction of the will is only partial, and does not specifically define the rights of complainant, except as they may be inferred. It should have fixed her rights under the instrument, for the guidance of herself, the executrix, and all others entitled to benefits. Besides, it is not strictly accurate, as she was not included in the provision for education and maintenance during the widow's possession.

A review of all the provisions of the will discloses a careful solicitude on the part of the testator to protect, care for, and educate the children, and not only furnish them with portions to the extent of his estate, but to so secure, at least

to the daughters, the continued enjoyment of them through life, that they could not be squandered by their husbands. Although great confidence is reposed in the wife, unless she should marry again, the children throughout are the principal objects of the testator's bounty. The devise to her is not absolute, nor are her powers unqualified. They are all carefully guarded with reiterations of the purpose for which they are conferred. They are to be exercised for the common benefit of herself and the children, and for the good of "the estate," as distinct from the aggrandisement of her own private fortune. They pass, upon her marriage, to the testator's brother, unimpaired, for the same purposes. She has power to sell and convey, but not an unqualified power. Her estate and her powers are all in trust, although it is a trust in which she has also a beneficial interest—not the ownership of any part of any specific property, but the right while executing the trust to be maintained, or to expend in her own maintenance, so much of the property as may be necessary in her condition of life. After her death or marriage, the *corpus* of the property, which may not be exhausted, passes to those children or their descendants who may not have died without issue—the shares of the daughters to be separate property, for life only, with remainder to their respective children. These rights of the children are derived from the testator, through the will, and cannot be defeated by the widow. It consists with those rights, however, that she may change the property by sale and reinvestment during the continuance of the trust, or may sell off portions of it for the purpose of raising means to carry out the trust, but not for her own private advantage, independently of her right to share with the younger children in the maintenance.

We fully recognize the general principle, established as the American doctrine, that a *bona fide* purchaser, under a

plain power, need not see to the application of the purchase money, but this principle is not to be applied to cover collusive or careless transactions with the trustee, which, by obvious consequences, will defeat a trust, of which the purchasers are held to be cognizant. A court may consider all the circumstances.

With regard to the purchases under execution against the widow, and the deed of trust made by her, and the several conveyances by herself and the children, it may be sufficient to say of them, in a body, that none of them bind the complainant nor touch her interests. The widow had no right to the property nor power of disposal over it, save through the will. It was probated and of record in the usual depository, accessible to all the world. Creditors levying upon her property, and purchasers buying at execution sales took only such interests as she had. Those who took deeds of trust or conveyances through her, could, upon the slightest examination of her title, which only the most careless of persons would neglect, become advised of her obligations under the trust, and if they dealt with her in violation of them it must be at their peril.

Amongst the conveyances relied on by Davis to sustain his title to the whole "Back" Rabb land, is one that requires special attention. It will be observed that by the will, the executrix was authorized, during her life, if she should deem it expedient, to appoint and set apart to any of the children such portions of the estate in severalty as she might deem them entitled to. This judgment, which she was thus delegated to exercise, did not authorize her, upon any fair construction of the instrument to appoint all the estate to one or several to the exclusion of others. The portions she might deem them entitled to, were not to be measured by her private view of their merits, but were such portions in

value, as she might think them entitled to upon the ground of equality.

By deed, executed in April, 1870, she recites that her husband had devised to her all of his property in trust for her own use during her life, and at her death to the use of his children. She then proceeds to release to Henry C., James W., Robert D., and Pete Ann, in fee simple, in equal shares, all the property which she acquired under the will, reserving only one hundred and sixty acres upon which she then resided, with the household and kitchen furniture, and provides that that also shall go to the grantees after her death. Davis claims under conveyances from these grantees, and insists that her deed was in execution of her power to give to any of the children such portions as she might please, and that it excludes the interest of complainant, vesting in him the full title.

Evidently that cannot be maintained. She does not profess to act under that clause of the will, but assumes to be entitled to the whole interest during her life, and releases that. She conveys nothing. The use of the term "in fee simple" is meaningless, in such a release of a life estate if she had it. The effect of the release is only to estop her from claiming any personal benefits under the will. The power to portion off the children separately could only be exercised by deeds to them for the purpose, made with intention to execute the trust, and did not authorize her to give to some of them jointly the whole estate. It is obvious that her attempt to do so was not meant to be in execution of the power, and just as plain that she misunderstood her powers, claiming under the will an absolute title for life, of which she supposed she could denude herself to bestow it upon others regardless of any trust. The complainant does not question the efficacy of this deed and the releases of the children afterwards to Davis, to convey all their own rights,

but contends, and we think properly, that they cannot affect hers.

2. WILLS: Ademption by gifts in life of testator

In further support of this power of Mrs. H. A. Rabb to exclude complainant and her sister, Sarah E., from all further benefits in the estate, it is shown that in December, 1854, about a month after the execution of the will, the testator gave to his daughter, A. Cecilia, nine slaves. They are valued by defendant, Davis, at $7000, and it is contendded that the gift effected an ademption of the legacy *pro tanto*, and that the whole estate left in the hands of the executrix when she released to the other children was not sufficient to give each of them a like amount. If the gift were indeed an ademption, she and her sister, Sarah, who by the will had been postponed until the others should have received $8000, would both be cut off from all further claims, and would have no standing in court to attack the conveyances.

There is a deposition by the testator's attorney and confidential adviser, with regard to this point, who states that he drew up the will, and also other instruments for the testator, and for his family after his death. He values the slaves given to Cecilia, about the first of December, 1856, at about $6000, and says he knows that the gift was intended as an advancement to the extent of the value.

Upon the other hand the testator's widow declares that the gift was *not* intended as an advancement. She says that she and her husband had, in 1853, apportioned each child certain lots of negroes, but that the deed for her part was not given to A. Cecilia until 1854; and that the reason for not executing deeds to the others was that none of them were of age before the war, by which the negroes were freed.

The testimony of the attorney gives no acts nor declarations of the testator from which his intention may be inferred, nor does it reveal any circumstances to enable the court

to determine it. It is without any value, as the mere opinion of the attorney. We need not consider whether or not it was properly admitted.

Mrs. Rabb's testimony is entitled to more weight, as she supports her opinion by circumstances, which, if true, show very clearly that it could not have been the intention of the testator, in making the gift, to affect the provisions of the will. The lots of the other children were, at the time, already designated to them, in the minds of the parents, with the intention of making a full gift to each—not carried out in the lifetime of the father, because of the minority of some. If the shares of the others had remained in existence, it is very sure upon general equitable grounds that Cecilia could not have come in for an interest in the other slaves, and retained her own also, but they were all swept completely out of existence by an extraordinary event, which neither the testator nor any one else could have anticipated. The loss was common to all and equal to each. The enjoyment the complainant had of her share, before emancipation, was not more beneficial, we may presume, than that which enured to the minor children at the same time, whilst their shares were kept in the father's hands and managed for their benefit. It would be grossly unjust now to charge Cecilia with the value of her share, out of her fair and equal portion of the residue of the property, when the testator has been so careful to manifest a general overruling intention of putting all his children on an equality. But it is not necessary to resort to general principles of equity, arising from the extraordinary and unexpected change of circumstances. The case must, indeed, be considered in the light of the circumstances as they stood when the gift was made, as the sole question is, as to the intention of the testator at the time. This may be shown by parol when the question is one of ademption ; and it is plain that the testator, intend-

ing to make his children equal, in his lifetime, with regard to slave property, or supposing that he had done so, could not, in making the gifts effective, from time to time, have meant to destroy their equality under the will. If such had been his intention, he would certainly have mentioned it in a will executed so nearly contemporaneous with the gift to one daughter, and after the intention had been formed to give like shares to others.

Moreover, we think the doctrine of ademption inapplicable to such interests as are given under the will. They are not legacies of definite sums, but of shares of property, in uncertain amounts, constituting, in effect, a residue of the estate. The doctrine of *advancements* is peculiarly applicable to the distribution of the estates of intestates. With regard to the *ademption* of legacies, by gifts, during life, its application has been confined to such legacies as are specific, or to general legacies of definite amounts in money, or something of the same nature. It is not applied where the bequest to the child in the will is of a residue, or part of a residue. *Williams on Exr's Mar., p.* 1202; *Roper on Legacies, vol.* 1, *mar. p.* 377; *Redfield on Wills, Part II, p.* 539. The court did not err in holding that the interest of Cecilia, in the will, had not been adeemed by the gift of the slaves.

Upon no principle can it be held to have been adeemed by the use of a certain plantation in Mississippi, which had been allowed to her husband, but which was never conveyed.

We do not think that defendant, Davis, acquired any right whatever which a Court of Chancery can define and properly administer by virtue of the purchases under execution against Mrs. Rabb individually. The levies and sales were in violation and in defiance of a plain trust, of which her creditors are chargeable with notice. The mortgages,

deeds, releases and agreements executed by her and the other children, may serve as estoppels against her, and as conveyances of the interests of the other children, according to the import of the several instruments, but such interests, whatever they may be, must be made to adjust themselves to the equity of complainant, Cecilia, in the subject matter. It is no easy matter, but she is not responsible in any manner for the difficulty, and it is the duty of the Chancellor, if need be, himself to devise a scheme to be applied to the property within his control, in accordance with equitable principles, whereby her rights may be maintained to the fullest extent. Without further discussion of the steps by which Davis obtained title, it may be sufficient to assume, what sufficiently appears from the transcript, that all the rights in the "Back" Rabb place of 960 acres are vested in him, which belonged to the widow, Harriet A., and the four children, Henry C., James W., Dan'l F., and Pete Anne, with her husband, and which they were empowered to convey. Or, to state it differently, he owns the "Back" Rabb place, subject to the portions of the complainant's, A. Cecilia, and the children of Sarah in the whole estate. Whilst he cannot claim it a *right*, that they shall be satisfied out of the other portions of the estate, yet a Court of Chancery will not disturb the existing condition of things with regard to the "Back" Rabb place, if sufficient be found otherwise fully to satisfy their claims, without inequitable conditions or restrictions. All such cases must rest upon their own circumstances.

It was the duty of the widow to pay taxes on the whole land during her life and widowhood. The same duty devolves upon Davis, whilst in pernency of the rents and profits. If he has paid taxes by arrangement with the widow and the children, whose interests he acquired, and continues to pay them till partition, he cannot either

strengthen his title or acquire any right to reimbursment against these complainants. He must look for remuneration to the interests of those whose title he acquired, and ought to have kept them down.

It further appears that the defendant claims, and is entitled, also, to all the interest in the "Front" Rabb place, which belonged to J. W. Rabb in January, 1875, at which date he purchased it from said J. W., and took a conveyance. It is conceded that John N. Rabb, another of the minor children, mentioned in the will, is dead without issue. The fact of his actual death is uncertain, but the legal presumption of it attached before any of the conveyances were made affecting the property. His interest was ancestral, and had descended in equal parts to his three sisters, Cecilia, Pete Anne and Sarah, and to his three surviving brothers, Henry C., Dan'l F. and James W., in the proportions of one-sixth each. This interest, in the part of said John N., which belonged to Sarah, is now vested in her children who are made co-complainants. It is not probable that the estate will, before partition, become sufficiently valuable to entitle them to any more through their mother; but if by any chance it should exceed the value of $48,000, they would be entitled to represent her in an equal partition of the surplus, in addition to the interest which they take, through her, in the part of John N., their deceased uncle.

It is plain that, throughout, the widow has repudiated the construction herein declared, of her rights and duties under the will, and has acted without any regard to any trust. The said complications which have already arisen afford the best practical illustration of the utility of that branch of equity jurisdiction under which the courts construe trusts and direct trustees. The parties have acted throughout under a misconception. The estate seems to have been badly managed,

and the interests even of those capable of acting *sui juris* have, probably, been sacrificed. Had an early application for the solution of doubts been made to the Chancery Court, and the estate been wisely and prudently administered, as the testator intended and the court might have compelled, it might, notwithstanding the loss of the slaves, have served the purpose of educating the minors and maintaining them with the widow, and left clear valuable well defined interests which they might have waited to enjoy, or sold without sacrifice.

This was not done, and the result has been shipwreck from executions, neglected taxes, deeds of trust, mortgages, and releases of uncertain interests, which it is hard now to repair. It is the duty of the court, being appealed to for the purpose, to gather up the *disjecta membra* floating in confusion, and adjust them by such plan as it can devise under recognized principles of equity, so that hereafter all who deal concerning this property or any part of it, may at least tread securely.

It is useless to attempt to revive the trust. It has been long abandoned, and the necessity for it is passed away. The minors are all long since of age, and have released in great part, all their rights. The widow has chosen to retire for life upon one hundred and sixty acres, and claims nothing more. So far as we can see, no one complains of this. The court might, if there were any reason for it or equity in it, appoint a new trustee, but will not do so to enable the defendant, Davis, until the widow's death, to enjoy the whole estate, and, meanwhile, set the rights of complainants at defiance. The testator, in the anxious solicitude for his children, which he everywhere manifests, never contemplated any such result as that. The Chancellor should have declared the objects of the trust to have become accomplished or impossible of execution, and decreed immediate parti-

tion. The circumstances justify an acceleration of the closing of the trust as completely as if the widow had died or married, and it consists with the general intention of the testator.

There would seem to be no necessity for a reference to determine whether or not there can be a division of the property in kind. It is not easy to perceive how one could be made so as to adjust all the complicated equities. If the Chancellor should be of the same opinion and none of the parties insist upon it, the costs need not be inflamed by requiring a report of commissioners upon this point, but the court may proceed at once to direct a sale of both plantations, saving the widow's life interest in the one hundred and sixty acres she has chosen out of the Front Rabb place. It is best that the places be sold separately, inasmuch as the interests of the parties in the two places vary. There may well be separate accounts of the two sales, and adjustments of proceeds in the same suit.

The court will fix such terms of sale as to time, as, in its opinion, will best insure a fair price, consistent with reasonable dispatch in closing up the whole matter, without regard to the times fixed for sales upon foreclosures by *section* 4708 of *Gantt's Digest.* This is not a case to which that section applies.

Out of the proceeds, after payment of all costs, the complainant, A. Cecilia, will be entitled to one-sixth by original right under the will, to be settled upon her for life, with remainder to her children or their descendants, in such manner as the court may order, and absolutely to one-sixth of one-sixth, or one thirty-sixth, through her deceased brother, Jno. N. Rabb. The complainants, James E. and Mary C., will be entitled jointly in the first instance to one thirty-sixth, with a contingent right to more, if the fund from both places

should exceed $48,000, when the original rights of their mother would begin under the will.

The defendant, Davis, or Fitzburgh (who, as Davis' vendee, is always intended when the rights of Davis are spoken of in this opinion) will be entitled out of each place to the rights or shares of the children who have sold or released to him their interests in the special place. No allowance will be made against complainants for taxes or improvements.

The several shares and proportions of the parties should, before sale, be ascertained and declared by the Chancellor according to the principles herein announced, using a master for the purpose, if advisable.

As this cause required the intervention of a court of equity for construction of the will, the Chancellor fitly decreed the costs and expenses to be paid out of the estate. The costs of the appeal will be against the appellee, Davis, in this court to be paid by him, with right of reclamation out of the fund when raised.

Reverse the decree upon the appeal of complainants below and remand the cause for further proceedings in accordance with this opinion, and the principles and practice in equity.

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School District No. 11 v. Williams.

1. Justices of the Peace: *Jurisdiction; Trespass on real estate.*
A justice of the peace has no jurisdiction of trespasses upon real estate.

2. School Districts: *Corporations; capacity; liability.*
School district are by Statute *quasi* public corporations with capacity to sue and be sued, but are not liable for trespasses committed by their officers. For these the officers are personally liable.

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

ENGLISH, C. J. School District No. 11, of Faulkner county, sued Williams in trespass before a justice of the peace for cutting and removing timber from a sixteenth section, and laid the damage at $100. Upon an affidavit made by two of the directors, and on the execution of bond by them and other persons, an attachment was issued, and levied on some cypress timber by a person authorized by the justice to execute the writ.

Judgment was given by the justice against Williams, and he appealed to the Circuit Court, where he demurred to the complaint for want of jurisdiction. The court sustained the demurrer and discharged him.

A jury was then impannelled, and the damages of the defendant assessed at $72.50, and judgment was rendered against plaintiff and the sureties in the attachment bond for the amount of the verdict, a new trial refused, a bill of exceptions, and an appeal taken by plaintiff.

The constitution does not invest justices of the peace with jurisdiction of trespass upon real estate. *Sec.* 40, *Art.* VII. The justice of the peace had no jurisdiction of the subject matter of the action in this case, and all of the proceedings before him were *coram non judice* and void.

The Circuit Court properly discharged appellee, and should have dismissed the whole case.

The Statute makes School Districts *quasi* public coporations, with capacity to sue and be sued. But it does not make them liable for trespasses committed by their officers. The Directors of School District, No. 11, were personal trespassers in suing out the attachment in this case before the justice of the peace, and causing the property of appellee to be seized and detained, but no judgment could be rendered against the corporation for damages occasioned by

such trespass. *Granger et al* v. *Pulaski county*, 26 *Ark.*, 37.

The judgment of the court below must be reversed, annulled, set aside and held for naught.

St. L., I. M. & S. Railway Co. v. Murphy Bros.

1. Practice: *Bill of exceptions on overruling motion; presumption.*
When there is no bill of exceptions showing upon what evidence the Circuit Court sustained or overruled a motion, this court will presume that the court ruled correctly.

APPEAL from *Clark* Circuit Court.
Hon. H. B. Stuart, Circuit Judge.

Dodge & Johnson, for appellant:

"The party objecting to the decision must except at the time, etc., and time may be given to reduce the exceptions to writing, but not beyond the succeeding term." *Sec.* 4694, *Gantt's Digest.*

The words (exceptions taken and noted) were written in the bill of exceptions, but the clerk failed to enter the motion for new trial.

It was the duty of the court to have granted the motion for *nunc pro tunc* order. The record should have been amended so as to speak the truth.

Williams & Battle, for appellee.

The motion for a new trial is not incorporated in bill of

exceptions. 30 *Ark.*, 585; 28 *Ib.*, 450; 35 *Ib.*, 536; *Gantt's Dig.*, *sec.* 4698; 21 *Ark.*, 286; 26 *Ib.*, 536.

ENGLISH, C. J. The complaint in this case was loosely drawn, and fancifully paragraphed, but substantially sets out a cause of action. Its formal defects were cured by the verdict.

Appellant took a bill of exceptions, setting out the evidence and instructions, but making no reference to a motion for a new trial.

At the next term it applied to the court to cure this defect by a *nunc pro tunc* amendment of the bill of exceptions, which the court refused. No bill of exceptions was taken to show upon what evidence the court acted in refusing to sustain the application, and the presumption is in favor of the correctness of the ruling.

Affirm.

JESSUP, AS AD. V. SPEARS.

1. RES JUDICATA: *Consent order in the Probate Court.*

To a bill by Jessup as administrator of Herrill's estate to foreclose a mortgage executed by Spears to secure his note, Spears answered that he had delivered to Herrill in his life time, a certain number of bales of cotton sufficient to pay the note. Upon the trial the administrator proved by the records of the probate court that Spears had before presented his claims for the cotton to him, and he had rejected it and referred it to the probate court, and upon trial there the court had, by consent of the parties, ordered that the administrator credit Spears' note with an amount equal to about one-third of his claim, and that Spears pay the cost of the proceeding, and that no appeal had been taken from the judgment. The credit appeared upon the note leaving a balance due on it.

Held: That the probate court had jurisdiction of the claim and the parties, and its judgment was as conclusive as if rendered upon hearing evidence; and Spears was estopped from going back of it on re-litigating the matter in this court.

APPEAL from *Perry* Circuit Court in Chancery.
Hon. JABEZ M. SMITH, Circuit Judge.

T. W. Pound, for appellant:

The payment insisted on is the same claim adjudicated in the probate court, and appellee is estopped by the judgment therein from setting it up. *Freeman on Judgments, secs.* 319, *a;* 221–2 *and* 249; *Hopkins* v. *Lea*, 6 *Wheat.*, 109; *Kendall* v. *Stokes*, 3 *Howard*, 100.

J. F. Sellers, for appellee:

1. The reply was properly stricken from the files. It contained neither a counter-claim nor set-off. *Gantt's Dig., sec.* 4579.

2. Action of probate court was *coram non*; it could only allow or disallow the claim. *Ib., secs.* 112, *et seq, and* 4700; *Freeman on Judg., sec.* 251.

3. Spears not estopped; the party pleading estoppel must have parted with something of value upon the acts or statements of the other, and could not be placed in his original position if the other was not estopped. *Kents Com., vol.* 4, *notes to p.* 261; 3 *Sneed*, (*Tenn.*,) 372.

4. The issue is upon the amount due, and not on an adjudication of the probate court.

5. Party seeking equity must come into court with clean hands. *Story Eq. Jur., sec.* 642.

ENGLISH, C. J. This was a bill to foreclose a mortgage. The material facts alleged by the bill, were:

That on the second of September, 1870, defendant, Stephen Spears, executed to Joseph G. Herrill, complainant's intestate, a note for $900.00, payable first January, 1871, with interest at ten per cent. from date until paid, and gave a mortgage upon a tract of land described, to secure the payment of the debt and interest.

That on the fourth of February, 1874, Herrill died, and on the ninth of March following, complainant, Mercator Jessup, was duly appointed administrator of his estate.

The bill admits, as partial payments, the following credits endorsed upon the note:

As of April 1st, 1872	$388.98.
As of April 1st, 1873	324.14.
As of April 24th, 1877	20.00,

and alleges the non-payment of the balance of the debt, etc., for which a decree is prayed, with foreclosure of the mortgage.

In his answer, defendant admitted the execution of the note and mortgage, but alleged that he had fully paid the note by delivering to Herrill, during the fall of 1870, ten bales of cotton worth $1200.00; in the fall of 1871, six bales, worth $700.00, and in the fall of 1872, five bales worth $600.00.

On the hearing the defendant proved, by his own deposition, the payments in cotton about as broadly as he had alleged them in his answer.

The complainant proved by the probate records, in substance, that defendant had made out and presented to him for allowance, a claim against the estate of Herrill for the cotton referred to in the answer, which he rejected, and referred it to the probate court. That the claim came on

for trial, and by consent of parties, it was ordered by the court that he credit the note in suit with $388.98, as of April 1st, 1872, and with $324.14, as of April 1st, 1873, and that claimant pay the costs.

It was also proved that no appeal was taken from the judgment of the probate court, so entered by consent, that the credits were entered on the note, and afterwards defendant made complainant a further payment of $20.00, which was credited upon the note as of April 24th, 1877.

Upon the above pleadings and evidence, the court dismissed the bill, and complainant appealed.

The probate court had jurisdiction of the claim and of the parties, and the judgment entered by consent was as conclusive upon appellee as if made by the court upon hearing evidence, and he was thereby estopped from going back of the judgment in this suit, and again opening up the controversy about the cotton payments. He, in effect, consented to a judgment allowing part of his claim, and rejecting the balance, and by consent of appellant, the amount was credited on the note now in suit.

The decree is reversed, and the cause remanded to the court below, with instructions to enter a decree for the balance due on the note, foreclosing the mortgage, and condemning the land to be sold for satisfaction, under the usual practice in equity in such cases.

GREENHAW v. ARNOLD.

1. PAYMENT: *Pendente lite; Judgment for cost.*
Payment of the debt sued for, during the pendency of the suit, will not bar a judgment against the defendant for the cost.

APPEAL from *Searcy* Circuit Court.
Hon. J. H. BERRY, Circuit Judge.

Henderson & Caruth, for appellant:

P. C. Dooley, for appellee:

There is no motion for a new trial in the record. It is not referred to in the bill of exceptions; is not embraced in it, nor made part of it. *White* v. *Prigmore*, 28 *Ark.*, 450.

ENGLISH, C. J. Arnold sued Henson before a justice of the peace of Searcy county, by attachment, for rent, under the landlord's lien act, and four bales of cotton were attached. Greenhaw interpleaded for the cotton, and on a trial obtained judgment. Arnold appealed to the Circuit Court, where there was a trial *de novo*, and verdict in his favor.

It was shown to the court that, pending the appeal, the rent debt for which the attachment was sued out had been paid, but that no costs had been paid; and thereupon the court rendered judgment upon the verdict in favor of Arnold against Greenhaw for costs.

It appears that Greenhaw filed a motion for a new trial,

which was overruled, and he took a bill of exceptions, and appealed to this court.

Upon the face of the record the judgment was right. The payment of the debt, pending the suit, was no bar to a judgment for costs against appellant. *Goings* v. *Mills*, 1 *Ark.*, 11.

We find a motion for a new trial in the transcript, but it is not embodied in the bill of exceptions, nor referred to, identified, and made part of the record.

If it had been made part of the record, there is nothing in it. One ground of the motion is, that the verdict was contrary to the instructions of the court, but the bill of exceptions sets out no instructions. A further ground is, that the verdict was not warranted by the evidence. The evidence conduces to prove that at the time the attachment was sued out, Henson was indebted to Arnold for rent; that the cotton attached was produced on the demised premises; that Arnold had a landlord's lien on it for rent, and that Henson had sold it to appellant, who interpleaded for it.

Affirmed.

STATE, USE, GARLAND COUNTY ET AL v. BAXTER ET AL.

1. COUNTIES: *Suits for: How prosecuted.*

Under *sec.* 3 of the *Act of 27th February*, 1879, a suit may be prosecuted in the name of the State for the use of a county, or by any citizen, for himself and other citizens and tax-payers of the county, to annul and cancel an illegal and fraudulent lease made by the county judge, of the county property.

2. ATTORNEY: *His authority to sue: How questioned,*

An attorney's authority to prosecute a suit in the name of the State for the use of a county cannot be questioned by a demurrer to the complaint.

APPEAL from *Garland* Circuit Court in Chancery. Hon. J. M. SMITH, Judge.

R. G. Davis and J. M. Rose, for appellants:

The county could receive and hold the property as a charitable use, as a gift for the use of the public. *Att'y Gen'l* v. *Helis*, 2 *S. & St.*, 67–76; 7 *Johnson, Chy.*, 292; 2 *How.*, 127; 55 *Ind.*, 297; 2 *Dill. on Mun. Corp.*, 437; *Hill on Trustees*, 453; 2 *Sneed.*, 305; 30 *Penn. St.*, 437; 5 *O. St.*, 237.

A private citizen can sue to prevent an injury to the public, or to restrain public officers from exceeding their duty. 2 *Dillon on Mun. Corp.*, *secs.* 729–739; *Art.* 16, *sec.* 13, *Const.* 1874; *sec.* 4478, *Gantt's Digest*; 31 *Ark.*, 264; 32 *Ark.*, 497, 30 *Ib.*, 482.

Suit properly brought in name of State use Garland county. *Acts* 1879, *p.* 13.

Sec. 4838, *Gantt's Dig.*, does not say *all* actions, nor prevent any citizen from prosecuting his suit. If it does, then, where the prosecuting attorney declined to act or was in collusion with county officers, the citizens would be remediless.

George J. Summers, for appellee Blades:

Sumpter is a stranger in the suit. *Gantt's Dig.*, *secs.* 4475–6–7–8, refers to persons having direct and immediate interests.

Sec. 13, *Art.* 16, *Const.*, refers alone to illegal taxes and illegal demands therefor. Every action must be prosecuted in the name of the real party at interest. *Gantt's Dig.*, *sec.* 4469; 26 *Ark.*, 463.

The suit should have been by the attorney general, the

prosecuting attorney, or by one of them in the name of the State. *Hill on Trustees*, 4 *Am. Ed.*, *bot. p.* 445 *et seq.*; *Gantt's Dig.*, 4838–9; 1 *Ark.*, 277.

The county was capable of receiving the donation. *Sec.* 940, *Gantt's Dig.*; *Acts* 1875, *p.* 144–5.

J. M. Harrell and G. W. Murphy, for appellees.

Argued on the merits.

English, C. J. This suit was commenced on the Chancery side of the Circuit Court of Garland county, on the fifteenth of January, 1881. The bill was filed in the name of the State for the use of Garland county, and John J. Sumpter joined as complainant in behalf of himself and other citizens and tax-payers of the county.

A demurrer was sustained to the original bill, and an amended bill filed, to which there was a demurrer and answer filed by defendants. The court sustained the demurrer "for want of proper parties plaintiff," dismissed the suit, and complainants appealed.

The amended bill alleged, in substance, that by act of Congress, entitled "An Act in relation to the Hot Springs Reservation in Arkansas," approved March 3, 1877, and acts supplemental thereto, the United States granted to the county of Garland a suitable tract of land upon the reservation, not exceeding five acres, to be laid off by the commissioners appointed under the act, *as a site for the public buildings of said county*. That the commissioners, in pursuance of the Act, on the twenty-third of June, 1879, laid off and designated a certain tract of land by survey and plat, which is described by metes and bounds, containing three acres and sixty-two hundredths of an acre, constituting the whole

block No. 114 of the city of Hot Springs, and in the S. E. Qr. of sec. 32, Township 2 S., R. 19 W, and filed said survey and plat in the recorder's office, etc., etc., together with the findings, action, and decision in the matter, etc., etc.

That on the twenty-first day of January, 1880, W. W. Wiggs, county judge of Garland county, claiming to act for and on behalf of said county, executed a lease of said property to George W. Baxter and Walter A. Moore, for the term of ninety-nine years, for the consideration as recited in the lease of $1025, of which $500 was to be paid in cash, and $525 to be paid on the first of January, 1880, and said Wiggs covenanted with the lessees that said sums, when paid, should be in full of all demands of whatever kind for assessments of and on said land for the full term of said lease, etc.

That Baxter and Moore had subleased portions of the ground to other persons, who are named, etc.

That on the execution of said lease, Wiggs delivered possession of the property to Baxter and Moore, and they had put their sub-lessees into possession of the portions subleased to them, and Garland county had thereby been totally deprived of the use of said land for any purpose whatever.

That the rent reserved by said lease, to Baxter and Moore, was wholly inadequate to the real rental value of the premises, and a mere nominal sum when compared with the actual value thereof. That the premises were centrally located, in and near the most valuable portion of the city of Hot Springs, accessible from all parts of the city, etc. That the lease to Baxter and Moore was made secretly, without advertisement, or any chance for public bidding, and was the result of a collusive attempt on the part of Wiggs and Baxter and Moore to unlawfully deprive the citizens of the county and public generally, of the benefit of said grant, which was a charitable use for the benefit of the

public generally, given to said county for the use and benefits of its inhabitants as a site for public buildings of said county; and any lease of the same for ninety-nine years was a perversion of the intent of the grantor, and an abuse of trust, etc. That said lease, sub-leases, possession and control of said lands by defendants were a cloud upon the title of Garland county, etc.

Baxter and Moore, and their sub-lessees, and Wiggs were made defendants.

The bill prayed that the lease and sub-leases be cancelled, that defendants be required to surrender up possession of the property, and that the court devise a scheme by which the gift of the United States could be made effectual, etc.

The grounds of demurrer to the amended bill, were:

1. That it did not state facts sufficient to constitute a cause of action.

2. That it did not state facts sufficient to entitle the plaintiffs to the relief sought, they having no interest in the subject matter of the suit, and no right to maintain the same.

It was upon the second ground that the court sustained the demurrer.

It is not material to state the matters of defense set up in the answer, as the suit was determined on the demurrer to the bill contained in the answer.

At the time the act of Congress, making the grant in question, was passed, Garland county was a corporation, (*Gantt's Dig.*, *sec.* 937, *etc.*,) and capable of receiving the donation. *Ib.*, *sec.* 940; *Act of 5th February*, 1875, *sec.* 78; *Acts of* 1875, *p.* 144.

By *Act of twenty-seventh February*, 1879, (*Acts of* 1879, *p.* 13,) passed before this suit was commenced, all laws and parts of laws making counties corporations, and

authorizing them to sue and be sued as such, were repealed.

This suit could not therefore have been brought in the name of Garland county.

Section 3 of the act last cited provides that: "When any county has any demand against any persons or corporations, suit thereon may be brought in the name of the State for the use of the county," etc.

I. COUNTIES: Suits for, how prosecuted.

The bill alleges, in effect, that the county judge made an improvident, fraudulent, collusive, and illegal lease to Baxter and Moore of the land donated by Congress to the county for public uses; that the lease was a perversion of the purposes of the grant. If this be true, (and the facts alleged are admitted by the demurrer,) the county had a "demand" against the lessees to have the lease revoked, and suit for that purpose might be brought under the Statute, in the name of the State, for the use of the county.

The word, "demand," as used in the act, is a comprehensive term. DEMAND. A claim: a legal obligation. Demand is a word of art of an extent greater in its signification than any other word except claim. A release of all demands is, in general, a release of all covenants, real or personal, conditions, whether broken or not, annuities, recognizances, obligations, contracts and the like, etc. *Bouvier's Law Dic.*

By Statute, (*Gantt's Dig.*, *sec.* 4838,) it is made the duty of the prosecuting attorney to commence and prosecute actions, both civil and criminal, in which the State or any county in his circuit may be concerned.

2. ATTORNEY: His authority to sue, how questioned.

The solicitors for appellees have made the objection here that the suit in this case was not commenced by the prosecuting attorney.

But this objection was not raised by the demurrer to the bill, and could not properly be presented by demurrer, which goes only to the sufficiency of the allegations of the

bill. *Tally* v. *Reynolds*, 1 *Ark.*, 99; *Cartwell* v. *Menifee*, 2 *Ib.*, 356.

The bill was signed by Mr. Davies as attorney for the plaintiffs. By what authority he undertook to represent the county of Garland, he was not called upon in the court below to show, and the matter cannot be enquired into on this appeal.

But if the allegations of the bill be true, Sumpter had the right to bring the suit in behalf of himself and other citizens and tax-payers of the county.

In this country, the right of property holders, or taxable inhabitants, to resort to equity to restrain municipal corporations and their officers from transcending their lawful powers or violating their legal duties in any mode, which will injuriously affect the tax-payers, such as making an unauthorized appropriation of the corporate funds, or an illegal disposition of the corporate property, etc., has been affirmed or recognized in numerous cases in many of the States. 2 *Dillon's Mu. Corp.*, *3rd Ed.*, *sec.* 914; *Town of Jacksonport* v. *Watson et al*, 33 *Ark.*, 704.

Counsel have taken a wide range in their briefs, but the question of parties plaintiff, presented by the demurrer, and decided by the court below, is the only one properly presented on this appeal.

Reversed and remanded for further proceedings.

HICKS v. BROWN.

38 469
188 589

1. LIMITATIONS: *Ten years as to Justice of the Peace judgments.*

A plea of the Statute of Limitations of five years is no bar or defense to an action upon a judgment of a justice of the peace. The Statute limiting the time to five years within which an execution may be issued on a justice's judgment is no limitation to an *action* upon the judgment.

APPEAL from *Sebastian* Circuit Court, Greenwood District.

Hon. JOHN H. ROGERS, Circuit Judge.

STATEMENT.

On the twenty-third day of August, 1880, Hicks sued Brown in the Circuit Court at Greenwood, in Sebastian county, upon a judgment he had recovered against him before a justice of the peace of the county, on the twenty-fourth day of August, 1870, for $200.

Brown answered "that said supposed cause of action in said complaint, declared upon, did not accrue within five years next before the institution of this action." A demurrer to the answer was overruled, and, upon the trial, the court found for the defendant upon the answer, and rendered judgment against the plaintiff for cost, and, after motion for new trial overruled, he appealed.

Duval & Cravens, for appellant:

Sec. 3791 *Gantt's Digest* only provides *that no execution shall issue after five years.*

The answer setting up five years as a bar was no defense.

Freeman on Judgments, 432; *Stuart* v. *Lander*, 16 *Cal.*, 372; *Sec.* 4128, *Gantt's Dig.*; *Osgoodby's Attorney & Banker's Directory for* 1881–82, *page* 25.

HARRISON, J. The Statute makes no distinction as to the limitation of actions between judgments of the Circuit Courts and justice's of the peace. Its language is:

"Actions on *all* judgments and decrees shall be commenced within ten years after the cause of action shall accrue, and not afterwards." *Sec.* 4128, *Gantt's Digest.*

There is no necessary relation between this section and section 3791, limiting the time in which executions may be issued on judgments of justices of the peace, and it is not required to be construed in *pari materia* with it. A payment or part satisfaction would not extend the time in which the execution might be issued, but though made after the expiration of it, would remove the bar of the Statute of Limitations.

The plea of the Statute of Limitations of five years was, therefore, no bar or defense to the action, and the plaintiff, notwithstanding the answer and the finding of the court, was entitled to judgment.

The judgment is reversed and the cause remanded, with the instruction to render judgment for the plaintiff.

FORT V. BLAGG ET AL.

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58 90

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68 460

38 471
73 48

1. STATUTE OF LIMITATIONS: *None against Probate Court allowances.* The Statute of Limitations does not run in favor of an estate against a claim which has been duly allowed and before the administration has been entirely closed.

2. ADMINISTRATION: *Allowances are judgments; when and how to be paid.* A probate court allowance has the force and dignity of a judgment; but no execution can be issued upon it, nor demand made upon the personal representative for payment until payment is ordered by the court; and the court must not order payment un.il it first ascertains all the debts of its class, and those having precedence, and the amount of the assets; and must then *pro rata* them, if necessary, before ordering payment. Meanwhile, no suit can be brought upon the allowance itself against the personal representative. He cannot pay without an order of the court, except at his peril.

3. STATUTE OF LIMITATIONS: *As to holders of the property of an estate.* In a suit to collect an allowed claim out of property of the estate, the Statute of Limitations will run in favor of all persons holding the property adversely, whether under or against an administration; although the allowance as against the estate may not be barred.

APPEAL from *Sebastian* Circuit Court in Chancery. Hon. J. H. ROGERS, Circuit Judge.

STATEMENT.

This was a suit in equity instituted by Fort against Thomas B. Blagg and others, in the Circuit Court of Sebastian county, at Greenwood, on the twenty-fifth of August, 1879.

A demurrer was sustained to the original complaint, and thereupon the plaintiff filed an amended complaint, alleging, in substance, that on the —— day of November, 1855, Samuel Blagg had died in said county, seized and possessed

of certain tracts of land, in the county, which he particularly describes, and leaving the defendants, his children, as his only heirs at law. That one James B. Spring, was appointed and qualified as administrator of his estate; that within two years thereafter the plaintiff presented to said administrator his claim against said estate, duly probated, and afterwards, on the twenty-second of April, 1856, the probate court of the county allowed said claim, amounting, with interest, to $920.00, and classed it in the fourth class; all of which had been paid except about $367.00. That in November, 1859, said administrator had obtained an order of the probate court to sell said lands for the benefit of the heirs of said deceased, and on the fourteenth day of December, 1859, had sold them under said order, to one John S. Quinlin, for the sum of $2000, who executed to said administrator his bond for said purchase price, and a mortgage upon said lands, to secure its payment; and said sale had at the January term, 1860, been duly reported to and confirmed by said probate court. That afterwards said administrator died and C. B. Neal was, on the fifteenth day of February, 1869, appointed as administrator in his stead, and had instituted an action in said Circuit Court to foreclose said mortgage and sell said land for the payment of the purchase price, and had obtained a decree accordingly; and the lands had been sold by a commissioner of the court, at public sale, on the twentieth of January, 1873, to the defendant, W. A. Blagg, for the sum of $2500. That the purchase was made by said W. A. Blagg for his co-defendants, the children and infant heirs of the deceased, for whom he was guardian; that the sale had been confirmed by said Circuit Court at the February term, 1875, but no part of the purchase money had been paid to the administrator, and he had, on the —— day of July, 1874, so reported to the probate court, and also that the purchase was for said heirs;

and at said term said probate court had discharged him as such administrator. That the amount bid for said lands was more than sufficient to satisfy all demands allowed against said estate, and is still due and unpaid, and is a lien upon said lands.

Prayer for an account of the amount still due on his claim against said estate, and that it be declared a lien upon said lands, and that the defendants be required to pay said amount by a fixed day, or in default therein, the said lands be sold for its payment. Only the heirs were made defendants.

The defendants demurred, 1st, for want of jurisdiction; 2nd, defect of parties; 3rd, want of equity.

The demurrer was sustained and the plaintiff appealed.

Duval & Cravens, for appellant:

1. The court had jurisdiction. 13 *Ark.*, 559; 14 *Ib.*, 260; 15 *Ib.*, 414.

2. There was a defect of parties defendant. 31 *Ark.*, 234. The suit was properly against the heirs.

3. The action was not barred by limitation. 33 *Ark.*, 141, *McCustian* v. *Ramey*; *Angel, on Limitations*, *p.* 55. The cause of action did not arise against defendants until they came into possession of the lands.

EAKIN, J. The demurrer presents three questions to be decided by the face of the complaint: 1st. Had the court jurisdiction? 2nd. Were there proper parties? And, 3d. Did the complaint show any such equities as would move the court to grant the relief?

The lands lay in Sebastian county, in the district of the

court. The object of the bill is to fix a lien upon them, and subject them to the payment of a debt. The court had jurisdiction to hear and determine the case, and to grant the relief, if a proper case had been shown, with proper parties before it. The last two questions will be considered together.

1. STATUTE OF LIMITATIONS: None against Probate Court allowances.

2. Allowances are judgments

First, as to the Statute of Limitations: That does not run in favor of an estate against a claim that has been duly allowed, and before the administration has been entirely closed. It stands, meanwhile, waiting payment, in due course, under orders of the court. It has the force and dignity of a judgment, but differs from it very materially in several respects. No execution can issue upon it. No demand can be made for it of the personal representative, until its payment be ordered, and the order of payment does not always, or generally, follow the allowance. Never as a matter of course. The court must first ascertain all the debts of its class, and all having precedence; and must take an account of the assets, and *pro rata* them, if necessary, before ordering payment. Meanwhile, no suit can be brought upon the allowance itself, against the personal representative. The allowance is the end of the law. Suits against administrators or executors are only for the purpose of ascertaining debts, to the end that they may be allowed and administered. Indeed, the personal representative *cannot* pay allowances before orders, unless at his peril. The allowance stands for the notice and guidance of the court, as an ascertained right, to be provided for as long as assets can be found. It is quite plain that the Statutes of Limitation have no application in favor of an estate as against allowances; or it might be practicable, by long postponements of, or impediments to the closing of an estate, to defeat all the allowances wholly. There is no provision for their renewal or revival.

3. STATUTE OF LIMITATIONS: As to holders of the property of an estate.

But this is not a claim against an estate. It professes to set up an equity against heirs, to whom lands have descended, to burden the lands with a debt, duly allowed against the estate, but never paid. In favor of all persons holding adversely, whether under or against an administration, the Statute will run. They stand on different grounds, and may hold by their adverse possession; although the allowance, as against the estate, may not be barred. There is no personal claim against them, as to which they can plead the Statute. They can only claim that after a certain adverse holding, their title and possession cannot be disturbed for the purpose of bringing back into the administration assets for the payment of debts. With reference to this view of the case, it does not appear that they have been seven years in possession. The possession, in contemplation of law, was in the administrator, and no holding, adverse to him, appears on the face of the bill. It had not been seven years after his discharge before this bill was filed, and the Statute did not bar.

But, in truth, the bill, properly considered in its effect, does not charge them as heirs, but as purchasers. The lands never decended to any one, save in contemplation of law. The title, it is true, vests immediately on the death of the ancestor; but practically, the control and right of possession of the lands was with the administrator, until, by order of the probate court, they were sold to John S. Quinlin, on the fourteenth of December, 1859, for the sum of $2000.00. They passed from the estate by that sale. The mortgage, to secure the purchase money, became assets of the estate, and there was a lien thereby created; but the control and management of the property was gone from the administrator, and heirs together. All the creditors could claim was that the $2000 note should be collected and divided amongst them.

The administrator, d. b. n., Neal, who succeeded Spring, took steps to this end. A foreclosure was decreed, and under it, in January, 1873, the lands were sold for $2500, to defendant, W. A. Blagg, who, at the time, was guardian of the infant heirs of deceased, and purchased as such. This sale was reported to the Chancery Court and confirmed, although, for some reason, not explained, no money was paid to the estate on the purchase.

Supposing that the guardian was authorized to purchase for the benefit of the infants, the effect of the transaction was simply to substitute as assets for the payment of the debts of the estate and for distribution, the obligation of W. A. Blagg to pay the $2500, bid at the sale, or so much thereof as would satisfy Quinlin's mortgage. All over that would belong to Quinlin. Blagg, as guardian, took by purchase, just as if the infants had been the heirs of any one else than the deceased. The lands did not descend to the heirs, nor were they purchased from the estate. It was a simple coincidence that they were purchased by the guardian for the benefit of the children of the intestate. Neal, as administrator d. b. n., should have collected the amount due from Quinlin, paid the debts and distributed the surplus. The creditors have no pretence to follow the lands and fix a lien upon them for their allowances. They must look to the estate.

It appears that this fund is yet unadministered, and the creditors may take steps to have the administration revived in the proper constitutional tribunal.

It may be that complainants are the only creditors; but the bill does not show that. Even if it did, however, it would not make a proper case for equity. The constitution invests the probate courts with the exclusive original jurisdiction to settle estates; and without some equitable ele-

ment to invoke the aid of the Chancellor, the administration should not be lifted into a court of equity.

The bill did not show cause of action, and the demurrer was properly sustained.

Affirm the decree of dismissal, which will be without prejudice.

CASTEEL V. CASTEEL.

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83 425
83 426

1. PRACTICE IN CHANCERY: *Divorce: Ad-interim alimony.*

Courts of Chancery have jurisdiction to order the husband to pay *ad-interim* alimony to his wife to enable her to prosecute her suit for divorce, and to enforce it by all or any of the means by which courts usually compel obedience—whether by execution or other orders, or by proceedings as for contempt; and if he be the plaintiff, and his wife's answer a cross complaint, his complaint may be dismissed for disobedience to the order, and the cross-complaint prosecuted to final decree. An appeal from an order for *ad-interim* alimony may be taken immediately.

2. PRACTICE IN SUPREME COURT: *Bill of exceptions in Chancery causes.*

Though a decree for divorce appear shocking from the depositions in the transcript, it will not be reversed if it appear from the record that oral testimony was heard which does not appear in the transcript by bill of exceptions or by being reduced to writing and filed in the cause. It will be presumed that the oral testimony justified the decree.

3. CHANCERY PRACTICE: *Appeals:*

An appeal in Chancery brings up every paper properly filed in the cause. They all, under our present system, become parts of the record.

4. DIVORCE: *Alimony not to be made a lien: How enforced.*

Alimony should not be declared a lien upon the husband's lands. Its payment may be secured by sequestration or by exacting sureties from him.

5. ALIMONY: *Continuance of: Relief from, on wife's marriage.*
Though no definite time be fixed for the continuance of alimony, it will cease at the death of either party, and upon the marriage of the wife the husband may apply to the court to be released from further payment.

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

Dunn & Howes, for appellant:

1. The order allowing alimony *pendente lite* was erroneously made. *Counts* v. *Counts*, 30 *Ark.*, 73; *Kock* v. *Kock*, 42 *Barb.*, 515; *Rhame* v. *Rhame*, 1 *McCord, ch*, 197.

2. The power of the court to enforce its orders as to maintenance, as in cases of contempt did not authorize it to dismiss the complaint of appellant without hearing. *Phillips* v. *Welch*, 11 *Nevada*, 187; 22 *Ark.*, 499; *Gantt's Dig.*, *sec.* 818 *et seq.*, 820; *Freeman on Judgments*, *sec.* 137; *Galland* v. *Galland*, 44 *Cal.*, 475; *In Re Chiles*, 22 *Wal.*, 157.

3. The order of the court directing the cause to proceed *ex parte* was a denial of justice, *coram non judice*, and void. *Windsor* v. *McVeigh*, 93 *U. S.* (3 *Otto*,) 278; *Townsend* v. *Clifton*, *M. S. Mch.* 12, 1881; *Freeman on Judgments*, *sec.* 118.

J. M. Rose, for appellee.

1. The court properly dismissed appellants complaint. *Gantt's Digest*, *sec.* 2202. It was discretionary with the court to use any reasonable means to compel compliance with its orders.

2. The order of the court to proceed, *ex parte*, simply meant that appellant having failed to plead to the cross bill, that the appellee be allowed to prove her case. *Sec.* 2200,

Gantt's Digest, forbids a decree *pro confesso*, and the order was proper.

3. The evidence not having been brought on the record by bill of exceptions or otherwise, this court will presume that there was sufficient to sustain the decree.

EAKIN, J. This is a bill by a husband for a divorce. The wife answered and filed a cross complaint, seeking a divorce, alimony and the custody of the children; all of which was granted. The case comes here on the husband's appeal.

He does not urge it as any error, which he desires this court to correct, that the alimony is made payable for an indefinite time, or that it is made a lien upon the lands and other property constituting his estate. Nor does he urge any error in the finding of the facts upon which the decree in favor of the cross complaint was based. The cause was heard upon oral testimony, and it is conceded that without a bill of exceptions the findings cannot be questioned.

1. DIVORCE APPEAL: From order for *ad interim* alimony.

He contends, however, that the court erred, first, in making the order for an allowance to be paid the wife *ad interim* to enable her to pay attorneys fees, and other expenses of the suit. He might have appealed immediately from that order, but he did not, and as it was only temporary, it becomes unimportant now, being superceded by the final decree. We deem it proper to add, however, that such orders are always in the sound discretion of the court, and there dose not appear to have been an abuse of it.

2. PRACTICE IN CHANCERY: DIVORCE: *Ad interim* alimony.

The principal objection is made to the dismissal of the complaint, because of the failure to pay in the alimony. The order was made on the seventeenth of April, 1880. Both parties were present by their attorneys. He was ordered to pay defendant, or her agent, $100, within ninety days; and it was decreed that, upon default, execution

should issue, and that such other proceedings might be had as might be necessary to enforce the order, and "that said plaintiff have no further prosecution of this, his suit, until he shall have paid said $100."

Six months afterwards, or nearly, at a subsequent term of the court, when the cause was called, the complainant did not appear. The cross-complainant thereupon demanded a hearing, which was granted. The court found that complainant had made default as to the payment of the $100, and it was ordered that the complaint be dismissed.

The court had jurisdiction to make the order, and to enforce it by all or any of the means by which courts usually compel obedience, whether by execution, or by other orders, or by proceedings as in case of contempt. (See *Gantt's Digest*, 2202 *and* 2205.) It is not unusual to make compliance with an order a condition upon which a party may be allowed to proceed with his suit. It is the usual mode, for instance, by which bonds for costs are compelled, where necessary. The principle applies generally. Courts of Chancery, especially, may entertain bills or refuse relief according to the disposition of the party to do equity by compliance with such proper terms as it may lawfully impose. It would soon bring the courts into contempt, if complainants disobeying the orders of the court, and setting them at defiance, could still insist that the court must retain their bills for relief, to be rendered when they might choose to come in and comply with the terms. The court did not err in dismissing the complaint. It would have been more orderly, and better, to have first made a rule on complainant to show cause why the suit should not be dismissed, but we cannot presume that injustice was done by the prompter course. The complainant should have attended his cause by himself, or attorney, and taken cognizance of the proceedings. There is no showing that he attempted any

explanation of his default, or came in at any time during the term to ask to be heard in his excuse. So far as the transcript shows he refused obedience to the order, stood by in silence until his complaint was dismissed, and a decree made against him upon the cross-complaint, which he did not answer, and now appeals, claiming that his bill should be reinstated.

The cross-complaint had not been answered, and the court proceeded to hear the evidence. This was proper. The expression that the court ordered a trial *ex parte*, has no other meaning than that the court proceeded to inform itself of the truth of the matters alleged in the cross-complaint on the wife's part. There was no issue between the parties. The original complainant did not go out of court with the dismissal of his complaint. He remained there, defendant in the cross bill. He might have answered and made an issue, if he had chosen to resist her claim. He admitted the truth of the matters by not answering them. That, however, did not satisfy the court, which, in this class of cases, is charged with the protection of the interests of society against collusive divorces. (See *Gantt's Dig.*, *sec.* 2200.)

The court, of necessity, proceeded to hear proof on the wife's part. There is no showing that complainant was precluded from cross-examination of witnesses, or the production of counter-testimony. Doubtless the court would have permitted either, and from all we can know, did.

3. PRACTICE IN SUPREME COURT: Bill of exceptions in Chancery causes.

It must be confessed that from the depositions in the transcript, the decree seems shocking. But we cannot comment upon it. There was oral evidence, which we must presume changed the whole aspect of the case. If not the appellant should have brought it here for our consideration, by bill of exceptions, or what in Chancery would have answered the same purpose, by having it taken down in

writing in open court, and by leave, filed with the papers. An appeal in Chancery brings up every paper properly filed in the cause. They all, under our present system, become parts of the record.

An appeal in Chancery brings up every paper filed in the cause.

4. Alimony not to be made a lien on property.

We need not modify the decree, as it is not urged upon us to do so. Otherwise it would be proper to remand the cause for its correction. The alimony should not have been made a lien upon the lands of complainant This is equivalent to charging them with an annuity, which the owner might do voluntarily, but the court should not *in invitum*, as it embarrasses alienation. If objection had been made, or were now insisted upon, the court might have secured the payment of the alimony by sequestration, or by exacting sureties. (See *Gantt's Dig. sec.* 2205.) The appellant has, however, chosen to stand on other ground.

5. ALIMONY: CONTINUANCE OF:

Relief from, on wife's marriage.

By the decree, as it now stands, although no definite time is fixed during which it is to continue, it will, from its nature, cease with the death of either party, or, upon the marriage of the wife, the complainant may apply to the court to be relieved from further payment.

Affirm the decree.

CROW, GUARDIAN, ETC., v. REED.

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38 482
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1. GUARDIANS: *Exceptions to their accounts not triable by jury.*

A trial by a jury in the Probate Court, of exceptions to an account, is not contemplated by law. The Statute conferring power upon the Circuit Court to order an issue to be tried by a jury, has no application to Probate Courts.

2. SAME: *Must file separate accounts for each ward.*

A guardian must file separate accounts with each ward. A consolidated account for several wards should be stricken out by the court of its own motion.

3. SAME: *Duty of Probate Courts as to errors in accounts.*

Probate Courts should not wait to be moved to correct errors in accounts of such fiduciaries as it is required to supervise, but should refuse to confirm any settlement obviously improper.

4. PRACTICE IN CIRCUIT COURT: *Upon trial of exceptions from Probate Court.*

Upon trial in the Circuit Court of exceptions to a guardian's annual account from the Probate Court, the Circuit Court can only settle the balance, and then remand the cause to the Probate Court for further proceedings, on the basis of the balance so ascertained.

APPEAL from *Clark* Circuit Court in Chancery.
Hon. HAWES H. COLEMAN, Special Judge.

STATEMENT.

To the annual consolidated account of Jacob W. Crow, as guardian of Calvin and Julia Reed, filed in the probate court of Clark county, and showing a balance due him of $53.44, Julia Reed, still a minor, filed her exceptions, charging him with failure to charge himself with sundry sums of money received by him, and with taking credits to which he was not entitled. Upon the guardian's motion, the exceptions were submitted by the probate court to a jury, who returned the following verdict: "We, the jury, find for the plaintiff, Miss Julia Reed, the sum of two hundred and twenty-one dollars and sixty-eight cents." And the court, thereupon, rendered judgment against him in her favor, for that sum and cost, and he appealed to the Circuit Court; where the exceptions were again submitted to a jury, who returned the following verdict: "We, the jury, find for the plaintiff, Julia Reed, the sum of $353.24." And thereupon, the court rendered judgment "that the account of the said J. W. Crow, as guardian of said Julia Reed, be restated and corrected, so as to charge said guardian with the sum of $353.24, and all costs herein expended. And

it is further considered, ordered and adjudged by the court that the said J. W. Crow, as such guardian, pay to the said Julia Reed the said sum of $353.24, and all the costs herein expended." Crow, after motion for new trial overruled, filed his bill of exceptions and appealed.

As the evidence and instructions of the Circuit Court have not been considered here, they are omitted.

Compton, Battle & Compton, for appellant.

Guardians must make their settlements with the court, and *not juries*. *Gantt's Digest*, *sec.* 3090. The probate court should hear and determine exceptions, or refer them to an auditor. *Gould's Dig.*, *ch.* 4, *secs.* 130, 132–3–4–5–6. (These sections are not the same in Gantt's as in Gould's.) The court had no authority to refer the exceptions to a jury.

The fund in the hands of appellant jointly belonged to his *two* wards; yet the jury returned a verdict in favor of appellee for $353.24. There is no proof to sustain it. The appellee was a minor, and appellant, as her guardian, was entitled to possession and control of her property, and the court erred in ordering him to pay the amount over to an infant.

EAKIN, J. All the questions in this cause arise on exceptions by a minor, acting *sui juris*, to a current settlement of her guardian with the probate court. She did not appear by next friend or special guardian. The matters in issue were tried by a jury in the probate court, and a verdict rendered against the guardian as if for a debt. The same course was pursued in the Circuit Court on appeal, where judgment was rendered that the guardian pay the ward the

sum of $353.24, with costs. There was a motion for a new trial, and the evidence is brought up by bill of exceptions.

1. GUARDIANS: Exceptions to their accounts not triable by jury.

Without reference to the merits, it is plain that the whole course of proceedings has been irregular, treating exceptions to a current account as a suit for the recovery of money, to be enforced by execution. Exceptions to accounts are interlocutory proceedings, for the purpose of reforming and correcting them, and the judgment or order on determining exceptions, is, properly, that the account be confirmed, if proper, or restated if erroneous. Balances thus ascertained may or may not be properly followed by orders of payment over, or by execution, according to the nature of the case. No such order in this case was proper, as the infant was not yet of age, and the balance found ought to have remained in the guardian's hands until final settlement, unless expended in accordance with law.

A trial of exceptions, by a jury, in the probate court, is not contemplated by law. The function of the county and probate courts in such matters is rather that of an auditor, clothed with judicial power, or that of a master stating an account. It is not, usually, such work as juries can perform. Any Circuit Court has the *power*, under the Code practice, to order any special issue or issues, to be tried by a jury, which before the Code, might have been so tried; but that has no application to the probate courts. It would not do to have exceptions to accounts burdened with costs of jury trials. The judges must take the responsibility of determining the facts as well as the law.

2. SAME: Must file separate accounts for each ward.

The guardian had two wards, and rendered one account as to both, consolidating credits and expenditures. This should not have been permitted. The probate court should, of its own motion, have struck it out, and directed the filing of separate accounts for each ward. The charges against each ward were not the same, and their rights would become

confused by keeping accounts in this manner. The guardian stands to each ward as if there were no other. *Connelly et al* v. *Weatherby*, 33 *Ark.*, 661.

3. SAME: Duty of Probate Court as to errors in accounts.

The probate judge should not wait to be moved to correct errors in accounts of such fiduciaries, as he is required to supervise, but should refuse to confirm any settlement obviously improper. Otherwise the interests of minors might often be sacrificed by failure of vigilance on the part of near relatives and next friends. For the same reason the Circuit Court erred in proceeding to hear the exceptions, as made, and determine them *de novo*, and to render a personal judgment against the guardian. Even if the settlement had been single, it should not have proceeded further than to have tried the exceptions, settled the balance, and remanded the cause to the probate court for further proceedings on the basis of the balance so ascertained. The settlement did not purport to be a final one.

4. Practice in Circuit Court on appeal.

It would be premature to determine the matters of law upon the merits of the charges and credits. Reverse the judgment of the Circuit Court, without costs, which cannot be rendered in such case, against the minor, and remand the cause to the Circuit Court, with directions to quash the judgment of the probate court, and remand the cause to said court with directions to cause the guardian to file a separate account with the ward, Julia Reed, and for further proceedings in accordance with law.

By this time the ward, as it appears, has come of age, and the probate court may make a final settlement instead of acting upon a mere account current, and may in its new order, direct payment to the ward herself of all that may be found due her. We will not anticipate error in the final action.

Reverse and remand for further proceedings.

GREGLEY V. JACKSON ET AL.

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60 181

1. DESCENTS: *Construction of Statute; Illegitimate children.*
   Children of the same mother, whether legitimate or illegitimate, may transmit an inheritance to any and all collateral relations on the mother's side who are of her blood.
2. SAME: *No vested right in laws of.*
   Laws of inheritance rest in public policy; and during the life of the person owning the property, may be changed at will, without any violation of contractual or vested rights. No one has a vested right to be the future heir of one living.
3. SAME: *Construction of Statute of sixth February, 1867.*
   The Statute of sixth February, 1867, legitimizing the recognized offspring of negroes, or mulattoes, who had cohabited as husband and wife, included the offspring of parents then dead, as well as of those living.

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

STATEMENT.

On the twelfth day of January, 1870, Barkley M. Gillespie and brothers, owners in fee of a certain tract of land in Jefferson county, conveyed it by deed to Marshall Jackson, Sanders Smith and Jacob Keith, as tenants in common.

Afterwards, in December, 1878, said Jacob Keith died intestate, without issue, but leaving a widow, Jane Keith, who died before the institution of this suit, leaving a last will, by which she devised the land to the defendant, William Gregley. In September, 1880, said Sanders Smith conveyed his undivided third interest in the land to Marshall Jackson and one John Keith; and afterwards the defendant, Gregley, got and held exclusive possession of the land, claiming it under the will of said Jane Keith.

In October, 1880, Marshall Jackson filed his complaint at law in the Jefferson Circuit Court against said Gregley, alleging the above facts, and further alleging that he was the half brother and only heir of said Jacob Keith, and was entitled to his third interest in the lands; and praying for judgment for his interest in the land, and damages, etc.

Gregley answered, admitting his possession and claim under the will of Jane Keith, and all the facts alleged in the complaint except the alleged heirship of the plaintiff to Jacob Keith. He denied that the plaintiff was the heir of Jacob Keith, or had any right to the land.

John Keith filed an application to be admitted as a party to the suit, alleging that he was half brother of Jacob Keith, and his joint heir with the plaintiff, Marshall Jackson, and was entitled to the half of Jacob's third interest, as well as the interest he obtained with the plaintiff from Sanders Smith; and praying for a joint recovery with said plaintiff against the defendant, Gregley. His application was granted, and he was made a party to the suit.

Upon the trial, before the court, the proof showed, in addition to the above admitted facts, that George Jackson and Mary Jackson, the father and mother of the plaintiff, Marshall Jackson, were slaves in South Carolina, and were married as slaves usually were, and lived together as husband and wife. The plaintiff, Marshall Jackson, and the said Jacob Keith were born of the mother while she and her husband lived together. They were both recognized as their children until Jacob became about eight or ten years old. After that he was considered as the son of a stranger, Abram Keith. He resembled him, and took his name. The mother had no other children. The plaintiff, John Keith, was also the son of Abram, but by a different mother, and in no way related to the plaintiff, Marshall Jackson.

George Jackson died in South Carolina before the war. His wife and the plaintiffs moved to Arkansas just before the war. She died in 1864.

The court found: 1st. That John and Jacob Keith were both illegitimate children of the same father, by different mothers, and that John was not heir to Jacob. 2nd. That Marshall Jackson, being of the same mother as Jacob Keith, was his heir; "and inasmuch as John Keith has an interest in the land, by purchase from Sanders Smith, and no conflict between him and Marshall Jackson, the finding is for plaintiffs."

The defendant excepted and appealed.

Bell & Elliott, for appellant:

The only question in this case is the proper construction of *sec.* 2164, *Gantt's Dig.* The collateral branches are not embraced in the meaning of the Statute, but it is confined to the ascending and descending lines *on the part of the mother.*

Descents are governed by the common law, unless otherwise provided for. *Gantt's Digest, sec.* 2174.

Cites *Bingham on Descents*, 481; 30 *Missouri*, 268; 8 *B. Mon.*, (*Ky.*,) 606; 1 *Metcalf*, 635; 11 *Metcalf*, 294; 86 *Penn.*, 219; 8 *Ohio*, 280; and especially *Stevenson Heirs* v. *Sullivant*, 5 *Wheaton*, 207.

McCain & Crawford, for appellees:

1. Marriage is ecclesiastical as well as civil, and slaves could enter into a marriage contract so far as to enable them to live together without sin, and beget children who would be brothers and sisters. *Girod* v. *Lewis*, 6 *Martin La., O. S.*, 559; (3 *Martin La., p.* 293;) *Exodus, Chap.* 21, 61–38

verses 1–6; *Bouv. Law Dict.*, *Connuburnium*; *Justinian Code Lib.*, 3, *tit.* 7, *p.* 32.

The offspring of former slaves were legitimized and made capable of *inheriting* by *Act* 1867, *No.* 35, *p.* 99.

2. One illegitimate brother can inherit from another, *on the part of the mother*. *Gantt's Dig.*, *sec.*, 2164; *Reeve on Descent*, 96; 6 *Vermont*, 83; *Lewis* v. *Entsler*, 4 (*or* 5) *Ohio St.*, 354; 42 *Conn.*, 491.

Stevenson Heirs v. *Sullivant*, 5 *Wheat.*, 207, overruled by *Bennett* v. *Toler*, 15 *Gratt*, (*Va.*,) 625; *Garland* v. *Harrison*, 8 *Leigh*, (*Va.*,) 368.

OPINION.

EAKIN, J. The questions presented by the record regard the legitimacy of persons of the African race, born in slavery, and the laws of descent applicable to them. There were no valid marriages amongst that class, in the slave States of America before their general emancipation near the close of the civil war, nor after that did any of the States take cognizance of former marriages amongst slaves, until provisions were made by Statute.

Jacob Keith, of the African race, died in 1878. Who were his heirs? His mother was an African slave in South Carolina, living and cohabiting with another slave, George Jackson, as man and wife, after such a marriage as was usual with slaves. Two children were the result of that relation; complainant, Marshall Jackson, and the deceased, Jacob Keith. The parents recognized both as their children, although afterwards, when Jacob was about eight years of age, he came to be regarded as the son of a stranger, one Abram Keith. He resembled him, and assumed his name. The father, George Jackson, died in South Caro-

lina. The mother was brought to Arkansas with the children, and died in 1864.

It is plain that no marriage relation ever existed between Jacob's parents, and that at common law, dying without issue, he could have no heir. Unless our Statutes have otherwise provided, his estate becomes the subject of escheat and no one can sue for it.

Jacob has a reputed half brother by his reputed father, Abram Keith, by a different mother. He also claims as heir, but he was not recognized as such, and takes no appeal. The question regards Marshall Jackson alone.

Our oldest Statutes upon this subject make a distinction between the questions of the *validity* of a marriage and the *legitimacy* of children, providing, in effect, that there may be legitimate children of void marriages. *Gantt's Digest, sec.* 2166.

1. DESCENTS: Construction of Statute: Illegitimate children.

The act has no reference to the marriages of slaves, but is noticeable as marking the early policy of the State to save the innocent offspring of void marriages from the inconvenience and odium of illegitimacy. One of the consequences of legitimacy is to enable one to inherit and transmit property generally.

But with regard to children professedly *illegitimate*, the same act provides that they shall be capable of inheriting and transmitting an inheritance *on the part of the mother*, "in like manner as if they had been legitimate of their mother." Legitimate children *of the mother* may transmit an inheritance to any and all collateral relations on the mother's side, who are of her blood, and so may her illegitimate children. This construction is too obvious to allow any serious consideration of the suggestion that the Statute was meant to confine inheritances of illegitimate children to or from the mother, or through her in the direct ascending or descending line. "On the part of the mother" means on

the mother's side of the genealogical tree. The effect of the old legislation was meant to be remedied to cure illegitimacy in the innocent. It amounted to this, that if there had been an actual marriage ceremony, the children should be legitimate for all purposes, although the marriage might be null. If it were a case of simple bastardy, the children were to be considered, nevertheless, upon the same ground with regard to heritable blood, as if the father were dead, leaving no blood relations. The father being supposed unknown, was simply ignored with all his blood, but no new laws of inheritance were intended, as to further line or limit.

2. No vested rights in laws of inheritance.

After the war, the Legislature of the State, adjusting its laws to the natural results of the abolition of slavery, passed an act, specially applicable to persons of the African race who had been slaves, and their descendents. One of the acts is retrospective in its operation, without any violence to contractual or other vested rights. Laws of inheritance rest upon public policy, and during the life of the person owning the property may be changed at will. No one has a vested right to be the future heir of any person not already dead, and there is no constitutional inhibition against changing the whole law of descents as to future deaths; and the right to inherit may be made to depend upon the former existence of relations which had ceased to exist when the law was passed.

3. DESCENTS: Construction of Statute of 6th February, 1867.

By the first section of an act passed December 20th, 1866, it was declared that the marriages of all persons of color, then living together as husband and wife, were valid, and their children legitimate. This was, at once, felt to be a very incomplete settlement of the question of inheritances. There were many thousands of men in the State belonging to the emancipated class, who were the offspring of former *quasi* marriages, which no longer existed when the law was passed, whose relations might acquire property and die

intestate. The law did not apply to such cases, of which this is one. To meet such cases, and to provide a more general and uniform system of inheritance, a law was drafted by one of the present members of this court, then a member of the Legislature, which was passed on the sixth of February, 1867. By the third section it was, amongst other things, provided, that in all cases where negroes or mulattoes have "*heretofore* been so cohabiting, as husband and wife, and may have offspring recognized by them as their own, such offspring shall be deemed in all respects legitimate, as fully as if born in lawful wedlock."

Both the parents of Jackson and Keith were then dead, but there had been the usual slave marriage between them, when living, and both had recognized the children, born of this cohabitation, as their own. It seems that common reputation, some eight or ten years after Jacob Keith's birth, attributed his paternity to another, but there is no evidence that this recognition by the parents, as first made, was ever retracted.

Laying aside, as no proper element for construction, the purpose and design of the member who drew the act, but looking to its language, its remedial nature, and the circumstances of which the court can take cognizance, it would be a very narrow, and exceedingly literal construction of this act to exclude from its scope those children, whose parents, although then dead, had cohabited as husband and wife, and recognized them as their offspring. The act is not in derogation of the common law. It is in aid of it—applying its rules of inheritance to what was really a new people, amongst whom there had been formerly no marriages, no property, nor any rules of inheritance whatever. It had in view the complete homologation of all *legal* rights of all classes in the State, as distinct from *political* rights—the

latter coming through the Federal Constitution and acts of Congress.

In any view of the case, whether considered simply as illegitimate children of one mother, or as Africans, the offspring of a former slave marriage, the brothers could inherit from each other, and Marshall Jackson, as held by the Circuit Court, became the heir of Jacob Keith.

Affirm the judgment.

PRICE, GUARDIAN, ETC., v. PETERSON.

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1. GUARDIAN: *Liability to account; Jurisdiction of Probate Court.*
Upon the death or marriage of a female ward, the powers of her guardian may cease, but not his obligations to account for her estate; and the Probate Court has power to compel him to do so.

2. SAME: *Power of Probate Court to compound interest.*
The Statute, *Gantt's Digest, secs. 4277, 4283,* has no application to cases in which fiduciaries upon equitable principles become chargeable with compound interest; and Probate Courts have the same discretion to compound interest, as to fiduciaries under their supervision, as appertains to a Chancellor.

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

Coody, for appellant:

1. It was wrong to compound interest. *Gantt's Digest, secs.* 4277 and 4283; 21 *Ark.*, 182; 22 *Ib.*, 2.

2. Probate court had no jurisdiction. Avery Peterson was married, and the guardianship ceased. *Gantt's Digest, sec.* 3094. What jurisdiction had the probate court after the guardianship ceased?

J. W. House, for appellee:

The interest should have been at ten per cent. and no commissions allowed. *Gantt's Digest, sec.* 3076; 23 *Ark.*, 47.

The interest was properly compounded. *Gantt's Digest, secs.* 3076, 3090; 8 *American Decisions*, 679; *Lay* v. *Barns*, 7 *Ib.*, 507; *Schieffelin* v. *Stewart*, 16 *Ib.*, 643; *Teague* v. *Durdy*.

EAKIN, J. Upon citation from the probate court of White county, at the instance of Avery Peterson (formerly Price), the appellant, F. R. Price, came in and filed for final settlement his account as guardian of said Avery. The probate court, upon exceptions, adjusted the account, finding a balance against the guardian. He appealed to the Circuit Court, where the account was restated by a special auditor, under the directions of the court, charging the guardian with compound interest, at six per cent. upon all moneys which came into his hands, allowing credits from time to time, and making annual rests. Judgment for the balance was rendered, and the guardian appeals here.

1. GUARDIAN: Liability to account: Jurisdiction of Probate Court

We cannot think the counsel for appellant serious in urging that a guardian cannot be called upon for a settlement in the probate court after his guardianship ceases by the death or marriage of his ward. His powers may cease, but not his obligations, with regard to the trust, especially the obligation of showing how he has discharged it, and what remains in his hands. The probate court has jurisdiction to compel him to do so, and is the appropriate original tribunal for the purpose. He is not called by the citation to exercise any power, but to render an account of what he has done, and to do and be done by, with regard to what he

has or should have in hands, as the court may direct. (*Const.*, *art. VII.*, *sec.* 34; *Gantt's Dig.*, *sec.* 3094.)

2. SAME: Probate Court may compound interest.

Objection is also made to the mode of computing interest, as it allows annual rests, or, in other words, compounds the interest. It is urged that it should have been computed as prescribed by the Statute in ordinary cases of delayed debts. This ignores the whole duty of the guardian, and the principles which, in equity, govern the administraton of trusts. Courts of probate in making settlements with those fiduciaries whom they control, apply equitable as well as strictly legal rules, to do complete justice. It would make great confusion and uncertainty if settlements made on strictly legal principles were to be left still open to readjustments in Chancery. Upon the other hand, if all such settlements, involving equitable principles, were required to be in the first instance, lifted into Chancery, a great part of the constitutional jurisdiction of the probate courts would be taken away. The Statute referred to has no application to those cases in which fiduciaries, upon equitable principles, become chargeable with compound interest; and the probate courts within their proper ambit, have the same discretion in this regard as appertains to a Chancellor, always, of course, subject to correction for abuse.

It is usual, and quite necessary, sometimes, in equity, to inflict compound interest upon trustees, not so much for punishment, but that the beneficiaries may receive that, which in justice, they should, and which they most probably would have received if the trustee had been reasonably attentive and faithful. Where no account can be taken of profits which have been made by a trustee, or which might have accrued from good faith and due care, it is the best means of enforcing, approximately, the more general, and all pervading principle, that trustees may not derive any personal

benefit through their relation to and powers over the trust fund.

Ordinarily trustees are chargeable with simple interest alone when chargeable with any, but in cases of gross negligence or abuse of trust, where necessary to protect the interests of *cestuis que trust*, courts of equity, both in England and America, have been used to compel settlements with rests; and this seems to be more equitable in cases like the present, where the Statute makes it the duty of the trustee to so invest, as that interest may, at stated periods begin to bear interest.

In the case in judgment the guardian had retained funds many years in his hands without any annual settlement or report to the court. He never made any settlement at all, until called by the citation, and was recalcitrant as to that; denying the jurisdiction of the court to require him to make it, because his ward had married and he was no longer guardian. We do not think the court transcended its power or abused its discretion in ordering the account to be taken with annual rests, and in compounding interest. We would not have thought so, if the rate had been even higher, if there had been proof that the guardian might have obtained better rates upon such securities, as the Statute provides.

He had been guardian for about eleven years. During a great part of that time the act of April 22nd, 1873, was in force, distinctly defining his duties. He should have annually reported to the probate court all money on hand, and should have loaned it at the highest rate of interest which could be got upon the prescribed security. But he insists that he should not now be chargeable with compound interest, or indeed any interest, because the ward had for a long time seemingly acquiesced in his failure to make settlements. For this, counsel cites *Brinkley* v. *Willis*, 22 *Ark.*, 1. But this case is an authority expressly to the point

that the rule cannot be applied to an infant not competent to sue—*sui juris*.

The guardian, under the circumstances, seems to have been dealt with very kindly by the court, for reasons doubtless not apparent in the record. He was allowed full commissions at 10 per cent., besides being held only to account for interest at six.

Affirm the judgment.

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CAMPBELL v. THE STATE.

1. EVIDENCE: *Production of.*

It is the usual and regular order in the production of evidence, for the State to call all her witnesses before closing her case, but the general course of examination of witnesses is subject to the discretion of the court, and it may permit a departure from the usual r.

2. SAME: *Of character of deceased.*

In criminal prosecutions for homicide the violent and dangerous character of the deceased can not be shown by evidence of isolated facts, or particular acts of violence.

3. SAME: *Dying declarations; their weight.*

The court can determine only as to the admissibility of dying declarations. Their weight or credit must be left to the jury.

4. NEW TRIAL: *For newly discovered testimony.*

A motion for new trial upon the ground of newly discovered testimony must be corroborated by the accompanying affidavit of the new witness, or of some other person, if his can not be had.

5. SAME: *Same. Impeaching witness.*

Newly discovered evidence that goes only to the impeachment of a witness, is no ground for new trial,

APPEAL from *Johnson* Circuit Court.

HON. W. D. JACOWAY, Circuit Judge.

STATEMENT.

At the December term, 1881, of the Johnson Circuit

Court, D. W. Campbell and S. N. Moore were indicted for the murder of J. M. Wilson.

Upon the trial on the 21st of December, 1881, Ed. Swanson, a witness for the State, testified as follows:

"I know the defendants; was present at the time of the shooting of J. M. Wilson at the house of Alf. Jones, in Johnson county, on the 28th day of January, 1881. The defendants came there about 12 o'clock, on that day, and borrowed a saddle from Jones. They took it away a piece and in about fifteen minutes brought it back and said they were looking for a brown steer. They stood around the fire. Moore laughed and said they were looking for a brown steer. Campbell walked towards the door and turned and drew his pistol and said to Wilson 'consider yourself under arrest', as he leveled his pistol at Wilson and fired. Wilson was standing near the fire, with his side to Campbell, his right hand near his right pants pocket, and the fingers of his left hand inserted in his vest. The ball struck his arm and went through his body and lodged in his clothes. Wilson said 'don't shoot any more boys, you have killed me,' and staggered back and fell, and drew his pistol and threw it out on the floor, and said he would surrender. Moore picked it up, cocked it, and laid it on a box in the room, and cursed Wilson. The shooting was about 12 o'clock on Thursday, and Wilson died from the effects of the wound about 11 o'clock on the following Saturday. He was in his right mind until about half an hour before he died."

Upon cross-examination the witness said: "I don't know where Mr. Jones is. Haven't seen him since last May. I left him in Franklin county and went through the Nation and into Texas. The ball went through the lower part of Wilson's left wrist and entered the left side below the ribs and came out just above the right hip and lodged in his

clothes. Wilson had been going by the name of Centers. He came to Jones' about dark the evening before and said he had had a difficulty that morning and wanted to stay all night. He also said that he was expecting to be arrested. I did not hear him say that he would not submit to arrest.

Charlie Arbaugh (colored), witness for the State, testified: "I was at Jones' house about five minutes after the shooting. When I reached the house Wilson was lying on the floor before the fire-place. He said he had nothing against the men and they had nothing against him, but they were hired to come there and kill him, and had stolen his life without giving him a chance. He said he was going to die and regretted that they did not give him a dead shot. I saw Wilson's pistol which was lying on the fire-board, not cocked. It was a five shooter, and three barrels were loaded. The empty barrels did not seem to have been recently fired; they looked like they had been fired off a day or two. I was about 150 yards off when I heard the shooting; heard but one shot; heard it distinctly, and if there had been more than one shot would have heard it."

John Powers, witness for the State, testified: "I am deputy sheriff of Johnson county. Upon receiving information of the killing, Ledbetter, a deputy sheriff and I went in pursuit of the defendants. We first struck their track in Newton county. They were horseback. Sometimes they traveled the main road and sometimes they didn't. We caught up with them in Stone county, where they were camping out in the mountains. Campbell was asleep and Moore was getting dinner, three or four miles from any house. We slipped up on them, caught Campbell, but Moore escaped and was afterwards arrested in Batesville. Mr. Jones sued out the warrant for them."

Here the defendants' counsel was permitted to recall the witness, Swanson, and ask him the following questions:

"Did you not say in the presence of J. B. Shepherd, at Jones' house, on the day of the shooting, that you did not see Wilson fall?" Answer. "I did not."

"Did you not say to Dano Smith, or in his presence, on the day of the shooting, that Campbell shot Wilson in self defense?" Answer. "I did not".

"Did you not testify, in your cross-examination, that you had not seen Jones since last May?" Answer. "I parted with Mr. Jones last May and have not seen him since."

Here the State closed except for rebutting testimony.

Pink Boyett, a witness for defendants, testified as follows; "I live in Johnson county; knew the deceased, Wilson, but he went by the name of Centers. He had been at my father's house six or seven weeks, and had picked cotton part of the time. My father had him to clean out a well, for which he claimed two dollars and wanted my father to pay him, and the day before he was shot he came to my father's house and told him that he had come to kill him, and would kill him if he did not pay him the two dollars. My father told him he did not have the money. Wilson called him a damned liar, and said he would kill him if he did not go and get the money. My wife told Wilson she would give him all the money she had if he would not kill the old man, and went and got it and gave it to him; one dollar and ninety cents. He said there was more money there, and kept cursing the old man and shot over his head. Some men at work near by came up and Wilson commenced shooting at a Mr. Boone. Boone ran off and Wilson came back and into the house where I and my wife were and threw his pistol down on me, and my wife knocked it up just as it fired, and the ball cut some of the hair out of her head. He then struck her in the face with the pistol and left, I then got out a warrant for him, and Ledbetter, deputy sheriff, and myself hunted for him that night. I saw the

defendant Moore and told him my father and myself would give fifty dollars to any one to capture Wilson and deliver him to the sheriff. Moore said he believed he could find him."

Boyett's wife and his step-mother gave substantially the same testimony of the occurence at his house.

Dr. A. C. Johnson, witness for the defendants, testified that he had lived in Franklin county, and knew Wilson, and his general character for peace and quiet. It was very bad. He was a violent, turbulent and dangerous man.

Here the defendants' counsel offered to prove by the witness, Johnson, that Wilson went into his store at Pleasant Hill, in Franklin county, a few weeks before his death, and asked to buy some tobacco on credit, and on being refused, stabbed the witness with a knife, without any provocation; but the court refused to admit the evidence, and defendant excepted.

Defendants then proved by other witnesses that Wilson's general reputation was that of a turbulent, disorderly and dangerous man.

They then proved by J. F. Ledbetter that he was deputy sheriff of Johnson county at the time of the homicide, and had a warrant for the arrest of Wilson which had been sued out the day before by Pink Boyett, charging him with an assault with intent to kill. After detailing his search for and failure to find Wilson, the State was permitted to prove by the witness, against the defendants' objections, his pursuit of the defendants after the homicide, and their capture, which he detailed substantially as stated by the witness Powers; to which examination by the State, on cross-examination, the defendant excepted.

Dr. J. W. Bell, a physician and surgeon and a witness for defendants, testified that he was called in to Wilson soon after he was shot. The ball entered about one and one-half

inches above the hip bone on the right side and passed out on the left side a little higher than the point of entrance. The wound on the wrist was on the top of the wrist, and was from the inside to the back of the wrist. He judged of the direction of the balls from the character of the wounds; the points of entrance being smooth and the flesh a little inverted, while the places of exit were lacerated and the flesh everted. He thought from the wounds that he must have been twice shot. Witness stated on cross-examination, that Wilson told him that he was commanded to surrender and was immediately shot without any resistance from him. He was rational when he made this statement and knew he was going to die.

David Smith, for defendants, testified that he got to Alf. Jones' about an hour after the shooting, and that the witness, Swanson, told him soon after he got there, that Campbell shot Wilson in self-defense. Wilson told witness that he had never had any difficulty with the defendants and that they would not have shot him if he had surrendered, but that he had rather die than surrender to any man. This statement of Wilson was made the night before he died.

J. B. Stephenson, for the defendants, was with Wilson about four hours after the shooting; and Wilson told him that he had not resisted arrest by the defendants. Witness was again with him the night before he died, and in conversation about the shooting, asked him if he resisted, and he noded his head as if to say he did. He also then asked the witness to write to his mother in Alabama, and to tell her he was the cause of his own death, and said his name was not Centers, but J. M. Wilson.

Witness was well acquainted with witness, Swanson, and Alf. Jones, and met them together in the Choctaw Nation on the 25th day of July, 1881, while on his way to Texas. Spoke to Swanson, calling him "Ed.," and he noded

his head. Swanson told witness at Jones' on the day of the shooting that he did not see Wilson fall.

Here the defendants closed and the State recalled the witness, Swanson, who testified that he was in the Choctaw Nation with Alfred Jones on the 25th of July, 1881. When he testified before, he did know which Jones was meant. *He* meant Mr. Steve Jones. He saw Alf. Jones about a month before the trial, at Fort Smith. On cross-examination he testified that Steve Jones' name had not been mentioned during the trial and he was not present at the difficulty nor at all connected with it.

Question by the defendant's counsel: "Did you not state to D. Linscott, last Sunday, in the court house up stairs, that the defendant Campbell gave Wilson a chance to surrender, but that Wilson refused?" Answer. "I was not on oath then and do not remember what I said to him, but will say that I did not make any such statement to him."

The State then closed, and the defendants' counsel asked leave to call D. Linscott, and prove by him that the witness, Swanson, did make to him the statement indicated at the time and place stated in the question; but the court refused to allow the proof to be made, and the defendants excepted.

INSTRUCTIONS.

For the State the court gave twenty-seven instructions; among them the following:

12. "It devolves upon the State to prove every material allegation of the indictment, and the law presumes the defendants innocent until their guilt is proven by competent testimony, and beyond any reasonable doubt."

13. "A reasonable doubt is one that is natural and the result of the exercise of reason, and is not an imaginary or speculative doubt. It must arise from a fair and impartial consideration of the testimony in the case."

18. "If you believe that any witness has willfully sworn falsely as to any material fact, you are at liberty to disregard his entire testimony."

The defendant asked ten instructions, which were refused. The 1st, 2d, 3d and 5th have been found by the court to be substantially the same as the 12th, 13th and 18th, given for the State, which are above copied. The 4th, 7th, 8th, 9th and 10th are as follows:

4. "If the jury believe, from the evidence, that the defendants had reasonable ground to believe and did believe that the deceased, Wilson, had committed a felony, and proceeded to arrest him for trial for said felony, and in doing so it became necessary to take his life to prevent his escape, or to overcome forcible resistance offered by him, then the jury must acquit the defendants, whether they had a warrant for his arrest or not."

7. "The dying declarations of the deceased J. M. Wilson, that is, his statements made after he was impressed with the belief that he was going to die, are of as much weight as testimony of witnesses on oath."

8. "In determining whether it was necessary for the defendants to take the life of the deceased, in order to prevent his escape from arrest, or to overcome resistance to arrest, the jury should look to the character of the deceased, and if it has been proven that he was a man of dangerous and desperate character, they should consider that fact in determining the character of the resistance and the necessity for taking life."

9. "It is not necessary for persons arresting offenders, charged with felony, to notify them of the nature of the charge before arresting them."

10. "If the jury believe, from the evidence, that the defendants approached the deceased for the purpose of arresting him for a felony, but before they had time to

inform him of the nature of the charge against him, he began to make resistance, then the defendants were not required to inform him of the character of the charge, but were justified in repelling all the force or resistance offered by him; and if his resistance was such as to force the defendants to take his life, then they will acquit."

The jury found the defendants guilty of murder in the second degree, and assessed their punishment at five years imprisonment each, in the penitentiary.

The defendants filed a motion for a new trial, assigning among other causes, that since the trial they had learned that the witness, Ed. Swanson, had a short time before the trial, stated to George Dorney, that if the defendants had paid him one hundred and twenty-five dollars he would have left the country, and would not testify against them, but as they had not done so he "intended to go to court and hang or stick them;" and that they had also learned, since the trial, that the deceased, Wilson, stated on his death bed to James Sparks, that "if Campbell had not shot just when he did, he, Wilson, would have shot Campbell." Many other facts impeaching the evidence of the witness, Swanson, learned since the trial, were assigned as causes for new trial.

They also assigned that since the trial they had ascertained that J. M. Payne had, the day before the shooting, loaned to Wilson three thirty-eight calibre cartridges, and the next day he went to Jones' to see Wilson and saw the pistol, and it contained two loaded and one blank shell.

The motion was overruled; bill of exceptions filed and an appeal allowed by one of the judges of this court.

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

The two principal grounds relied on for reversal are that:

1. Defendants have newly discovered evidence by which they expect to impeach the main witness for the prosecution.

We contend this is no sufficient ground, and the court below did not err in not granting a new trial. *Hilliard on New Trials, pages* 512-513, *sec.* 31. *Ib., p.* 519, *sec.* 40. *Ib., p.* 505, *sec.* 19. *Minkwitz* v. *Steen*, 36 *Arks., p.* 260.

2. Defendants wanted to prove the bad character of deceased, and complain of error in the court below in not allowing the evidence. We cite in support of the correctness of the ruling of the court below, 3*d Greenleaf on Ev., sec.* 27 (*Redfield's Edition.*)

OPINION.

HARRISON, J. According to the usual and regular order in the production of evidence, the State should have called and examined the witness, Ledbetter, before closing its case; or if for any reason that could not have been done, it might by the permission of the court have called and examined him as its own witness, after the close of the defendants' case; but the general course of the examination of witnesses is subject to the discretion of the court, and it may permit, as was done, a departure from the usual order. 1 *Green., Ev., secs.* 431, 447; 1 *Bish. Crim. Pro., sec.* 966. The defendants could, if they had wished, have cross-examined him as to the new matter brought out by the State, and we cannot see that any prejudice to them resulted from the irregularity in the examination of the witnesses.

1. EVIDENCE: Production of.

The question the defendants asked Swanson, upon his recall by the State, his answer to which they proposed to contradict by Linscott, was not in relation to any evidence then given by him, but related only to his testimony when on the stand before; and no reason appears to have been shown the court why the contradicting witness could not have been produced before they closed their case. That, as in the case of the examination of Ledbetter, was a matter likewise in the sound discretion of the court, and its refusal

to allow them to call the witnesses and so prolong the trial cannot be assigned as error. *Whar. Crim. Ev. sec.* 495.

2. SAME: Of character of the deceased.

The evidence offered as to the assault of the deceased upon the witness Johnson, was very properly excluded. His violent and turbulent character could not be shown by proof of isolated facts or particular acts of violence. It was no part of the *res gestæ*; 2 *Bish. Crim. Pro. sec.* 617; *Eggler* v. *The People*, 56 *N. Y.*, 642; *Franklin* v. *The State*, 29 *Ala.* 14.

The first, second and third instructions, asked by the defendant, were embodied in the twelfth and thirteenth, already given for the State, and in substance and effect the same; and those given for the State were equally as clear and plain; and so also was the fifth asked by them, the same as the eighteenth given for the State, and it could have served no useful purpose to have given those for the defendants, and they were properly refused, and we need not consider or express any opinion in regard to them. *Sweeney* v. *The State*, 35 *Ark.*, 585; *Ford* v. *The State*, 34 *Ark.*, 649.

There was no evidence that the defendants could not have arrested the deceased, if such was their purpose, and they had tried, without shooting him; or that he was, when he was shot, making any resistance to an arrest. Their fourth, eighth, ninth and tenth instructions, were therefore abstract and irrelevant, and were likewise properly refused.

3. SAME: Dying declarations. Their weight.

The seventh also was rightly refused. The jury alone might determine the weight to be attached to the dying declarations of the deceased. Mr. Bishop says: "Judges have sometimes attempted a comparison between the declarations and the testimony of living witnesses as to the weight which the jury should accord them. But evidently such comparisons are impossible, or at least they pertain to the facts of the case, not the law. Like other evidence,

they are open to observation, but the jury alone are to decide on their effect, giving them such weight as may seem to them under all the circumstances to be just." 1 *Bish. Crim. Proceed. sec.* 1216; *Walker and Black* v. *The State*, 37 *Tex.*, 366; *State* v. *McCanon*, 51 *Mo.*, 160. The court could only determine as to the admissibility of the declarations, and leave the weight or credit which should be given them to the jury. Judges are prohibited by the Constitution from charging juries with regard to matters of fact, and may not comment upon the evidence.

4. NEW TRIAL: For newly discovered testimony.

It is a well settled rule that when a new trial is applied for upon the ground of newly discovered evidence, the application must be corroborated by the affidavit of the newly discovered witness, or if that cannot be had, by the affidavits of other persons. No such corroboration was offered as to the newly discovered facts, that the deceased said to Sparks, the day after he was shot, that if Campbell had not shot just when he did he would have shot Campbell.

5. SAME: Impeaching witness, no ground for new trial.

The newly discovered evidence, concerning the pistol and cartridges, the defendants expected to produce by Payne, was immaterial and irrelevant, and all the rest of the evidence discovered after the trial would only have gone to impeach the credit of the witness, Swanson, and it is a settled and well established rule, that newly discovered evidence that goes only to impeach the credit of a witness is not a sufficient ground for a new trial. *Hill. on New Trials*, 385; 1 *Gra. & Water on New Trials*, 496; *Minkwitz* v. *Steen et al*, 36 *Ark.*, 260; *Wallace* v. *The State*, 28 *Ark.*, 531; *Robbins* v. *Fowler*, 2 *Ark.*, 133.

As the defendant, Moore, has since the appeal was obtained been pardoned by the Governor, we shall refrain from any remarks in relation to the sufficiency of the evidence to sustain the verdict against him.

The verdict against appellant, Campbell, was sustained by the evidence.

The judgment is affirmed.

BRIDGES v. THE STATE.

1. CRIMINAL PRACTICE: *Trial in absence of defendant; Discretion of Circuit Court.*

It is within the discretion of the Circuit Court to refuse a trial of a misdemeanor in the defendant's absence, and in matters of discretion there is no review in this court except in cases of abuse.

2. APPEAL: *Final judgment; what is not.*

An order of the Circuit Court refusing to try a defendant in his absence, and directing an *alias capias* to issue for him, and a summons for his sureties in his bail bond, returnable to the next term, is no final judgment, and an appeal from it will be dismissed at the appellant's cost.

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

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

Defendant was out on bail bond, conditioned as prescribed by *sec.* 1723 *Gantt's Dig.*, and failed to appear at any time in person.

Sec. 1888 *Ib.*, provides that the "*trial*" may be had in the absence of defendant, but no valid judgment (criminal) can be rendered against one who at no time has been personally present. Had defendant entered his appearance and plea, as required by his bond, then the trial may have proceeded under said section. There is no such thing known to the criminal code as a *judgment by default.* The action is personal and the court must have jurisdiction over the *person* to render a *proper* judgment.

ENGLISH, C. J. At the November term, 1880, of the Circuit Court of Franklin county, S. S. Bridges was indicted for selling liquor to a minor. A capias was issued to the

sheriff of Johnson county, who arrested defendant and delivered him into the custody of the sheriff of Franklin, and he released him on his executing a bail bond with sureties, for his appearance at the next term thereafter.

At the appearance term, the case was called for trial, and the defendant failed to appear. His attorneys asked to be allowed to enter a plea of not guilty for him, and that he be tried in his absence. This the court declined to permit, and directed the fact of his failure to appear to be entered on the minutes; ordered an alias capias for defendant, and a summons upon the forfeiture to his sureties in the bail-bond returnable to the next term.

From this order and before any final judgment in the case, or upon the forfeiture, defendant's attorneys prayed in his name, and there was granted an appeal to this court.

Where the indictment is for a misdemeanor, the Statute provides that the trial may be had in the absence of the defendant. (*Gantt's Dig.*, *sec.* 1888,) and it was said in *Griffin* v. *The State*, 37 *Ark.*, 442, that no doubt the court had the discretion to permit the trial in his absence, but as a practice it was not to be commended.

The court below, in the exercise of its discretion, declined to permit appellant to be tried in his absence, and in matters of discretion, there is no review on appeal except in cases of abuse.

There was, however, no final judgment from which an appeal would lie, and the appeal must be dismissed at appellant's costs.

Owen v. The State.

1. Criminal Practice: *Trial in absence of defendant.*

The defendant in a criminal case has the constitutional right to be present and confronted with the witnesses against him at the trial, and the State cannot demand a trial in his absence. The provision of the Statute (*Gantt's Digest sec. 1888*) authorizing the trial of a misdemeanor in the absence of the defendant, applies to cases in which he waives the right to be present.

2. Same: *Same.*

The Circuit Court may, in its discretion, refuse to try a misdemeanor in the absence of the defendant, even with his consent; and *should* refuse, if the verdict and judgment may be for imprisonment. And if the case be an appeal from the judgment of a justice's court, the Circuit Court may compel his presence by bench warrant or capias, or dismiss his appeal and leave the justice's judgment to be enforced.

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

Moore, Attorney-General, for the State.

Sec. 1888 *Gantt's Dig.* provides: "If the indictment is for a misdemeanor the trial may be had in the absence of the defendant." It was *purely within the discretion of the court* to try the case in the absence of the defendant, or to require his personal presence if deemed necessary.

English, C. J. In September, 1880, Amos Owen was charged, tried and convicted for malicious mischief, before a justice of the peace of Lee county, and appealed to the Circuit Court.

At the appeal term he was present in the Crcuit Court, the case was submitted to a jury, and they failing to agree on a verdict were discharged. At the next term he was absent,

and the State demanding his presence, the court continued the case. At the following term, when the case was called for trial, he was absent; the State demanded his presence; his attorney offered to proceed to trial in his absence, which the court declined to permit, and dismissed the appeal for want of prosecution; and his attorney prayed for him an appeal to this court, which was ganted.

In all criminal prosecutions the accused has the right to be confronted with the witnesses against him, (*Sec.* 10, *Dec. of Rights*) and therefore the State cannot demand a trial in his absence.

The Statute provides that if the indictment be for a misdemeanor, the trial may be had in the absence of defendant, (*Gantt's Dig. Sec.* 1888), but that must be understood to apply to cases in which the accused consents to waive the right to be present.

In this case the attorney of appellant offered to proceed to trial in his absence, and being a misdemeanor, that might be done: but the State objecting and demanding his presence, the court was not legally obliged to permit the trial to proceed in his absence. It was, as we have held in other cases, matter of discretion in the court, and a practice not to be commended. *Griffin* v. *The State*, 37 *Ark.*, 442; *Bridges* v. *State*, *ante*.

The offense with which the appellant was charged is punishable by fine or imprisonment, or both, (*Acts of* 1879, *p.* 85), and the court should not, in the exercise of its discretion, permit a trial in the absence of the accused when the verdict and judgment may be for imprisonment. He should be present to be placed in confinement if convicted. 1 *Bishop Cr. Pro.*, *sec.* 268, *and notes.*

On the failure of appellant to appear for trial in the prosecution of his appeal, as he was bound to do, the court

might have ordered him brought in on bench warrant or capias. But the court thought proper on such failure, to dismiss his appeal, which it had the discretion to do, and which left the judgment of the justice standing, and to be enforced.

Affirmed.

MURPHY v. THE STATE.

1. NEW TRIAL: *Newly discovered testimony.*

A motion for a new trial for newly discovered testimony must show why the testimony was not produced at the trial.

2. TAX ON CRIMINAL CONVICTION: *Not unconstitutional.*

The tax imposed by Statute (*Gantt's Dig., sec.* 5053,) on each criminal conviction, is a fee to the public and not a tax within the meaning of the clause of the constitution requiring all property to be taxed *ad valorem.*

3. CRIMINAL PRACTICE: *Hiring out misdemeanor convicts.*

Where there is no public county contractor for keeping and working misdemeanor convicts, under Sec. 5 of the act of March, 22, 1881, the Circuit Court should direct in the judgment for the fine and cost, that the convict be put to labor or hired out as provided by Sec. 4, Act of 10th of March, 1877; but the failure to make such direction is no ground for reversal. It may be corrected on application to the Circuit Court by amendment of the judgment; and on appeal, this court will affirm the judgment for fine and costs, and certify the affirmance to the Circuit Court, that the correction may be made by a further order if desired.

ERROR to *Chicot* Circuit Court.

Hon. T. F. SORRELLS, Circuit Judge.

Martin & Martin, and C. H. Carlton, for plaintiff in error:

There is no law making the $3 *tax* any part of the fine

and costs in a criminal case. *Sec.* 5053 *Gantt's Dig.*, is the only Statute on the subject which provides that there shall be *levied* and collected a county tax, etc., a *tax* of $3 on each criminal conviction. This act provides for the *levy* and *collection* of the $3 as a *tax—not as a part of the fine and costs*, etc. The Circuit Court cannot *levy a tax*. That power, under Constitution of 1874, and by the Act in question, is conferred solely on the *county court*. The act of 1877 provides for imprisonment only, until the *fine* and *costs* are paid. *Acts*, 1877, *pp.* 74-75.

Suppose the party were actually unable to pay the fine and costs, under the judgment in this cause, he would be held in custody until millenium's dawn.

If the fine and costs had been paid could the sheriff hold him for a *tax?*

The judgment is not in accordance with *sec.* 4, *Acts* 1877, *pp.* 74-5.

C. B. Moore, Attorney-General for defendant in error.

Secs. 1621 *and* 5053 *Gantt's Dig.*, are the only law of this case, and they are too explicit to admit of argument.

English, C. J. P. F. Murphy was indicted in the Circuit Court of Chicot county, at the July term, 1881, for playing cards on Sunday; he was tried at the January term, 1882, and the jury found him guilty, and assessed a fine of twenty-five dollars against him. He was refused a new trial, and judgment rendered against him for the fine assessed by the jury, and the further sum of $3 as a tax imposed by Statute upon the conviction, and for costs; and it was ordered that the sheriff retain custody of defendant until the fine, tax and costs were paid. He took a bill of exceptions and brought error.

I. The first ground of the motion for a new trial was, that the verdict was contrary to the evidence.

The testimony of two witnesses, introduced by the State, conduced to prove that plaintiff in error, and three other persons, played poker at the saloon of one McDaniel, in Lake Village, on the Sunday preceding the term of the court at which the indictment was found. No witness was introduced for the defense.

1. NEW TRIAL: For newly discovered testimony.

II. The second ground of the motion for new trial was for newly discovered evidence. In the motion, unsupported by any affidavit, plaintiff in error stated that he could prove by the persons who played the game at cards, and by the saloon keeper, that he did not engage in the game. Why he did not have one or more of these persons at the trial, is not shown. The showing was insufficient, and not within the rule.

2. Tax on criminal conviction constitutional.

III. It is submitted for the plaintiff in error, that the tax of $3 imposed by *section* 5053 *Gantt's Dig.*, on each criminal conviction, and included in the judgment in this case, is in violation of the Constitution.

The tax is a fee to the public, and not a tax within the meaning of the clause of the Constitution requiring all property, etc., to the taxed *ad valorem*. *Lee County* v. *Abraham*, 34 *Ark.*, 166.

It is a mode of making persons convicted of crime, contribute to defray the expenses of public prosecutions.

3. Hiring out convicts.

IV. It is further submitted for plaintiff in error, that if he was unable to pay the fine and costs, he would, by the terms of the judgment have to remain in the custody of the sheriff until doomsday, as it does not direct that he be put to labor on the public works, or hired out to satisfy the judgment.

Section 4 of the Act of March 10th, 1877 (*Acts* of 1877, *p.* 74), provides that when any person shall be convicted of

a misdemeanor, the judgment shall direct that such person shall be put to labor in any manual labor work-house, or on some bridge or public improvement, or hired out until the fine and costs be paid.

But the failure of the judgment, so to direct, would not be ground of reversal; the judgment on the verdict for fine and costs would be valid, and the court on application, might amend by adding the direction required by the Statute.

At the time the plaintiff in error was convicted, however, the Act of March 22d, 1881, was in force, and by the 5th section of that Act it was the duty of the sheriff, if the fine and costs were not immediately paid or secured, as therein provided, to commit him to jail, to be by the jailer delivered to the public contractor, if a contract had then been made for keeping and working such convicts by the county court of Chicot county, as provided by the Act. But if no contract had been made, the court should have made the direction in the judgment required by the Act of March 10th, 1877. *Griffin* v. *The State*, 37 *Ark.*, 437.

The judgment must be affirmed, and the affirmance certified to the court below that a further order may be made touching the fine and costs if required.

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STATE v. DEVERS.

1. LIQUOR: *Selling without license; indictment. Agent of licensed owner.* An indictment for selling liquor without license, need not allege that the owner had no license The seller is presumed to be the owner when nothing to the contrary appears. But if he be the servant or agent of a licensed owner, he can show the fact in defense by proof on the trial.

ERROR to *Scott* Circuit Court.

Hon. J. H. ROGERS, Circuit Judge.

STATEMENT.

Thomas Devers was indicted at the August term of the Scott Circuit Court, 1881, for selling liquor without license; the indictment charging that he "the said Thomas Devers, on the 10th day of December, 1880, in the county of Scott, unlawfully did sell to one John Scroggins, one quart of ardent liquor, to-wit: whisky, without first obtaining a license from the county court of said county of Scott, authorizing him, the said Thomas Devers, to exercise such privilege, against the peace and dignity of the State of Arkansas."

The court sustained a demurrer to the indictment because it did not allege that the *owner* or *owners* of the liquor had no license to sell, and the State appealed.

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

The indictment is in regular form. It alleges time, place and all else necessary to constitute a valid indictment, and is precisely similar to the one in *State* v. *Marsh*, 37 *Ark.*, 356.

Under *Act March* 8, 1879, *p.* 34, *sec.* 1, the court erred in sustaining the demurrer.

HARRISON, J. It was not essential that the indictment should have specifically alleged that the owner of the liquor had not obtained license. Without evidence to the contrary the law presumed the defendant to be the owner.

A licensed liquor dealer may sell by an agent or servant, and if the sale has been made by the defendant, as the agent or servant of one who had a license, that was matter of defense upon the trial. *The State* v. *Keith*, 37 *Ark.*, 96.

The indictment was sufficient and the court erred in sustaining the demurrer to it.

The judgment is reversed and the cause remanded.

STATE v. GRAHAM.

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1. INDICTMENT: *Must allege the facts, not a conclusion of law.*

An indictment must allege the special matter of the whole fact with such certainty that the offense may judicially appear to the court. It is not sufficient to charge a conclusion of law.

2. SAME: *Charging offense in language of the Statute.*

It is sufficient, as a general rule, to charge a Statutory offense in the words of the Statute; but when a more prticular statement of the facts is necessary to set it forth with requisite certainty they must be averred.

3. SAME: *Charging officer with refusing to act on information.*

An indictment against a justice of the peace for failing to proceed against one for carrying a pistol as a weapon, must allege that the justice had information of the offense from the oath of some person, or that he had personal knowledge of it.

4. CRIMINAL STATUTES: *Construed strictly. Pistol Act of 1875.*

Criminal Statutes must be strictly construed, and no case brought by construction within a Statute unless it is completely within its words: and the Act of February 16th, 1875, imposing a penalty upon justices of the peace for failure to enforce its provisions against carrying arms, does not apply to mayors of towns.

APPEAL from *Izard* Circuit Court.
Hon. R. H. POWELL, Circuit Judge.

STATEMENT.

At the June term, 1881, of the Circuit Court of Izard county, the following indictment was found against the appellee:

"STATE OF ARKANSAS v. J. H. GRAHAM. } Indictment for non-feasance in office.

The grand jury of Izard county, in the name and by the authority of the State of Arkansas, accuse J. H. Graham of the crime of non-feasance in office, committed as follows, to-wit: The said J. H. Graham on the twelfth day of March, A. D. 1881, in the county and State aforesaid, then

and there being mayor of the incorporated town of Melbourne in said county and State, and having legal information that one W. P. Cook had committed the offense of carrying a pistol, as a weapon, within the incorporation of said town, unlawfully did fail to proceed against the said W. P. Cook, as required by law, against the peace and dignity of the State of Arkansas."

The defendant demurred to the indictment for insufficiency. The demurrer was sustained and the State appealed.

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

By *Act March 9th*, 1875, *sec.* 45, mayors of incorporated towns are given full powers and jurisdiction of a justice of the peace, and while acting in such capacity they are, to all intents and purposes, conservators or justices of the peace, in all matters civil or criminal, arising under the laws of this State. A mayor, by virtue of his office is, for the purpose of enforcing State laws, *a justice of the peace, and as such should be held to a strict account of his stewardship*, and by *Act of Feb.*, 16*th*, 1875, *sec.* 3, *p.* 156, is responsible for abuse of his high trust.

J. L. Abernethy, for appellee.

1. The indictment does not specifically allege that Marshall was an incorporated town.

2. It does not show in what manner the defendant failed to proceed against Cook.

3. *Sec.* 3, *Acts* 1875, *p.* 156, only applies to justices of the peace. Criminal laws must be strictly construed.

4. Officers of incorporated towns are not punishable by indictment in the Circuit Court for malfeasance, misfeasance or non-feasance in office. Such offenses are exclusively within the jurisdiction of the corporation.

5. The indictment is uncertain in this: it does not show whether defendant failed to proceed against Cook for an offense against the incorporation of Melbourne or against the State.

HARRISON, J. The indictment did not set forth the means by which the defendant was informed that Cook had committed the alleged offense. It merely charged a legal conclusion, without setting forth the facts from which it was drawn, or inferrable. An indictment should set forth the special matter of the whole fact, with such certainty that the offense may judicially appear to the court; and it is not enough to charge a conclusion of law. 1 *Whar. Crim. Law, sec.* 285.

The indictment here, it is true, follows the language of the Statute, *Act of February* 16*th*, 1875, "to prohibit the carrying of side arms and other deadly weapons;" and it is, as a general rule, sufficient to charge an officer created by Statute, in the words of the Statute, but the rule is subject to the qualification that where a more particular statement of facts is necessary to set it forth with requisite certainty, they must be averred. To set forth the offense with sufficient certainty and definiteness, if the defendant were subject to indictment under the Statute, it should have been charged that information of Cook's offense had been given him on the oath of some person, or that he had personal knowledge of it.

But we are of the opinion that, as the Statute only speaks of justices of the peace, it is in its application confined to them, and has no application to mayors of cities and towns, and that the defendant could not be indicted under it.

Criminal Statutes are to be strictly construed and no case is to be brought by construction within a Statute unless it is

completely within its words. HAWKINS says: "No parallel case, which comes within the same mischief, shall be construed to be within the purview of it (the Statute) unless it can be brought within the meaning of the words." 2 *Hawk.*, *P. C.* 188, *sec.* 16. And BISHOP says: "If a case is fully within the mischief to be remedied, and is even of the same class, and within the same reason as other cases enumerated, still, if not within the words, construction will not be permitted to bring it within the Statute." *Bish. Stat. Crimes, sec.* 220.

The demurrer to the indictment was rightly sustained.

Affirmed.

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SCHLIEF V. THE STATE.

1. APPEAL FROM J. P., *In misdemeanor, mortgage to secure the judgment no satisfaction.*

The giving of a bill of sale or mortgage of property to the sheriff, to secure the payment of a fine and cost adjudged against a defendant, by a justice of the peace, is no satisfaction of the judgment, and will not bear an appeal from it to the Circuit Court.

2. SAME: *Same.*

Where there is a judgment for fine and cost against a defendant in a justices' court, for malicious wounding of stock, and also for damages to the owner for the injury, payment of the fine and cost is no satisfaction of the judgment, and will not bar an appeal to the Circuit Court.

APPEAL from *Polk* Circuit Court.

Hon. H. B. STUART, Circuit Judge.

C. B. Moore, Attorney-General for the State.

STATEMENT.

On the twenty-seventh of September, 1881, Theodore

Schlief was tried and convicted before a justice of the peace, in Polk county, of malicious mischief, in shooting a mule of C. B. Sale; was fined twenty dollars, and further adjudged to pay to Sale, for damages, the sum of twenty-five dollars, and also to pay all cost of the prosecution, and was ordered into the custody of the sheriff until the fine and cost were paid. The sheriff took from him a bill of sale of personal property to secure the payment of the fine and cost, and discharged him. Afterwards, on the twenty-ninth day of October, 1881, he appealed to the Circuit Court. The State moved to dismiss the appeal upon the ground that the fine and cost had been paid before it was taken. Upon the trial of the motion, the sheriff testified that after Schlief was placed in his custody, he took from him a bill of sale on certain personal property, which he enumerated, to secure the payment of the fine and cost. The property was delivered to him, and it was agreed between them that if Schlief paid the fine and cost in thirty days, the property should be returned to him. Witness had disposed of part of the property, but had not yet paid the money into court, but was ready to do so. He considered the fine and cost paid from the time he took possession of the property. The defendant failed to pay, and witness considered himself responsible to the State for the fine and cost in the justice's court.

Upon this testimony the court sustained the motion and dismissed the appeal, and the defendant appealed to this court.

OPINION.

HARRISON, J. The bill of sale from the defendant to the sheriff, which was in effect a mortgage to secure the payment of the fine and costs, was no payment thereof. *Floyd*

v. The State, 32 *Ark.*, 200. And if the fine and costs had been in fact paid, that was not a satisfaction of the entire judgment; the damages adjudged Sale remained unpaid, and the case was not within the meaning of section 2103 of *Gantt's Digest*, which says: "No appeal shall be taken from a judgment of a justice's court after it has been paid or collected. The court below erred in dismissing the appeal from the justice's court."

Reversed and remanded.

GILL v. THE STATE.

1. INDICTMENT: *Showing prosecution barred by Statute of Limitations.*
   An indictment is good upon demurrer though it shows upon its face that the offense was committed beyond the period of the statute bar.

(This *per* force of the Statute. See *Scoggins v. The State, 32 Ark., 215.*—REP.)

2. EVIDENCE: *Exclusion of relevant, when not error.*
   A party has no right to complain of the refusal of evidence which could do him no good, though it be relevant.

3. STATUTE OF LIMITATIONS: *In criminal prosecution.*
   In criminal prosecutions the State must prove that the offense was committed within the period of the Statute of Limitations next before the finding of the indictment, or that there was a previous indictment within the time, which had been quashed, or set aside, and the new indictment found in due time afterwards.

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

STATEMENT.

On the eighth day of September, 1880, Rufus Gill was indicted in the Conway Circuit Court for Sabbath breaking, by selling liquor on Sunday, on the twenty-ninth day of

August, 1880. A bench warrant was ordered but not issued until January 25th, 1882, and served the next day. On the seventh of March, 1882, the indictment was quashed, on motion of the State, and the case referred to the grand jury, then in session, and on March 13th, 1882, the grand jury returned into court another indictment against him for Sabbath breaking, charging that "the said Rufus Gill, on the twenty-ninth day of August, 1880, in the county and State aforesaid, unlawfully did sell one pint of ardent spirits on Sunday, against the peace and dignity of the State of Arkansas."

The defendant demurred to this indictment because it showed that the offense was committed more than one year next before the finding of the indictment. 2d, That it did not allege that the day of the sale was Sunday. The demurrer was overruled and the defendant excepted.

On the trial the State proved the offense committed at the time alleged. The defendant in defense, offered to prove by the record the finding of the first indictment and the proceedings thereon, but the court refused to admit the evidence.

The defendant asked the court to instruct the jury that in order to convict the defendant they must find from the evidence that the offense was committed within one year next before the finding of the indictment, but the court refused this, and instructed the jury that it was sufficient if they found from the evidence that the offense was committed within one year next before the eighth day of September, 1880—the date of the finding of the first indictment. The jury returned a verdict of guilty, and after motion for new trial overruled, the defendant filed his bill of exceptions and appealed.

G. B. Denison, for appellant.

Gantt's Dig., *sec.* 1665, fixes the period within which

offenses of this grade must be prosecuted. *Secs.* 1666-7 provide the rule as to the exceptions, and if this case came within the rule the indictment should have so alleged. It showed on its face that it was barred. See 1 *vol. Bish. Crim. Pro., sec.* 405.

Upon motion in arrest a conviction on this indictment might be sustained, but on demurrer it was bad.

No attempt was made by the State to prove any fact that would bring the case within the exceptions, and the court excluded the evidence offered by defendant of the former indictment, warrant of arrest, records of court, etc.

Submits that *sec.* 1667, *sup.*, applies to cases only where "the indictment shall be quashed, set aside or reversed" for some defect or error, *at the instance of the defendant*, and not to cases where the State, for some undisclosed reason, procured the quashal of a *good indictment* and had the case remanded.

The court erred in telling the jury that there had been a former indictment, and that it was only necessary to find that the offense was committed one year before the finding of such indictment. This was telling them of the existence of facts which the State had not attempted to prove, and which had in fact been excluded upon objection by the State, when offered by defendant.

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

The Statute of Limitations did not run while the former indictment was pending. Counting out that time the prosecution was not barred. *Sec.* 1667, *Gantt's Dig.*

OPINION.

HARRISON, J. The objections to the indictment were not well taken. It was alleged with sufficient directness and

certainty that the day on which the ardent spirits were sold, was Sunday. No person of ordinary understanding, but could so have understood. And it need not have alleged that the offense was committed on a day within the period of limitations. *Scoggins v. The State*, 32 *Ark.*, 205.

Though relevant and important for the State, it was certainly not an error of which the appellant might complain, that the court refused to allow him to introduce evidence of the finding and subsequent quashal of the former indictment. He was in no wise prejudiced thereby.

The instruction asked by defendant should have been given. It was necessary to a conviction, for the State to prove that the offense had been committed within twelve months next before the finding of the indictment, unless it had been proved that a former indictment had been found for the offense, and the same had been quashed or set aside; in which case, the time during which it was pending would not have been computed as part of the time of the limitation, and as there was no such evidence the instruction given by the court was erroneous. It appearing from the evidence that the offense was committed more than twelve months before the finding of the indictment, the verdict was against the evidence.

Reversed and remanded for a new trial.

ATKINS v. SWOPE.

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1. *Pleading and Practice: Sale by plaintiff of attached property, no defense to the action.*

A paragraph in an answer to an action of debt by attachment, that the plaintiff had obtained and sold the property attached, and praying for damages for its value, is not admissible, and should be stricken out. Wanton or illegal proceedings under an attachment resulting in injury to, or loss of the attached property, although otherwise remediable, cannot be pleaded in defense of the action.

2. ATTACHMENT: *Attached property is in control of court; Plaintiff no right to it.*

Attached property is within the control of the court; the plaintiff has no right to it as property, and to remove and sell it, with or without the consent of the attaching officer, is a contempt of court which a party commits at his peril.

3. SAME: *Power of court to remedy illegal disposal of attached property.*

The court has the inherent power to compel the plaintiff to account for attached property converted by him, before giving judgment for him, or allowing execution; or if judgment be against him, may compel him to refund; and no material injustice of which the plaintiff could complain, would be done by including the matter in a verdict.

4. PRACTICE: INSTRUCTIONS: *General objection to several in gross.*

A general objection to several instructions in gross, will not be entertained if any one of them be good, and is objectionable if all be bad. Their errors should be specifically pointed out.

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

STATEMENT.

On the fourth day of December, 1878, Atkins sued Swope, in the Monroe Circuit Court, on a promissory note for $430, due December 1st, 1878, for rent of land for that year, and caused a specific attachment to be issued and levied upon cotton, produced on the land, to enforce his landlord's lien for the rent. Swope answered in two paragraphs; in the first, by way of set off, "that Atkins was

indebted to him in the sum of $456 25, by note, made January 24, 1877, and due December 1st, 1878." In the second, "that he was damaged by the suing out of the attachment herein, to the amount of $200, in this; that by virtue of said attachment four bales of cotton of the value of $200, the property of the defendant, were seized by the sheriff and delivered to the plaintiff or his agent, who shipped the same beyond the limits of the State, and sold them without authority of law and without the defendant's consent, and the same, thereby, became lost to defendant,"

To this answer the plaintiff filed the following reply:

"Plaintiff, for reply, says that the note set up in this action as a set-off, was obtained from him by fraud and without any consideration.

"That defendant, who was then in possession of a plantation belonging to plaintiff, under a lease, a copy of which is herewith filed, falsely and fraudulently represented to plaintiff that he had cleared thirty-six and a half acres more land than he had been paid for; that he had had the land measured; that plaintiff lived some distance from there and knew nothing as to the amount of land cleared, and believing the representations so made, to be true, and the agreed price for clearing being $12 50 per acre, he executed said note for the clearing of said land and for no other consideration. That soon afterwards he discovered that said defendant had not cleared said land, nor any part of it, except about one acre; and as to the balance of said note ($443 75), there was no consideration whatever; and that defendant knew at the time of making said representations, that they were false and a fraud upon the plaintiff, and that he was getting said note for nothing."

2. "And for further reply, he says: That at the time said note was executed he, said defendant, had been cultivating some land belonging to plaintiff and doing some clearing for

him; that each year defendant deducted from the rents a sufficient sum to pay for the clearing; that for three years he paid $6 per acre rent, and two years $4 per acre; that plaintiff knew nothing of the amount of land cultivated by defendant, or the amount he cleared, only from his statements; that defendant lived on the place and plaintiff did not and was not familiar with it; that at said pretended settlement the defendant represented that he had cleared thirty-five and a half more acres of land than he had cleared, and cultivated twenty-one and a half acres a year, for five years, less than he had cultivated; and the said note was given to represent the balance that was due said defendant for said clearing that had not been paid for out of the rents; that said defendant made said representation falsely and fraudulently, and with the intent to cheat and defraud plaintiff; and plaintiff at the time relied upon them and executed said note; when the truth was, as soon afterward discovered by plaintiff, that defendant had not cleared said land, and had kept back rent on said place for clearing, to the amount of $516 more than the clearing he did come to, at their agreed price; and at the time said note was executed the said defendant had in his hands the sum of $516 to pay him for clearing, which he did not do, except about one acre; and so he says that said note was executed without any consideration whatever, and was procured by the fraud of the defendant, and he demands that it be held for naught."

Upon the trial the plaintiff produced in evidence the lease referred to in the reply; the material part of which is, in effect, stated in the opinion of the court.

The plaintiff testified, in substance, that the defendant occupied the lands under the lease, cultivating the old and clearing new lands for five years. That when the note, pleaded as a set-off, was executed, he knew nothing as to the

amount of land the defendant had cleared or cultivated, except from his representations. He was, though, frequently upon the lands, between the date the clearing was finished and the date of executing the note; that each year for four years, the defendant deducted $125 from the rents to pay himself for clearing. That he and defendant had a settlement at the time the note was executed, and the defendant represented to him that he had cleared seventy-six and a half acres of land, and had cultivated fifty-seven and a half acres of old land, during the terms of his lease, and stated, at the same time, that Houser, the county surveyor, had surveyed the lands, and that according to his survey there was still due him $456 25, the amount of the note; and he relied upon the statement and executed the note; that soon afterwards he met Houser and asked him about the survey, and Houser told him he did not know the number of acres of cleared land, but had left a memorandum of it with Swope. He then told Houser he wanted him to make the survey, but Houser referred him to Walkup, who would soon be elected county surveyor, and was more competent to make it. Witness and defendant had agreed for Houser to make the survey, before he made it, and witness had been notified of the time the survey would be made, but could not attend, and sent word to Houser and Swope to go on and make it. He afterwards got Walkup to make it, who found that Swope had cleared only forty-four 81-100 acres, and deadened and chopped off some timber from eighteen acres, and it had grown up with briars and underbrush.

Walkup testified that he had made the survey since the date of the note; that there were forty-four acres and a fraction of the cleared land; eighteen acres deadened and grown up with briars so thick he could not get through it, and seventy-three and three-fourths acres of the old land. That he could easily distinguish the old land from the new

by the absence of timber and stumps from the old. He had thoroughly studied surveying, had had many years practical experience at it, and a correct survey could not be made of land with irregular lines, without a compass. He swore the chain bearers, and had a full set of instruments in making the survey. That while making it Swope was present for a while, and then left. He had no means of telling the old land from the newly cleared, except from appearance of the lands. Atkins and James Seals had pointed out the lands cleared by Swope. He was not certain that he could distinguish the land cleared by Swope, the first year of his lease, from the land previously cleared.

James Seals and J. T. Holloway testified that the eighteen acres were not in a state of cultivation; were covered with briars and underbrush, and did not appear to have ever been cultivated. A part of it was good dry land.

Swope testified, for himself, that at the time the note was executed, he and the plaintiff had a settlement, and that he told the plaintiff that Houser had reported seventy-six and a half acres of land cleared by him, and the plaintiff thereupon executed the note. That he had cleared some land that was wet, at the plaintiff's request, and against his own remonstrance. Plaintiff said he would have it ditched, but he told him at the time it was impracticable to ditch it, and it never had been ditched and was not cultivated. The first year of the lease he cleared not quite ten acres; the second year over ten, and the third all he did clear. That plaintiff frequently visited the place after the clearing and before giving the note, and had ample opportunity to ascertain the amount cleared. That there being an unsettled account between them for clearing, they had mutually agreed to refer it to Houser to survey the land and settle by his report; and upon the report of Houser of seventy-six and a half

acres cleared, being an excess of thirty-six and a half acres over what he had been paid for, plaintiff executed the note.

Houser testified of his survey the same as the other witnesses. He did not remember that he swore the chain bearers, but thought he did. He used no compass in making the survey. He only run around the cleared land and made no deductions for slash, uncleared land or anything else. He didn't know much about surveying; had never surveyed very much, and had never studied a thorough course, but that he could make an accurate survey when there were irregular lines, without a compass, if two of the lines were perpendicular to each other, as in this case. He was not a very skillful surveyor, but thought he could survey land correctly.

It was agreed that there were four bales of the cotton seized by the attachment, shipped and sold by the plaintiff, and were worth $164 68.

For the defendant the court gave the following

INSTRUCTIONS.

1st. If the jury believe, from the evidence, that the clearing done by Swope was completed in the spring of 1876, that the plaintiff had ample opportunity to ascertain the number of acres that had been cleared, that the county surveyor, Houser, was employed by the parties to measure the cleared land, and that he did measure it and report the number of acres, upon which report the parties settled, and that the plaintiff made the note filed with the defendant's answer, without any representation by the defendant than that Houser had reported a certain number of acres, they will allow said note as a set-off against the plaintiff's claim, notwithstanding they may find that upon a subsequent survey there is a slight discrepancy between the number of acres, as reported by the surveyors.

2d. The lease read in evidence does not oblige the defendant to keep in cultivation all the land which he may have cleared under the lease. If, therefore, the jury find that Swope cleared wet places, by plaintiff's direction, under protest, and afterwards failed to keep them in cultivation, because they were not tillable without being ditched, Swope is, nevertheless, entitled to the full contract price for said clearing.

3. A doubtful or disputed claim is a sufficient consideration for a note. If, therefore, the plaintiff executed the note without any fraud or imposition practiced upon him, the defendant is entitled to recover the amount of it.

4. If the jury believe, from the evidence, that the parties agreed upon thirty-six and a half acres as the quantity of land cleared by the defendant, and for which he had not been paid, and that they settled upon that basis without any false and fraudulent representations from the defendant, they will find for the defendant for the amount of the plaintiff's note, with interest, and the value of the cotton attached, with interest, less the amount of the defendant's note, with interest.

5. When a party undertakes by his plea, to impeach the considerations of a note on the ground of fraud, he must prove the fraud. If, then, the jury find that no fraud was practiced upon the plaintiff in the settlement, which resulted in giving his note, they are instructed that the plaintiff's reply is not sustained by the evidence.

The plaintiff asked no instructions. One given by the court of its own motion, sufficiently appears in the opinion. The jury returned a verdict for the defendant for $200, including the value of the four bales of cotton, and the plaintiff, after motion for new trial overruled, filed his bill of exceptions and appealed.

S. P. Hughes, for appellant.

The note set up in the counter-claim was without consid-

eration and void; even if there was no fraud, it was executed under a mistake as to material and important facts, and no settlement of disputed claims. A false and inaccurate survey is not binding, nor does it conclude parties who consent to have it made to ascertain the truth. A note, executed for a supposed debt, and it turns out nothing is due, is not a compromise of disputed claims. *Parsons on Cont.*, *secs.* 441–2. *Ib. sec.* 438.

Misrepresentations may not imply fraud in fact, if made by mistake, but if material, and they go to the substance of a contract, they avoid it, whether caused by mistake, or are designed and fraudulent. 2 *Ib.*, *sec.* 786, and cases cited, notes (g) and (h). *Ib.*, *sec.* 779. They need not be made by the party benefitted. *Ib.*

Appellant had a right to rely on Houser's survey, (he being county surveyor), and upon his representations as to the quantity of land, and if he did so rely, as the proof shows, and settled by the same, there was a fraud in law, and avoids the note.

W. W. Smith, for appellee.

1. The affidavit for attachment was not positive, but made on information and belief, and should have been quashed. 24 *Ark.*, 235; repudiating the dictum in 5 *Ib.*, 522.

2. The bond was not conditioned, as required by *Act*, *Dec.* 28th, 1860, *Gantt's Dig.*, *sec.* 4102; 28 *Ark.*, 466.

3. Was this defect amendable? *Gantt's Dig.*, *sec.* 4616; 33 *Ark.*, 406.

4. This court will not disturb a verdict unless there is total lack of evidence to support it. 24 *Ark.*, 251; 31 *Id.*, 163.

5. Exceptions to instructions *in gross*, without specific

action of objections, will not be sustained, if any one is good. 28 *Ark.*, 8; 32 *Id.*, 223.

6. The instructions, in detail, state the law fairly, and the jury were the judges of the conflict of evidence.

7. The third instruction, good law. 21 *Ark.*, 69; 29 *Id.*, 131; 31 *Id.*, 222; *Fisher* v. *May*, 2 *Bibb*, 448; *Pitkin* v. *Noyes*, 48, *N. H.*, 294 *and c. c.*; 14 *Serg. & R.* 425.

8. Atkins had no right to rely on representations as to quantity of cleared land. The land was there, and he had the same facilities for estimating it that Swope had. The means of information being alike accessible to both parties, each must be deemed to have relied on his own judgment. 31 *Ark.*, 170.

9. The burden was on appellant to establish the defense set up in the reply. 5 *Ark.*, 345; 6 *Id.*, 150; 7 *Id.*, 34; 11 *Id.*, 307; 18 *Id.*, 123; 21 *Id.*, 69; 22 *Id.*, 441; 25 *Id.*, 225; 31 *Id.*, 103.

10. The exception taken below is waived, no specific objection being pointed out by counsel in his brief. 18 *Ark.*, 384.

EAKIN, J. No question is made in this case, of the validity of plaintiff's note. The whole controversy arises upon the note pleaded as a set-off, independently of which, there was, strictly speaking, no defense.

1. PLEADING: Sale by plaintiff of attached property, no defense in the action.

So much of the answer as claims damages on account of the attachment, or the value of the cotton taken under it, which had been allowed to go into plaintiff's hands, was out of place as matter of defense, and might well, upon motion, have been stricken out. An attachment has no bearing whatever upon the merits of a suit. It is only ancillary to secure the fruits of any judgment to be obtained.

It brings under control of *the court*, not of the plaintiff, property, to be held for the purpose. The ownership is not changed. The plaintiff has no right to it in any case, as property, and to remove and sell it, with or without the consent of the sheriff, is a contempt of court, which a party commits at his peril. If the plaintiff fails in his action, the defendant is entitled to its return. In any case, if the attachment has been properly sued out, the Statute provides the mode of controverting the grounds, and obtaining satisfaction for damages. But wanton or illegal proceedings under an attachment, whereby the property has been injured or lost, although otherwise remediable, cannot be pleaded in defense of the action. The merits of that are not affected.

2. ATTACHMENT: Attached property in control of the court. Plaintiff no right to it as property.

It is alleged in the answer, that the property had been lost by the plaintiff's conversion of it, whilst under control of the court, and that, without defendant's consent. Doubtless, the court, upon proper motion, might correct this wrong, and should, but it was neither matter of set-off, nor counter-claim, to be pleaded.

3.——: Power of court to remedy illegal disposal of attached property.

It is proper to add, as a corollary, that it was not correct practice in the court to direct the jury, trying the main issues, if they found for defendant to add to his note against plaintiff the value of the cotton seized, under the attachment, with interest," "less the amount of defendant's rent note, with interest." The jury should have been instructed to set-off the two notes, in such case, against each other, and to find accordingly for plaintiff or defendant, as the case might be. The validity of the set-off was the only issue properly made by the pleadings, and the only matter properly submitted to the jury. There had been no issue made, as provided by Statute, upon the *grounds* of attachment; no discharge of the attachment itself. Nevertheless, as the court might, by its inherent power, have

compelled the plaintiff to account for the property by him converted, before giving a judgment in his favor, or allowing execution; or in case of a judgment against him, might have compelled him to refund; no material injustice of which he could complain would be done by including the matter in a verdict. As the practice pursued was not made a special ground of the motion for a new trial, nor urged here as error, we will not notice it further. Compare *Holliday Bros.* v. *Cohen*, 34 *Ark.*, 707.

The gist of the reply to the set-off is, that the note was obtained by the fraud of defendant, in making false representations concerning the amount of the land which he had cleared, and the amount of the land which he had cultivated; in consequence of which, there was a partial failure of consideration. It is not a plea of total failure, nor of "no consideration." In each clause there is an admission of some small part of an intended consideration, enough, in the absence of fraud or mistake, to support the note in an action at law; at least to the extent, that it should not be considered *nudum factum*.

The substance of the reply is, that defendant was tenant of plaintiff under a certain lease, by which he was to pay a certain amount, per acre each year, for the old land in cultivation, and to clear more during the tenancy. The lease provided that he was to be paid twelve dollars and a half per acre for the new clearings, and to have the use of them for the first crop, without rent. It is alleged that defendant, for four years, retained out of the rents, each year, enough to pay for the clearing of ten acres, and afterwards, falsely represented to plaintiff that he had cleared, in all, seventy-six and a half acres. For the excess of thirty-six and a half acres the note was executed, making at the stipulated rate, $456 25. It is alleged that defendant had only,

in fact, cleared one acre in excess of that for which there had been former payments.

It is further alleged that defendant had actually cultivated more of the old lands than he represented to the plaintiff, to the extent of about twenty acres, and kept back the rents upon this excess from year to year, so that when the note was executed, he had already in his hands enough of plaintiff's money to pay for the additional clearing, save one acre. These representations also, are charged to have been false and fraudulent, and with regard to all of these, it is alleged that the plaintiff relied upon them, and was thereby induced to execute the note.

These were the issues presented. The jury, including the value of the cotton attached, about which there was no controversy, set-off the notes against each other, and rendered a verdict against the plaintiff below for the sum of $200 06.

4. INSTRUCTIONS: General objection to several in gross.

The first ground of the motion for a new trial is, that the court erred in giving the 1st, 2d, 3d, 4th and 5th instructions, asked by defendant.

The objection made to giving these instructions was general, embracing all of them in gross. It was not specific as to either or any of them, and directed the attention of the court to no particular error. We have, several times, held that objections of such a sweeping nature will not be considered here, if any of the instructions be good. It is not to be encouraged, even if they all be bad. It is manifestly due the court, as has been repeatedly said, that the attorney should "lay his finger" upon the errors complained of, and not compel the judge to seek them amongst all the matter included in a drag-net objection.

It would serve no useful purpose to discuss the instructions severally. It is enough to say, that, save with regard to the estimate of the value of the cotton in determining the

amount of the verdict, a point to which we have already alluded, they correctly present the law, as far as they go, and are applicable to the evidence. The gist of the reply was fraud, and they are directed, principally, to that point. If the plaintiff had desired others, particularly directed to the failure of consideration, independently of fraud, he might have asked them. The reply evidently rested upon the point of *fraudulent* concealments and representations, which were directly charged as the means by which the note had been obtained for a slight consideration. It was not charged that it had been executed under a *mistake* as to the quantities of land cleared and cultivated, nor does it appear that any such point was pressed under the vague allegation that, because of the alleged facts, the note had been executed without consideration.

The second ground is, error in the instructions given by the court, of its own motion. It is contended that its effect was to advise the jury "that the only real issue to be determined was, whether there was any fraud in the transaction or not." If such had been its effect, it would not be clearly erroneous, in view of the pleadings, and in the absence of any request on the part of plaintiff to modify the instruction so as to present to the jury any point, except fraud, upon which he relied. But we do not understand it as having such limiting effect. It, too, announces the law correctly, as far as it goes. The parties had agreed, beforehand, to settle in accordance with a survey of the lands, to be made by the county surveyor, Houser. He made the survey, and they did settle by his report; the plaintiff, thereupon, executing the note in question for the clearing. A subsequeut survey, made by a different surveyor, differed from that of Houser, as to the quantity of old land in cultivation when the lease was made, and also as to the quantity of land cleared by defendant.

The court instructed the jury "that the law would presume that the county surveyor, in discharging his official duty, would proceed in the manner prescribed by law; and if the jury find that the county surveyor failed to make such survey in a legal manner, and that defendant knew that fact, and concealed that fact from plaintiff, and thereby induced him to give his note, it would be a fraud upon the part of defendant; unless the plaintiff had equal opportunity to know of such neglect."

This was in the appellant's favor. If there was any other aspect of the case made by the evidence, which the plaintiff desired to have hypothetically presented to the jury, he might have asked it. The instruction was substantially correct. The plaintiff asked none.

The third ground is, that the verdict was contrary to the law and the evidence. The burden was upon the plaintiff to show, by evidence preponderating with the jury, that the note set-off was void, or subject to abatement as to amount. The proof as to fraud failed wholly. The discrepancy between the two surveys is considerable, but there are several reasons why the jury may have failed to place such implicit reliance upon the second, as to wholly overthrow that of Houser, and nullify the agreement of the parties to settle by it. For instance, it may be noticed that the second surveyor, Waldrup, although evidently skillful, and accurate in his lines and calculations, much more so than Houser, made his survey long after the lease had been executed, and confesses that he was not able certainly to distinguish between the lands in cultivation when the lease was made and those cleared the first year afterwards. This distinction was very important.

The jury were the judges of the weight of the evidence, and its effect, taken altogether; and were not satisfied that the plaintiff had well sustained the burden in making out his

case. We cannot say their verdict was contrary to the evidence or the law. Upon the whole case, it seems that it does substantial justice. The plaintiff owned the land, and, as the evidence shows, was frequently upon it. It was his interest, as well as his duty to himself, to take notice and form some estimate of the amount of land for which his tenant was required to make payment, as well as the amount of clearing for which he was himself required to allow compensation. It is important that men should be enabled to rely, with some reasonable confidence, upon their adjustments with each other of business matters. If, as seems plain, there was no fraud in the settlement, and he relied too readily upon the judgment and capacity of Houser, and closed his business with his tenant by note, he ought not, in fairness, to repudiate his act, and at a later day subject his tenant to a stricter account, without clear, decided proof of fraud or mistake.

The objection to the verdict, on an account of excess, made the last ground for the motion for a new trial, is not well taken.

Admitting the charge for cotton at its agreed value, calculating interest upon that from the time of seizure, and upon both notes, at 6 per cent. up to the time of the verdict, the amount of the balance accords with that found.

Affirm the judgment.

KIRTLEY V. THE STATE.

4. OBTAINING MONEY BY PERSONATING ANOTHER: *Personation must be proved as alleged.*

The allegation of the false personation in an indictment for obtaining money by personating another, is descriptive of the offense, and must be proved as alleged; and proof that two were acting in concert and one of them personated the assumed party with the assent and concurrence of the other, will not sustain the charge of false personation by the latter.

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

STATEMENT.

This was an indictment in the Conway Circuit Court, for obtaining money by falsely personating another, charging that "The said James Kirtley on the seventh day of March, 1881, in the county and State aforesaid, unlawfully, feloniously and falsely, did represent and personate J. P. Allnutt, and in such assumed character, unlawfully and feloniously did receive from one B. H. Montgomery the sum of twenty dollars," describing it, etc.

Upon the trial W. P. Childres for the State, testified in substance, that on the evening of the seventh day of March, 1881, in Morrilton, Conway county, Arkansas, about an hour after dark, defendant and Britt Treadway came into Wells & Hawkins' store together, where witness was, and tried to borrow ten dollars from a Mr. Scott, to get Polk Davis out of the calaboose; and failing, they swore they would get him out, and started out. Witness and a young man followed to see what they would do, and found them around the corner of the house talking. He heard one of

them say: "Montgomery has got plenty of money, and let's get it," and the other replied, "all right," and both started toward the calaboose, witness and the young man following some six or ten paces behind. When they arrived at the calaboose Treadway said, "Montgomery, how are you getting on?" Montgomery replied, "Polk, bad enough." Treadway said, "give ten dollars more and I'll turn you out." Montgomery, cursing, said, "I gave you ten dollars awhile ago to turn me out and you went off and left me in here." Treadway then caught hold of the bars of the door and shook them violently, and in an angry tone said: "Dry up immediately, or I'll come in and chain you down, flat of your back." This seemed to frighten Montgomery, who replied: "Oh! no, Mr. Allnutt, don't do that; I'm sober now, and want to be out of here." Treadway then said: "Give us ten dollars more and I'll turn you out. I charged you ten dollars for your first release, and for your second will charge you twenty dollars." Witness then asked defendant if Treadway had any of Montgomery's money. He said, "yes, he has ten dollars; I had it in my possession not five minutes ago." Witness then told Treadway that there was no law for robbing a man, if he was a prisoner, and he was fixing himself, perhaps, for a term in the penitentiary. At this he handed to Montgomery, through the calaboose window, what appeared to be a bill, saying: "Here, Montgomery, is your money." Defendant then placed his hands on witness' shoulder, and said: "Hold on, Mister; that man's got plenty of money, and we want it to release Davis." Witness stepped back and defendant then stepped up to the window, and said: "Montgomery, if you want to get out, give me twenty dollars and I'll release you. If not, I am going to bed, and will leave you here till morning, if not for a week." Montgomery replied: "Oh! no, Polk; don't do

that. I'll give you twenty dollars if you will pledge yourself to turn me over my horse, so I can leave town." Defendant replied: "Hand me twenty dollars, and I'll turn you out and deliver up your horse immediately." Montgomery handed him a twenty dollar bill (witness describing it), and as defendant turned off with it, witness took hold of his arm and told him he "could not rob that man in that way, if he was a prisoner;" and held his arm until he returned the money to Montgomery. Defendant then got on his horse, which was hitched near by, and rode off. Witness reported to Allnutt what had occurred, and he went to the calaboose and turned Montgomery out. J. P. Allnutt is called "Polk Allnutt."

Fillmore Cleveland, for the State: "Heard Britt Treadway talking to Montgomery, at the calaboose, about some money, wanting him to give to defendant twenty dollars, to get him, Montgomery, out of prison; and Montgomery was addressing Treadway as "Mr. Allnutt;" and Mr. Childress made Treadway hand back to Montgomery ten dollars he had taken from him. Treadway then stepped off and defendant went to the window and told Montgomery to give him twenty dollars, and he would turn him out. Montgomery spoke to him as "Mr. Allnut," and handed to him a twenty dollar bill, that looked green. Did not see the kind or denomination of the bill. Defendant, on receiving the bill, said, "here is the officer," and handed the bill to Treadway, who refused to take it; and Childress caught hold of defendant, and he returned the bill to Montgomery, and then got on his horse and rode off."

J. P. Allnutt, for State: "Was town marshal of Morrilton; had put Montgomery in the calaboose, the day spoken of, for being drunk and boisterous. When he got sober took him before the mayor and he was fined, and when released he got drunk and noisy, and witness put

him in the calaboose again and kept him there until informed by Childress, that night, of the conduct of Treadway and the defendant.

The defendant introduced no evidence.

The instructions passed on by the court sufficiently appear in the opinion. The defendant was found guilty, and his punishment fixed at one year in the penitentiary; and after motion for new trial overruled, he filed his bill of exceptions, and obtained an appeal from one of the judges of this court.

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

The indictment is good. *Sec.* 1375, *Gantt's Dig.* *Treadway* v. *State*, 37 *Ark.*, 443. The instructions fairly present the law of the case. There was no error in permitting the State to prove that Allnutt was the town marshal. The object of defendant in personating, was to induce Montgomery to believe that, as *marshal*, he would release him.

The instructions asked for appellant are, some of them, misleading.

The 2nd and 3rd exclude the idea of defendant's guilt as an accomplice, or aider or abettor, or that he and Treadway could, jointly, commit the offense.

EAKIN, J. The indictment charges that the appellant "did represent and personate one J. P. Allnutt, and *in such assumed character*, unlawfully and feloniously did receive from one B. H. Montgomery, the sum of twenty dollars." There were other allegations to make a good indictment.

There was evidence tending to show that, when the supposed crime was committed, he was in company with one Treadway; and upon the evidence there was a question of

fact, as to whether the money had been obtained by falsely representing to Montgomery that *appellant* was Allnutt, or that *Treadway* was; or whether each of them had not, during the transaction, represented that he, himself, was Allnutt.

Kirtley alone, however, was indicted upon the specific charge, in effect, that he had, himself, personated Allnutt, and assumed his character. This was descriptive of the offense, although the turpitude of the crime would be no less, in obtaining money by co-operating with Treadway, in representing that Treadway was Allnutt, and although the punishment would be the same; yet that would be a pretense wholly different from representing that the appellant was Allnutt.

In the indictment for the common law cheat, it was necessary that "the several elements of the offense should be alleged, and with due particularity."

The symbol, or token, or means of the fraud, were required to be set forth; "how it was addressed to the person operated on, and how it accomplished a fraud, and what fraud." In indictments upon Statutes like this, it has been required that the facts be given as minutely and particularly as would be required by the common law rules. The particular pretences must be stated, that the defendant may certainly be advised as to what he must answer. (*See Bishop on Crim. Pro., vol.* 2, *sec.* 158, *et seq.*)

The court erred in refusing the instructions asked by defendant, to the effect that "they must believe, from the evidence, that the defendant or his accomplice represented to Montgomery that he (defendant) was J. P. Allnutt, and that in such assumed character, he received the money from Montgomery, and that Montgomery delivered to him the money, believing that he was delivering it to J. P. Allnutt."

And also in giving, on its own motion, the correlative

instructions to the effect, that if they believed the defendant and Treadway were acting in concert, and either of them personated Allnutt, with the consent and concurrence of the other, they might find the defendant guilty.

Whilst it may be truly said that each and every principal does the act in which he participates, yet the act done must be truly described, in all its essential elements, and proved as charged.

What the verdict might have been, under correct instructions, is not for us to consider. The defendant was entitled to them; that the jury, discarding all parts of the evidence tending to show that Treadway personated Allnutt, should confine their attention to all which tended, directly or indirectly, to show that the appellant did.

Reversed and remanded.

ROBINSON V. STATE.

1. JUDICIAL NOTICE: *Of a day of the week or month.*

The courts take judicial notice of the day of the week a certain day of the month came on.

2. SABBATH BREAKING: *Indictment for.*

The charging part of an indictment for Sabbath breaking must show that the offense was committed on some Sunday, though the particular Sunday is not important.

ERROR to *Pope* Circuit Court.

HON. W. D. JACOWAY, Circuit Judge.

STATEMENT.

Indictment in the Pope Circuit Court, against Henry Robinson, for Sabbath breaking; charging that "the said Henry Robinson, on the twelfth day of November, 1880, in

the county and State aforesaid, unlawfully did sell one pint of ardent liquor against the peace," etc.

A demurrer to the indictment was overruled, and after trial and conviction, the defendant brought the case to this court by appeal.

C. B. Moore, Attorney General, appellant.

It is sufficient that the indictment charge the offense as having been committed at a date previous to the finding of the indictment. *Gantt's Dig.*, *secs.* 1618, 1781; *Bridges* v. *State*, 37 *Ark.*, 224. It does not specifically charge that "the twelfth day of November, 1880," was the "Sabbath day," but it *does* charge defendant with "*Sabbath* breaking," by sale of "one pint of liquor," etc.

EAKIN, J. The indictment in this case was not good, and the demurrer should have been sustained. The courts, judicially know, that the twelfth day of November, 1880, was a Friday.

It was not a misdemeanor for a licensed vendor to sell whisky on that day. The charging part of the indictment should have shown that on some Sunday, he did the act constituting the offense, although the particular Sunday was not important. The designation of the crime in the commencement, is merely prefatory, and to be valid, must be supported by the charging portion. It is not charged that defendant sold liquor on any Sunday at all.

Reverse and hold for naught.

STATE v. NICHOLS.

1. INDICTMENT FOR MAIMING: *Plea of former acquittal before J. P.*

A justice of the peace has no jurisdiction of maiming, or other felony; and a plea in the Circuit Court of a former conviction or acquittal, before a justice of the peace, of the felony, or of a misdemeanor included in the felony, will not bar a prosecution for the felony in the Circuit Court.

2. INDICTMENT FOR FELONY: *Convicted of misdemeanor.*

On an indictment for a felony, the accused may be convicted of a misdemeanor, if both offenses belong to the same generic class, and the higher includes the lower offense, and the indictment contains all the substantive allegations necessary to admit proof of the misdemeanor; and a conviction of the misdemeanor is a bar to any further indictment for the felony.

APPEAL from *Franklin* Circuit Court.

Hon. W. D. JACKOWAY, Circuit Judge.

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

The J. P. could only sit as an examining court, on a charge of felony; and if, instead of convicting of assault and battery, he had simply discharged him, it would not have barred an indictment and conviction on a charge of maiming. How, then, could a conviction have been a bar? To hold this plea good, would establish a most pernicious precedent.

I. INDICTMENT FOR MAIMING:

ENGLISH, C. J. Wm. Nichols was indicted in the Circuit Court of Franklin county, for maiming, the indictment charging that on the eleventh day of January, 1882, in the

county aforesaid, he unlawfully, feloniously, willfully, and of his malice aforethought, did bite off the ear of one D. A. Goldsmith, etc.

Plea of former conviction before a J. P., not good.

Defendant plead former conviction. The substance of the plea was that Goldsmith, by affidavit, charged him with the same maiming, before a justice of the peace; that he was arrested upon a warrant, and taken before the justice, who heard the evidence, investigated the charge, and discharged and acquitted him of the crime of maiming, but held him to answer for an assault and battery on said Goldsmith, and that said justice, sitting as a jury, heard the evidence on said charge, found him guilty, and adjudged him to pay a fine of five dollars, etc.

The transcript, which was filed with the plea, shows that the justice heard the evidence on the charge of maiming, and adjudged defendant not guilty of that charge, and acquitted him thereof, but held him to answer for an assault and battery; whereupon defendant confessed guilt of that charge, "and the court imposed a fine of five dollars."

The State demurred to the plea of former conviction; the court overruled the demurrer, and, the State resting, judgment was entered discharging defendant from the indictment, and the State appealed.

The offense charged in the indictment, biting off the ear, is made maiming, by Statute, and is a felony (*Gantt's Dig.*, *secs.* 1322-5) of which the Circuit Courts have exclusive original jurisdiction, and of which justices of the peace have no jurisdiction except to sit as examining courts. *Constitution*, *art.* 7, *sec.* 40.

A justice of the peace having no jurisdiction to try one accused of a felony, his judgment of acquittal, or conviction, is no bar to an indictment for the same offense in the Circuit Court.

2. INDICTMENT FOR FELONY: Convicted of a misdemeanor.

Upon an indictment for a felony, the accused may be convicted of a misdemeanor, where both offenses belong to the same generic class, where the commission of the higher may involve the commission of the lower offense, and when the indictment for the higher offense contains all the substantive allegations necessary to let in proof of the misdemeanor. *Cameron* v. *State*, 13 *Ark.*, 712.

So it was held in *Guest* v. *State*, that upon an indictment for maiming, the accused might be convicted of an aggravated assault and battery. 19 *Ark.*, 405.

If, on an indictment for maiming, in the Circuit Court, the accused be convicted of an assault and battery, the judgment is a bar to any further indictment for the same maiming, because the court has jurisdiction of both the higher offense charged, and the lower one included in the charge; and the conviction for the lower is, in legal effect, an acquittal of the higher.

So, if the accused be convicted, or acquitted generally, in the Circuit Court, on the charge of maiming, he cannot afterward be tried and punished for any less offense included in the charge. *Gantt's Dig.*, *sec.* 1850.

Justices of the peace have concurrent jurisdiction with the Circuit Court of misdemeanors; and there are a number of felonies which include misdemeanors; but to hold that a conviction before a justice of the peace, of any such misdemeanor, would be a bar to a prosecution in the Circuit Court, for a felony, including such misdemeanor, is not warranted by principle, and would be contrary to good public policy.

There are various felonious assaults which include common assaults; and to permit justices of the peace to protect criminals against indictments in the Circuit Courts, for the felonious assaults, by trying and finding them as for common assaults, would be a public mischief.

The *State* v. *Foster*, 33 *Iowa*, 525, is similar to this case. In that case Foster was indicted in the district court for an assault, with intent to inflict a great bodily injury. He pleaded a former conviction before a justice of the peace on a charge of assault and battery; alleging that the same act was the foundation of both charges. A demurrer of the State to the plea was overruled, and on appeal by the State, the Supreme Court held the plea bad, because the offense for which the accused had been convicted before the justice of the peace, was the lesser offense, and did not include the greater offense, for which he was indicted in the district court.

In *Commonwealth* v. *Curtis*, 11 *Pickering*, 134, Curtis was indicted in the Circuit Court for larceny of spoons in a dwelling. He pleaded in bar that he had been charged in the police court of Boston, for pilfering the same spoons; tried, convicted, and fined twenty dollars. It seems that the police court had no jurisdiction of the higher offense, larceny in a dwelling, charged in the indictment, but had jurisdiction of common pilfering. The effect of the decision was, that the plea, in the form drawn, presented no bar to the charge in the indictment, but the accused might have made it availing, by pleading a former conviction in the police court, of simple larceny of the spoons, and not guilty as to the residue of the charge; that is, the larceny in the dwelling, alleged in the indictment.

So it may be, where one is indicted for maiming, he may plead that he has been convicted before a justice of the peace of an assault and battery, included in the charge of maiming, and not guilty as to the alleged offense of maiming. Then, if it turn out in evidence, on the trial, that he is not guilty of the higher offense of maiming, but is guilty of an assault and battery, the court may charge the jury to allow him the benefit of his plea of

former conviction of that offense, and acquit him altogether. But the splitting of offenses by justices of the peace, and trials by them of lower offenses included in higher, is not to be encouraged, but carefully avoided.

The plea of appellee, was in bar of the whole charge in the indictment, and the court erred in overruling the demurrer to it.

Reversed and remanded with instructions to the court below to sustain the demurrer to the plea of former conviction, and for further proceedings.

DISSENTING OPINION.

EAKIN, J. It seems to me that the principle announced in this case subjects the party to two punishments for the same act; one for the assault, and the other for the maiming. This could not be done if he were indicted for the felony in the first instance. He has no means of preventing the prosecution before the justice, and could not complain of the conviction for assault, as error, without appealing and confessing himself guilty of the felony, which he might not actually believe to be true.

The Legislature has the power to control and fix the jurisdiction of justices, in cases of misdemeanor, and I think it the less evil (notwithstanding the very respectable authorities of other States), that it should be left to it, by proper act, to provide against collusive charges of minor offenses, for the purpose of barring persecutions for greater, unless the offenses be divisible, and separately punishable, or the nature of the crime be changed by subsequent consequences.

I therefore fail to concur in the opinion of the court; rather fearing to open a door for the undue harrassment of suspected offenders, than doubting the power and will of the Legislature to harmonize the general jurisdiction of justices over minor offenses, with the due punishment of those felonies which involve them.

STATE V. RHEA ET AL.

1. GAMING: *Indictment in several paragraphs, when demurrable.*
An indictment for gaming, containing several paragraphs, and not indicating that they are all intended to charge but one offense, is bad on demurrer.

ERROR to *Johnson* Circuit Court.
Hon. W. D. JACOWAY, Circuit Judge.

STATEMENT.

Indictment in the Johnson Circuit Court, in five counts, against J. A. Rhea and F. R. McKennon, for gaming; the first count charging that "the said J. A. Rhea and F. R. McKennon, on the tenth day of February, 1880, in the county and State aforesaid, unlawfully did mutually bet the sum of five dollars in money together with each other, and with W. M. Brown, and a man whose name is to the grand jurors unknown, on a certain game of cards, commonly called 'pitch,' then and there played with cards, by the said J. A. Rhea, F. R. McKennon, W. M. Brown, and the said man, whose name is to the grand jurors unknown, against," etc.

The second count charged that they played and bet five cents on a game called "set-back." The third, charged that they played and bet two oranges, each of the value of five cents, on a game called "pitch." The fourth, that they played, and bet a box of oysters, of the value of ten cents, on a game called "pitch;" and the fifth, that they played, and bet a can of oysters, of the value of ten cents, and two oranges each, of the value of five cents, on a game called "set-back." Except as to the game and bets as above stated, all the counts were alike.

The defendant demurred in short by consent upon the record. The court required the prosecuting attorney to

elect to prosecute, either upon counts 1st, 3d and 4th, or upon 2d and 5th, which being refused, the court sustained the demurrer, quashed the indictment, and discharged the defendants, and the State brought error.

C. B. Moore, Attorney-General, for plaintiff in error.

Under *sec.* 1564, *Gantt's Digest*, it is sufficient to charge the offense of "gaming," without specifying *name of game played*. The indictment is in good form substantially, and charges every necessary fact. The counts are substantially the same upon the essential points in the indictment, viz: "betting and playing a game of cards." Does the fact that the same offense is charged in five different counts, weaken the indictment? We think not.

HARRISON, J. The demurrer to the indictment being entered in short upon the record, there was no assignment of the causes or grounds therefor; it is, however, apparent that the objection relied upon, was, that more than one offense was charged.

Except in the cases mentioned in sections 1784 and 1351, an indictment must charge but one offense; but if the offense may have been committed in different modes, and by different means, it may allege the modes and means in the alternative, and in distinct counts. *Sec.* 1783, *Gantt's Digest.* The *State* v. *Jourdan*, 32 *Ark.*, 203; *Howard* v. *The State*, 34 *Ark.*, 433.

There is nothing in the record by which it was indicated that but one act of gaming, or but one offense was intended to be charged, or that the playing of the game of cards called set-back, charged in the second and fifth counts, was the same act of gaming charged; but in different modes in

the first, third and fourth; and two offenses, at least, as held by the court, are apparently charged. Therefore, as the prosecuting attorney would dismiss neither, the demurrer was, according to section 1840, properly sustained, and the indictment quashed.

Affirmed.

NEVADA COUNTY v. HICKS ET. AL.

38 557
72 334

1. CHANCERY: *Jurisdiction to relieve from penalties and forfeitures. Transfer of case.*

To retrieve against penalties and forfeitures is one of the ordinary grounds of equity jurisdiction; and though by Statute a remedy in many cases may now be had at law, courts of equity still retain this jurisdiction. And when there is an equitable defense to an action at law on a penal bond, the cause may be transferred to the equity docket.

2. PENALTY—LIQUIDATED DAMAGES. *Bonds of bridge contractors.*

The sum specified in the bond of a bridge contractor, for the performance of his contract, required by the Act of March 6th, 1875, is a penalty, and not liquidated damages.

APPEAL from *Nevada* Circuit Court.
Hon. G. D. ROYSTON, Special Judge.

STATEMENT.

This was an action at law upon a penal bond, instituted in the Nevada Circuit Court, December 17th, 1878; the complaint charging, in substance, that on the 14th day of August, 1876, the sheriff of Nevada county, under the orders of the county court, let to the defendants a contract for building a county bridge over Dorcheat creek, in said county, they being the lowest bidders therefor, at the price

of $1,500. That the defendants entered into bond to the State of Arkansas, for the use of said county, in the sum of $1,500, conditioned to be void if they built the bridge by the first day of November, 1876, according to the plan and specifications which had been made and filed by certain commissioners, appointed by the court, and approved by the court. That afterwards, on the first day of November, 1876, the commissioners, under the directions of the county court, examined the bridge which the defendants had built, and found that it had not been built according to the plan and specifications, and therefore rejected said bridge, and reported their finding and action to the county court, specifying the defects as follows: The pine lumber in the bridge was one-third short of that prescribed by the contract, and one-third of the pine lumber in the sleepers, flooring and hand-railing was sap, and not heart, as required by the contract. That on the thirteenth day of November, 1876, said county court convened in special session, at the court house in said county, in pursuance of notice therefor given by the county judge of said county, and posted as the law directs; and in said session adopted said report, and discharged the commissioners, and rejected and refused to receive said bridge; declared the defendant's bond forfeited, and ordered suit to be instituted for the penalty. The complaint then negatives the performance of the conditions of the bond and the payment of the penalty, and demands judgment for the penalty and interest.

The bond, and all the proceedings of the county court and of the commissioners, are exhibited.

The answer of the defendants admitted the contract and bond as stated in the complaint, and asserted that they built the bridge within the time and according to the plan and specifications contained in the contract; and, assuming that said special term of the court was illegal, denied that the county

court ever rejected the bridge, or authorized suit on the bond; and asserted that the bridge was reasonably worth, when completed, thirteen hundred dollars; that said county court had never ordered said bridge to be taken down or removed; that it still remained where it was erected; that the travelling public had used it continually, at all times since it was completed; that the county had accepted and enjoyed the benefits and advantages of it ever since it was built; had never ordered or directed another bridge to be built in lieu of it; but, to the contrary, permitted it to remain and be used by the travelling public. And they insisted that the county was liable and bound to pay them the sum of $1,300, with interest at six per cent. per annum from the first day of November, 1876, which it had neglected and refused to pay; and they prayed judgment for that amount and interest against the county.

With this answer they filed their motion to transfer the cause to the equity docket, which was done against the plaintiff's objections.

To the answer the plaintiff replied, setting up in preclusion of the defense and in bar of the relief prayed for, that the special county court of November 13th, 1876, had rejected the bridge and refused to receive it, and declared the bond forfeited, "in accordance with the Statute in such cases made and provided; which order still remains in full force and effect, and from which said defendants have never appealed, nor otherwise in lawful manner objected to. Wherefore, the plaintiff submits that they are estopped to deny their liability on said bond, or the legal form and effect of said order and judgment of said county court."

The cause was heard upon the pleadings and exhibits, and the admissions of the plaintiff at the bar, that the facts stated in the answer were true, except where they contro-

verted the allegations of the complaint. The court found the facts as stated in the answer, and decreed to defendants the relief prayed for. The county appealed.

Dan W. Jones, for appellant.

If *sec.* 590, *Gantt's Dig.*, was not repealed by Act of Feb. 5, 1875 (*Acts* 1874-5, *p.* 145), and *Art. VII, Sec.* 31, *Const.* 1874, then the judgment of the county court, under *sec.* 4, *Acts* 1874-5, *p.* 259, was a final judgment, and, appellees having failed to appeal, are estopped. *Herman on Estoppel, pp.* 97-8; *Ellis v. Clark et al.*, 19 *Ark.*, 422; *Bauman* v. *Bauman*, 18 *Ib.*, 332-3.

If said section 590 was repealed, the entire action of the county judge was a nullity; and the Circuit Court had no jurisdiction, but should have dismissed for want of jurisdiction. *Levy* v. *Shinman*, 6 *Ark.*, 183.

If the action of the county judge was regular, and the Circuit Court had jurisdiction, then appellant should have had judgment for the full amount of the bond.

If the amount specified in the bond was *liquidated damages*, then appellant should have had judgment for the full amouut; but if for a *penalty*, then for the amount of the bond *less* the value of the bridge, as agreed upon. In no case should the appellees have had judgment. *Graham* v. *Bickham*, 2 *Yeats* (*Penn.*,) 32; *S. C.*, 4 *Dallas*, 148, *cited in* 1 *Am. Dec.*, 331 *et seq.*; *Dennis* v. *Cummins*, 3 *John. Cases*, 297, *cited in* 2. *Am. Dec.*, 160; *Perkins* v. *Lyman*, 11 *Mass.*, 16; *also in* 6 *Am. Dec.*, 158; *Greenl. Ev. Sec.*, 257 *et seq.*; 2 *Kent Com.*, 628, *note 1*; *Bouv. Law Dict.*, *title Liquidated Damages*; 2. *John. Ch. Rep.*, 527; 14 *Ark.*, 315; 2 *Burrows' Rep*,, 1351; 4 *Burrows' Rep.*, 2225-2228; 2 *T. R.*, 388-89.

Sec. 4, *Acts* 1875, *sup.*, certainly means that bridge contractors shall be held to a strict performance of their

contracts; otherwise they could build any kind of a structure, worth something, but not at all according to contract, and then obtain judgment against the county for its value, without suffering any penalty for their breach of contract.

Williams and Battle, for appellees.

The $1,500 was a penalty, and not liquidated damages. *Taylor* v. *Sandifur*, 7 *Wheat*, 13; *Merrill* v, *Merrill*, 15 *Mass.*, 487; *Graham* v. *Bickham*, 4 *Dallas*, 149; 3 *Parsons on Cont.* (*5th ed.*), 156, 163, *and notes.*

The damages to the county by failure to build according to plans, etc., was easily ascertained. If the county had not accepted the bridge, the damage would have been the cost of tearing down and removing it, and the amount it cost the county to build one according to the plans, etc., *in excess* of fifteen hundred dollars. "*Id certum est quod certum reddi potest.*" The $1,500 was a penalty. *Hoag* v. *McGinnis*, 22 *Wend.*, 163; *Bisp. Equity*, *sec.* 179.

The Act, March 6th, 1875, should be construed with *secs.* 4391-4398, *Gantt's Dig.* *Acts* 1874-5, *p.* 258.

The action properly transferred to the equity docket. Equity will relieve against penalties, and its jurisdiction is not limited to bonds or instruments which in terms impose a penalty. *Adams' Eq.* (*4th ed.*) *marg. p.* 107-109; *Bish. Eq.*, *sec.* 178-9; *Story Eq.*, *sec.* 1301-13-14-19; *Lead. Cases in Eq.* (*4th ed.*) *2nd vol.*, *pt.* 2, *p.* 2022; *Perkins* v. *Lyman*, 11 *Mass.*, 76.

Extrinsic evidence may be admitted to show that the intention was to inflict a penalty under the pretense of compensation. 2 *Lead. Cases in Eq.*, *2nd pt.* (*4th ed.*) 2060, and cases cited; *Ib.*, 2067; *Taylor* v. *Sandefur*, *Sup.*

The county court was held on a day not authorized by

law, and its proceedings were null and void. *Graham* v. *Parham*, 32 *Ark.*, 676.

The county court accepted the bridge, enjoyed its benefits, and the public used it. It was worth $1,300, and the county should pay for it, its value. 2 *Parsons on Cont.*, *5th ed.*, 523; *Thomas* v. *Trott*, 4 *Ala.*, 108; *Major* v. *McLester*, 4 *Ind.*, 591; *Canley* v. *Ingersoll*, 4 *Blackf.* (*Ind.*), 493; *Gillman* v. *Hall*, 11 *Vt.*, 510; *Thompson* v. *Purcell*, 10 *Allen*, 426; *Bowker* v. *Hoyt*, 18 *Peck*, 555; *Hayward* v. *Leonard*, 7 *Peck*, 181; *Smith* v. *First Cong. Meeting House*, 8 *Peck*, 177; *Chapel* v. *Hicks*, 2 *Campbell*, 214; *Ridgway* v. *Toran*, 2 *Md. Ch.*, 303; *Watchman* v. *Crooks*, 5 *Gill & J.*, 240; *White* v. *Oliver*, 36 *Mo.*, 93; *Jewell* v. *Schiveppel*, 4 *Cowen*, 564.

HARRISON, J. The cause was properly transferred to the equity side of the court. To relieve against penalties and forfeitures is one of the ordinary grounds of equity jurisdiction; and though by Statute a remedy in many cases may now be had at law, courts of equity still retain their jurisdiction. 2 *Sto. Eq. Jur.*, *sec.* 1301.

That the sum in which the bond was given was designed as the penalty, and not as liquidated damages, we think there can be no question. *Section* 4 *of the Act of March* 6th, 1875, providing for the building of bridges on public roads, and under the provisions of which Act the contract was let, required the bond to be in the amount of the defendant's bid. The Legislature could not have intended to fix the damages in every case, for each and every breach of the condition, whether total or only partial, arbitrarily at the amount of the bid, irrespective of the real injury sustained; for in some instances they may be merely nominal.

As to the power of the county judge to call a special term of the county court, we need not express our opinion; for as it was admitted upon the hearing that the defendants had received nothing for building the bridge, and that it was and had been ever since it was completed, in use by the public, and was worth to the county thirteen hundred dollars, the sum adjudged them, and no special injury or damage to the county from their failure to build it in strict accordance with the specifications of the contract, nor notice given them to remove it, was shown, whether the report of the commissioners of the bridge had been acted upon, and the bridge rejected by the county court or not, the defendants were entitled to be paid by the county the sum adjudged them by the decree.

The decree is affirmed.

STATE v. SCARLETT.

38 563
71 475

1. LIQUOR: *Indictment for selling liquor within three miles of Evening Shade College.*

An indictment for selling liquor within three miles of Evening Shade College, must aver that the sale was not for medical purposes by a regular practicing physician, who had made and recorded the affidavit required by the Act of twenty-sixth of February, 1879.

ERROR to *Sharp* Circuit Court.
Hon. R. H. POWELL, Circuit Judge.

H. B. Moore, Attorney-General, for plaintiff in error.
Scarlett, pro se.

STATEMENT.

Indictment against W. B. Scarlett, for selling ardent spirits within three miles of Evening Shade College, in vio-

lation of the Act of twenty-sixth of February, 1879, prohibiting the sale, or giving away of ardent spirits, within three miles of Evening Shade College."

The sufficiency of the indictment only has been passed on by the court, and its defects are sufficiently shown in the opinion.

HARRISON, J. The indictment in this case is bad. It did not negative the exception in the act, or aver that the sale of the ardent spirits was not for medical purposes by a regular practicing physician, and who had made and recorded the affidavit prescribed by the act. 1 *Bish. Crim. Proced.*, *secs.* 631, 636; 1 *Chit. Crim. Law*, 284; *Thompson* v. *The State*, 37 *Ark.*, 408. As for that reason the judgment must be affirmed, we need not consider the exceptions taken by the State upon the trial.

Affirmed.

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38 564
83 29

HAILE V. STATE.

1. CARRYING PISTOL: *Act of April 1st, 1881, constitutional.*

Sections one and two of the Act of April 1st, 1881, prohibiting the carrying of army pistols except uncovered and in the hand, is not unconstitutional.

ERROR to *Pope* Circuit Court.

Hon. W. D. JACOWAY, Circuit Judge.

STATEMENT.

Haile was convicted in the Circuit Court of Pope county, for carrying a pistol upon the following agreed facts:

"On the twenty-sixth day of September, 1881, in the county of Pope, and State of Arkansas, the defendant did carry uncovered, and buckled around his waist, but not

uncovered and in his hand, a large revolving pistol, known as the Colts army pistol, and such as is used in the army and navy of the United States, when he was not an officer; and said carrying was not under the direction of an officer, and when he was not upon a journey, nor upon his own premises."

This was all the evidence. He appealed.

C. B. Moore, Attorney-General, for the plaintiff in error.

Cites Act April 10, 1881, sections 2 and 4. *Acts* 1881, *p.* 192.

EAKIN, J. The defendant below was charged before a justice of the peace, with the offense of carrying a pistol contrary to the Statute, and upon conviction appealed to the Circuit Court.

He was then tried, *de novo*, and convicted upon the agreed state of facts contained in the reporter's statement, and fined fifty dollars. From this judgment he appeals.

The proof shows all the essential elements of the offense, as defined by section 2, of the Act of April 1st, 1881, which prohibits the wearing or carrying any such pistol as is used in the army or navy of the United States, in any manner, except uncovered, and in the hand, save under circumstances which, in this case, did not exist.

The appellant has no brief, but we suppose his exceptions refer to the validity of the act as unconstitutional.

The first two sections are complete in themselves, to constitute and prohibit the offense, and may stand without reference to other sections of the act, concerning which, no opinion is now expressed. The question is, can the Legislature regulate the mode of carrying any arms which the citizens have the constitutional right to keep and bear for

their common defense ? We have decided that it may, to some extent, which means that it may, in a reasonable manner, so as, in effect, not to nullify the right, nor materially embarass its exercise.

The constitutional provision sprung from the former tyrannical practice, on the part of governments, of disarming the subjects, so as to render them powerless against oppression. It is not intended to afford citizens the means of prosecuting, more successfully, their private broils in a free government. It would be a perversion of its object, to make it a protection to the citizen, in going, with convenience to himself, and after his own fashion, prepared at all times to inflict death upon his fellow-citizens, upon the occasion of any real or imaginary wrong. The "common defense" of the citizen does not require that. The consequent terror to timid citizens, with the counter violence which would be incited amongst the more fearless, would be worse than the evil intended to be remedied.

The Legislature, by the law in question, has sought to steer between such a condition of things, and an infringement of constitutional rights, by conceding the right to keep such arms, and to bear or use them at will, upon one's own premises, and restricting the right to wear them elsewhere in public, unless they be carried uncovered in the hand. It must be confessed that this is a very inconvenient mode of carrying them habitually, but the habitual carrying does not seem essential to "common defense." The inconvenience is a slight matter compared with the danger to the whole community, which would result from the common practice of going about with pistols in a belt, ready to be used on every outbreak of ungovernable passion. It is a police regulation, adjusted as wisely as the Legislature thought possible, with all essential constitutional rights.

The constitutional right is a very valuable one. We

would not disparage it. A condition of things within the experience of men, still very young, illustrates the importance of keeping alive in the mind, and well defined, these old land-marks of Saxon liberty. "*Semper paratus*," is a good motto. Yet if every citizen may keep arms in readiness upon his place, may render himself skillful in their use by practice, and carry them upon a journey without let or hindrance, it seems to us, the essential objects of this particular clause of the bill of rights will be preserved, although the citizen be required to carry them uncovered, and in the hand, off his own premises, if he should deem it necessary to carry them at all.

The clause, upon this point, of the Tennessee bill of rights, is similar to ours, except that it expressly reserves to the Legislature the power, "by law, to regulate the wearing of arms, with a view to prevent crime." We think this reservation a matter of superabundant caution, inserted to prevent a doubt, and that, unexpressed, it would result from the undefined police powers, inherent in all governments, and as essential to their existence as any of the muniments of the bill of rights. Only the Legislature must take care that in regulating, it does not destroy, nor materially interfere with the objects of the constitutional provision.

A Tennessee law, passed under this constitution in 1871, prohibiting the carrying of an army weapon, except openly, and in the hand, was held constitutional (*State* v. *Welburne*, 7 *Jere Baxter*, 57). We think the first and second sections of our Act of 1881, as free from objection.

There need be no fear, from any thing in these sections, that the citizen may not always have arms, and be skilled in their proper use, whenever the common defense may require him to take them up.

Affirm.

STATE v. JOHNSON.

38 568
58 401

38 568
186 73

1. STATUTE: *Sec. 1659, Gantt's Digest. Constitutionality of.*

The Statute (*Gantt's Dig., sec. 1659*), which authorizes the prosecution of a thief in any county in this State where he may be found with property stolen in another State, is not abrogated by the provision of the Constitution of 1874, which secures to parties a trial in the the county in which the crime was committed.

2. EVIDENCE: *Must be in bill of exceptions, not in judgment entry.*

Unless the evidence on a trial be brought to this court by bill of exceptions, the judgment of the Circuit Court will be presumed correct. The evidence cannot be imported into the record of the judgment

3. JURISDICTION: *Property stolen in another State*

In order to give to the Circuit Court of a county in this State, jurisdiction to try one for larceny of property stolen in another State, it must appear that the stolen property was brought by him into this State, with a continuous felonious intent.

APPEAL from *Miller* county.
Hon. J. K. YOUNG, Circuit Judge.

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

Defendant should be prosecuted under the laws of Arkansas, *sec.* 1659, *Gantt's Digest*, he having brought the stolen property into this State.

EAKIN, J. After a jury had been impanneled to try the appellee on the charge of larceny, and had heard the evidence, we are advised by the record that the court stopped the trial, and remanded the prisoner to jail, for a specified time, to await a requisition from the Governor of Texas. The record recites, that it appeared to the satisfaction of the court that the offense was committed in Texas, although the money alleged to have been stolen was found

in defendant's possession, in Miller county, Arkansas. The court was, therefore, of the opinion that it had no jurisdiction to try the cause.

By the common law, larceny, whilst the goods are in possession of the thief, with a continued felonious intent, is a crime committed by each movement of them; and he may be indicted in any county into or through which they may be carried. In contemplation of law, "the possession of them still remains in the true owner, and every moment's continuance of the trespass and felony amounts to a new caption and asportation." *Russell on Crimes, Vol.* 11, *p.* 116; *Bishop on Crim. Pro., Vol* 1, *sec.* 59. This doctrine has been accepted by the courts of many American States, and is amongst them sustained by a largely preponderating weight of authority.

In accordance therewith, it was early enacted by our Legislature, that "every person who shall steal, or obtain by robbery, the property of another, in any other State or country, * * * and shall bring the same within this State, may be indicted, tried, and punished for larceny; the same as if the property had been feloniously stolen or taken within this State; and, in any such case, the larceny may be charged to have been committed in any county into or through which such stolen property may have been taken." *Gantt's Digest, sec.* 1659. So far as regards property stolen, this was but in affirmance of the common law; and was not abrogated by the Constitution of 1874, securing in all criminal prosecutions "the right to a speedy and public trial, by an impartial jury of the county in which the crime shall have been committed." For in fact the crime was being committed all along the route.

This section of the common law was peculiar to the crime of larceny, and the case where the asportation was with a continued felonious intent. It did not apply to crimes not

of a continuous nature, such as burglary, arson, or criminal homicide; nor to larceny where the transfer was not felonious. Mr. BISHOP, in the section above cited, states, for instance, the case of a prisoner who, with the goods about him, goes to the new locality under arrest for the theft.

With regard to this latter class of cases, when it cannot be said that the crime is committed in each county into which the accused person goes, we apprehend there would be upon the Legislature, a constitutional inhibition against trial and punishment outside of the county where the crime was perpetrated.

By the Criminal Code of 1868, a provision dictated by comity of States, was made for all crimes whatever, committed in another State. If it should appear, upon trial, that the offense was committed out of the State it was directed, that the trial should be stopped and the defendant be either discharged or ordered to be retained in custody for a reasonable time, until the counsel for the State should have an opportunity to inform the chief executive officer of the State, in which the offense was committed, of the facts; and for said officer to require the delivery of the offender. (*Gantt's Digest, sec.* 1950.) This contemplates no trial whatever, but was in aid of the Federal provisions regarding fugitives from justice. It is not amenable to any constitutional objection.

2. EVIDENCE: Must be in bill of exceptions, not in judgment entry.

In the case now in judgment, we are not advised as to what the evidence precisely was. The State made no bill of exceptions. The evidence could not be imported into the record of the judgment. Its recitals of what appeared to the satisfaction of the court, stated only the conclusion of the court upon the evidence, and is merely explanatory of the grounds of the judgment or order. It does not appear from the recitals that the offense was committed by the

prisoner, although that might, perhaps, be inferred. What is more clear, however, it does not appear that the property stolen was brought by him into the State with a continuous felonious intent, which was necessary to give jurisdiction in Miller county. But it clearly does appear, from the recitals, that the offense with which the prisoner was charged, was actually committed in the State of Texas; and that the case came within the provision of the Criminal Code of 1868.

3. JURISDICTION: Larceny of property in another State.

Without a bill of exceptions showing such a state of facts as should have compelled the court to proceed with the trial as for an offense committed within the county, we must presume in favor of the correctness of the order, and affirm it.

YOUNGBLOOD V. CUNNINGHAM ET AL.

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1. SALE: *On execution running over sixty days.*

Where an execution is made returnable more than sixty days from its date a sale of land under it within the sixty days is within its legal life, and is not void. The execution is only voidable, and may be quashed or amended at the discretion of the court issuing it, on the application of either party to the jndgment.

2. SAME: *On voidable execution to bona fide purchaser.*

It is a general rule that a sale to a *bona fide* purchaser under a voidable execution, is valid. Application should be made to the court that issued it to recall or quash it before the sale.

3. SAME: *Under execution; failing to advertise the property.*

The failure of the sheriff to advertise lands for sale under execution, will not invalidate the title of a *bona fide* purchaser.

4. SAME: *Selling land in a body.*

An execution debtor consenting that his land be sold in a body, instead of separate tracts, as directed by the Statute, cannot afterwards object that they were sold in a body.

5. OFFICER DE FACTO: *Deputy sheriff, etc.*

A deputy sheriff, under a written appointment from the sheriff, and who has taken the oath of office, and has long acted and been recognized as deputy, is an officer *de facto*, althongh there is no record evideuce of the approval of his appointment, as required by the Statute. (*Gantt's Dig. secs.* 5597-6000.)

6. ESTOPPEL: *Execution debtor inducing purchaser to buy his land at irregular sale.*

If an execution debtor induce one to purchase his land at the sale, he is estopped from setting up irregularities in the process, advertisement, or sale of the land to defeat the title of the purchaser.

7. ACKNOWLEDGMENT OF DEED: *By officer after his term expires*

The acknowledgment of a deed by a sheriff after the expiration of his term, for land sold under special execution from a Chancery Court, will not invalidate the sale. The purchaser may apply to the court to confirm the sale if it has not been done, and order the sheriff in office to make him a deed.

APPEAL from *Yell* Circuit Court, in Chancery.
Hon. W. W. MANSFIELD, Circuit Judge.

W. N. May, for appellant.

1. The special *fi. fa.* was void, being made returnable one hundred and fifty days instead of sixty, from its date. *Sec.* 2602, *Gantt's Dig.*; *Nash Pl. and Pr., vol.* 2, 1109, *et seq.*

2. It was void because the lands were sold in a body. *Sec.* 2681, *Gantt's Dig.*

3. The land should have been sold by a Master Commissioner, *Nash Pl. and Pr., vol* 2, 1106; *Gantt's Dig.*, 997 *to* 999. The sale was not approved by the court. *Gantt's Dig., sec.* 4788; *Ky. Code*, 504, *note b.*

4. The sale was made by an acting deputy not legally appointed. *Gantt's Dig.*, 5597 *to* 5599; *Wells* v. *Catwall*, 1 *Marshall*, 441; 6 *Monroe*, 276. There was no valid levy by sheriff or deputy, 26 *Ark.*, 228.

5. The land was not advertised as required by law, in

the official newspaper. *Gantt's Dig. secs.* 4031 *to* 4034, nor properly posted. *Ib., sec.* 2678.

6. The return on *fi. fa.* was false and fraudulent, and may be contradicted and falsified. *Pollard* v. *Rogers*, 1 *Bibb*, 475.

7. The fact that defendant verbally authorized the sheriff to sell the whole tract, did not confer upon him the power to convey the legal title to the land to the purchaser, 12 *B. Monroe*, 232.

8. A void or prejudicial sale by a sheriff will be set aside. 6 *Ark.*, 425, or one made by irregularity, mistake or fraud, 10 *Ark.*, 544. The rule *caveat emptor* applies to sheriff's sales. *Ib.*, 212; 7 *Ib.*, 167; 11 *Ark.*, 58. Purchasers must see that the records give authority for making the sale. 26 *Ark.*, 228. A sheriff's deed is prima facie evidence only, and the recitals may be put in issue, and if false, the sufficiency of the deed is effected. *Ib.* The deed was made after the sheriff's term of office expired, and is a nullity. 16 *Wendell*, 568. The mere presence of a party at a sheriff's sale does not estop him from asserting his title, 10 *Ark.*, 212. Appellants silence as to the improvements, would not imply acquiesence, for defendants had at least constructive notice of his rights. 30 *Ark.*, 407.

Mansfield & Cunningham, for appellees.

1. The *fi. fa.* was only voidable. 1 *Eng.*, 139; 20 *Ark.*, *Neal* v. *Jetter;* 10 *Ib.* 541; *Freeman on Ex., sec.* 44; 22 *Ark.*, 19; 12 *Ib.*, 421; *Gwynne on Sheriffs*, 202; 4 *Bibb*, 332; 2 *Nash, Pl. and Pr., sec.* 1109; 9 *Johnson*, 96. And being voidable only, will, in this case, be considered amended. 1 *Irdell*, 34; 5 *Paige*, 541; *Gwynne on Sheriff's*, 440; 2 *Denio*, 185; 9 *Mass.* 217. The sale was made within the life of the writ. There was no necessity

for execution. *Freeman on Ex.*, *sec.* 10. The court will presume that sale was made by the sheriff, as commissioner, and that he was appointed as such by the court, and so acted. The court is the vendor; whoever sells the mere agent. *Sessions* v. *Peay*, 23 *Ark.*, 39.

2. The sale by the deputy was valid. 12 *Ark.*, 218. He was an officer *de facto*. *Gwynne on Sheriff's*, 42; 25 *Ark.*, 336. Deputy sheriff's may sell land under decree in Chancery. *Gwynne on Sheriff's*, 493; *Craig* v. *Fox*, 16 *Ohio*, 563.

3. Neither irregularity in advertising notice of property levied upon, paucity of bidders, nor inadequacy of price, will, *per se*, affect a purchaser, unless he is privy to it. *Kibby* v. *Hoggin*, 3 *J. J. Marshall*, 213. Laws which prescribe order of sale, time and place advertised, etc., are merely directory. 6 *J. J. Marshall*, 237. Upon return of execution is proper time to settle these questions. *Roads* v. *Simmons*, 16 *Ohio R.*, 315. Purchasers at sheriff's sales depend upon judgment, levy and deed, and other questions are between parties to judgment and sheriff. *Gwynne on Sheriff's* 336, and authorities. *Bona fide* purchasers not affected. 12 *Ark.*, 218; *Id.* 421; 22 *Id.*, 19, *and authorities*; 15 *Id.*, 209. If sheriff fail to advertise, he is responsible to debtor, and sale valid. *Hoyden* v. *Dunlapp*, 3 *Bibb*, 216; *Webber* v. *Cox*, 6 *Mon.*, 110.

4. Plaintiff consented to sale in a body, and if not it was a mere irregularity, 23 *Ark.*, 69; 21 *Id.*, 331; 8 *Id.*, 5-10.

5. No levy necessary under decretal orders in Chancery. *Gwynne on Sheriff's*, 493; doubtful, if necessary at law. *Freeman on Ex.*, *sec.* 280-1.

6. Sheriff's return conclusive and cannot be collaterally contradicted. 4 *Ohio R.*, 136; 14 *Ark.*, 9; 7 *Id.*, 390; 29

La. Ann., 698; 22 *J. J. Marsh*, 400; *Gwynne on Sheriff's*, 473.

7. Purchase money not tendered. 14 *Ark.*, 38; 20 *Ark.*, 652; 23 *Id.*, 69; 6 *Id.*, 425; 7 *Monroe*, 615; 7 *Dana*, 397; 5 *Id.*, 756; 28 *La. Ann.*, 126.

8. Appellant estopped. 10 *Ark.*, 211; 18 *Id.*, 143-165; 14 *Id.*, 505; *Bigelow on Estoppel*, 515; 3 *Wash. on R. Prop.*, 84; 1 *Greenleaf*, *sec.* 207, *p.* 271; 5 *J. J. Marsh*, 569.

9. No fraud proven, and none presumed. 9 *Ark.*, 482; 17 *Id.*, 151; 18 *Id.*, 124; 22 *Id.*, 19.

English, C. J. On the seventh of November, 1872, Murdock & Kimball obtained a decree on the chancery side of the Circuit Court of Yell county, against James H. Youngblood, foreclosing a mortgage executed by him to them, upon lands, and directing a special execution to be issued to the sheriff for the sale of the lands, to satisfy the decree. An execution was issued as directed by the decree; the lands were sold and purchased by Henry C. Cunningham and Robert Smiley, who took possession of the lands, and made valuable improvements upon them. The sale was made on the twenty-eighth of May, 1874, and on the twenty-sixth of May, 1877, Youngblood brought this suit on the chancery side of the Circuit Court of Yell county, for the Dardanelle district, against Cunningham and Smiley, the purchasers of the lands, to set aside the sale for alleged irregularities, etc. The case was finally heard on the pleadings and evidence, and the bill was dismissed for want of equity, and Youngblood appealed to this court.

I. The first point made by the bill is, that the special execution under which the lands were sold, was made returnable one hundred and fifty days, instead of sixty

1. Sale: On execution running over sixty days.

days, from its date, and that it was, therefore, void, and the sale invalid.

The decree directed the lands to be sold on a credit of three months, and it was further decreed, that if the money found to be due the complainants in the foreclosure suit and costs should not be paid within ninety days from the date of the decree, a special writ of *fieri facias* should be issued to the sheriff of Yell county, commanding him to sell the lands, etc.

The decree was for the debt secured by the mortgage, interest and taxes paid by complainants on the mortgaged premises, and for costs.

On the tenth of April, 1874, the clerk of the court issued a special execution, directed to the sheriff, reciting the decree, and commanding him, that of the lands described in the decree, he cause to be made the debt, etc., etc., decreed to complainants, "and that he have the same in one hundred and fifty days to render to said plaintiffs."

The sheriff's return upon the execution, which bears date seventeenth September, 1874, shows that the lands were sold on the twenty-eighth of May, 1874.

The Statute provides, that "all executions shall be returnable in sixty days from their date." If this Statute is applicable to the special execution in question, the sale was made within the period of its legal life, that is, within sixty days from its date, and the sale made under it was not void. The execution was not void, but voidable, and might have been quashed, or amended, in the discretion of the court from which it issued, on application of the appellant against whose property it issued, or the complainants in the decree.

In *Adams et al.* v. *Cummins, ad.* 10 *Ark.*, 541, an execution was improperly issued upon a judgment *de bonis testatoris*; a sale was made of property of the estate, and the

administrator made application to the court out of which it issued, after the sale, to quash the execution and set aside the sale, and the court held that the execution was not void, but voidable, and might have been quashed on application before the sale, but that the purchaser having no notice of the irregularity in the issuance of the execution, the sale should not be set aside.

So it was held in *Dixon* v. *Watkins, et al.*, 9 *Ark.*, 139, that a *fi. fa.*, issued upon a judgment of the Circuit Court, after appeal and recognizance to stay execution, was not void, but voidable.

In *Whiting & Stark* v. *Beebe et al.*, 12 *Ark.*, 422, it was held that a *ven. ex.* with a *fi. fa.* clause was not void, and that a sale made to an innocent purchaser under the *fi. fa.* clause, whilst the first levy was undisposed of, was not invalid.

In *Wilson* v. *Huston*, 4 *Bibb*, 332, when an execution was not made returnable within the time required by law, it was held not to be void but voidable.

In this case it not only appears that appellees had no knowledge that the execution was made returnable out of time, but as will be noticed further on, that they purchased the land at the sale at the request of appellant.

2. ——: On voidable execution to *bona fide* purchaser, valid,

The general rule is that a sale to a *bona fide* purchaser, under a voidable execution, is valid; that application should be made to the court out of which it issues, to quash or recall it before the sale. The cases cited above establish this rule.

3. ——: Failure to advertise property.

II. The next point made by the bill is, that the lands were not legally advertised for sale. The sheriff's return states that he duly advertised the lands for sale "in the Laborer, a newspaper printed in Yell county, and the official paper of said county," etc. The bill alleges that the Laborer was not the official paper of the county. Appel-

lees answered that they had no knowledge of any defects or irregularities in the advertisement. That they believed the Laborer to be the official newspaper at the time, and had no knowledge or information to the contrary.

It appeared from a certified transcript, made by the Secretary of State, of a memorandum in the Executive Register, read in evidence by appellant, that on the twenty-fifth of July, 1873, the Governor issued a proclamation designating the Danville Argus, published at Danville, as the official paper for Yell county.

It was proved by appellees that the Argus had suspended before the lands in question were advertised for sale, and that the Laborer was the only newspaper published in Yell county at the time the advertisement was made (April and May, 1874); that the delinquent tax lists and other legal notices were published in the Laborer, and it was generally understood and believed to be the official paper of the county; that the lands were advertised in it for sale for the usual number of times, and also by posting notices in public places.

A Statute then in force (*Gantt's Dig.*, *sec.* 4031-7), but since repealed (*Acts of* 1874-5, *p.* 154), required legal notices to be published in newspapers designated by proclamation of the Governor; and section 4031 of the Statute provides, that "any publication made contrary to the provisions of this Act, in judicial circuits or counties where, or for which, newspapers are so designated, shall be void, and of no effect."

The Argus, having suspended, and no other paper being shown to have been designated by the Governor as the official paper, and the Laborer being, at the time, the only paper published in the county, and generally used as the medium of legal notices, we are not inclined to hold the advertisement in question void, under the Statute.

But, be this as it may, the failure of a sheriff to advertise lands for sale under execution, in the mode directed by Statute, will not invalidate the title of a *bona fide* purchaser. *Byers* v. *Fowler*, 12 *Ark.*, 218; *Newton* v. *State Bank*, 14 *Ib.*, 9; *S. C.*, 22 *Ib.*, 19; *Ringgold* v. *Patterson*, 15 *Ib.*, 209.

4 ——: Selling land in a body.

III. A further objection, made by the bill to the validity of the sale is, that the lands were sold in a body, and not by separate tracts, etc.

The lands embraced in the mortgage, and condemned to be sold, by the decree, were one eighty, and two forty-acre tracts, making one hundred and sixty acres, being in the same section, the tracts adjacent, and constituting one farm.

The Statute provides that, in sales of real estate under execution, when the tract or tracts to be sold contain more than forty acres, the same shall be divided as the owner or owners may direct, into lots containing not more than forty nor less than twenty acres, etc. *Gantt's Dig.*, *sec.* 2681.

It was proved that appellant was present at the sale, and not only gave no direction to the officer making the sale to divide and sell the lands in lots, but consented to have them sold in a body, thinking they would sell better, and for a larger price, if so sold, than if put up for sale in separate tracts.

Having so consented, he could not be heard afterwards to complain of the sale of the lands in a body, nor to object to the title of the purchasers on that ground. *Ringgold* v. *Patterson*, 15 *Ark.*, 216; *Miller* v. *Fraley*, *et al.*, 21 *Ark.*, 39; *Field*, *Brown*, *et al.*, v. *Dortch*, 34 *Ark.*, 399.

5. OFFICER *de facto* Deputy sheriff, etc.

IV. The next point made by the bill, is that the sale was not made by the sheriff, but by an acting deputy, not legally appointed.

It appears that, at the time the execution was issued, Joseph A. Wilson was sheriff of Yell county; the writ was placed in his hands, and he advertised the lands for sale, and made the return upon the execution. The sale was made at his request, and in his absence, by James McCarroll, his deputy.

It was proved that Wilson made a written appointment of McCarroll as his deputy, on the first of January, 1873; and he served as such for eighteen months, including the time of the sale in question. He was also jailer. He took the oath of office before the county clerk, and was generally known throughout the county as deputy sheriff, and recognized as such by the clerks, and by the courts. There was no record evidence of the approval of his appointment by the Circuit Court, or the Judge thereof in vacation, or the board of supervisors, as provided by Statute. *Gantt's Dig., secs.* 5597-5000. Appellees had no knowledge that his appointment had not been so approved; he was acting as deputy, and they believed him to be such.

The deputy sheriff, on the facts shown, was certainly an officer *de facto*.

6. ESTOPPAL: Execution debtor inducing one to buy his land at irregular sale.

V. Moreover, appellant procured and induced appellees to attend the sale and purchase the lands, and he was, therefore, estopped from setting up irregularities in the process, advertisement, or sale, to defeat their title. They purchased them on his importunity, agreeing, verbally, that he might redeem them within twelve months. He made no offers to redeem them within that time, but, after a lapse of about three years, and after appellees had made improvements upon the lands of about the value of eleven hundred dollars, appellant brought this bill to set aside the sale, for alleged irregularities in the special execution, advertisement, and sale, making no offer to refund to appellees the $925 which they bid and paid for the lands.

The bill makes sweeping allegations of fraud on the part of appellees, and of combination between them and the sheriff, to cheat and wrong appellant in the sale of the lands; all of which allegations were denied in the answer, and not sustained by the evidence.

VI. It is further objected in the bill, that the sheriff executed and acknowleged a deed to appellees after his term of office had expired. But if the deed so executed be invalid, it does not invalidate the sale and purchase of the lands by appellees. They may apply to the court out of which the special execution issued, to confirm the sale, if it has not been done, and order the sheriff in office to make a deed.

7. ACKNOWLEDGING DEED. By officer after expiration of his term.

Decree affirmed.

STATE v. DAVIS ET AL.

1. EVIDENCE: *Of accomplice in misdemeanors.*

The Statute requiring corroboration of an accomplice's testimony before conviction, applies to misdemeanors as well as felonies, and a party cannot be convicted of gaming upon the uncorroborated testimony of a participant in the game.

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

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

Sec. 1932, *Gantt's Dig.*, does not apply to misdemeanors. The offense was complete without the assistance of the witness, and the mere fact that he was engaged in the game, would not make him an accomplice. There can be no accessories in misdemeanors, and to apply the strict definition of an accomplice in cases of gaming, would make

every *bystander* who does nothing to prevent or stop the game, a principal. The Statute would thus be nugatory.

STATEMENT.

ENGLISH, C. J. The indictment in this case was for gaming, and charged that J. P. Davis, Tom. Duncan, and King Duncan, on the tenth day of August, 1881, in the county of Conway, unlawfully did bet one quart of whisky, of the value of one dollar, on a certain game of cards, commonly called seven-up, against the peace, etc. The defendants pleaded not guilty, and the case was submitted to a jury. R. M. Morgan, a witness for the State, testified that on the tenth day of August, 1881, at Springfield, in Conway county, the defendants, J. P. Davis, Tom Duncan and King Duncan, and he, the witness, played a game of cards called seven-up, for one quart of whisky, of the value of one dollar. That all of them, witness and defendants, engaged in the playing and betting. Here the State closed, and defendants introduced no evidence. Thereupon, on motion of defendants, and against the objection of the State, the court read as an instruction to the jury, *Section* 1932 *of Gantt's Digest*, and further instructed the jury: That as the witness, Morgan, was engaged in the playing and betting with defendants at the same game of cards with which defendants were charged, he was an accomplice, and they could not therefore convict the defendants on his uncorroborated testimony," and directed them to return a verdict of not guilty, which they did, and judgment was entered discharging defendants.

The State was refused a new trial, took a bill of exceptions and appealed.

OPINION.

Section 1932, *Gantt's Digest*, provides that: "A con-

viction cannot be had 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."

It is submitted by the Attorney-General, that this section applies to felonies only, and not to misdemeanors; but its expressions are general, and there is nothing in its context to indicate that it was the intention of the Legislature to limit its application to felonies.

At common law, the practice of requiring confirmation of an accomplice, applied to misdemeanors as well as felonies. *Roscoe Cr. Ev.* 156; 1 *Phillips Ev.* 112; 2 *Russell on Cr.* 967.

Regina v. *Farler*, 8 *Car. & Payne*, 106, is cited by ROSCOE, PHILLIPS and RUSSELL, to show that it applied in misdemeanors.

Before the Statute it was matter of practice; but the Statute makes it absolute law, that the testimony of an accomplice must be corroborated to warrant a conviction, and the law applies to misdemeanors as well as felonies.

Affirmed.

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LITTELL V. GRADY ET AL.

1. FORCIBLE ENTRY AND DETAINER: *Object of the Statute.*

The object of the remedy of forcible entry and detainer, is not to determine rights of property, but to maintain the peace, and prevent persons, with or without title, from assuming to right themselves by force.

2. MORTGAGES: *Power of sale must be executed fairly and impartially.*

Less than actual fraud in the sale of mortgaged property, will justify a Court of Chancery in setting aside the sale. Equity watches with much jealousy deeds of trust and mortgages containing a power of sale *in pais;* and if the power be executed with partiality to the creditor, and with unfairness and oppression towards the mortgagor, and to his injury, it will set aside the sale.

3. PARTIES: *Defendants in bill to vacate mortgage sale:*

In a mortgagor's bill to set aside a sale of the mortgaged property, for unfairness and oppression in the sale, the mortgage creditor, as well as the purchaser, should be made a defendant.

4. TRUSTS: *Setting aside trust sale. Return of purchase money. Subrogation. Improvements..*

If a trustee's sale of the trust property be unfairly and oppressively made, and the purchaser knowingly aid in the oppression, the owner need not return or offer to return to him the purchase money in order to set aside the sale. If the sale be set aside, the purchaser may be subrogated to the lien of the creditor. Nor can the purchaser claim the value of his improvements on land so purchased, unless the owner claims rents from him. He may then be allowed for his improvements *pro tanto.*

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

Tappan & Hornor, for appellant.

Sales under powers in deeds of trust, etc., are a harsh mode of foreclosure. They are scrutinized with great care,

and will not be sustained unless conducted with great fairness, regularity, and scrupulous integrity. They will be declared void for the slightest unfairness, or excess, or for anything that prevents competition. *Perry on Trusts, sec.* 602; *Longworth* v. *Butler*, 3 *Gilman*, 32; 1 *Hilliard on Mortgages*, 131; *Jones on Mortgages, sec.* 1906.

The sale was void, because—

1st. The amout due was not fixed, but the subject of controversy. *Jones on Mortgages, sec.* 1776; *Perry on Trusts, sec.* 602, *x.*; *Sanford* v. *Flint*, 24 *Mich.*, 16; *Bloom* v. *Rensselaer*, 15 *Ill.*, 503.

2d. It was made in violation of an agreement to extend time. *Schoonover* v. *Pratt.*, 25 *Id.*, 457.

3d. Appellant had offered, through another, to pay, and it was not paid because mortgagee could not fix amount of debt. 5 *Leigh*, 370; 1 *Gilmer*, 230.

4th. The sale was hurried; land sold at eleven o'clock, when few were present, to accommodate purchaser. 21 *Ark.*, 585.

5th. Cash was demanded on the spot, from all except Grady, and no notice given that such demand would be made. *Penn* v. *Tollison*, 20 *Id.*, 652. Very slight proof of fraud or unfairness will set aside a sale. *Perry on Trusts, sec.* 602, *x*; *Jones on Mort.*, *secs.* 1909-11-13. If the trustee acts in bad faith, or proceeds in an irregular or oppressive manner, the sale is void. *Perry on Trusts, sec.* 602, *W.*; *Goode* v. *Comfort*, 39 *Mo.*, 325. There were few or no purchasers present. *Perry on Trusts, sec.* 502, *W.*; *Richards* v. *Holmes*. 18 *How.*, 143.

6th. The price was grossly inadequate.

Dunn & Howes, for appellees.

1st. No offer or tender was ever made by appellant, to

pay the debt, nor to refuund the purchase money. "He who seeks equity must do equity."

2d. "If the amount secured by the mortgage can be ascertained by calculation, there is no objection to a foreclosure under the power." *Jones on Mortgages, sec.* 1776. The proof fails to sustain any agreement to postpone.

3d. The amount due was fixed. The mortgage *fixed* it at $314.

4th. The sale took place between legal hours. Appellant was present, but did not object to the *hour*.

5th. Trustee had a right to demand *cash*. *Bergen* v. *Bennett*, 1 *Caine's Cases*, *p.* 1.

EAKIN, J. The history of this case, in its progress, is somewhat unique. A. L. Grady sued Philander Littell, under the Statute (1874-5, *p.* 196), for a forcible entry upon and detainer of a quarter section of land, gave bond, and was put in possession. Littell filed an answer in two paragraphs. The first denied plaintiff's right of possession, and claimed it for defendant. The second denied plaintiff's title. He also filed a cross-bill against plaintiff and others, who were members of a mercantile firm, showing that the plaintiff claimed his title by purchase at a sale made by Prewitt, one of the defendants in the cross-bill, and a member of the firm, under a deed of trust executed by the defendant to Prewitt, to secure a debt due the firm. Detailing the circumstances, he charges that the sale was made fraudulently, in such manner as to be oppressive and unfair; and that the plaintiff, Grady, participated in the design, and bought the land at a grossly inadequate price. Wherefore, he prays that the sale may be set aside, and plaintiff's deed cancelled, as a cloud upon his title, and for general relief.

The court, at first, sustained a demurrer to the second clause of the answer, and to the cross-complaint, and denied the motion to transfer, leaving the issue standing upon the right of possession alone, under the charge of forcible entry and detainer. This was correct practice. The Statute above referred to, section 19, expressly provides that in trials under its provisions, the *title* shall not be adjudicated upon, or given in evidence, except to show the right *to the possession*, and its extent.

1. FORCIBLE ENTRY AND DETAINER. Object of the remedy.

The special object of the summary remedy of forcible entry and detainer, is to keep the peace; not to determine rights of property. It is to prevent any and all persons, with or without title, from assuming to right themselves with strong hand, after the feudal fashion, when peaceable possession cannot be obtained, and to compel them to the more pacific course of suits in court, where the weak and strong stand upon equal terms. Upon complaint that this had occurred, the law, as it then stood, without hesitation applied the remedy, *in limine;* ejecting the presumtuous offender, even from property to which he had the best title, unless he could also show the better right to the immediate possession. He was not allowed to plead such superior title, or show it in evidence for his justification, except incidentally, as it tended to disclose his better right to the immediate possession at the time the forcible entry was made.

It would equally contravene the policy of the law, wholly defeating its primary object, if one, merely having grounds to invoke the aid of a court of equity to set aside a legal title, might, with impunity, enter by force, and interpose his equitable right as a shield against the consequences of a forcible entry. For in such an action the title cannot be adjudicated upon at all, save as aforesaid.

The cause with the issue thus made as to the right of

possession, was continued, the other issues having been properly excluded.

At a subsequent term, the plaintiff, by leave of court, withdrew his demurrer to the cross-complaint, and consented that the cause might be transferred to the equity docket, and heard upon its legal and equitable merits. This was done, and time given to answer. There was no further litigation as to the forcible entry. The effect of the consent evidently was to change the entire nature of the suit, to admit the litigation and final determination of the title, just as if the cross-complaint had been an original bill The matter of the change was not jurisdictional, and the consent was such as the court might permit, Its effect was to reverse the parties and change the aspect of the cause from an action of forcible entry by Grady against Littell, to an equitable suit by Littell against Grady, to set aside a deed inequitably obtained, and restore the former status of complainant. And so it should have been considered throughout. No new parties were actually made. The members of the firm, including Prewett, are named as defendants in the bill, but none of them answered, nor do they appear to have been served with notice.

The answer of Grady denies all unfairness or fraud in the sale under the deed of trust, at length and in detail. Its effect is to claim that the sale was proper, and authorized by the deed of trust; that he was an innocent purchaser, and that there was nothing improper in the sale for which he should be held accountable. He appends a demurrer to the bill for want of equity, prays that it be dismissed, and for all other proper relief.

The cause was heard upon the pleadings, exhibits and evidence. The Chancellor, as recited in the decree, "found that the *allegations of fraud* were not sustained by the evidence," "and declared that there was no other point at

issue in the cause." The bill was dismissed, and it was ordered that Grady retain possession. Grady having afterwards died, this appeal is now presented against his heirs, and personal representatives.

Upon a careful review of the evidence, in connection with the pleadings, we cannot find such preponderating proof of actual fraud, based upon deceit, misrepresentation, or craft, as would justify us in deciding that the Chancellor erred upon this special point in his finding. But we think this too narrow a view to support the decree, and that there were other very material points at issue in the cause.

2. MORTGAGES: Power of sale must be executed fairly and impartially.

Deeds of trust and mortgages, with powers to be executed *in pais*, belong to a class of instruments which are watched with much jealousy by Courts of Chancery. Those who make them, are often, indeed most generally, under a pressure for money or credit, and somewhat at the mercy of those who afford accommodations. They cannot, as we think this case well illustrates, always protect themselves against oppressive, unjust, and unfair executions of the power, which may be within the letter of the trust, and which, amongst parties dealing on equal terms, would not amount to actual fraud. Parties who execute these powers are properly held to "*uberrima fides*," in view of the danger of oppression, and the Courts of Chancery have been used to interfere to prevent any unnecessary sacrifice, or unfair disregard of the rights of the debtor. Where the trustees or beneficiaries do not wish to become the subjects of this jealousy, and are diffident of enduring the test, they may always invoke the aid of equity, and foreclose under its supervision. It is always the safe plan for all parties.

"Sales under powers," says Mr. PERRY (*Trusts, sec.* 602, *X*), "in deeds of trust, or mortgages, are a harsh mode of foreclosing the rights of the mortgagor. They are scrutinized by courts with great care, and will not be sustained

unless conducted with all *fairness*, regularity, and *scrupulous* integrity. Upon *very slight* proof of fraud, or unfair conduct, or of any departure from the terms of the power, they will be set aside." (See authorities cited.)

Lord ELDON, in the case of *Downes* v. *Grazelrook*, 3 *Merivale*, 207, went so far as to say, that a trustee for sale is bound to bring the estate to the hammer;" under, *every possible advantage* to his *cestui que trust*," who in that case was the grantor or debtor. Perhaps that is too severe a requisition, in its literal sense, but reasonably taken, it announces the doctrine universally received.

Mr. DILLON has treated this subject in two articles, published in the numbers of the American Law Register, for September and October, 1873, in which he has collected a great mass of authorities. The particular question now before us, is discussed in the latter number. He says that the trustee is bound to look to the interests of *both* parties in the execution of a power of sale. He must act reasonably for the interests of the debtor, as well as the creditor, and must be impartial between them. He should not permit the creditor to *force* the sale at an inadequate price in the absence of other bidders, and should *postpone* the sale, if necessary, to obtain a fair price." He quotes C. J. SHAW, 3 *Met.*, 311, saying that: "In exercising the power, the mortgagee becomes the trustee of the debtor, and is bound to act *bona fide*, and to adopt all reasonable modes of proceeding, in order to render the sale the most beneficial *to the debtor*." Also the remarks of Vice Chancellor BRUCE, in *Mathie* v. *Edwards*, 2 *Col.*, 480, who says: "I apprehend, that a mortgagee having a power of sale, cannot, as between him and the mortgagor, exercise it in a manner merely arbitrary, but is, as between them, bound to exercise some discretion, not to throw away the property, but to act in a prudent, and business-like manner, with a view to

obtain as large a price as may, fairly and reasonably, with due diligence and attention, be, under the circumstances, attainable." And on general principles, the same rule would apply in a contest between the mortgagor and a purchaser under the power, with notice of the circumstances.

In accordance with these views, stands the case of *Seesel et al.* v. *Ewan et al.*, reported in 35 *Ark.*, 127. There the sale was made by the trustee, in accordance with the wishes of the grantor and debtor, and was attacked by other creditors, having no liens on the property when sold. The court sustained the sale, saying: "The trustee should have sold the property *to the best advantage of the grantor in the deed*, and those claiming under him, subject to the creditor's right to his secured debt." He was held not to be a trustee for general creditors, and that he might follow the wishes of the grantor in the sale, who would have control of the surplus.

It will be readily seen, that in all cases the trustee will best subserve the interests of the creditor by making such sale, as would be in price, most advantageous to the debtor. Incidentally, and to the extent of the debt only, the creditor is a *cestui que trust* under the power. Beyond that, and generally, the person entrusted with the power of sale, owes a fiduciary duty to the real owner of the land, to secure to him all advantages reasonably within his power, consistent with his trust. It is the plain, sensible dictates of a spirit of fair dealing between man and man.

From these considerations, it is plain that the Chancellor erred in supposing that he could grant no relief in the absence of proof of fraud. Less than fraud will suffice, unless we consider want of fidelity to a trust, in all cases, a fraud of itself.

The trustee in this case seems to have acted wholly in disregard, not only of the interests, but of the feelings of

the debtor. The debt had not been ascertained, and the firm of which he was a member, seems to have evaded the efforts of the debtor to arrive at a correct ascertainment of the true amount. The debtor, through a friend who was able to advance the money, and would have done so, could have paid the money and stopped the sale, if a settlement had been made and the debt satisfactorily adjusted. It has never yet been done. The sale was advertised, pending negotiations. The debtor remonstrated, and (as he says in his deposition, and which is not thoroughly contradicted), the trustee agreed that the sale should be deferred to another day. Nevertheless, upon the day for which notice had been given, the trustee, professing to act under peremptory instructions from his own firm, insisted upon proceeding with the sale. He proceeded to the ground, accompanied by defendant, Grady, in a buggy. The complainant had gone there expecting a postponement, and unprepared to pay the money. The trustee announced that he would not receive any bid, except from parties prepared to pay down, in cash, upon the ground. There was no other bidder present, besides Grady. Only five or six others present in all, who had been invited to attend, to give a semblance of a public sale. The complainant requested Grady not to buy, making him acquainted with the circumstances, and declaring his intention to contest the sale in the courts. Grady said he knew that complainant had been badly treated in the matter, but that was a matter between the debtor and trustee. He urged upon the trustee, repeatedly, to hurry up the sale. The trustee, inflexible to complainant, was quite complaisant to the intended vendee. He did hurry up the sale. It took place about 11 o'clock, six miles from Forrest City, in the country. Grady made the only bid, $315. Whether that was more or less than the sum due, cannot yet be known. No money was paid on

the ground, nor demanded. Grady and the trustee went off together, in a buggy, as they came. The money was afterwards paid in Forrest City, and a deed made there. The land did not bring one-fourth its value.

Perhaps no one of all these acts was intended to be fraudulent, or thought to be so by the actors. Perhaps they thought they were only availing themselves of legal rights. But it was hard measure for complainant, who had for some time had a friend ready to pay the debt; who had honestly and earnestly endeavored to ascertain its amount, for the purpose, and who, there is good reason to believe, attended at the place, in the just expectation of a postponement, unprepared to pay anything on the ground. The proceedings were arbitrary, unkind, unjust, and detrimental to complainant; and the purchaser made himself a party to them with full knowledge of the hardship.

The result was, the firm got into its hands the full amount it claimed, whether justly or unjustly; Grady got a very cheap bargain in lands; and the complainant had his property taken from him without any necessity. It is very plain that no sale at all need have been made, if the firm, or Prewitt, acting for it, had in good faith co-operated to fix the true amount of the debt.

Taking all the circumstances together, we think the Chancellor erred in dismissing the bill for want of equity.

Under the prayers for general relief on both sides, he might have ordered an account taken of the debt due, and of the actual market value at the time, of the funds used in paying taxes; and might have adjusted the rights of all parties; either making the repayment of the taxes, with interest a condition of setting aside the sale, and restoring the former condition; or, on application of the defendant in the bill, he might have proceeded to decree and execute a foreclosure, subrogating Grady to the extent of his purchase

money, (or less, if the debt be less), to the original lien of the firm. The firm should also have been brought in and made parties. We do not think it was incumbent on the complainant to offer to pay Grady his purchase money. Perhaps it was more than he owed. In any event, Grady, having knowingly lent his aid to an oppressive transaction, cannot thus involuntarily make the complainant his debtor, and hold his property until he be repaid. This is not required of complainant, in order to "do equity." The estate of Grady must be content with the subrogation to the lien, and to his claim for taxes, with interest. He is entitled to no improvements, unless there be a claim made against him for rents, during his occupation; in which case he may be allowed improvements, *pro tanto*.

Reverse the decree, and remand the cause, with leave to amend the pleadings and bring in new parties, and for further proceedings, consistent with this opinion.

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38 594
64 465

HURLBURT ET AL. v. W. & W. MANUFACTURING COMPANY.

1. ACTION: *Joinder of, on separate instruments.*

Where one obligates himself in writing to perform certain acts, and others in a separate instrument to the same obligee, guarantee the performance of the acts by the first, the obligors in the two instruments being different, an action will not lie on both instruments jointly, even under the Code. But if in such joinder the principal be not served with summons, and the joinder be not objected to by motion or otherwise, it will be waived, and cured by the dismissal of the action as to the principal not served.

2. PRACTICE: *Motion to set aside default judgment must be in bill of exceptions.*

A motion to set aside a judgment by default, and the answer tendered with it, must be incorporated in the bill of exceptions, and not in the record. The record should show the filing of the motion, but

its recital of the grounds of the motion, and of the accompanying papers, will be no evidence of them in the Supreme Court.

3. PLEADING: *Presumption from pleading, as to kind of contract.*

In this State an alleged contract within the Statute of frauds, will be presumed to have been made in writing, or as required by the Statute, and proof of a written contract will be necessary to sustain the allegation.

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

N. & J. Erb, for appellants.

EAKIN, J. The appellant, Hurlburt, as a canvasser for the sale of the Wheeler & Wilson sewing machines, entered into a written contract with the company, in which the terms of his employment, and their reciprocal obligations, were set forth. In general, it may be said, that the company was to furnish a wagon and team for the business, and the machines for sale; and he was on his part, to account for all the property furnished, in accordance with the terms, subject to his commissions.

About the same time, Dodd and the other appellants, together, entered into a separate written agreement with the company, to which Hurlburt was not a party. They referred to Hurlburt's agreement, and under a penalty of one thousand dollars, guaranteed to the company the faithful performance, by Hurlburt, of all he had undertaken, and that he would pay over all that, upon settlement, should be found to be due. The bond contains the following stipulation: "We * * * consent and agree that the Wheeler & Wilson Manufacturing Company, and J. S. Hurlburt may, from time to time, make any modification or modifications, change or changes, of the contract between them, in which we are held as guarantors, as to the territory in which machines are to be sold, or as to times of

sale, price, commissions, or terms of payment of, and for sewing machines, without releasing our liability as such guarantors, and this, our liability as guarantors, shall be and remain the same on said modified contract as on said original contract."

This action was begun against Hurlburt and his guarantors jointly. The complaint exhibits and incorporates, by reference, both instruments, with subsequent written modifications of the first, which it says were made with the knowledge and consent of the guarantors, and in accordance with the stipulation in the contract of guaranty.

It alleges that goods were furnished Hurlburt, by the company, under the agreements, for which, upon request, he failed and refused to account, and claimed that there was due $393 53. A bill of particulars was also filed.

All the defendants, save Hurlburt, were duly summoned. No one appeared to defend, and at the next term the cause was dismissed as to Hurlburt, and judgment by default noted against the others. The court, "upon the oath and evidence of plaintiff," proceeded then to ascertain the amount due, and entered the judgment for the sum stated in the complaint.

So far, there is no serious objection to the regularity of the proceedings. The contracts of the guarantors, and of the canvasser, were separate and distinct, and did not, taken together, bind all parties to the same thing. The guarantors did not bind themselves in the original agreement, to do the acts, but secondarily to answer for damages, in case Hurlburt should not. Where this is done by separate instruments, the parties in each being different, an action will not lie upon both instruments jointly, even under the Code. *Marshall* v. *Peck and Gilmore*, 1 *Dana* (*Ken.*) 610; *Harris and Gearheart* v. *Campbell*, 4*th Ib.*, 586; cases cited in *Myers' Kentucky Code*, *p.* 283, *note*

(*f*). But such joinder was waived by want of objection, by motion or otherwise, and cured by the dismissal of the case as to Hurlburt.

There is a criticism of the expression in the record, that the amount was ascertained upon the oath and evidence of the plaintiff, which was a corporation. The expression, however, may be easily conceived to mean, on behalf of the plaintiff. A corporation can only make affidavits and adduce evidence through its agents or officers.

2. Bill of exceptions must contain motion to vacate judgment.

It is noted in the record, that afterwards, during the same term, the defendants made two several motions, in effect, to set aside the default, and tendered an answer. The motions and the answer tendered, are set forth in the transcript, but are not incorporated in any bill of exceptions. Whilst it is proper for the record to show that motions of this class were made and acted upon, neither the grounds of the motions recited therein, nor the papers tendered with them, can be received as evidentiary of the facts therein stated. The grounds upon which the court based its discretion, cannot be known, nor can it be seen whether or not the court abused its discretion without a bill of exceptions, showing the matters set forth in the motions and papers tendered, and the proof upon which they are based. It is not the office of the record, proper, to do that.

The motions to set aside the default were overruled, and the defendants appealed.

The record proper, discloses no error in the judgment as first rendered. It is urged upon us, that the modifications of the original contract, were not of the nature contemplated by the provisions in the guarantor's bond, and that this appears upon the face of the pleadings, inasmuch as they incorporate the several agreements.

If the construction of the instruments were as contended,

3. PRESUMPTION of contract, from pleading.

and the alterations were not justified by the license, it is matter which should have been shown by answer. Otherwise *non constat*, but that the alterations may have been made by written consent, or the objections waived. The general rule at common law is, that a contract not described, as made by writing obligatory, or instrument under seal, will be presumed to have been by parol. But the presumption does not extend to the effect that it was *verbal*. Notwithstanding some conflict in the decisions of other States, it is well settled in this State, that a contract within the Statute of frauds, alleged to have been made, will be presumed to have been made *in writing*, or as required by Statute, and this is supported by the greater weight of authority. Issue may be taken on the allegation, which would require proof of a written contract. See authorities collected in *Brown on Statute of Frauds*, *sec.* 505, and the opinion delivered by Mr. Justice COMPTON in *McDermot* v. *Cable et al.*, 23 *Ark.*, 200.

If we were inclined, or thought it safe practice to notice the matters recited in the transcript, as grounds for the motions, or in the answers tendered, which for want of a bill of exceptions, we do not, we could not clearly see that there had been an abuse of discretion. The showing on the part of the defendants, that they had been misled by the plaintiff, or its authorized agents, to decline making any defense, confiding in an agreement for a settlement made, pending the suit, is combatted by an affidavit on the part of complainant, which, on its part, further offers to credit the judgment with all machines which might be returned in compliance with propositions pending the suit to that effect.

Declining, however, to examine into the matter of abuse of discretion, for want of a bill of exceptions, showing the abuse, we, upon that ground, affirm the judgment.

GALBREATH ET AL. V. ESTES, AD., ETC.

1. PRACTICE: PARTIES: *Purchaser pendente lite not necessary.*
Purchasers *pendente lite* are not necessary parties to the suit. Litigants need not notice a title acquired during the litigation; otherwise litigation would be interminable.

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

Wright, Falkes & Wright, of Memphis, for appellant.

Appellant was not a purchaser, *pendente lite*. On the death of Gonder, the suit should have been revived against Galbreath; and without this the court had no jurisdiction, and the sale would be void. He was a necessary party to the suit. *Story Eq. Pl., secs.* 326 *to* 332, 340, 340*a*, 1-2, (*and note*), 3-7-8-9 (*and note*), 350, *and notes* 1 *and* 2, 351-1*a*-4–4*a*-6-7-8-9, 380-4-5-7, 427, *and, especially*, 379-387; 2 *Hare*, 81-96; 5 *John. Ch.*, 342: 13 *Vesey*, 160-3; *Ib.*, 435. The sale and decree are void. *Story Eq. Pl., secs.* 427, 379.

L. A. Pindall, also for appellant.

1. Appellant was a necessary party. At the time of the filing of the cross-bill by Hartsook, Galbreath was in possession of the lands, claimed in fee, under a chain of title duly recorded. *Fletcher* v. *Hutchison*, 23 *Ark.*, 30.

2. Even if not a necessary party, as a junior encumbrancer, or as the owner in possession, he was a proper party, and has had no day in court.

U. M. & G. B. Rose, for appellee.

Appellant was not a party, and cannot appeal. *Gantt's*

Dig., *sec.* 1057; *Tobey* v. *Whitaker*, 26 *Ark.*, 95. He was not an indispensable party to the suit. He claimed under a subsequent mortgage. His admission would have been a commencement of a new suit. *Interest Reipublicae ut sit finis litium.* He was not a party to the decree; it is *res inter alios acta.* He was a purchaser *pendente lite*, and bound by the decree. *Holman* v. *Patterson*, 29 *Ark.*, 358; *Montgomery* v. *Birge*, 31 *Ib.*, 491; *Whiting* v. *Beebe*, 12 *Ib.*, 425; *Ashley* v. *Cunningham*, 16 *Ark.*, 175; *Merrick* v. *Hutt*, 15 *Ark.*, 344; *Pindall* v. *Trevor*, *etc.*, 30 *Ib.*, 250.

SMITH, S. J. This is a fragment of the case of *Estes* v. *Martin*, reported in 34 *Ark.*, *at page* 410. The mandate had been sent down; a final decree of foreclosure of the mortgage upon the Desha lands had been entered; the term had passed, and the commissioner had advertised the lands for sale, when Galbreath attempted to intervene. The litigation had been pending ever since the year 1867. The cross-bill, which sought to subject these lands to sale for satisfaction of a mortgage prior to the purchase of Gonder, the plaintiff in the original bill, had been filed as long ago as June 17th, 1868. Galbreath claimed title by virtue of a purchase in October, 1874, under a power of sale contained in a deed of trust, made by Gonder, after the commencement of the suit. He avers that he has been in possession ever since March, 1875, and insists that he was an indispensable party to the determination of the controversy. The Chancellor dismissed him out, refusing to open the decree to let him in to defend, and he has prosecuted an appeal.

Galbreath was not a necessary party to the suit. Litigants are exempted from taking any notice of a title acquired during the pendency of a suit. Otherwise, litigation might be interminable. *Sto. Eq. Jur.*, *sec.* 406.

We suppose that a person who shows an interest in the subject matter of a suit, who applies in apt time to be made a party defendant, and whose prayer is denied, may appeal. As to him, such an order, it seems, is final.

But we are of opinion that Galbreath's application came too late. If he had come in before the decree had been rendered, doubtless the Chancellor would have admitted him to defend; but his admission at that stage of the cause would have been virtually the commencement of new suit, under pretext of continuing the old one.

Whether Galbreath, as the holder, under a subsequent mortgage, who has had no day in court, may litigate his rights, if he has any, in some future action; or whether, being a purchaser *pendente lite*, he is concluded by the decree, we express no opinion. All that we decide is, that the Chancellor committed no error in refusing to vacate his decree at that late day.

Affirmed.

COMPTON, ATTORNEY, v. THE STATE.

1. ATTORNEY'S LIEN: *Upon judgment recovere l for the State.*

The Governor has no power to employ counsel to represent the interests of the State in litigation, so as to give him a lien on the judgment recovered.

W. W. SMITH, S. J. After the opinion in *M. & L. R. R. Co., as reorganized, in* 37 *Ark.*, 632, had been delivered, and when the mortgage money was in course of being

covered into the State Treasury, Mr. Compton filed in this court, his claim of lien for $5,000, for his services as solicitor. Thereupon the court directed the clerk, who was entrusted with the execution of the decree, to deposit this sum in bank until the claimant could be heard and his claim be investigated.

He was employed by Governor Miller, under the following circumstances: After the cause had progressed to issue in the Pulaski Chancery Court, the Attorney-General, perceiving that some perplexing questions were raised by the answers of one of the defendants, made an application in writing, to the Governor, for the employment of associate counsel; and Mr. Compton was retained, and thenceforward until the successful termination of the suit, rendered such services as only a lawyer of consummate skill could have rendered. No agreement was made with the Governor as to the mode or measure of compensation, as, indeed, none could have been made which would have bound any department of the government. The natural presumption is, that both parties looked to the Legislature to become paymaster to Mr. Compton, since that party could alone sanction the employment of counsel to assist the proper law officer of the State, and could alone make an appropriation of public moneys for that purpose. And whilst it was an eminently proper thing for a zealous and careful executive to engage additional counsel, if, in his judgment, the emergency demanded it, yet he did not, and, without authority from the Legislature, could not make such a contract with the solicitor as would give him a lien upon the fruits of the litigation. And herein this case differs from *In re Paschall*, 10 *Wallace*, 483. There the Legislature had previously authorized the Governor to take such steps as he might deem proper to recover possession of the Texas Indemnity bonds, and to

compromise with the holders of them, or parties through whose hands they had passed. Pursuant to this authority, the Governor had retained Paschall and had agreed that he might receive his fee out of the amount to be recovered.

By the early common law, as we understand it, an attorney had no general lien, either for his cost or his fee, upon the judgment recovered for his client; *Getchell* v. *Clark*, 5 *Mass.*, 309; *Baker* v. *Cook*, 11 *Id.*, 236; *Potter* v. *Mayo*, 3 *Greenleaf*, 34; *Forsythe* v. *Beveridge*, 52 *Ill.*, 268. *In re Wilson, U. S. District Court, Southern District of N. Y., reported in* 26 *Albany Law Journal*, 271; but only a specific lien upon any papers of his client which might be in his hands. This lien depended upon possession, and conferred no right in the property, but only a bare right to hold possession until payment. Now, the mortgage for foreclosure of which the suit was brought, was never in Mr. Compton's hands; but had been placed in the hands of the Attorney-General, by the Joint Resolution of January 21st, 1875. See *Acts of* 1874-5. But it is plain that Mr. Compton does not claim under the attorney's "retaining lien," since that is purely passive, and no active proceedings can be taken, either at law or in equity, to procure payment out of the deeds, vouchers, and other papers so held. It is the attorney's "charging lien" upon the judgment, or the fund in court decreed to his client, under which he proceeds.

This last-mentioned lien was carved out by the English courts for the protection of attorneys and solicitors. The judges considered it their duty to take care, as Lord KENYON expresses it, in *Reade* v. *Dupper*, 6 *T. R.*, 361, that "a party should not run away with the fruits of the cause, without satisfying the legal demands of the attorney, by whose industry and expense those fruits were obtained." The oldest case we can find, establishing this right, is *Welch*

v. *Hale*, 1 *Douglass*, 238 decided by Lord MANSFIELD, in 1779. The extent of the lien in England was the taxable costs and disbursements in the particular suit. This doctrine was adopted in many of the American States, although rejected in some; and it was no longer limited to costs. Thus, in *Sexton* v. *Pike*, 13 *Ark.*, 193, it was decided that an attorney has a lien for his fee upon a judgment recovered for his client, which he may enforce against an assignee of the judgment, who has collected and discharged it. But in *Hanger* v. *Fowler*, 20 *Ark.*, 667, the court refused to extend the principle so as to charge lands. This extension has since been made by the Civil Code, (*Gantt's Dig.*, *secs.* 3622-6), and the whole subject is now regulated by Statute, which defines the rights of attorneys in such cases, and points out the mode of enforcing them. But it is doubtful whether the lien prevails against the State. The general rule is, that the sovereign is not bound by a Statute, unless expressly named. If, however, the act does apply to cases in which the State is the client, we are all agreed that there is no lien here, for the reason above stated—that in the absence of an enabling Act, or Concurrent Resolution of the two Houses, the Governor cannot employ counsel to represent the interests of the State, so as to give him a lien upon the judgment recovered.

It follows that we are without any jurisdiction in the premises. We can only commend the eminent counsel to the sense of justice of the General Assembly, when it shall meet. We regret that it is not in our power to fix his fee and order its payment without a violation of legal principle, and the establishment of a dangerous precedent. From the proofs adduced before us, and our familiarity with the record, we are enabled to say that the fee charged is a moderate one, regard being had to the amount in controversy, the intricate questions involved, and the grave

responsibility resting upon counsel. The State has profited by his labors, his learning, and his experience. It is only bare justice to recompense him.

The money that was deposited to abide the result of this application must be turned into the Treasury; and the clerk will see that it is done without delay.

THE STATE v. HARDISTER AND BROWN.

1. CRIMINAL LAW. *Homicide by mal-practice as a physician.*

For a mere mistake of judgment in the selection and application of remedies, resulting in the death of his patient, a physician is not criminally liable; but when death is caused by gross ignorance in the selection or application of remedies, by one grossly ignorant of the art he assumes to practice, he is criminally liable.

ERROR to *Sharp* Circuit Court.
Hon. L. L. MACK, Circuit Judge.

STATEMENT.

A demurrer was sustained by the Sharp Circuit Court, to the following indictment, and the State brought error:

"The grand jury of Sharp county, in the name and by the authority of the State of Arkansas, accuses Nathan G. Hardister and Henry W. Brown, of the crime of manslaughter, committed as follows, to-wit: The said Nathan G. Hardister, on the twenty-seventh day of October, 1880, in the county and State aforesaid, then and there being a physician, surgeon, and obstetrician, holding himself out to the public as

such, and soliciting patronage, then and there, in the county and State aforesaid, as such physician, surgeon, and obstetrician, and by reason of the said Nathan G. Hardister so holding himself out as such physician, surgeon, and obstetrician, as aforesaid, was, on the day and year last aforesaid, and in the county and State aforesaid, then and there being called in the capacity of physician, surgeon, and obstetrician, to attend upon one Amanda Saunders, being a married woman, and then and there being pregnant with a quick child, and in the labor of child-birth; the said Nathan G. Hardister did, then and there, feloniously, and without due caution and circumspection, make an assault upon the said Amanda Saunders, and then and there, feloniously, and without due caution and circumspection, and by mal-practice, did administer to her, the said Amanda Saunders, while in the pains of child-birth, as aforesaid, a large quantity of morphine; being unnecessary, not required, and wholly unauthorized, and the quantity so administered being excessive; and by reason of the administering of the morphine aforesaid, the said labor pains were retarded, interfered with, and allayed, and the said Amanda Saunders made nervous, delirious, and prostrated with a fever; and thereupon the said Nathan G. Hardister, feloniously, and without due caution and circumspection, and by mal-practice, did administer to her, the said Amanda Saunders, large and excessive quantities of fluid extract of ergot; and by reason of the administering of the said ergot, in excessive quantities, as aforesaid, by the said Nathan G. Hardister, he then and there caused the said Amanda Saunders to have convulsions; and thereupon the said Nathan G. Hardister, then and there, feloniously, and without due caution and circumspection, did bleed the said Amanda Saunders in the arm; which bleeding was, then and there, unnecessary and unauthorized.

And the said Nathan G. Hardister did, then and there, feloniously, and without due caution and circumspection, attempt to deliver said quick child from the said Amanda Saunders, by the use of forceps, by repeatedly introducing them, without due caution and circumspection, into the body of said Amanda Saunders; and by the unauthorized use of the forceps, produced an inflammation in the body of the said Amanda Saunders; which inflammation, so produced, by the unauthorized use of the forceps, aforesaid, caused the said Amanda Saunders to have fever; and the said Nathan G. Hardister did, then and there, feloniously, and without due caution and circumspection, administer to said Amanda Saunders, large and excessive quantities of chloroform, which administering of the said chloroform, in such excessive quantities, was unnecessary and unauthorized; and then and there, feloniously, without due care and circumspection, with a certain pocket-knife, did cut, puncture, penetrate and wound the said quick child, in the head, thereby, then and there, feloniously killing said quick child, before its delivery from its mother, the said Amanda; the killing of the quick child aforesaid being unnecessary and wholly unauthorized; causing great irritation and inflammation of the body of her, the said Amanda Saunders, and other great injuries to the body and person of the said Amanda Saunders, then and there did; and then and there, feloniously, and without due caution and circumspection, did insert his fingers into the mouth of the said quick child, and force its head out of the mouth of the vagina of the said Amanda Saunders; and then and there, without due caution and circumspection, feloniously did tie a rope around the neck of said child, killed as aforesaid, and, with force and violence, and without due caution and circumspection, feloniously did pull and deliver said child

from the womb of said Amanda Saunders; and the delivery of said child was unnecessary and wholly unauthorized.

And the said Nathan G. Hardister, then and there, without delivering the afterbirth from the said Amanda Saunders, feloniously, without due caution and circumspection, did abandon her, the said Amanda Saunders, leaving her in a prostrated, delicate, and precarious condition; and from the effect of the treatment, as aforesaid, by the said Nathan G. Hardister, she, the said Amanda Saunders, did languish from the twenty-seventh day of October, 1880, in the county and State aforesaid, and languishing did live until the third day of November, 1880, in the county and State aforesaid; on which said third day of November, A. D. 1880, from the effect of the said treatment and mal-practice of the said Nathan G. Hardister, she, the said Amanda Saunders, did die. And so the grand jury aforesaid, in the name and by the authority aforesaid, do say that the said Nathan G. Hardister, on the twenty-seventh day of October, 1880, in manner and form as aforesaid, her, the said Amanda Saunders, feloniously, and without due caution and circumspection, did kill and slay, 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 charge that, on the said twenty-seventh day of October, A. D. 1880, in the county and State aforesaid, the said Henry W. Brown, then and there being a physician, surgeon, and obstetrician, and holding himself out to the public as such, and soliciting patronage as such, was, in the capacity of such surgeon, physician, and obstetrician, called in to consult with and assist the said Nathan G. Hardister, in the treatment of the said Amanda Saunders, as aforesaid, feloniously, and without due caution and circumspection, abetting, aiding, and assisting the said Nathan G. Hardister, the said Amanda

Saunders then and there to kill and slay, in manner and forms as aforesaid, against the peace and dignity of the State of Arkansas."

C. B. Moore, Attorney-General, for the State.

We have no Statute directly bearing upon mal-practice and death caused thereby, but *Sec.* 1266, *Gantt's Dig.*, provides that killing another by a person "in the prosecution of a lawful act, done without due caution and circumspection," shall be manslaughter.

The indictment was good. *Wharton on Homicide*, 131-144; *Archbold Cr. Law and Plead.*, *Vol.* 2, 221, *and notes.*

English, C. J. Appellees were indicted in the Circuit Court of Sharp county, for manslaughter; a demurrer was sustained to the indictment; they were again indicted for the same offense; a demurrer was sustained to the second indictment, and the State appealed.

It may be seen from the reporter's copy of the indictment, that appellees were accused of causing the death of a woman, by mal-practice as physicians.

The demurrer to the indictment was general, the only cause assigned being that it did not state facts sufficient to constitute a public offense.

It is manifest, from words used in the indictment, that it was drafted under the second clause of *section* 1266, *Gantt's Dig.*, the whole section being: "If the killing be done in the commission of an unlawful act, without malice, and the means calculated to produce death, *or in the prosecution of a lawful act, done without due caution and circumspection, it shall be manslaughter.*" The preceding section defines voluntary manslaughter, and the section copied is, in

substance, the common law definition of involuntary manslaughter, which, by our law, is a felony, and punishable by imprisonment in the penitentiary for a period not exceeding twelve months. *Ib.*, *sec.* 1278.

The indictment charges, in substance, that appellees, holding themselves out as physicians, etc., were called to attend Mrs. Saunders, and that they feloniously, and without due caution and circumspection, and by mal-practice, in the use of the remedies and appliances described, and, finally, by abandonment, caused her death.

Sir MATTHEW HALE said: "If a physician gives a person a potion, without any intent of doing him any bodily hurt, but with an intent to cure or prevent a disease, and contrary to the expectation of the physician, it kills him, this is no homicide; and the like of a chirurgeon. And I hold their opinion to be erroneous, that think, if he be no licensed chirurgeon or physician, that occasioneth this mischance, that then it is felony; for physic and salves were before licensed physicians and chirurgeons; and therefore, if they be not licensed according to the Statute. (3 *H.* 8. *Cap.* 11 or 14 *H.* 8. *Cap.* 5), they are subject to the penalties in the Statutes; but God forbid that any mischief of this kind should make any person, not licensed, guilty of murder or manslaughter. These opinions, therefore, may serve to caution ignorant people not to be too busy in this kind with tampering with physic, but, are no safe rule for a judge or jury to go by," etc. 1 *Hales' Pleas of the Crown*, 429.

In note 6, first American Edition of HALE, by Stokes & Ingersoll, the annotators say: "Later authorities agree with HALE in these points. If a person, whether he be a regular practitioner or not, honestly and *bona fide*, perform an operation which causes the patient's death, he is not

guilty of manslaughter. But if he be guilty of criminal misconduct, arising from gross ignorance or criminal inattention, then he will be guilty of manslaughter," citing cases.

Sir WILLIAM BLACKSTONE said: "If a physician or surgeon gives his patient a potion or plaister to cure him, which, contrary to expectation, kills him, this is neither murder nor manslaughter, but misadventure, and he shall not be punished criminally, however liable he might formerly have been to a civil action for neglect or ignorance. But it hath been holden that if he be not a regular physician or surgeon, who administers the medicine, or performs the operation, it is manslaughter at least. Yet Sir MATTHEW HALE very justly questions the law of this determination." 2 *Black Com. Book* 4, *p.* 197.

In 1809, SAMUEL THOMPSON, the father of the botanical, or steam system of medicine, was indicted in the Supreme Court of Massachusetts for murder, and the court charged the jury that, "if one, assuming the character of a physician, through ignorance, administer medicine to his patient, with an honest intention and expectation of a cure, but which causes the death of the patient, he is not guilty of a felonious homicide." *Commonwealth* v. *Thompson*, 6 *Mass. R.*, 134.

This case was followed in 1844, in *Rice* v. *State*, 8 *Missouri*, 561.

But in an edition of the Massachusetts Reports in 1850, in a note to *Commonwealth* v. *Thompson*, the editor says: "If death ensue from the gross ignorance, carelessness, negligence, or rashness of any one who undertakes to administer medicine, without any intent to do harm, the offense has often been held by eminent judges, to amount to manslaughter," and after citing the later English decisions

to sustain this proposition, the editor adds: "And this not only seems to be sound, but wholesome doctrine."

In *March* v. *Davison*, 9 *Paige*, 587, Chancellor WALWORTH, commenting on *Commonwealth* v. *Thompson*, said: "Our Statute does indeed, prohibit persons, not authorized by law, from practicing physic or surgery in this State (New York). And as the person who should attempt to practice contrary to the Statute, would be engaged in an unlawful act, he could not probably escape a conviction of manslaughter if he should kill a patient, even where he supposed the remedy administered was not dangerous to health or life," etc.

In *Rex* v. *Williamson*, 3 *Carrington & Payne*, 635, the prisoner, a man-midwife, tore away a part of the prolapsed uterus of a woman whom he had delivered of a child, supposing it to be a part of the placenta; the woman died, and he was indicted for murder. Lord ELLENBOROUGH, C. J., in summing up, said to the jury: "There has not been a particle of evidence adduced which goes to convict the prisoner of the crime of murder; but still it is for you to consider whether the evidence goes so far as to make out a case of manslaughter. To substantiate that charge, the prisoner must have been guilty of criminal misconduct, arising either from the grossest ignorance or the most criminal inattention. One or other of these is necessary to make him guilty of that criminal negligence and misconduct, which is essential to make out a case of manslaughter," etc., etc.

In *Rex* v. *Long*, 4 *Carrington & Payne*, 398, it was held that a person acting as a medical man, whether licensed or unlicensed, is not criminally responsible for the death of a patient, occasioned by his treatment, unless his conduct is characterized either by gross ignorance of his art, or gross inattention to his patient's safety.

In another indictment against *Long*, *Ib.*, 423, it was held, that when a person undertakes the cure of a disease (whether he has received a medical education or not), and is guilty of gross negligence in attending his patient, after he has applied a remedy, or of gross rashness in the application of it, and death ensues in consequence of either, he is liable to be convicted of manslaughter.

In *Rex* v. *Speller*, 5 *Carrington & Payne*, 332, held that any person, whether a licensed medical practitioner or not, who deals with the life or health of any of his Majesty's subjects, is bound to have competent skill, and is bound to treat his or her patients with care, attention and assiduity, and if a patient dies for want of either, the person is guilty of manslaughter.

The English cases, those cited above and others, are reviewed in *Roscoe's Criminal Evidence*, 717–20.

Mr. GREENLEAF, in treating of involuntary manslaughter, says: "If the act be in itself lawful, but done in an improper manner, whether it be by excess, or by culpable ignorance, or by want of due caution, and death ensues, it will be manslaughter. Such is the case where death is occasioned by excessive correction given a child by the parent or master, *or by ignorance, gross negligence, or culpable inattention or maltreatment of a patient on the part of one assuming to be his physician*," etc. 3 *Greenleaf's Evidence*, *secs.* 128–9.

See also *Wharton's Law of Homicide*, 131–144; *2 Bishop's Cr. L.*, *6th Ed. secs.* 664–686.

Physician not liable for mistake of judgment, but is for gross ignorance.

The court is of the opinion that the indictment in this case is sufficient. Whether appellees are criminally responsible for the death of Mrs. Saunders, must depend upon the evidence. A felonious want of "due care and circumspection" in her treatment, must be proved as alleged. For a mere mistake of judgment in the selection and application

of the remedies and appliances, named in the indictment, they would not be criminally liable. Were they grossly ignorant of the art which they assumed to practice? Did they manifest gross ignorance in the selection or application of the remedies? Were the remedies unusual, inapplicable, or rashly applied? Were appellees grossly negligent or inattentive? These are all questions of evidence.

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

NOTE.—The judgment of the court was made up in this case and the opinion prepared, and concurred in by Hon W. M. HARRISON, before he left the bench.

M. & L. R. R. R. Co. AS REORGANIZED, v. C. M. FREED.

1. STOPPAGE IN TRANSITU: *Who has the right to.*

F., a merchant at Dardanelle, ordered goods of W. B. & Co., merchants at St. Louis. They sent the order to L. A. & Co., merchants at New Orleans, with directions to ship the goods to F. at Dardanelle, and send them the bill and bill of lading. L. A. & Co. filled the order, shipped the goods to F., and sent the bill and bill of lading to W. B. & Co., and charged the goods to them, and they charged them to F. During the transit W. B. & Co. failed, and L. A. & Co. claiming the right of stoppage *in transitu*, demanded the goods of the M. & L. R. R. R. Co., who were transporting them to F., and the company delivered them up to them. F. then sued the company for the value of the goods. Held: that L. A & Co. were not the vendors of F.; there was no privity between him and them, and they had no right to stop the goods, and the defendant was liable to F. for their value.

2. COMMERCIAL LAW: *Consignment of goods vests title in consignee.* Upon the consignment of goods the title becomes vested in the consignee, absolutely and against all the world, subject only to the carrier's lien for freight, and the consignor's right of stoppage *in transitu* upon the consignee's insolvency.

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

STATEMENT.

Freed, a merchant at Dardanelle, ordered of Walker Bros. & Co., merchants at St. Louis and Memphis, a bill of dry goods. Walker, Bros. & Co. transmitted the order to Lehman, Abrahams & Co., merchants at New Orleans, with directions to ship the goods to Freed, at Dardanelle, and send the invoice and bill of lading to them. Lehman, Abrahams & Co., filled the order and shipped the goods to Freed, by way of Hopefield; charged them to Walker, Bros. & Co., and sent the invoice and bill of lading to them, and they charged the goods to Freed.

At Hopefield the goods were delivered to the defendant company, to be transported on their road to Argenta, and thence, to be forwarded to Freed, at Dardanelle. While the goods were in transit from New Orleans, Walker, Bros. & Co. failed, and Lehman, Abrahams & Co. claiming the right of stoppage *in transitu*, demanded the goods from the defendant company, and they were delivered to them.

Freed then sued the company for the value of the goods, for not delivering them as contracted in their bill of lading.

Upon the trial, the defendant objected to the introduction of the following testimony of Freed: "That early in October, 1879, he sent an order to Walker, Bros. & Co., of St. Louis, Mo., to send him some sheeting and yarn, which were the same mentioned in the complaint, and the

same were charged to him by Walker, Bros. & Co. That the following was a copy of a letter sent by Lehman, Abrahams & Co., of New Orleans, to Walker Bros. & Co., to-wit:

NEW ORLEANS, LA., October 28, 1879.

Messrs. Walker Bros. & Co., St. Louis:

SIRS:—We enclose bill of lading and invoice of goods shipped to C. M. Freed, as per your instructions, amounting to $507 44, for which please credit our account. We shipped the goods *via* Hopefield.

Yours truly,

LEHMAN, ABRAHAMS & CO.

The objection to this testimony was overruled, and after other testimony, showing the facts above stated, there was a verdict for the plaintiff, and from final judgment the defendant appealed.

Cohn & Cohn, for appellant.

First. The testimony of Freed was irrelevant and immeterial, and comes within the rule *res inter alios acta*, etc. Freed, so far as the rights of L. A. & Co. could be affected, occupied the position of a representative, receiver or agent of W. Bros. & Co., and was not bound as a purchaser to L. A. & Co. *Benj. on Sales*, 1*st Eng. Ed. p.* 352; *Hardman* v. *Booth*, 1 *H. & C.*, 803; 32 *L. J. Ex.*, 105. No sale is binding unless the buyer not only accepts, but receives the goods. *Benj. on Sales, passim.* Freed had not paid for the goods, and can in no way be prejudiced by the exercise of the right of stoppage. See generally authorities cited *supra*, and *Smith's L. C. (H. & W. Am. notes), p.* 892, *vol.* 1, *and p.* 1195, 7*th Am. Ed.*; *also p.* 1219 *Ibid.*

Second. The case in 12 *Pick*, 307, is not applicable, for there was a complete delivery in contemplation of all par-

ties. But it shows that the right of stoppage is a *quasi* lien, and such a lien L. A. & Co. had, as vendors. *Benj. on Sales*, 1*st Eng. Ed.*, *p.* 695; *Oppenheim* v. *Russell*, *B. & P.*, 42.

Freed, though named as such, was not the consignee of L. A. & Co., but W. Bros. & Co. were. He could sue on the bill lading. *Sec.* 589, *Story on Bailm.*, 8*th Ed.*; *G W. R. R.* v. *McComas*, 33 *Ills.*, 185; so could the consignor, *Hooper* v. *Chicago, etc.*, 27 *Wis.*, 81; *Blanchard* v. *Page*, 8 *Gray* (*Mass.*) 281; *So. Ex. Co.* v. *Craft*, 49, *Miss.*, 480; 44 *Ala.*, 101; 49 *N. Y.*, 188; 19 *N. H.*, 337; *Story on Bailm.*, 8*th Ed.*, *sec.* 589, and so could any person in interest. *Wells on Res. Adjudicata, secs.* 67, 64, 74 and 16, *and Code.* Hence, because a person is entitled to sue, and is consignee, is not the criterion whether the vendor may exercise the right. This shows that *it is not essential, in all cases, that the person named as consignee in the bill of lading* must be insolvent. The insolvency of the *vendee* is the criterion, and not of some sub-vendee, or consignee. *In Re Golding, Davis & Co.* v. *Knight & Son*, 42 *L. T. Rep. N. S.*, 270; *Houston on Stoppage, etc.*, *chap. I*; *Benj. on Sales, chap. V.*; *Smith L. C.*, *p.* 217, 7*th Ed.*

Freed was not a *bona fide* purchaser for a valuable consideration; he was not a purchaser at all; he paid no value; he received no bill of lading. W. Bros. & Co. were the purchasers, and on their insolvency the right attached.

9 *Heisk* (*Tenn.*) 388 and *Eaton* v. *Cook*, 23 *Vt.*, 60, are not applicable. In the former there had been complete delivery, etc., and in the latter there was no sale on credit.

Third. Vendée sells subject to vendor's right of stoppage. *Dixon* v. *Yates*, 5 *B. & A.*, 313; *Jenkins* v. *Usborne*, 8 *Scott, N. R.*, 505; 7 *M. & G.*, 678.

B. C. Brown, also for appellant.

1. Freed is in no way damaged—avers no special damages. He has not paid for the goods, nor is he liable to W. Bros. & Co. until he does receive them. There is no *privity* between him and L. A. & Co. They made no contract with him, had sold him nothing, and were under no obligation to deliver goods to him; consequently there was no privity between Freed and the defendant carrier. Privity arises from mutuality of obligation. The carrier was the agent of L. A. & Co., and they had the right to countermand and revoke their orders to their agent.

The order from Freed to W. Bros. & Co. is *res inter alios acta*. The right of stoppage exists so long as the transitus exists, and the transitus is not at an end until the goods have reached the place named by the buyer, to the seller, as the place of destination. *Benj. on Sales*, 1st *Ed.*, 643. The vendor has the right to re-take the goods before they are actually delivered to the vendee, or some one whom he means *to be his agent, to take possession of, and keep the goods for him. Ib.*, 635.

2. The true and only criterion of the right, is the insolvency of the purchaser. It is based: 1st. Sale on credit; 2d. Insolvency of the *purchaser;* and, 3d. That the goods have not reached the purchaser or his agent, or the place of destination; but are still in the possession of the carrier *qua* carrier. *Ib.*, 627; *Hutchison on Carriers*, §409; *Reynolds* v. *Boston, etc., R. R.*, 43 *N. H.*, 580. All these circumstances are found here. The fact that the purchaser named Freed to receive the goods cannot alter the principle on which stoppage is based, that "one man's goods shall not be appropriated to payment of another man's debts." Cites *Ex parte Golding, supra*, and *Mohr v. B. & A. R. R.*, 106 *Mass.*, 107.

J. M. Moore, for appellee.

The right can only be exercised between vendor and vendee, and during the transit from vendor to vendee. L. A. & Co. were the vendors, and W. Bros. & Co. their vendees, and the goods were delivered to the carrier for shipment to a different destination; it was not contemplated that they should ever reach the possession of W. Bros. & Co. The bill of lading was in name of appellee. Every circumstance concurred to defeat the right. See *Eaton* v. *Cook*, 32 *Vt.*, 58; *Rowley* v. *Bigelow*, 12 *Pick.*, 313; *Stubbs* v. *Lund*, 7 *Mass.*, 453; *Noble* v. *Adams*, 7 *Taunton*, 59. Delivery of goods to carrier is a constructive delivery to the consignee, and sufficient to pass title. *Crumbacker* v. *Tucker & Hamilton*, 9 *Ark.*, 370; *Magruder & Bro.* v. *Gage*, 33 *Md.*, 334.

When the relation of vendor and vendee exists, the delivery is subject to the right of stoppage in transitu in the vendor *qua* vendor. *Benjamin on Sales*, *sec.* 832; 1. *Smith*, *L. C.*, *5th Am. Ed.*, 874-5, 908.

Appellee was neither the vendee nor sub-vendee of L. A. & Co., and hence no right existed in them.

EAKIN, J. There was no error in admitting the testimony of plaintiff, Freed, to show that he had ordered the goods from Walker Bros. & Co. The right of stoppage in transitu does not arise from any contract between the parties. It is a commercial right, arising from the circumstances; and it is competent to show the facts. The fact intended to be shown, by this testimony, was, that the plaintiff, Freed, to whom the goods were shipped, was the real owner, by purchase from Walker Bros. & Co., and that the goods were not shipped to him, as the agent of Walker Bros. & Co., who ordered them from the New Orleans firm, and directed them to be

sent to Freed at Dardanelle; but that the goods, if they had come to his possession, would have been received by him, not as the goods of Walker Bros. & Co., but as his own. In other words, it tended to show that the relation of vendor and vendee did not exist between him and the consignors, but between him and the firm of Walker Bros. & Co.; and that there was never any consignment, or *transitus* of the goods to the original purchasers, either in their own names, or to them in his name, as agent. If he had really been the agent of Walker Bros. & Co., or under any obligations to receive the goods for them, the right of Lehman, Abrahams & Co., the consignors, to stop them *in transitu* could not be doubted; but, as he had never had any transactions with Lehman, Abrahams & Co., and had never represented himself to them as the agent of the purchasers; and as he had made himself responsible to Walker Bros. & Co., and would have received the goods absolutely as his own property, in his own right, if they had not been intercepted, then it becomes a grave question whether or not the right of stoppage *in transitu* ever existed at all; or, if it existed, whether it should not be considered as existing in Walker Bros. & Co., the real vendors to Freed, upon *his* insolvency, if it had occurred. It was proper to bring before the court all the facts showing the actual status or condition of things, that it might determine the rights of the parties, within the scope to which the doctrine of stoppage *in transitu* extends. To such cases the prohibition against showing *res inter alios acta* does not always apply.

The true state of the case, as developed by the record, is simply this: Lehman, Abrahams & Co., upon the request of Walker Bros. & Co., and taking them as paymasters, shipped goods to Freed, at a point distant from the business place of either. It was never contemplated, from anything

that appears, that the goods were intended to reach Walker Bros. & Co., or their agents, or to come into their possession. The fact is, they were not; and there is nothing from which the shippers might fairly have presumed an intention on the part of Walker Bros. & Co. to take control of them at their destination, or retain any property in them. Freed remains solvent. Walker Bros. & Co. became insolvent, and the goods were redelivered, by the carrier, to Lehman, Abrahams & Co., before they came to Freed's possession.

Is the carrier responsible to Freed for that? The goods became his property, on consignment, absolutely and against all the world, subject only to the carrier's lien for freights; which, under the circumstances, it would have been idle to tender; and any right of stoppage *in transitu* which might exist. Had Lehman, Abrahams & Co., that right? If not, the action of the court is correct. If they had, it must be reversed.

In the present condition of commerce, it is not uncommon, as in this case, for purchasers to direct their vendors to consign the articles to customers of the former, with whom the shippers have no privity whatever.

The distinction between vendor and consignor and vendee and consignee, sometimes lost sight of in the old cases, has thus become a matter of vast importance, in these triangular transactions; and, there being only one transit, it is a weighty matter to determine who, during that transit, has the right of stoppage, and upon whose insolvency; whether, in this case, it would have been in Walker Bros. & Co., or in Lehman, Abrahams & Co., on the insolvency of the consignee, Freed, if in either. It could not have been in both; for that would produce an unseemly conflict. If in Lehman, Abrahams & Co., the contingency has not arisen; for Freed is not insolvent. If in Walker Bros. & Co., upon what principle can it, on *their* insolvency, arise in

favor of the New Orleans consignors, against the solvent vendee of Walker Bros. & Co? If in neither, in case of Freed's insolvency, but only in Lehman, Abrahams & Co., in the contingency of the insolvency of Walker Bros. & Co., then we have the case presented of a solvent consignee, ready and willing to pay for his goods, subject to have them taken upon the default of a party for whom he is not liable, and whose actions he cannot control. If more attention had been paid in the discussions, to the distinction between consignee and vendee, and consignor and vendor, the decisions would have cast, on this point, more light than we now have.

A review of the authorities shows that the right has never been applied in cases where the consignor claiming it has not been the vendor, and the consignee (upon whose insolvency it arises) the purchaser and debtor. Lord Chancellor BARON EYRE remarked, in *Kinloch et al.* v. *Craig*, in 1790, (3 *Term Rep.*, *p.* 787), that the right never occurred, but as between vendor and vendee.

It will simplify the matter to bear in mind when the terms "consignor" and "consignee" are used, that by the former is meant a vendor who ships, and by the latter, a purchaser to whom they have been sent. It is the real interest on one side and liability on the other, which gives the right; not the technical designation of the parties in the bill of lading. (See notes to case of *Lickbarrow* v. *Mason*, *Smith's Leading Cases*, *Vol.* 1, *p.* 901).

It is equally clear, from all the cases, that the right has never been exercised, save upon the transit of the goods from a vendor to the purchaser from him.

Freed bought the goods from Walker Bros. & Co. They were his vendors and to them only was he liable. There can be no doubt that if the goods had taken their natural course, and been shipped by the original owners to Walker

Bros. & Co., their vendees, the right of stoppage would have attached against the latter, upon their insolvency; and the goods might have been reclaimed during that transit. But if they had reached Walker Bros. & Co., and been by them reshipped to Freed, at Dardanelle, it is equally clear that the original vendors would, on that transit, have had no right of stoppage, in any event; but it would have been in Walker Bros. & Co., upon the contingency of Freed's insolvency. Quite as clearly, Freed never contemplated, nor can be presumed to have assented to any other or different right of stoppage of the goods, than in case of *his own* insolvency, on the transit from his vendors to himself.

Neither transit was used. By agreement between Walker Bros. & Co. and the original vendors, another was adopted, which contemplated that the goods should come to the possession of the vendee of Walker Bros. & Co., without ever reaching Walker Bros. & Co., at all. This was before any shipment, and before Lehman, Abrahams & Co. had parted with possession. It is not like a sale by a purchaser of goods on their transit to himself; because, when the vendor contemplates a transit to his purchaser, and ships accordingly, he cannot be defeated of his right by the conduct of the purchaser during the transit, without his assent, either express, or implied, in case of the assignment of the bill of lading. Here he assents to a different destination before parting with his property; and if he thereby loses his right of stoppage, it is his voluntary act.

A case very nearly in point, as to the rights of parties in this case, is that of *Feise et al.* v. *Wray*, 3 *East.*, 93. Browne, a London trader, ordered of Fritzing, a Hamburg merchant, a quantity of beeswax. Not having it, Fritzing procured the wax from another merchant, a stranger to Browne, (having, with him, no privity of contract), and shipped it to Browne, upon the latter's account and risk,

drawing bills upon him for the purchase money. Upon the insolvency of Browne, Fritzing, by his agent, stopped the goods in *transitu*. The assignees in bankruptcy of Browne, brought trover.

In his opinion, Mr. J. GROSE remarked, after stating the prominent facts: "There was *no privity* between Browne and the merchant of whom the wax was purchased." "What is this, then, but the plain and common case of the consignor of goods, who has not received payment for them, stopping them *in transitu*, before they get to the hands of the consignee? It is said that no such right exists in the case of a factor against his principal. If this were a case of factor and principal, merely, I should find great difficulty in saying that it did. But here, Fritzing may in reality be considered as the vendor; for the name of the original owner was never made known to the bankrupt, but the goods were purchased and the bills drawn in Fritzing's own name; and therefore he stands in the relation of vendor as to Browne."

LAWRENCE, J., alluded to the argument that the right of stoppage applied solely to the case of vendor and vendee; from which it was contended that Browne must be considered as the principal for whom the goods were originally bought, and that Fritzing was only the factor, or agent; the Hamburg merchant, furnishing the beeswax, being, in fact, the vendor of the bankrupt; and that there was no right of stoppage in Fritzing. He says: "If that were so, it would nearly put an end to the application of that law in this country; for I believe it happens, for the most part, that orders come to merchants here from their correspondents abroad, to purchase and ship certain merchandise to them. The merchants here, upon the authority of those orders, obtain the goods from those whom they deal with; and they charge a commission to their correspondents

abroad, upon the price of the commodity thus obtained. It never was doubted, but that the merchant here, if he heard of the failure of his correspondent abroad, might stop the goods *in transitu*. But, *at any rate*, this *is* a case between vendor and vendee; for there was *no privity* between the original owner of the wax and the bankrupt; but the property may be considered as having been first purchased by Fritzing, and again sold to Browne, at the first price, with the addition of his commission upon it. He then became the vendor, as to Browne, and consequently had a right to stop the goods *in transitu*.' "

Le Blanc, J., puts the case in this wise: "The situation of Fritzing was that of being employed by Browne to purchase the goods abroad, and to send them to him here. For the purpose, then, of stopping the goods *in transitu*, they stood in the relative situation of vendor and vendee; though, perhaps, not so as for all purposes. Fritzing *pledged his own credit* in the purchase of the goods from the original owners; and Browne could not be called upon for the value by the original owners, unless the goods came to his hands and he had not paid or accounted for the value of them to Fritzing, with whom he dealt. Then, clearly, Fritzing had a right to stop them *in transitu*." And so all the Justices agreed.

I have cited the different expressions of the justices in that case, in order to show the true grounds of their conclusion, and that the differences in the facts between that case and this, would not have been considered material. There the original vendor was not advised of the name of the ultimate purchaser, for whom the goods were intended, but that is mentioned only as conclusive proof of want of privity of contract, and it was upon this *want of privity* between the original vendor and ultimate purchaser, that the right of stoppage *in transitu* was to be in Fritzing, the immediate

vendor of Browne. In the case in judgment, the want of privity between Lehman, Abrahams & Co. and Freed, is even more marked than if they had not known Freed's name.

The goods were sold on the order and sole credit of Walker Bros. & Co.; the bills made out in their name and at their request, sent to them with the bills of lading.

The vendors need not have inquired nor known anything of Freed. He was nothing to them, nor they to him. The goods were put in a carrier's hands directed to him, simply as a mode of disposition of them, directed by the purchasers.

In the American notes to Smith's leading cases (*ubi supra*) it is said. "It is not necessary, however, in order to support the right of stoppage *in transitu*, that the consignor should be the original owner of the goods, or have purchased them on his own account. Although acting as an agent for a commission, and with the view of paying for them ultimately, with funds derived from the consignee, still, *if he have obtained them on his own risk and credit*, he will be entitled to stop them *in transitu*, on the insolvency of the latter," citing American cases, and also *Jenkyns* v. *Usborne*, 7 *Man. & G.*, 678.

In view of these principles, I think it plain that if Freed had, himself, become bankrupt upon the transit of the goods from New Orleans to Dardanelle, there would have been no right of stoppage in Lehman, Abrahams & Co., and as there would be in Walker Bros. & Co., notwithstanding the goods had been shipped from New Orleans, they being the true owners and vendors as regards Freed, we may safely take this standpoint, and consider, from it, whether or not the former firm, by agreeing to consign upon a transit, burdened with a right of stoppage in behalf of Walker Bros. & Co. upon *one* contingency, can claim for

themselves, a right of stoppage in another; to-wit: the insolvency of Walker Bros. & Co. I have never heard of any case which held that the same goods, or the same transit might be subjected to two conflicting rights of stoppage upon different contingencies.

I think it would result that no right of stoppage as to these goods, remained in Lehman, Abrahams & Co. in any event.

Although the contingency upon which they claim that their right arises, is the insolvency of Walker Bros. & Co., it is not immediately against them, or to prevent the goods reaching them, that its exercise is attempted. It is to prevent the goods from reaching Freed, who does not stand in the position of a purchaser, during transit, but of one who has been accepted by Lehman, Abrahams & Co. before shipment, as the person entitled to receive them, as owner, and not as their vendee. There is nothing in the record to bring this case within the class where the purchaser designates a place of delivery different from his own place of business, for if to be delivered for him, or to his use, at any named place, the right of stoppage remains until he receives them.

Even upon the supposition that Freed has not paid Walker Bros. & Co. for the goods, and might defend a suit against him by pleading this stoppage—a point not necessary to decide—this would then resolve itself into an effort on the part of Lehman, Abrahams & Co. to secure a preference over other creditors of Walker Bros. & Co. by diverting to themselves, the value in goods, of so much of the assets of the latter firm as consists of Freed's debt. If they had such right to save themselves upon a plank of the shipwreck, there was certainly a counter right on the part of Freed to receive his goods and pay for them to whoever might be entitled. He is solvent, and may, in the absence

of proof to the contrary, be considered willing to pay for the goods in full. I think it would be difficult, amongst all the cases, to find one where the right of stoppage *in transitu* has been used to defeat the owner and consignee of goods of their possession, without any default of his own. It cannot be presumed to be a matter of indifference to Freed, whether he shall take his goods and pay for them, or lose them and be excused, and the carrier had no right to decide this for him, and restore the goods to Lehman, Abrahams & Co.

A leading case in America upon this point, is that of *Stubbs* v. *Lund*, 7 *Mass.*, 453. Chief Justice PARSONS upon the facts in that case, which, however, are not analagous to these, remarked upon the general principle, that the true distinction governing the right of stoppage *in transitu*, is this: "Whether any actual possession of the consignee or his assigns, after the termination of the voyage, be or be not provided for in the bill of lading. When such actual possession after the termination of the voyage is so provided for, then the right of stoppage *in transitu* remains after the shipment. Thus, if goods are consigned on credit, and delivered on board a ship chartered by the consignee, to be imported by him, the right of stoppage *in transitu*, remains after the shipment. But if the goods are not to be imported by the consignee, but to be transported from the place of shipment to a foreign market, the right of stopping *in transitu* ceases on the shipment, the transit being then completed, because no other actual possession of the goods by the consignee is provided for in the bills of lading which expresses the terms of the shipment."

These remarks are applicable to the case in judgment this far: That, here, the goods were not purchased by Walker Bros. & Co., to be imported by them to St. Louis or Memphis, where their business houses were, and

no possession by them was ever contemplated; but they were put upon a steamer, by their directions, and with the assent of the vendors, to be transferred from the place of shipment to Dardanelle, in Arkansas; which, as to commercial matters, "may be considered a foreign market." In further illustration, he says: "If a ship sail from this country to Great Britain, with the intention of taking on board goods for divers persons, or freight, to be transported to a foreign market, as the mercantile adventures of different shippers; if goods are so shipped by the several consignors, there is no transit to the consignees after shipment, and no right of stopping remains with the consignors. But it is otherwise when several persons import goods in a general ship, on their own credit and risk; for a future actual possession by them is provided for in the bills of lading."

The subsequent case of *Eaton et als.* v. *Cook*, 32 *Vt.*, 58, seems essentially in point. The plaintiffs, Eaton and others, hardware merchants of Boston, sold and shipped goods to Cooke, in Vermont, upon the order and credit of Barnes & Brothers, a firm with which they had dealings. They gave Cooke a receipt for the bill, as paid by the order of Barnes & Bros., and charged them up to the latter firm. During the transit Barnes & Bros. failed, and the firm of Eaton & Co. demanded the goods of a depot agent, before they reached their destination. He delivered them, however, to Cooke, upon being indemnified, and Eaton et als. brought trover. The judgment below was for Cooke, which, on appeal, was affirmed.

The court held, 1st, That if the matter were to be viewed as a sale directly from Eaton & Co. to Cooke, there was no credit, and, consequently, no right of stoppage. 2d. Viewed as a sale to Barnes & Bros., and a re-sale by them to Cooke, the right of stoppage could not be maintained. For if the vendors knew that the purchase was for the purpose of a

re-sale, or consented to it, they were bound by the new destination as a final and irrevocable delivery; and, 3d. The opinion says: "If we attempt to make it a sale to Barnes & Bros., and to find a journey, or transit, there was, in fact, nothing of the kind contemplated, so far as the vendees were concerned;" and add, "upon the delivery to the carrier, it had effectually come to the possession of Barnes & Bros., *as much as ever it was contemplated it would come;*" and that "this is expressly recognized in numerous cases."

These conclusions commend themselves to us as obvious and sound, and we think they apply with equal force to this case.

We have carefully considered a report of the case of *Ex Parte Golding, Davis & Co.*, in the Court of Appeals in Bankruptcy in England, published in "The Law Times," of May 8th, 1880, which has been strongly pressed as authority *per contra*, by the counsel for appellant. The report is not very intelligible, as published in the Times, but it seems to have the bearing claimed by counsel. However that may be, we are of opinion that the weight of authority is with the Vermont case above cited, and we are disposed to follow that. We think the firm of Lehman, Abrahams & Co. had not the right to stop the goods *in transitu*, and that the verdict was properly for the plaintiff.

Affirm.

McDearmon, Ex'r. v. Maxfield et. al.

1. Administration: *Power of executor over personally before his qualification.*

An executor's powers before qualification, are limited to the burial of the deceased and the preservation of his estate; but if before then he intermeddles with the estate, his subsequent qualification legalizes his tortious acts, making him liable to those interested in the estate, and protecting the party with whom he deals. The title to the personal property of a deceased, is in abeyance until his executor qualifies or an administrator is appointed, when it vests in him by relation from the time of his death.

2. Witness: *Party in suit against executor.*

A party in a suit against a surviving executor, may testify of his transactions with a deceased executor in relation to the matters in controversy.

APPEAL from *Independence* Circuit Court.
Hon. R. H. Powell, Circuit Judge.

Henderson & Caruth, and *Franklin Doswell*, for appellant.

The powers of an executor before probate of will, are limited to the burial of deceased, payment of funeral expenses and the *preservation of the estate*. *Sec.* 46, *Gantt's Dig.*; *Diamond* v. *Shell*, 15 *Ark.*, 26; *Newton, Ex'r* v. *Cocke*, 5 *Eng.*, 176; *Ludlow* v. *Flournoy, et al.*, 34 *Ark.*, 401. An executor is bound, even after grant of letters, to pursue either the directions of the will or the orders of the Probate Court. *Sec.* 73, *Gantt's Dig.*

Defendants took upon themselves the right, and assumed the control of the property, which constituted a conversion. *Gentry* v. *Madden*, 3 *Ark.*, 127; *Kent* v. *Welsh*, 7 *J. R.*, 257; *Murray* v. *Burling*, 10 *J. R.*, 172; *Fish* v. *Cobb*, 6 *Vt.* 622; *White* v. *Webb*, 15 *Ib.*, 302.

One who "spontaneously and officiously" proposes to keep the goods of another, will be held to a higher degree of diligence. *Kent Com., vol.* 2, *p.* 739.

The declarations of Wilson McDearmon improperly admitted. *Sec.* 2, *Schedule Const.*, 1874.

An owner of property tortiously obtained and sold, may waive the tort and sue in assumpsit. *Bowman* v. *Browning*, 17 *Ark.*, 599; *Peay, adm'r.* v. *Ringo*, 22 *Ib.*, 68.

J. W. Butler and *U. M. Rose*, for appellees.

If an executor, before proving the will, does any act affecting the estate, his letters, when granted, will relate back and cover his prior acts, making them valid. *Hatch* v. *Proctor*, 102 *Mass.*, 354; *Alford* v. *Marsh*, 12 *Allen*, 604–5; *Staggs* v. *Green*, 47 *Mo.*, 500; *Sheilaber* v. *Wyman*, 15 *Mass.*, 325; *Priest* v. *Watkins*, 2 *Hill* (*N. Y.*) 226; *Rattoon* v. *Overacker*, 8 *John*, 126; *Carter* v. *Carter*, 10 *B. Mon.* 330; 2 *Redfield on Wills*, *p. p.* 14, 15, 16, (*ch.* 1, *sec.* 2.)

The executors ratified the action of appellees, and this validates and confirms what they had done. *Omnis rati habitio retrotrahitur et mandate priori equiparatur. Foster* v. *Bates*, 12 *M. & W.*, 226; *Brooms Leg. Max.* 677.

Gratuitous bailees liable only for gross negligence. 11 *Ark.*, 189; *Story on Bailments*, *sec.* 28. Forwarding merchants are the agents of consignor, and in the absence of negligence, not liable for losses. *Ib. secs.* 444–502; 12 *Johnson*, 232; 6 *Allen*, 254; *Edwendson on Bailments*, *sec.* 335.

By bringing assumpsit, the tort, if any, was waived, and the action ratified. 1 *Doug.* (*Mich.*) 330; 17 *Ark.*, 602; 31 *Ib.*, 158.

The declarations of a deceased co-executor admissible

under *sec.* 2, *Schedule Const.*, 1874. They were not statements of the testator, Wiley McDearmon, but only of a deceased co-executor, and not within the exception.

SMITH, J. Theodore Maxfield & Bro., were merchants and partners, trading at Batesville, in this State. Wiley McDearmon, who lived in Stone county, had been a customer of theirs for many years. He had fifty-four bales of cotton lying on the bank of White river, on the sixth day of February, 1878, when Edward Maxfield, a member of said firm, who was in the neighborhood upon a collecting tour, came to his house to spend the night. It is probable that it was arranged between them that the firm should ship the cotton to New Orleans. But this we cannot certainly know, since their lips have been sealed, the one by death, and the other by the policy of our law. For, on the self-same night, after they had inspected the cotton and had conversed about its disposition, McDearmon was taken desperately ill, being speechless from the time of his attack until his death, which occurred the next day. After this event Maxfield seems to have been perplexed what to do with the cotton. It was exposed to the weather; the boat, descending the river was due, and it was necessary to come to some determination. The widow of the deceased urged its immediate shipment. His son, John, the present appellant, appears to have advised the same course, and to have pointed out the cotton to Maxfield. There is a conflict of evidence upon the point of John's activity in this matter. But this was a question of fact, which was resolved by the jury in favor of the defendants.

The cotton was marked T. M. X—W. M., meaning Theodore Maxfield & Bros., Wiley McDearmon, and was put aboard of the steamer in the afternoon and night of February 7th, the same day on which its owner had died.

Maxfield, in returning to Batesville, met Wilson McDearmon, the other son of the deceased, who joined in bringing this action, but has died since its commencement. Maxfield informed him of what had been done, and offered to unload the cotton at Batesville and to store it in a warehouse. But Wilson expressed his approval of the course pursued, and insisted on the cotton going forward. At Batesville a bill of lading was taken in the name of Theodore Maxfield & Bros., the consignment being to McGeehee, Snowden & Violet, the factors of the Maxfield's in New Orleans, and who were then in good repute and credit. The evidence shows that it was the custom of the local merchants to ship the cotton of their customers for the account of the shipper and not the owner.

This lot of cotton reached New Orleans on or about February 14, and would have been put upon the market upon arrival, but Wilson McDearmon, who held the receipt of the Maxfield's for the cotton, requested that it might be held up for a better price. Later, he requested that it might be sold; and both requests were communicated to the factors, by the Maxfield's, and were by the factors obeyed. So the cotton was not sold until March 25th, and McGehee, Snowden & Violet suspended payment on the twenty-seventh of the same month, and have been since adjudged bankrupts. The proceeds of the sale were placed to the credit of the Maxfield's on the books of the factors, but they were not drawn out before the failure, nor has anything been paid to them since by the factors, either on this or any other account. A proposition to pay twenty-five cents on the dollar, was submitted to Wilson McDearmon, through the Maxfield's, and was by him declined on account of the smallness of the per centage, and because the factors desired too long a time within which to pay it.

Wiley McDearmon, at the time of his death, had his will

in the safe of the Maxfield's, and it is possible that Theodore Maxfield was acquainted with its contents, as he was one of the subscribing witnesses. The will was afterwards duly proved. The testator left his entire estate to his two sons above named, and to a daughter. He appointed the two sons his executors, and letters testamentary were granted to them March 20th, 1878. In December following they brought this action against the Maxfield's, for money had and received to their use. The answer denied the receipt of the money, and averred that the defendants were gratuitous bailees of the cotton. The jury found for the defendants, and the Circuit Court, on a motion for a new trial, refused to disturb the verdict.

It is proper to say, although it may not affect the legal aspect of the case, that prior to the commencement of this action, the plaintiff's had given no intimation, by word or act, of their intention to hold the defendant's liable for the loss of the proceeds of the cotton. The executors had been indebted to the Maxfield's, and the Maxfield's owed the estate a considerable sum of borrowed money. A settlement was had in the summer of 1878, and a balance was struck against the Maxfield's, and was paid by them. No demand was made on account of the cotton.

Since the jury must have found that the cotton was removed under authority of the plaintiffs, the most important question which the record presents relates to the power of the executors to deal with the property of the testators before proof of the will and the issue of letters.

At common law, the personalty of a testator, vested in his executor, and he might, by virtue of the will and before probate, take possession and dispose of it. In fact he could do almost any act pertaining to his office, except to bring or defend a suit.

ADMINISTRATION: Power of executor over personalty before his qualification.

But our Statute, enacted in the interest of creditors and legatees, have modified the common law. The executor's powers, before qualification, are limited to the decent burial of the deceased and the preservation of his estate. *Gantt's Dig. sec.* 46; *Diamond* v. *Shell*, 15 *Ark.*, 26. But if he does intermeddle and afterwards qualifies, his letters relate back and legalize his previous tortious acts; making him accountable to the persons interested in the estate. And this liability to account involves a validity in his acts, which is a protection to those who have dealt with him. 3 *Redf. Wills, ch.* 1, *sec.* 2, *p. p.* 13–16; *Stagg* v. *Green*, 47 *Mo.*, 500; *Alvord* v. *Marsh*, 12 *Allen*, 603; *Hatch* v. *Proctor*. 102 *Mass.*, 351; *Rattoon* v. *Overacker*, 8 *Johns*, 125; *Priest* v. *Watkins*, 2 *Hill*, 225.

The doctrine, as modified by Statute, may be formulated thus: The title to the personal property of a decedent, is in abeyance until his executor qualifies, or an administrator is appointed, when it vests in him by relation from the time of the death.

Plaintiffs and defendants were all alike trespassers in removing the cotton before letters were granted, but the subsequent issue of letters to the persons named in the will as executors, related back and covered their former acts.

Some of the facts stated above, were proved by the Maxfields in testifying as to the declarations of Wilson McDearmon, the deceased co-executor. And it was contended that the admission of such testimony contravened section 2 of the schedule to our present Constitution, which provides, that in actions by or against executors, etc., neither party shall be allowed to testify against the other as to any transactions with, or statements of the testator, etc. The evidence was competent. See *Wassell* v. *Armstrong*, 35 *Ark.*, 247.

Affirmed.

STATE OF ARKANSAS v. PORTER ET AL.

1. CRIMINAL LAW: *Keeping a bawdy house; indictment for.*

The keeping of a common bawdy house is a misdemeanor, indictable and punishable by law in this State, and it is not necessary to allege in the indictment, or to prove, that it was kept for lucre and gain.

2. CRIMINAL PLEADING: *Immaterial allegations.*

It is a rule of criminal pleading, that material allegations must be proved; and if an allegation need not be proved it is not material.

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

Moore, Attorney-General, for appellant.

We have no Statute for the offense charged. At common law it was an indictable offense. *Chitty Cr. Law, vol.* 2, *p.* 39–40, *note*; *Whar. Am. Cr. Law, p.* 804; *Jennings* v. *Comw'lth*, 17 *Pick*, 26. The indictment is sufficient. *Whart. Prec. of Indict. etc., vol.* 2, *p.* 719 *et seq*; *Chitty Cr. Law, vol.* 2 *p.* 39.

STATEMENT.

ENGLISH, C. J. Appellees were indicted in the Circuit Court of Garland county for keeping a common bawdy house. They filed a general demurrer to the indictment, which the court sustained and the State appealed. The indictment follows:

"The grand jury of Garland county, in the name and by authority of the State of Arkansas, accuse George Porter and Mrs. George Porter, of the crime of keeping a common bawdy house, committed as follows, to-wit: The said George Porter, on the first day of June, A. D. 1881, and on divers other days and times between that day and the day this indictment is filed in said court, in the city of Hot

Springs, in the county Garland, etc., did unlawfully keep and maintain a certain common bawdy house, and in said house, certain persons, as well men as women, of evil name and fame, and of dishonest conversation, then and there, and on the said other days and times, then unlawfully and wilfully did cause and procure to frequent and come together, and the said men and women in the said house then, and on the said other days and times, there to be and remain drinking, whoring and misbehaving themselves, unlawfully and wilfully did permit, to the great annoyance and damage, and common nuisance of all persons there inhabiting, being, residing and passing, and against the peace and dignity of the State of Arkansas."

OPINION.

His honor, the Circuit Judge, seems to have been in doubt about the sufficiency of the indictment, for he first overruled the demurrer to it, and ordered a jury to be called to try the accused, but afterwards discharged the jury, set aside the order overruling the demurrer, and caused judgment sustaining it to be entered. On what ground he held the indictment bad, we do not know, the demurrer being general, and appellees unrepresented by counsel here.

We have no special Statute making it a criminal offense to keep a common bawdy house, and providing for its punishment.

1. Keeping a bawdy house.

A bawdy house is defined to be "a house of ill-fame, kept for the resort and convenience of lewd people of both sexes." A bawdy house was of criminal cognizance at common law, upon the ground of public nuisance, endangering the peace and morals of the people. *State* v. *Evans*, 5 *Iredell*, *N. C.*, 606.

It is clearly agreed, that keeping a bawdy house is a common nuisance, as it endangers the public peace by draw-

ing together dissolute and debauched persons, and also has an apparent tendency to corrupt the manners of both sexes by such an open profession of lewdness. And it has been adjudged that this is an offense of which a *feme covert* may be guilty as well as if she were *sole*, and that she, together with her husband, may be convicted of it. 3 *Arch. Cr. Prac. and Plead. Waterman's notes*, 609–87, and authorities cited.

The common law, etc., was adopted by Statute in this State, and crimes and misdemeanors, the punishment of which has not been provided for by Statute, are punishable under the common law, etc., and the punishment is limited to fine and imprisonment. *Gantt's Dig. secs.* 772–3, *etc.*

The keeping of a common bawdy house is a misdemeanor, therefore, indictable and punishable by law in this State.

Indictment for.

The indictment in this case follows the common law form used in England, except that it does not allege that the house was kept "*for filthy lucre and gain*," words used in the English precedent. 2 *Chitty Criminal Law*, 38. But we do not find in the notes that these were regarded as material.

Mr. Wharton says it is not necessary to allege that the house was kept for *lucre and gain. Whart. Am. Cr. Law, vol.* 3, (*6th Ed.*) *sec.* 2386.

Mr. Bishop says: "It was at one time deemed not certain, but now it is established, that, to constitute a bawdy house, there is no necessity for it to be kept for *lucre*. The offense consists in the public nuisance, and the form of corrupt motive is immaterial." 1 *Bishop Cr. Law*, (*6th Ed.*) *sec.* 1068.

And in his work on *Criminal Procedure, vol.* 2 *sec.* 108, he says the allegation that the house was kept for *lucre* is unnecessary.

In *The State* v. *Bailey* 1 *Foster* (*N. H.*) 343, the indict-

ment was for keeping a disorderly house, as a common law offense, and in the second count the words "*for his own gain and lucre*," were omitted. The court held that the keeping of a disorderly house was indictable at common law as a nuisance, and that this part of the common law was in force in New Hampshire. Justice BELL, moreover said: "We regard the omission of the allegation, that the respondent kept the house *for gain or lucre* as not material. The substance of the offense is the keeping such a house as is a common nuisance to the community, and whether this is done for the motive of gain, or for some other object, is unimportant. In this respect we can see no difference between this case and the case of an indictment for keeping a brothel, a gaming house, or any other disorderly house. They are all indictable on the same principle, to-wit: that they are nuisances. In *Jac. Law. Dict. titled Bawdy House*, is a precedent of an indictment for keeping such a house in which this averrment is omitted."

In Massachusetts keeping a house of ill-fame is punishable by Statute, and in *Commonwealth* v. *Ashley*, 2 *Gray*, 356, it was held that it was not necessary to allege that it was kept for gain, and in *Commonwealth* v. *Wood*, 97 *Mass.*, 225, it was decided that the trial court properly refused to instruct the jury that it was necessary to prove the defendant kept the house for lucre and gain.

The indictment in *State* v. *Homer*, 40 *Maine*, 438, omitted the words for lucre and gain, and it was held sufficient.

In *State* v. *Nixon*, 18 *Vermont*, 71, the indictment charged that the bawdy house was kept for lucre and gain, but the trial court charged the jury that this allegation need not necessarily be proved. In the Supreme Court, WILLIAMS, C. J., said: "The exceptions which were taken to the charge of the court, we think, were not well founded. The Statute does not make the keeping a house of ill-fame

an offense to depend on the motive of the person keeping it. It is immaterial whether it is kept for pecuniary profit and gain, or for other motives, equally bad and more debasing. It is most common that pecuniary profit and gain, in some way, is the governing motive. This motive may be inferred, as the evil intent is in other cases; but the prosecutor is not and cannot be bound to prove the actuating motive of the offender. The precedents of indictments for this offense, usually state, as in this case, that it was for pecuniary profit or gain. This, however, need not be proved. The charge of the court was correct in this particular."

2. PLEADING: Material allegations.

It is a rule of criminal pleading, that material allegations must be proved, and if an allegation need not be proved, it is not material.

Reversed and remanded for further proceedings.

ROBINSON & WARREN v. STATE OF ARKANSAS.

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88 268

1. LIQUOR: *Criminal liability of part owner, for illegal sale.*

A partner in a saloon or dramshop is criminally liable for an illegal sale of liquor by his co-partner, to a minor, though he was absent at the time of the sale, and had no knowledge of it. EAKIN, J., dissenting.

2. SAME: *Retailing, is not a natural right.*

No one has a natural right to retail spirituous liquors. The whole subject is within the police power of the Legislature, and persons engaging in the business, must submit to such regulations, terms and burthens as the Legislature may have prescribed for the public good.

ERROR to *Pope* Circuit Court.
Hon. W. D. JACOWAY, Circuit Judge.

Moore, Attorney-General, for appellees.

Sec. 19, *Act March 8th*, 1879 (*p.* 38), is the law of this case. Warren was certainly "*interested in the sale*" if he accepted any part of the proceeds; and if he did not, it was competent for him to show it, by proof, as a defense, which he did not do.

STATEMENT.

English, C. J. The indictment charges, "That Henry Robinson and Jesse Warren, on the tenth day of January, 1881, in the county of Pope, unlawfully were interested in the sale, to one R. B. Lazenby, of one pint of ardent liquors, without the written consent or order of the parent or guardian of the said R. B. Lazenby, who was then a minor, under the age of twenty-one years," etc.

On the trial, the State introduced R. B. Lazenby, as a witness, who testified, in substance, that about the tenth day of November, 1881, at the saloon, or business house of Robinson & Warren, in Atkins, Pope county, at the request of witness, who was then a minor, under the age of twenty-one years, and without the written order or consent of his parent or guardian, defendant, Henry Robinson, sold and delivered to witness one pint of ardent liquors, for which he paid him fifty cents.

That defendant, Warner, was a joint owner with defendant, Robinson, in the liquors sold, they being partners in business, and the sale aforesaid was made at their business house, or saloon; but that defendant, Warren, was absent at the time the sale was made; and if he knew of it, or had any knowledge or information of such sale, witness did not know it. This was all the evidence introduced on the trial.

Defendants moved to exclude the testimony as to defendant, Warren, and the court overruled the motion.

The court charged the jury: "That if they believed, from the evidence, beyond a reasonable doubt, that at the saloon of defendants, in the town of Atkins, county of Pope, etc., within twelve months before the finding of the indictment, the defendant, Robinson, sold to the witness, Lazenby, one pint of ardent liquors, without the written consent or order of his parent or guardian, and that said Lazenby was under twenty-one years of age at the time; that although the defendant, Warren, may not have been present at the time, or have known or had any knowledge of such sale, if the jury believe that he was a partner in business with the defendant, Robinson, and a joint owner with him to and of the liquor sold to said witness, they will find each of the defendants guilty, and assess their punishment at a fine of not less than $50 each, and not more than $100."

To this charge defendants excepted. The jury found defendants guilty, and assessed their punishment at a fine of $52.50 each. A new trial was refused them, and they took a bill of exceptions. Final judgment was rendered in accordance with the verdict, and both defendants brought error.

OPINION.

1. LIQUOR: Criminal liability of partner in illegal sale.

Plaintiffs in error, Robinson & Warren, were partners in a saloon. Robinson made a criminal sale of liquor to a minor, at the saloon, in the absence and without the knowledge of his partner, Warren. Was Warren also criminally liable for the sale?

Section 1608, *Gantt's Digest*, made it a criminal offense for any person to sell to or buy for a minor any kind of intoxicating spirits, without the consent or order, in writing, of the parent or guardian of such minor.

In *Cloud* v. *State*, 36 *Ark.*, 152, it was held that in prosecutions under that Statute, the general rule of law, as

to criminal agency applied: That if liquor was sold to a minor by a clerk or partner of appellant, in his absence, and without his direction, authority, consent or approbation, though a part owner of the liquor, he would not be liable, upon the general principle that a man is not responsible for the criminal acts of his partner or agent. That they must answer for their own criminal conduct.

Section 19 of the Act of March 8th, 1879 (*Acts* 1879, *p.* 38), under which plaintiffs in error were indicted, and both convicted, provides that:

"Any person, who shall sell, either for himself or another, or be interested in the sale of any ardent, vinous, malt, or fermented liquors, or any compound or preparation thereof, called tonics, bitters, or medicated whisky, to any minor, without the written consent or order of the parent or guardian, shall be deemed guilty of a misdemeanor; and on conviction thereof, shall be fined in any sum not less than fifty, nor more than one hundred dollars."

Section 5, of the same Act, makes persons selling ardent spirits, etc., for themselves, or others, or interested in such sales, without license, criminally liable.

Plaintiff, Warren, was interested in the sale made to the minor, by his partner, and his case is within the letter of section 19 of the Act.

A Statute of Mississippi prohibits the sale of spirituous liquors to persons intoxicated, and makes the seller, and also any person interested in the liquors sold, liable to indictment. Whitton & Ford were indicted for selling liquor to one Greer, when intoxicated. The proof was, that Whitton & Ford kept a licensed grocery, and that Whitton sold liquor to Greer, when intoxicated, in the absence, and without the knowledge of Ford. The court charged the jury, that it was immaterial whether both the defendants sold the liquor or not, provided both had an

interest in the liquor sold. Both the defendants were convicted, and brought error; and the High Court of Errors and Appeals affirmed the judgment. *Whitton & Ford* v. *State*, 57 *Miss.*, 379.

Justice HANDY, who delivered the opinion of the court, after stating the facts of the case, said:

"The first error assigned, is to the following instruction, given at the instance of the State, etc., that it is immaterial whether both defendants sold the liquor or not, provided both had an interest in the liquor sold.

"It is insisted that this instruction was erroneous, because a partner is not liable, criminally, for the criminal acts of his co-partner, or his agent, employed to do his legal business.

"This is true, as a general rule of law, and if the instruction was supported alone by general principles the objection to it would prevail. But the Statute, in relation to the subject, establishes a new rule of evidence, affecting the responsibility of parties so situated. It prohibits, among other things, the sale of any vinous or spirituous liquor, by any person having license to retail the same, to any person then being intoxicated; and provides, that the person so offending (and also any person who may own, or have any interest in any vinous or spirituous liquors, sold contrary to this act), shall be liable to indictment," etc. *Rev. Code*, 199, *Art* 9.

"It is admitted that Ford was a partner in the grocery, and interested in the liquor charged to have been sold. The rule, then, declared by Statute, renders him responsible for the illegal acts of his partner, done in the course of the partnership business, whether he participated in the act or not; and the instruction is sanctioned by the Statute. But it may be said, that to give the Statute such a construction would be contrary to the principles of natural justice, and

oppressive. This view might be taken with better reason; and, in order to ascertain the true construction of the Statute, if there was any room for doubt upon it. But the terms of the Statute are plain and explicit, and there is no room for construction upon the point raised by the objection under consideration. Its object is as plain as its terms are clear. It was intended to reach a grievous evil in the community, by which persons of more or less responsibility, engaged worthless and profligate persons in the business of retailing spirituous liquors, for the profit of their employers, in violation of the law of the land, resorting to all sorts of pretences, artifices, and frauds, to conceal the violations of law, or the guilty participation of the principals in it. The evil required a stringent process to reach it, and the Legislation designed by the Statute, in some degree, to meet and prevent it. Persons, who, by this means, set up and enable others to engage in a business, which, in its very nature is almost inseparable from violations of law, have no right to complain that the tribunals of justice are clothed with adequate powers to drag them from their concealment, and to visit upon them some slight degree of punishment for the misery and crime which they have been instrumental in inflicting upon the community within the range of their influence."

Smith v. *Village of Adrian*, 1 *Michigan*, 495, seems to be in point. The village of Adrian prosecuted Smith by a penal action for selling spirituous liquors without a license. It was proved, on the trial, that Smith & Manning were engaged, as partners, in keeping a recess, in the Franklin House, in the village of Adrian; and the trial court permitted the acts of Manning to be given in evidence against Smith. The Supreme Court sustained this ruling, holding that Smith, being a partner of Manning, and participating in the profits of the unlicensed sales, was responsible for his

acts, under the Statute regulating the business of selling liquors.

By the Act of March 8th, 1879, the Legislature has, in effect, declared that persons interested in the sale of ardent spirits, etc., shall be criminally responsible for illegal or forbidden sales, whether made by themselves or their partners, or employees, in the business. This is a departure from common law principles, and a new feature in the legislation of this State. The whole act is but a police regulation of the sale of ardent spirits, etc., and the feature in question violates no clause or provision of the Constitution. The law says to persons wishing to engage in selling spirituous liquors, or to be interested in sales thereof, you must be careful in the selection of your partners, or servants, and watchful of their conduct in your business; for if they make forbidden sales, you are responsible. You must see that sales, in which you are interested, are not made without license, nor made to minors, without proper permission from their parents or guardians. If you are not willing to engage, or be interested in the business, on these terms, there is no compulsion upon you to do so.

2. Retailing, not a natural right.

On the subject of retailing spirituous liquors, there can be no assertion of a natural right, or appeal to natural justice. The whole subject is within the police power of the State, (34 *Ark.*, 397), and persons engaging in the business must submit to such regulations, terms and burthens as the Legislature has deemed it expedient to prescribe for the public good.

Robinson & Warren were partners, in a saloon. Robinson made an illegal sale of liquor, to a minor, at the saloon, and in the partnership business. Warren, though absent at the time of the sale, and without proof that he had knowledge of it, is subject to indictment, as well as Robinson, under section 19, of the Act of March 8th, 1879.

Such is the conclusion of the court in this case.

If it be thought that the law, in conjectural cases, may work a hardship, persons engaged or interested in the sale of liquors, must apply to the Legislature to repeal or amend it; the courts can do neither.

If it be said that Warren may have forbidden his partner to make illegal sales to minors, may have repudiated this very sale, and refused to share in its profits, it is sufficient to reply that he offered no such proof.

We are deciding the case as presented in the transcript, and not an imaginary case.

Affirm.

EAKIN, J.—Dissenting. I cannot concur in the opinion of the court, even supported, as I concede it to be, by the Supreme Court of Mississippi. The tone of the latter court, as exhibited by the extracts imported into the opinion of this court, does not seem judicial; and I cannot resist the conviction that the case was ill-considered, and the result dangerous. There is reason to apprehend, moreover, that our own courts are going too far in the support of a vague and mysterious *police power*, as it is called, under which Constitutional limitations become indistinct. This power may come, by gradual steps, to recognize no inalienable right which it need respect, when it stands in its way.

Our Constitution does not provide that its sacred and time-honored guarantees shall be subject to any exception in favor of a shadowy police power, under which, as has been forcibly remarked by a prominent jurist of our State, "Our liberties may be driveled away."

Our Constitution recognizes inherent rights which are inalienable; and its enumeration of them is not exhaustive. "*Amongst them*" are the rights which all men have "of

enjoying and defending life and liberty; of acquiring, possessing, and protecting property and reputation; and of pursuing his own happiness"—of course, in lawful ways.

It is lawful to own whisky and to sell it, under license. The Legislature has so declared. If it be dangerous, or immoral, why not further regulate or prohibit it? The police power is confessedly competent for that. Whilst the business is sanctioned thus, even encouraged, as a source of revenue, by what warrant can the judicial mind affect it with a tinge of turpitude, and, for that reason, withdraw from the citizens engaged in it, the ægis of the Constitution, leaving them alone to be punished by the Legislature, under the pretext of "rules of evidence," and "the police power," for offenses which they never committed, nor abetted, nor ratified, nor knew of? They are not pariahs.

It is lawful to own navy revolvers, and to carry them in the hand; yet, if our courts should conclude such things to be practiced by violent and dissolute men, I think they would not allow the Legislature to establish such "rules of evidence," or "police regulations" as would make the owner or half owner of a revolver, punishable for a murder committed by a person in whose hands he had placed it for lawful purposes. It would seem to me a far more direct and legitimate means of repressing the evil to pass an Act to prohibit the ownership or use, altogether, if they could; and if they could not, they could not indirectly do it by making it extra perilous.

If the construction, which this court puts upon the law in question be correct, and the law be constitutional, as construed, what is to prevent the Legislature, if advised, from following it with another, to make owners of liquor, exposed lawfully for sale, more careful to prevent crime, and, by a "police regulation," providing a "rule of evidence" to the effect that, if a pocket be picked in a saloon,

they shall be indicted, held guilty of the act, and sent to the penitentiary?

If there be any right more inherent or inalienable than that of going free of a crime which one never committed, nor intended to commit, nor authorized any one to commit, nor knew of when committed, I cannot conceive it. A criminal conviction, even for a misdemeanor, endangers *liberty* and tarnishes *reputation*. The Constitution does not leave innocent citizens naked to that danger and that detriment, at the will of the Legislature. Their right to enjoy liberty and protect reputation, is absolute, inherent, and inalienable, until they do some unlawful act. It is not an unlawful act to be a partner in a licensed retail dram shop. Many of our good citizens wish it were; but the Legislature has thought differently. A man cannot be indicted for that. How, then, because of that, can he be made amenable for an *unlawful* act, done by another, without his knowledge or consent—even against all his efforts to guard against it? For, under this decision, it would be wholly futile for him to show that he had taken every precaution.

Courts may consider the nature of an occupation to explain an act; but I fail to perceive the principle upon which they can, judicially say, that this, or that *lawful* business is so disreputable or dangerous, that those who engage in it may not have the same protection of liberty and reputation, as other citizens have. It seems to me, that if the sale of liquors needed more safeguards, they might be afforded by the imposition of additional civil liabilities, which affect neither liberty nor reputation. Several of the States have tried that, without constitutional impediment; and we have already some wholesome laws of the kind. For instance, the very law in question provides (*sec.* 10), that every applicant for a liquor license, before obtaining it, shall enter into a bond to the State, in the sum of two thousand dollars, condi-

tioned to pay damages "that may be occasionad by reason of *liquors sold at his house of business*; and shall further pay, to any person, all such sums of money as may be lost at gaming in his said saloon or dram-shop, or any room or building attached thereto, under his control." Now, here is a legitimate police regulation, with the conditions expressed, which were considered necessary to the public safety. It will be observed that they are severe, and bind the applicant for all acts of the kind done at his place of business, whether he was present and consented or not, or whether he knew of them or not. The Legislature might, properly, have made these conditions broader and more severe. They are civil matters, involving no criminal imputation or punishment. One might, without constitutional objection, be made responsible, civilly, for the torts of a partner, or agent, or clerk, committed in the course of the business, and with reference to it. I have never read nor heard of a case, before the one in Mississippi, in which it was held, that *crime* could be imputed to him, without his participation or carelessness. To me, it is simply obliterating all distinction between criminal and civil responsibility; and if it can be done, I know not on what foundation to rest for the security of *any* time-honored liberties. The police power, *then*, may sweep them all from under our feet, like treacherous sand.

"The equality of all persons before the law, is recognized" by the Constitution. By what right can persons engaged in one lawful business be subjected to criminal punishment by a "rule of evidence" *estopping them from proving innocence*, and not applicable to persons engaged in others? The police power, too, has its limits, to prohibit acts regulating conduct, and punish negligences. It is the point in a circle which may move at will, but must not pass on either side the pillars of the Constitution.

It may punish for *acts*, whether the perpetrator knew them to be criminal or not, but it breaks its appointed bounds when it attaches to one man criminality for the act of another, in which the defendant had no participation. Admit this power and all will be at sea. This is simply what the law in question, as construed, proposes to do. What regulation did Warren violate? All that *he* has done was to put in his capital with Robinson, and to take out license to sell whisky, giving the bond required for the public safety. The Legislature has said he may do that and sell whisky to adults as freely as he might potatoes. The State and county, and through them every tax-payer, as the Legislature must suppose, derive a benefit from that. As it must appear from the legislative and judicial standpoints, it was rather a laudable thing to do. Courts do not sit to administer the moral sentiment of the community, but the law. If then, his partner determines to violate the law, and without Warren's consent or knowledge, perverts the common property for the purpose, how can Warren be criminal? After all, what warrant have we to say that Warren is *interested*, even, in this sale? *Non constat*, but that when advised of it, he may have been mortified and offended by his partner's misdeed, may have refused to receive any profit from the sale, and may have made his partner account for the conversion of the whisky to unlawful purposes. Nevertheless, I understand this court to mean that his guilt became absolute, and fixed by Warren's act, and that he has no escape from the inflexible rule of evidence.

No citizen, nor class of citizens, says our Constitution, shall have granted to them privileges or immunities which, upon the same terms, shall not equally belong to all citizens." All other citizens have the valuable privilege, if it be one, of escaping punishment for crime, by showing their

entire and complete personal innocence of the criminal act. But persons who, under the favor and encouragement of the State, and for a valuable consideration, paid to her, engage in selling whisky, must, according to this decision, be content to be ranked as a sort of outlaws from the eternal principles of right and justice, and be punished for the acts of others, whether personally innocent or not.

There is no telling how far reaching the range of the decision, just rendered, may be. The case in judgment is very trifling. But the decision is not confined to dram-shops and their owners. Its immediate effect will be to include every wholesale dealer in the State, who sells by clerk, or by agents in other towns, and those who have interests or shares in the business, whether widows or not, and make each or any, and all of them liable to be dragged before the criminal tribunals and punished, if the lowest sub-agent or employee anywhere, even the porter who sweeps the stores, should some day sell liquor to a minor. If the mere interest in the liquor sold, fixes the liability, where is the line to be drawn? Why may not a lady, retaining an interest in a deceased husband's drug store, find it necessary to follow her Sunday devotions, by an appearance next day in the criminal court, to be punished for a crime committed whilst she was at prayer, by a good-natured clerk who sold a drink to a boy companion? Will she be told she ought not to be in that business? The ulterior effects of the decision in unsettling old well-defined safeguards of liberty, cannot be calculated. Bad precedents are like arrows shot from a bow. They cannot be controlled after they have left the string. Their logical sequence often runs terribly away to consequences never dreamed of. Better stand on the old foundations, and walk in the old ways. I distrust the social advantages promoted by decisions of this nature. *Timeo Danaos, et dona ferentes.* They

have the fair semblance of hand maidens of morality. They *may be* wooden horses, unwittingly drawn within the citadel of the Bill of Rights. I think they are.

With genuine deference to the views of my associates, which I know they have thoughtfully reached, I do not think that the authorities, quoted by them, except the case from Mississippi, have any just bearing upon this question. That case, till now, has stood alone, confessedly at variance with old well settled principles of justice, based solely upon a concession of power to the Legislature to do a shocking thing for a laudable purpose, and declining to entertain any question as to whether the Legislature meant any thing else than what the words literally import.

It is for that reason, and because of the expressions in the Mississippi opinion, that I do not consider its tone judicial. We have been used to treat the legislative body with more consideration, and to approach it with the presumption that it did not intend an absurdity. We have, on several occasions, in that view, disregarded the plain import of its language. I think this court should do so now, and presume against an intention of the Legislature to violate natural right, and the spirit, if not the letter of the Constitution. I believe it intended, and this would be just, to punish criminally, every one who participated in, or knowingly allowed, for his own interest, or knowingly received to his own use, the profits of a sale of liquor to a minor. It is no objection to this view, that the previous law sufficed for that. It is not unusual to enact laws of a declaratory nature, for prospective operation, and greater certainty. In this view, the charge given by the court below was erroneous.

If my associates mean, in their opinion, to say that an innocent person may, *under peculiar circumstances*, be allowed to show his innocence, where there has been a

sale of liquors, in which he was interested, it is to be regretted that the court in construing the law, has not indicated the principles upon which the exceptions rest, so that they might be subjected to analysis by the profession, and made intelligible to such citizens as desire to obey the law. If they mean to decide only that the proof of the sale shall be *prima facie* proof of the guilt, throwing the *onus* upon, but allowing the privilege to the defendants, each and all, of showing that they had no complicity in the criminal act, then their construction of the law agrees with my own. My only regret in such case would be, that they decline to make the court express what they actually mean; and by sustaining the charge will cause the profession to mistake the conclusions of their own minds. A charge *asked* may be refused if there be no evidence to support it. But this charge was *in invitum*. It was given by the State against the defendants' objections, and upon it the State procured the conviction. She cannot be allowed now thus to play fast and loose, and trifle with the liberty and reputation of the citizen. She cannot be heard to say that there was really no evidence of defendants personal innocence. Why then ask such a definite charge, excluding from the jury all consideration of the matter? If the charge is incorrect, there should be a new trial. Holding it correct, and refusing a new trial, will be taken every where, and, under correction I think should be, as an announcement of it as law.

I am very sure my associates are not in earnest in saying, that "on the subject of retailing spirituous liquors there can be no question of a natural right, or appeal to natural justice." There is surely no warrant for that in the opinion quoted from 34 *Arkansas*. I am equally sure they do not mean to base their judicial opinion upon any such principle as, that a man by any innocent act, may consent to

abide a criminal prosecution in the future, without the privilege of then showing his want of any participation in a criminal act. Such rights are inalienable. They cannot be waived, and I do not think courts have any thing to do with the citizens' moral right to complain, if he have the legal right to do so. Antonio really felt that he had no right to complain of the penalty of *his* bond, but an English Court of Chancery, or common law either, would have heard him nevertheless.

I think for error in the charge, the judgment should be reversed, and a new trial awarded. I intend this dissent to apply to all the cases now pending, involving the same questions, and which may be based on a construction of the law, according to its letter.

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WALLER v. STATE OF ARKANSAS.

1. LIQUOR: *Indictment for selling to minor. Allegation of age.*

The word "Minor," in an indictment for selling liquor to a minor without his parent's or guardian's consent, sufficiently describes his age, without more.

2. SAME: *Same: Allegation of defendant's interest in the sale.*

Where an illegal sale of liquor is made by the accused, it may be so charged in the indictment; but if not made by him, personally, and he is interested in the sale, it is sufficient to charge that he was interested in it. How he was interested, is matter of proof.

3. SAME: *Same: Allegation that minor had parents or guardian.*

It is not necessary, in an indictment for selling liquor to a minor, to allege that he had parents or guardian. If he had neither, no consent could be procured, and no legal sale could be made to him.

4. SAME: *Evidence of defendant's interest in the sale.*

In a prosecution for being interested in an illegal sale of liquor, the

record of the county court, showing that license had been granted to the accused to keep a dram-shop at the place where the liquor was sold, is admissible, in connection with other competent evidence, as tending to prove his ownership of the saloon, and in erest in the sale.

5. SAME: *Criminal liability of partner for illegal sale by co-partner.*

A partner in a saloon or dram-shop is criminally liable for an illegal sale of liquor to a minor, by his co-partner, or agent, though he was absent at the time of the sale, and had no knowledge of it. EAKIN, J., dissenting. See his opinion in *Robinson & Warren* v. *The State*, *ante*.

6. JUDICIAL NOTICE: *That lager beer is fermented, etc.*

The courts take notice that lager beer is malt and fermented liquor, as matter of common knowledge.

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

G. B. Denison, for appellant.

The indictment does not state the age of the party to whom the sale was made. The age was a material fact, an essential ingredient of the offense. It fails to set out how appellant was "interested in the sale." It is vague and indefinite. *Johnson* v. *State*, 37 *Ark.*, 98, following *State* v. *Keith*. It charges no unlawful act, but accuses appellant of having an unlawful interest.

The Legislature, by the act of March 8th, 1879, did not mean to wipe out the principle, that there can be no crime without an evil mind. See 1 *Bish. Cr. L.*, (*6th Ed.*), *sec.* 206; *Ib.*, 286-287; *Ib.*, *sec.* 205. It was error to instruct, as the court did, in effect, that there need be neither knowledge, act, nor intent; but that, any kind of an interest being shown, guilt follows. *Supra*, and 1 *Bish. Cr. L.*, *sec.* 291.

To hold defendant liable on the ground that the sale was made by an agent (1 *Bish. Cr. Pro.*, 488 *d*), it would be necessary to show agency for making this kind of sale; for the presumption would be that the agency was only for lawful sales.

The State charged a sale of both a malt and fermented liquor, and should have been held to prove it. 1 *Bish Cr. Pro.*, *sec.* 588. It was error to instruct that "lager beer is a malt *and* fermented liquor." *Jackson* v. *State*, 19 *Ind.*, 312; *Bish. ont Sat. Cr.*, *sec.* 1007-8-9-10.

Moore, Attorney-General, for appellee.

Cites *Sec.* 19, *Act March 8th*, 1879, and *Cloud* v. *The State*, 36 *Ark.*, 151.

ENGLISH, C. J. The indictment in this case charged: "That S. R. Waller, on the twenty-sixth of September, 1881, in the county of Conway, unlawfully was interested in the sale of one pint of beer, malt and fermented liquor, to one W. P. Wells, a minor, without the written consent or order of the parent or guardian of the said minor."

The defendant demurred to the indictment; the court overruled the demurrer; he was tried on plea of not guilty, convicted, fined $50, refused a new trial, took a bill of exceptions and appealed.

1. LIQUOR: Indictment for selling to minor. Allegation of age.

I. The first ground of the demurrer to the indictment was, that it did not state the age of the party to whom the liquor was sold.

The indictment alleges that he was a minor, the term used in the Statute (*Sec.* 19, *Act of March* 8th, 1879), and that was sufficient.

The material matter was, that he was a minor; his exact age, below majority, was of no legal consequence. The

meaning of the word "minor," as used in the Statute, is well known and commonly understood.

II. The second ground of demurrer was, that the indictment did not charge defendant with selling, and did not show in what way he was interested in the sale. It turned out, in evidence, that defendant was a licensed saloon-keeper at Morrilton, and lager beer was sold to the minor named, at his saloon; but the witness for the State, who was the minor, Wells, could not remember that the sale was made to him by the defendant.

2. Allegation of defendant's interest in the sale; what sufficient.

When the sale is made by the accused, it may be so charged; but where the sale is not, in fact, made by him, personally, but he is interested in the sale, he has no good cause to object to a charge made in accordance with the facts. The charge in the indictment was, that he was interested in the unlawful sale made to the minor. It was sufficient to follow the language of the Statute. How he was interested, whether as owner, or part owner of the lager beer sold to the minor, or a share in the profits of the sale, was matter of evidence.

III. The third ground of demurrer was, that the indictment did not charge that the minor had parents or a guardian.

3. Allegation of parents or guardians.

It was sufficient for the indictment to follow the language of the Statute in negativing the consent of the minor's parent or guardian. If he had neither, no consent could have been procured, and he could have bought no lager beer, unless sold to him illegally; and the deprivation would, perhaps, have been better for him.

IV. On the trial, the witness for the State, W. P. Wells, testified that, when but twenty years of age, and within twelve months before the finding of the indictment, he bought and paid for lager beer, at defendant's saloon, in Morrilton. That defendant staid at the saloon, and liquors,

4. Evidence of defendant's interest in the sale.

whisky, wines, and beer were kept for sale there. Witness did not know whether it was defendant's saloon or not; it was called his saloon, and there was a sign out, "S. R. Waller's Saloon."

The State was permitted to read, from the county court record, against the objections of defendant, an order granting to S. R. Waller, a license to keep a dram shop, at Morrilton, in Conway county.

The order was competent, as tending to prove that defendant was the owner of the saloon at which witness, Wells, purchased the lager beer, and, therefore, interested in the sale.

V. The court charged the jury, in effect, that if they found, from the evidence, that defendant was interested in the sale of the lager beer to the minor, Wells, as owner, or part owner, thereof, etc., he was liable; and refused to charge them that it was unnecessary to prove that the sale was made by him, personally; or that he had knowledge, before the sale, that it was to be made; or consented to, or, in some manner, participated or took part in such sale.

It was sufficiently proved that the sale was made to the minor, at defendant's saloon, and in his dram-shop business; and that was sufficient to make him liable. *Robinson et al.* v. *State*, *ante*.

5. JUDICIAL NOTICE: That lager beer is ferment'd.

VI. It was not proved that the lager beer sold to the minor was malt and fermented liquor; but the court properly treated this as matter of common knowledge.

Affirmed.

EDWARDS ET AL. v. PROBST & HILB.

1. SUNDAY CONTRACT: *Action maintained on original debt.*
A promissory note executed on Sunday is void, and an action may be maintained on the debt for which it was given, disregarding the note.

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

STATEMENT.

Appellees sued the appellants on an itemized account for $165. Appellants pleaded that the account had been settled and fully paid by note. Appellees replied and proved that the note was executed on Sunday. Verdict and judgment for appellees, and appeal by appellants.

Dan B. Granger, for appellants.

1. A note given in satisfaction, is an extinguishment of the debt. 11 *J. R.*, 518. It is a bar to an account, though the note is unpaid. 8 *Ark.*, 213. The legal presumption is, that it was intended, and *in fact* was an extinguishment of the original demand. 5 *Ark.*, 558.

2. The note valid on its face, bearing date of a week day. Appellees treated it as a valid satisfaction of their account, and ratified the Sunday transaction. They never offered to return the note, nor made demand for their receipt against the account. By their acts they ratified and gave validity to the note. *Tucker* v. *West*, 29 *Ark.*, 404; 1 *Dan. Neg. Inst.*, 69, *last clause.*

N. & J. Erb, for appellees.

"Though the note made and delivered on Sunday be void, the payee may recover upon the original consideration. "*Daniel on Neg. Inst.*, *par.* 69; *Finney* v. *Calendar*, 8 *Minn.*, 41.

HARRISON, J. The note having been executed on Sunday, was void, and no satisfaction of the account.

The judgment is affirmed.

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1. *Certificate of, When evidence.*

An officer's certificate of the grantor's acknowledgment of the execution of a deed is not evidence of the execution, unless the deed and certificate have been filed for record. Watson v. Billings. 278

2. *False certificate of; Burden of proof.*

The burden of proof that a certificate of acknowledgment of a deed is false, and that no acknowledgment was, in fact, made, is upon the party alleging it. Meyer v. Gassett. 377

3. *Certificate of; When and of what evidence.*

When there is no appearance before an officer to acknowledge the execution of a deed, and no acknowledgment of it, in fact, his false certificate of acknowledgment is void *in toto;* but where there is an appearance and acknowledgment of it in some manner, then the official certificate of the acknowledgment is conclusive of every fact appearing on its face; and evidence of what passed at the time of the acknowledgment is inadmissible to impeach the certificate, except in case of fraud or imposition in obtaining the acknowledgment, and where knowledge or notice of the fraud or imposition is brought home to the grantee. Ib.

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See ADMINISTRATION, 9. CONTRACTS, 1. FORCIBLE ENTRY AND DETAINER, 1. REPLEVIN, 2.

1. *Joinder of, on separate instruments.*

Where one obligates himself in writing to perform certain acts, and others in a separate instrument to the same obligee, guarantee the performance of the acts by the first, the obligors in the two instru-

ments being different, an action will not lie on both instruments jointly, even under the Code. But if in such joinder the principal be not served with summons, and the joinder be not objected to by motion or otherwise, it will be waived, and cured by the dismissal of the action as to the principal not served. Hurburt et al. v. W. & W. Manuf. Co 594

2. SUNDAY CONTRACT: *Action maintained on original debt.*

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ADMINISTRATION.

1. *Sale of land without apppraisement.*

The failure of an administrator to have land appraised before selling it under an order of the Probate Court, will not render the sale *void*, if it be confirmed by the court. It can be set aside only by appeal from the order of confirmation, or by direct proceedings for that purpose. It cannot be impeached in a collateral proceeding. Bell et al. v. Green, Ad., et al. 78

2. ADMINISTRATORS: *Employment of Attorneys; Construction of Statute.*

Where one who is executrix and also sole legatee of an estate, employs an attorney to prosecute a suit for land devised to him, which is not needed for the payment of the testator's debts, upon a contingent fee of part of the recovery, the contract will be considered as that of the legatee, and not of the executrix; and will be binding, and not avoidable by a succeeding administrator *de bonis non* with the will annexed; and the attorney can set off his claims for services, against the suit of the administrator against him for the fruits of the recovery in his hands.

The scope and design of the Statute (*Gantt's Dig.*, 195-197), is to require the allowance of fees to representatives of estates out of sums for which they may be chargeable, and has no application to a contract made by the devisee and owner of the land, in good faith, with the attorneys for its recovery. Bell & Carlton v. Welch, Ad. 139

3. WIDOW: *Her allowance in deceased husband's estate; How estimated.*

The value of both the real and personal property of an estate is to be estimated in determining whether it may be vested in the widow under *sections 6 and 7 of Gantt's Digest;* but if the remainder interest in the homestead and the personal property, are, together, of less value than $800 the widow may retain, absolutely, $300 of the property, and continue her occupation of the homestead. Word, Ad. v. West. 243

4. SAME: *When her rights in the estate vest; Incidents of.*

The widow's rights in her husband's estate become absolute upon his death, and upon her subsequent marriage, prior to the act of twenty-eighth of April, 1873, they passed, with the possession, by the marital right, to the husband, and so remained, unless scheduled as her separate property. Id.

5. *When distributive shares are payable.*

An Executor or Administrator can not pay lega ies or distributive shares until two years after the date of his letters, unless ordered to do so by the probate court; and such order can not be made unless it appear from his settlement that the assets are sufficient to pay all demands against the estate. McDearman, Ex. v. Martin et al. 261

6. *Petition for sale of land in litigation, for payment of debts.*

The fact that creditors petitioning the probate court for tbe sale of a decedent's lands for payment of his debts to them, are themselves suing the estate for an undivided half of the lands, is no ground for the denial of their petition; but the court may, in its discrétion, suspend the proceedings until the litigation about the title is ended Grider, Ad. v. Apperson & Co. 388

7. *Probate sale of lands; Credit.*

The credit in probate sales of land for payment of debts is not limited to six months as in other judicial sales, but is left to the sound discretion of the court. Id.

8. ADMINISTRATRIX: *Removal from the State.*

The removal of an administratrix from the State does not *eo instanti* vacate her letters. This requires the action of the court, on motion. McCreary v. Taylor. 393

9. *Allowances are judgments; when and how to be paid.*

A probate court allowance has the force and dignity of a judgment; but no execution can be issued upon it, nor demand made upon the personal representative for payment until payment is ordered by the court; and the court must not order payment un il it first ascertains all the debts of its class, and those having precedence, and the amount of the assets; and must then *pro rata* them, if necessary, before ordering payment. Meanwhile, no suit can be brought upon the allowance itself against the personal representative. He cannot pay without an order of the court, except at his peril. Fort v. Blagg et al. 471

10. EXECUTOR: *Power of executor over personalty before his qualification.*

An executor's powers before qualification, are limited to the burial of the deceased and the preservation of his estate; but if before then he

intermeddles with the estate, his subsequent qualification legalizes his tortious acts, making him liable to those interested in the estate, and protecting the party with whom he deals. The title to the personal property of a deceased, is in abeyance until his executor qualifies or an administrator is appointed, when it vests in him by relation from the time of his death. McDearman, Ex'r. v. Maxfield et al. 631

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The statement in an appeal transcript from the probate to the Circuit Court, that an affidavit for the appeal, as required by law, was filed, will not be countervailed by the fact that such affidavit was not filed with the other papers in the case in the Circuit Court. If the statement be false the record should be corrected in the probate court, and then carried to the Circuit Court by *certiorari*. Grider. Ad. v. Apperson & Co. 388

2. *From final judgment in principal branch of case.*

An appeal will lie from a final judgment on the merits in the main branch of a cause, though there is no final action in the attachment proceedings, which are ancillary to it; but upon such appeal errors in the attachment branch of the case which is unfinished will not be considered. McCreary v. Taylor. 393

3. CHANCERY PRACTICE: *Appeals:*

An appeal in Chancery brings up every paper properly filed in the cause. They all, under our present system, become parts of the record. Casteel v. Casteel. 477

4. *Final judgment; what is not.*

An order of the Circuit Court refusing to try a defendant in his absence, and directing an *alias capias* to issue for him, and a summons for his sureties in his bail bond, returnable to the next term, is no final judgment, and an appeal from it will be dismissed at the appellant's cost. Bridges v. The State. 510

5. APPEAL FROM J. P. *In misdemeanor, mortgage to secure the judgment no satisfaction.*

The giving of a bill of sale or mortgage of property to the sheriff, to secure the payment of a fine and cost adjudged against a defendant, by a justice of the peace, is no satisfaction of the judgment, and will not bar an appeal from it to the Circuit Court. Schlief v. The State. 522

6. SAME: *Same.*

Where there is a judgment for fine and cost against a defendant in a justices' court, for malicious wounding of stock, and also for damages to the owner for the injury, payment of the fine and cost is no satisfaction of the judgment, and will not bar an appeal to the Circuit Court. Id.

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1. *On running accounts; Election of parties; Mortgages.*

In running accounts only the debtor has the election to apply payments to any particular items of the account; and if he makes no application the law will apply them to the earliest items on the account. The whole is one debt, and the creditor has no election. But even in case of a mortgage, the debtor may authorize the application of the fruit of part of the mortgaged property to unsecured items in the account, if no rights of others have intervened. The proof of such authority is upon the party alleging it. Hughes v. Johnson, Trustee. 285

2. *Time for creditor to elect.*

When the creditor has, by law or consent, the right to make the application, he need not do so at the time of payment, but may at any time before settlement. Id.

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See PLEADING AND PRACTICE, 10. PRACTICE IN CHANCERY, 1.

1. *Sale of land not attached void.*

In attachment suits where there is only constructive service on the defendant the court acquires no jurisdiction over any property not attached, and a sale of any other under a personal judgment and execution rendered in the case, is void. Wilson and wife v. Spring. 181

2. *Interpleader.*

An interpleader may present his claim to the attached property as an independent proceeding, without reference to any controversy between other parties; and the determination of it does not affect the right of property as between him and the defendant in the attachment, or other person. Brown v. McGehee. 329

3. *Attached property is in control of court; Plaintiff no right to it.*

Attached property is within the control of the court; the plaintiff has no right to it as property, and to remove and sell it, with or without the consent of the attaching officer, is a contempt of court which a party commits at his peril. Atkins v. Swope. 528

4. *Power of court to remedy illegal disposal of attached property.*

The court has the inherent power to compel the plaintiff to account for attached property converted by him, before giving judgment for him, or allowing execution; or if judgment be against him, may compel him to refund; and no material injustice of which the plaintiff could complain, would be done by including the matter in a verdict. Id.

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2. ATTORNEY'S LIEN: *Upon judgment recovered for the State.*

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1 SPECIAL JUDGE: *Auditor cannot question his services.*

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1. *Construction of; Interest; Rate and computation of; Application of credits.*

A promissory note payable at a future fixed day, "with ten per cent. per annum from date," and stipulating that "if the interest be not paid annually, to become principal and bear the same rate of interest," will continue to bear interest at ten per cent. after maturity; and the unpaid interest due at maturity of the note, and each successive annual installment of interest from that date, will bear interest at the same rate (ten per cent.); not, however, so as to compound the interest on the amounts in default. They will each bear simple interest only, at the contractual rate. It is only the interest on the principal which will become principal. Credits will be applied, 1st, to the deferred amounts of annual interest, with the secondary interest accrued thereon, and the remainder, if any, to the interest accrued on the principal since the last annual period, and then (if any remains) to the principal itself. It will be only the interest on the balance of principal from that time to the annual period which will be next payable, or be subject to interest, and so on. Vaughn et al. v. Kennan. 114

2. *Assignee after maturity.*

The assignee of a note after maturity takes it subject to the same defenses which the maker has against the assignor. Sorrels v. McHenry. 127

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1. *The evidence.*

A bill of exceptions should state expressly that it contains all the evidence, but will be sufficient if it shows with reasonable certainty by its expressions that no other evidence was introduced than that set out in it. Hibbard v. Kirby. 102

2. *When to be filed.*

Time cannot be given beyond the term next after the one at which exceptions were taken, to file a bill of exceptions; and a bill of exceptions signed by the judge after the term, where no time was given, or after the next term thereafter when time was given, is a nullity. Carroll v. Sanders 216

3. NEW TRIAL: *Motion for must be in bill of exceptions.*

A motion for new trial is no part of the record, unless made so by bill of exceptions. Id.

4. *Its province.*

It is the province of a bill of exceptions not only to bring upon the record facts which would not otherwise appear, but rulings of the court on questions of law, and exceptions to them, in order to have them reviewed in the Supreme Court. Green v. The State. 304

BONDS.

1. *Statutory—Common Law.*

Though a bond given in the course of judicial proceedings may not be authorized by Statute, it will be good as a common law bond, if founded upon sufficient consideration and not opposed to any principle of public policy.

Generally any bond entered into voluntarily and for a valid consideration, is good at common law if not repugnant to the letter or policy of the law. McLeod v. Scott et al. 72

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1. *Liability of himself and sureties for money in his custody.*

When money in the control of the Circuit Court, is, by its order, placed in the custody of the clerk, he holds it in his official capacity and may be punished for contempt for failing to pay it over as ordered by the court, and deprived of his office for malfeasance; and he and his sureties will be liable for it on his official bond to the party entitled to it. State use, etc. v. Watson. 96

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Upon the consignment of goods the title becomes vested in the consignee, absolutely and against all the world, subject only to the carrier's lien for freight, and the consignor's right of stoppage *in transitu* upon the consignee's insolvency. M. & L. R. R. R. Co. v. Freed. 614

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The court of Common Pleas has no jurisdiction to render a judgment for damages for a wrongful attachment, for more than five hundred dollars. Both verdict and judgment in that court for greater damages than five hundred dollars are void for excess of jurisdiction. Street et al. v. Stuart et al. 159

2. *Practice upon return of excessive verdict.*

When a jury returns in the court of Common Pleas a verdict for damages above five hundred dollars, the court should inform them of the extent of their jurisdiction and direct them to retire and reconsider the matter. Id.

3. *Judgment of, void upon its face, quashed on certiorari.*

A judgment of the court of Common Pleas which is void upon its face for excess of jurisdiction will be quashed on *certiorari*. Id.

4. *When court abolished, to what court its causes transferred.*

Upon the abolition of a Court of Common Pleas in which an inquest of damages on a discharged attachment is pending, if the claim on which the suit was instituted be within the concurrent jurisdiction of the Circuit Court and a justice of the peace, and judgment has been rendered on it, the party claiming the damages may transfer the cause either to a justice of the peace or the Circuit Court as he may elect. If to a justice of the peace the recovery of damages can not exceed three hundred dollars exclusive of interest. If to the Circuit Court the jurisdiction will be as unlimited as if the suit had been originally brought there. Id.

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1. *Possession as consideration for purchase note.*
Possession of land, under a void sale, is no consideration for a note given for the purchase money. Sorrells v. McHenry. 127

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1. CONSTRUCTION OF CONTRACT: *Building material; What is.*
One who contracts to deliver material for building a house in payment of supplies, cannot refuse to deliver *lumber* to the assignee of the contract on the ground that he was a manufacturer of brick, and not of lumber, and that brick, and not lumber, was contemplated in making the contract. Ward v. Cadel. 174

2. STATUTE: *Construction: Rule of.*
A statute is to be so construed, if possible, as to give sense and meaning to every part; and it is a rule of construction that the expression of one thing sometimes implies the exclusion of another. L. R. & Ft. S. R. R. Co. v. Clifton, et al. 205

3. MORTGAGE OR CONDITIONAL SALE: *When doubtful.*
When it is doubtful whether an instrument was intended as a mortgage or conditional sale, the law will construe it to be a mortgage. Gibson v. Martin. 207

4. CRIMINAL STATUTES: *Construed strictly. Pistol Act of 1875.*
Criminal Statutes must be strictly construed, and no case brought by construction within a Statute unless it is completely within its words: and the Act of February 16th, 1875, imposing a penalty upon justices of the peace for failure to enforce its provisions against carrying arms, does not apply to mayors of towns. State v. Graham. 519

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1. CONTRACTS FOR SERVICE: *Entire; Action on.*
When a contract for service is for a particular time, and payment is to be made either expressly or by implication of law, at the end of the period, and the servant leaves the service of his master improperly. without a sufficient cause, and without his consent, before the expiration of that time, he can recover no compensation for his services either on the contract or on a *quantum meruit.* Hibbard v, Kirby. 102

2. *Mutual; Non-performance by one releases the other.*

Where there is a mutual contract for successive acts to be performed, the refusal on the one side to perform will justify the other in treating the contract as rescinded. Ward v. Kadel. 174

Same.

In mutual contracts for the performance of successive acts, one party cannot recover damage for non-performance by the other, if such failure was occasioned bv his own violation of the contract, or his failure or refusal to perform its stipulations. Id.

3. CONTRACT TO BUILD BRIDGE: *When performed by building levee.*

Chandler had a charter from the County Court to build a bridge, and charge certain tolls for crossing it. He built the bridge and it was swept away by the current in high water. This was repeated several times; and finding that a wooden bridge for the whole distance (345 feet) would not stand, he built a strong and sufficient turnpike of earth and rock for most of the distance, and bridged the balance, about ten feet; which, together, answered all the purposes of the bridge. *Held:* That the structure was a substantial compliance with the contract to build the bridge—the essential purposes of the grant were accomplished—and he had not forfeited his charter. Chandler v. State. 197

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1. *Assets, a trust fund for payment of its debts. Innocent purchaser. Director is not.*

The assets of an incorporated company are a trust fund for the payment of its debts, and may be followed into the hands of any person acquiring them with notice of the trust. A director of the company is conclusively presumed to know its pecuniary condition, and his purchase of the assets will not be *bona fide*, and without notice of the trust. Jones, McDowell & Co., et al. v. Ark. Mech, & Ag'l. Co. 17

2. DIRECTOR: *Purchase by, voidable.*

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1. *Presumption as to regularity of its acts.*

The County court is a superior court of record in the sense that in subject matters within its jurisdiction its action will, in the absence of evidence to the contrary, be presumed to be upon facts sufficient to justify it; and so its appointment of school directors, as required by the act of December, 1875, will, without proof to the contrary, be presumed to be upon the vacancy in office contemplated by the act, though the record of the appointment does not show any such vacancy. Such directors have color of title to the office and their school warrants, drawn for teachers' services, are valid. Pierce v. Edington. 150

COUNTY SCRIP.

1. *Tender for taxes.*

When county warrants tendered in payment of taxes levied to pay county indebtedness existing at the adoption of the constitution of 1874, afford no evidence that the allowance upon which they were issued was for county indebtedness prior to the adoption of that constitution, and are subsequent thereto, and are drawn upon the fund appropriated for county expenditures, the collector should refuse them. Hughes v. Ross, col. 275

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Evidence that the accused killed the deceased would not, of itself, make out a case of murder in the first degree under the Statute. Morris v. State. 221

2. MALICE: *Evidence of: killing with a deadly weapon.*

Where there is a homicide with a deadly weapon and no circumstances of mitigation, justification, or excuse appear, the law implies malice. But a killing with a deadly weapon with nothing more will not make out the offense of murder in the first degree under the Statute. *Id.*

3. MURDER: *Motive, proof of, not essential to conviction.*

Proof of a motive for committing a murder is not essential for the conviction of the murderer in a case depending upon circumstantial evidence. Green v. The State. 304

4. *Homicide by mal-practice as a physician.*

For a mere mistake of judgment in the selection and ap lication of remedies, resulting in the death of his patient, a physician is not criminally liable; but when death is caused by gross ignorance in the selection or application of remedies, by one grossly ignorant of the art he assumes to practice, he is criminally liable. State v. Hardister & Brown. 6 5

5. *Keeping a bawdy house; indictment for.*

The keeping of a common bawdy house is a misdemeanor, indictable and punishable by law in this State, and it is not necessary to allege in the indictment, or to prove, that it was kept for lucre and gain. State v. Porter et al. 637

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1. PENALTY—LIQUIDATED DAMAGES. *Bonds of bridge contractors.*

The sum specified in the bond of a bridge contractor, for the performance of his contract, required by the Act of March 6th, 1875, is a penalty, and not liquidated damages. Nevada County v. Hicks et al. 557

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1. DECREE DIVESTING TITLE: *Who bound by.*

A decree divesting title out of a party binds him, his heirs and all subsequent purchasers from him, except purchasers for valuble consideration and without notice after the expiration of a year from its rendition, when it has not been recorded in the recorder's office under sec. 3642 Gantt's Digest. Wilson and wife v. Spring. 181

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1. SHERIFF'S DEED: *Executed by Deputy, good.*

A sheriff's deed of land sold under execution may be executed in his name by his deputy. Gibson v. Martin. 207

2. SAME: *When unimpeachable by evidence.*

A sheriff's deed, regular and valid on its face, and set up in the complaint, and not impeached by the answer, cannot be impeached by evidence. Id.

DESCENT AND DISTRIBUTION.

1. DESCENTS: *Construction of Statute; Illegitimate children.*

Children of the same mother, whether legitimate or illegitimate, may transmit an inheritance to any and all collateral relations on the mother's side who are of her blood. Gregley v Jackson et al. 457

2. SAME: *No vested right in laws of.*

Laws of inheritance rest in public policy; and during the life of the person owning the property, may be changed at will, without any violation of contractual or vested rights. No one has a vested right to be the future heir of one living. Id.

3. SAME: *Construction of Statute of sixth February, 1867.*

The Statute of sixth February, 1867, legitimizing the recognized offspring of negroes, or mulattoes, who had cohabited as husband and wife, included the offspring of parents then dead, as well as of those living. Id.

DIVORCE.

See JURISDICTION, 6. PRACTICE IN CHANCERY, 6.

1. *Parties competent witnesses; Decree.*

Husband and wife are competent witnesses in divorce cases, but a decree should never be granted upon the uncorroborated testimony of the parties. Kurts v. Kurts. 119

2. *Personal indignities, what are.*

The ruling in *Rose* v. *Rose*, 9 *Ark.*, 507, that the personal indignities contemplated by the statute as grounds for divorce, include rudeness, vulgarity, unmerited reproach, haughtiness, contempt, contumely, studied neglect, intentional incivility, injury, manifest disdain, abusive language, malignant ridicule, and every other plain manifestation of settled hate, alienation and estrangement, is the settled construction of the Statute; but it goes to the very verge of safety, and should be cautiously applied, and pressed no further. Id.

3. *Alimony; Lien.*

Upon decreeing a divorce to a wife, alimony should be ordered only for the joint lives of the parties; and future payments should not be made a lien upon the husband's property. Id.

4. *Alimony, subject to modification.*

Decrees for continuing alimony are always subject to the modification of the Court upon a change of circumstances, upon the application of either party. Id.

5. *Indignities, charge of must be specific.*

The indignities assigned as cause for divorce must be specified in the complaint, that the court may see whether they be such as to render plaintiff's condition intolerable, or sufficient for a divorce; but uncertainty in the charge can be availed of only by motion to make the charge more specific—not by demurrer. Brown v. Brown. 324

6. HABITUAL DRUNKENNESS: *Charge of in pleading.*

The charge in a bill for divorce "that the defendant has deen addicted to habitual drunkenness for the space of one year," is sufficiently specific. Id.

7. *Evidence of parties.*

The evidence of the parties in a suit for divorce is admissible, but will not sustain a decree unless corroborated. Id.

8. INDIGNITIES: *During intoxication only, not sufficient.*

Ill treatment by a hu·band, during spells of intoxication only, and proceeding from it, without evidence of a fixed purpose to treat her amiss, or that he no longer entertained affection for her, does not constitute the indignities which justify a divorce. Id.

9. HABITUAL DRUNKENNESS: *What constitutes.*

Habitual drunkenness is not exactly definable; but it may be said that one is addicted to habitual drunkenness who has a fixed habit of frequently getting drunk; and he may be so addicted, though not oftener drunk than sober, and though sober for weeks. Id.

10. ALIMONY: *What it is.*

The court should not decree absolutely a certain and specific sum of money as alimony. Alimony is not a sum of money, nor a specific proportion of the husband's estate given absolutely to the wife, but is a continuous allottment of sums, payable at regular intervals, for her support from year to year, and continuous only during the joint lives of the parties; or in case of divorce from the bonds of matrimony, until the wife marries again; and should be a reasonable and certain sum, having in regard her state and condition in life, and the estate and income of her husband, and be payable at stated and proper times. Id.

11. ALIMONY: *Continuance of: Relief from, on wife's marriage.*

Though no definite time be fixed for the continuance of alimony, it will cease at the death of either party, and upon the marriage of the wife the husband may apply to the court to be released from further payment. Casteel v. Casteel. 477

DOWER.

1. *Infant married woman cannot relinquish dower.*

Marriage of an infant female gives her no power to contract; and her relinquishment of dower, while under lawful age, is voidable; and her institution of suit to avoid it, in a reasonable time after the death of her husband, is itself a disaffirmance of it. Watson v. Billings, 278

2. *How relinquished by wife.*

Where a husband's deed of conveyance is followed by a paragraph relinquishing dower on the part of the wife, and then follow the signatures of both husband and wife, this is such a joining with the husband in the deed as is required by the Statute for the relinquishment of dower in his real estate. Meyer v. Gossett. 377

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EVIDENCE.

See ACKNOWLEDGMENT OF DEEDS, 1, 2, 3. CRIMINAL LAW, 1. DEED, 2. DIVORCE, 7. LIQUOR, 4. MORTGAGE, 3. PRACTICE, 19, 24, 28. PRESUMPTION, 1.. REPLEVIN, 1.

1. MARKET VALUE: *Evidence of.*

Evidence of what one can purchase a commodity at from a particular party is not evidence of its market value. Ward v. Kadel, 174

2. *Decree; When admissible alone.*

A decree divesting and vesting title, and reciting the facts and proceedings upon which it is founded, is admissible as evidence in a subsequent suit for the party claiming under it, without producing the whole record of the cause in which it was rendered, where it is shown that the record is lost or destroyed, and cannot be produced. Wilson and wife v. Spring. 181

3. *Unrecorded deed.*

The acknowledgement of the execution of a deed of conveyance, as required by the statute, does not alone authorize its introduction as evidence. It must also be filed and recorded, or its execution proven at the trial. Id.

4. *Of title to land.*

Title to land must be proved either by force of the statute of limitations or by showing chain of title from the government, or at least from a source common to both parties, which implies admission of title up to that source on both sides. Id.

5. CRIMINAL EVIDENCE: *Attempts to escape.*

Flight of one charged with a homicide, or his efforts to escape from prison by violenee or otherwise, are admissable as evidence against him, but their weight must be left to the jury. They may indicate consciousness of guilt, or may be attributable to other motives. Burris v. State. 221

6. SAME: *Of a different offense than the one charged, not admissable.*

Upon trial of one for a homicide it is not competent for the State to read his affidavit for continuance at a former term and then prove by a witness that the facts stated in it are false. One crime cannot be established by proof of another. Id.

7. *Parol, inadmissible to enlarge contract.*

When a written contract of sale contains no warranty, or an express warranty, parol evidence is inadmissible to show a warranty in the first case; or in the second, that there was another or larger warranty than the one expressed. A warranty is a contract provable only by the contract; but an intentionally false and misleading representation, which induces the contract to the other's injury, is a tort, outside of the contract, and is provable by parol. Hanger et al. v. Evins & Shinn. 334

8. ADMISSIONS: *Of satisfaction with an article before discovery of defects.*

An expression to the vendor of satisfaction with the article purchased, after using it, will not preclude the purchaser from afterwards setting up real defects then existing, but unknown, and subsequently discovered. Id.

9. *Of character of deceased.*

In criminal prosecutions for homicide the violent and dangerous character of the deceased can not be shown by evidence of isolated facts, or particular acts of violence. Campbell v. State. 498

10. *Dying declarations; their weight.*

The court can determine only as to the admissibility of dying declarations. Their weight or credit must be left to the jury. Id.

11. *Exclusion of relevant, when not error.*

A party has no right to complain of the refusal of evidence which could do him no good, though it be relevant. Gill v. State. 525

12. *Of accomplice in misdemeanors.*

The Statute requiring corroboration of an accomplice's testimony before conviction, applies to misdemeanors as well as felonies, and a party cannot be convicted of gaming upon the uncorroborated testimony of a participant in the game. State v. Davis et al. 581

EXECUTION.

See SALE, 1, 2, 3, 4.

EXEMPTION.

1. ACTION, *for use and occupation.*

The statutory action for use and occupation is of the nature of assumpsit at common law on an implied promise, and not an action *ex-delicto;* and is subject to the exemption of the Constitution as a debt by contract.

The exemption clause of the Constitution is highly remedial, and should be liberally construed. St. L. I. M. & S. Ry. Co. v. Hart. 112

EXHIBITS.

See PLEADING, 6.

FALSE REPRESENTATIONS.

See EVIDENCE, 7. FRAUD, 2, 4. WARRANTY, 1.

1. *When actionable.*

A false representation, to be actionable, must not only mislead, but must be made fraudulently, and with that intent. No one can be held liable for a false representation who honestly believed it when made, however false it may be; but he is liable if he knew it to be false, or knowing nothing about it, asserted it to be true. Hanger et al. v. Evins & Shinn. 334

2. WARRANTIES: FALSE REPRESENTATIONS: *Patent defects.*

Neither warranties nor false representations bind the maker, regarding things patent to any observer who would take the trouble to examine the article, where the aggrieved party has the opportunity of seeing it. But where one of the parties declines the examination on the grounds of his want of experience and judgment, and expressly declares that he confides in the judgment of the other, this imposes

upon the other, if he accepts the trust, the duty of fair representations, even as to matters which might easily have been seen by one well acquainted with the subject of the negotiation; but even then he is bound only for a fair exercise of his judgment, and not for an honest mistake. Id.

FORCIBLE ENTRY AND DETAINER.

1. *What necessary to maintain the action.*

The *Act of March* 2, 1875, is a re-enactment of chapter 72, title, "Forcible Entry and Detainer," of *Gould's Digest*, and the action of forcible entry and detainer can be maintained only in a case of a forcible entry, or a turning out by force, or where the plaintiff has parted with the possession under some contract or agreement, express or implied, that the possession shall be restored to him. It is not intended to take the place of the action of ejectment, but to restore possession forcibly or unlawfully detained, without regard to the ownership or title to the property. Force is the gist of the action, and must be actual and hostile. Implied force, as where the entry is peaceable, but unlawful, is not sufficient. Hall v Trucks. 257

2. *Object of the Statute.*

The object of the remedy of forcible entry and detainer, is not to determine rights of property, but to maintain the peace, and prevent persons, with or without title, from assuming to right themselves by force. Littell v. Grady et al. 584

FRAUD.

See False Representations.

1. *Diverting purchaser's attention from defects.*

If a vendor, experienced in the manufacture and use of an article, knows that the purchaser is without experience in such things, and that there are material defects in it, which are not apparent to ordinary observation, and he deceitfully induces the purchaser not to enquire into its condition, he is guilty of a fraud, for which the purchaser may recover. Hanger et al. v. Evins & Shinn. 334

2. *False representations.*

If a vendor knows the purposes for which an article is intended by the purchaser, and so represents to him, and also knowingly and fraudulently represents that he knows the purchaser's business, and that the article is well fitted for it, and the purchaser rely on such representation, in making the purchase, and they are untrue, it is a fraud, for which he may recover. Id.

3. FRAUD: *Not presumed.*

Fraud will not be inferred from an act which does not necessarily import it. It is never presumed, and circumstances of mere suspicion, leading to no certain results are not sufficient proof of it. Toney et al. v. McGehee et al. 419

4. FRAUDULENT CONVEYANCES: *When impeachable by subsequent creditors.*

A voluntary conveyance may be impeached by a subsequent creditor on the ground that it was made in fraud of existing creditors; but to do so, he must show either that actual fraud was intended, or that there were debts still unpaid which the grantor owed at the time of making it. Id.

5. FRAUD: *Confidential relations: Dealings between brother and sister.*

Ordinarily, about ordinary matters, if there be nothing in the circumstances showing dependence and trust on the one hand, and the assumed duty of protection and counsel on the other, equity will not compel a brother to treat a sister with more tenderness in their dealings than other women; yet, though this relation differs generally in its confidential nature from that between parent and child, guardian, and ward, etc., it has been held to assume a confidential character, not only as to brother and sister, but between any near relatives dealing with regard to inheritances or distributive shares of estates coming to them jointly; many authorities exacting under such circumstances *uberrima fides*, with the duty of full disclosure of everything affecting value and each others interest in the subject matter. Blood relations so dealing are under a mutual obligation, not merely to say or do nothing to mislead, but to give such counsel as would resumably proceed from a third person who was equally concerned for all. Such contracts are wholly different from family compromises for peace and harmony. Courts of equity are as earnest to support the latter as to look upon the former with distrust and suspicion. Million and wife v. Taylor. 428

GUARDIAN AND WARD.

See PROBATE COURT, 1, 2, 3, 4, 5.

HUSBAND AND WIFE.

See DIVORCE, 1.

1. *Husband's rights in wife's land before Constitution of 1874.*

Before the adoption of the Constitution of 1874 a husband acquired by the marriage an interest in the wife's lands which was subject to execution for his debts; unless she held it by a title expressly exempting

it from his liabilities, or had scheduled it as her separate property as provided in the married woman's law in *Gould's Digest*, or *sec.* 4201 *Gantt's Digest*. Tillar & Taylor et al. v. McCoy. 91

2. MARRIAGE CONTRACT:

Effect of.

A wife who has entered into an ante-nuptial contract with her husband for a child's part of his personal estate upon his death, stands on the footing and with the same rights and remedies of a distributee. She is not a creditor and can take nothing until the debts are paid. McDearman, Ex'r, v. Martin et al. 261

IMPROVEMENTS.

See PRACTICE IN CHANCERY, 9.

INDICTMENT.

See PRACTICE, 27.

1. LIQUOR: *Selling without license; indictment. Agent of licensed owner.*

An indictment for selling liquor without license, need not allege that the owner had no license The seller is presumed to be the owner when nothing to the contrary appears. But if he be the servant or agent of a licensed owner, he can show the fact in defense by proof on the trial. State v. Devers. 517

2. *Must allege the facts, not a conclusion of law.*

An indictment must allege the special matter of the whole fact with such certainty that the offense may judicially appear to the court. It is not sufficient to charge a conclusion of law. State v. Graham 519

3. *Charging offense in language of the Statute.*

It is sufficient, as a general rule, to charge a Statutory offense in the words of the Statute; but when a more prticular statement of the facts is necessary to set it forth with requisite certainty they must be averred. Id.

4. *Charging officer with refusing to act on information.*

An indictment against a justice of the peace for failing to proceed against one for carrying a pistol as a weapon, must allege that the justice had information of the offense from the oath of some person, or that he had personal knowledge of it. Id.

5. *Showing prosecution barred by Statute of Limitations.*

An indictment is good upon demurrer though it shows upon its face that the offense was committed beyond the period of the statute bar. (This *per* force of the Statute. See *Scoggins v. The State, 32 Ark., 215*.—REP.) Gill v. The State. 524

6. SABBATH BREAKING: *Indictment for.*

The charging part of an indictment for Sabbath breaking must show that the offense was committed on some Sunday, though the particular Sunday is not important. Robinson v. State. 548

7. FOR MAIMING: *Plea of former acquittal before J. P.*

A justice of the peace has no jurisdiction of maiming, or other felony; and a plea in the Circuit Court of a former conviction or acquittal, before a justice of the peace, of the felony, or of a misdemeanor included in the felony, will not bar a prosecution for the felony in the Circuit Court. State v. Nichols. 550

8. GAMING: *Indictment in several paragraphs, when demurrable.*

An indictment for gaming, containing several paragraphs, and not indicating that they are all intended to charge but one offense, is bad on demurrer. State v. Rhea et al. 555

9. LIQUOR: *Indictment for selling liquor within three miles of Evening Shade College.*

An indictment for selling liquor within three miles of Evening Shade College, must aver that the sale was not for medical purposes by a regular practicing physician, who had made and recorded the affidavit required by the Act of twenty-sixth of February. 1879. State v. Scarlett. 563

10. *Indictment for selling to minor. Allegation of age.*

The word "Minor," in an indictment for selling liquor to a minor without his parent's or guardian's consent, sufficiently describes his age, without more. Waller v. State. 656

11. *Same: Allegation of defendant's interest in the sale.*

Where an illegal sale of liquor is made by the accused, it may be so charged in the indictment; but if not made by him, personally, and he is interested in the sale, it is sufficient to charge that he was interested in it. How he was interested, is matter of proof. Id.

12. *Same: Allegation that the minor had parents or guardian.*

It is not necessary, in an indiatment for selling liquor to a minor, to allege that he had parents or guardian. If he had neither, no consent could be procured, and no legal sale could be made to him. Id.

INFANCY.

See DOWER, 1.

INJUNCTION.

See SCHOOL TAX, 1.

INSTRUCTIONS.

See PRACTICE, 2, 3, 11, 20.

INTEREST.

See BILLS AND NOTES, 1. PROBATE COURT, 5.

INTERPLEADER.

See ATTACHMENT, 2.

JUDGE.

See AUDITOR, 1.

JUDGMENT.

See ADMINISTRATION, 9.

JUDICIAL NOTICE.

1. *Of a day of the week or month.*

The courts take judicial notice of the day of the week a certain day of the month came on. Robinson v. The State. 548

2. *That lager beer is fermented, etc.*

The courts take notice that lager beer is malt and fermented liquor, as matter of common knowledge. Waller v. The State. 656

JURISDICTION.

See ATTACHMENTS, 1. COMMON PLEAS COURT. INDICTMENT, 7, JUSTICE OF THE PEACE, 1. PRACTICE, 4.

1. QUO WARRANTO: *Jurisdiction of Supreme Court.*

The Constitution of 1874, in giving to the Supreme Court power to issue the writ of *quo warraanto* to test the legality of municipal corporations, may be held, in view of the settled practice of the court, to have included informations for public purposes in the nature of the writ, as well as the writ itself, and prescribes the limits of the power and the proper parties to the suit. State v. Leatherman. 81

2. MUNICIPAL CORPORATIONS: *Jurisdiction to create.*

The act of April 28, 1873, conferring power upon Circuit Courts to annex territory to municipal corporations, did not empower those courts to create corporations. Id.

3. JUSTICES OF THE PEACE: *Jurisdiction; Amount.*

An action upon an account for less than three hundred dollars is within the jusrisdiction of a justice of the peace. Hibbard v. Kirby. 102

4. *For killing stock by R. R. local.*

By statute, an action against a railroad company for killing or wounding stock by its trains, must be brought in the county in which the injury occurs. L. R. & Ft. S. R. R. Co. v. Clifton et al. 205

5. PARENT AND CHILD: *Chancery jurisdiction over infants.*

The jurisdiction of a Court of Chancery extends to the care of the person of an infant so far as necessary for his protection and education; and whenever it appears that a father is guilty of gross ill-treatment or cruelty towards his infant children, or that he is in constant habits of drunkenness and blasphemy, or low and gross debauchery, or that he professes atheistical or irreligious principles, or that his domestic relations are such as tend to the corruption and contamination of his children, or that he otherwise acts injuriously to their morals or interest, in every such case a Court of Chancery will interfere and deprive him of their custody and appoint them a suitable guardian to take care of them and superintend their education; and this jurisdiction is not taken away by the like power conferred by Statute on the probate court. State v. Grisby and wife. 406

6. JUSTICES OF THE PEACE: *Jurisdiction; Trespass on real estate.*

A justice of the peace has no jurisdiction of trespasses upon real estate. School District v. Williams. 454

7. PRACTICE IN CHANCERY: *Divorce: Ad-interim alimony. Appeal.*

Courts of Chancery have jurisdiction to order the husband to pay *ad-interim* alimony to his wife to enable her to prosecute her suit for divorce, and to enforce it by all or any of the means by which courts usually compel obedience—whether by execution or other orders, or by proceedings as for contempt; and if he be the plaintiff, and his wife's answer a cross complaint, his complaint may be dismissed for disobedience to the order, and the cross-complaint prosecuted to final decree. An appeal from an order for *ad-interim* alimony may be taken immediately. Casteel v. Casteel. 477

8. CHANCERY: *Jurisdiction to relieve from penalties and forfeitures. Transfer of case.*

To relieve against penalties and forfeitures is one of the ordinary grounds of equity jurisdiction; and though by Statute a remedy in many cases may now be had at law, courts of equity still retain this jurisdiction. And when there is an equitable defense to an action at law on a penal bond, the cause may be transferred to the equity docket. Nevada County v. Hicks et al. 557

9. JURISDICTION: *Property stolen in another State.*

In order to give to the Circuit Court of a county in this State, jurisdiction to try one for larceny of property stolen in another State, it must appear that the stolen property was brought by him into this State, with a continuous felonious intent. State v. Johnson. 568

JUSTICE OF THE PEACE.

See INDICTMENT, 4, 7. JURISDICTION, 3, 6.

1. JURISDICTION OF JUSTICE OF THE PEACE: *Answer raising question of title to land.*

An answer in a justice court to an action for the purchase price of land, setting up a want of title to the land, is not, of itself, sufficient to oust the jurisdiction of the court without evidence on the trial tending to bring the title into question. Bramble v. Beilder. 200

LANDLORD AND TENANT.

1. LANDLORD: *His rights in crop as against Mortgagee.*

When a tenant abandons his crop and fails to perform the terms of his lease, the landlord may gather, gin and bale the cotton cultivated by him and take out of it and retain against the tenant's mortgagee of the crop, the expenses of preserving it from waste and preparing it for market, as well as the rent. Fry & Co. v. Ford. 246

2. TENDER: *Of rent no discharge of landlord's lien.*

A landlord's lien is not released or discharged by a refusal to accept a tender of the rent; and to make a plea of such tender good the money must be paid into court. Brown v. McGehee. 329

LIEN.

See ATTORNEY, 2. DIVORCE, 3. LANDLORD AND TENANT, 2. PRACTICE IN CHANCERY, 6. REPLEVIN, 2.

1. JUNIOR: *How affected by Chancery sale to enforce senior.*

A sale of property under a Chancery decree to enforce a paramount li n, extinguishes a junior lien, or transfers it to the proceeds of the sale; and the junior lienor can avail himself of it, only by becoming a party to the Chancery suit and intervening for the surplus. Jones, McDowell & Co. et al. v. Ark. Mech. and Ag'l. Co. 17

2. *Acquired by filing bill, etc*

A judgment creditor who first files his bill and serves summons upon his debtor, thereby obtains a lien on the assets which he seeks to reach, and will have preference over other creditors in their distribution. Id.

3. *Attorney's for his fee.*

By Statute an attorney has a lien upon, and interest in, the judgment recovered by him for his client in a court of record; and if the judgment be for the recovery of property, the lien amounts to an interest to the extent of it, in the property recovered, and may be enforced in a court of equity. Lane et al. v. Hallum et al. 385

LIQUOR.

See INDICTMENT, 1, 9, 10, 11, 12, 13. JUDICIAL NOTICE, 2.

1. *Criminal liability of part owner for illegal sale.*

A partner in a saloon or dram-shop is criminally liable for an illegal sale of liquor by his co-partner, to a minor, though he was absent at the time of the sale, and had no knowledge of it. EAKIN, J., dissenting. Robinson & Warren v. State. 641

2. *Retailing, is not a natural right.*

No one has a natural right to retail spirituous liquors. The whole subject is within the police powers of the Legislature, and persons engaging in the business, must submit to such regulations, terms and burthens as the Legislature may have prescribed for the public good. Id.

3 *Criminal liability of partner for illegal sale by co-partner.*

A partner in a saloon or dram-shop is criminally liable for an illegal sale of liquor to a minor, by his co-partner, or agent, though he was absent at the time of the sale, and had no knowledge of it. EAKIN, J., dissenting. See his opinion in *Robinson & Warren* v. *The State*, *ante* 641. Waller v. State. 656

4. SAME: *Evidence of defendants interest in the sale.*

In a prosecution for being interested in an illegal sale of liquor, the record of the county court, showing that license had been granted to the accused to keep a dram-shop at the place where the liquor was sold, is admissible, in connection with other competent evidence, as tending to prove his ownership of the saloon, and interest in the sale. Id.

MARK.

See SIGNATURE, 1.

MARRIED WOMEN.

1. *May convey, but not contract to convey, their lands.*

Married women may convey estates acquired since the adoption of the Constitution of 1874, but cannot make executory contracts to convey. Chrisman v. Partee and Wife. 31

MORTGAGES.

See CONSTRUCTION, 3. PRACTICE IN CHANCERY, 8, 9.

1. *Satisfaction; Equities; Parties.*

Buchanan, as administrator of the estate of Davis, loaned Bourland money of the estate, and took his note for it, secured by mortgage upon different town lots in Ozark. Afterwards Bourland mortgaged one of the lots to secure other debts, and it was sold to satisfy this mortgage, and purchased by Wittich. About this time Buchanan settled up the estate of Davis, and by decree of the probate court delivered to Bourland, as guardian of the distributees of Davis' estate, his note and mortgage. In a bill in equity by Wittich against Buchanan and Bourland, claiming that the delivery of the notes and mortgage to Bourland discharged them, and praying that his title be quieted against them, or that the other lots be first sold to pay them; *Held:* 1. That this transaction did not extinguish the note and mortgage; 2, but the other lots should be first subjected to the satisfaction of the mortgage; 3, that the distributees (Bourland's wards,) were necessary parties to the suit. Bourland v. Wittich. 107

2. *What it is.*

A mortgage is not necessarily a security for a debt. It may be for the performance of some acts or an indemnity against some liability of the mortgagee. Gi' son v. Martin. 207

3. MORTGAGE OR *Conditional sale; Intention of the parties; Evidence.*

In the absence of extrinsic evidence, the intention of the parties in executing an instrument is to be determined by the instrument itself, and a conveyance reserving to the grantor the privilege of "redeeming" the estate within a specified time will be a mortgage if given to secure a debt, otherwise it will be a conditional sale. Striker v. Hershey. 264

4. *Effect of assignment of mortgage as collateral security for mortgagee's debt.*

A mortgagee does not lose his interest in the mortgage by assigning it to his creditor as collateral security for his own debt, though he stipulates in the assignment to forfeit all interest in the mortgage if he fail to pay his debt by a specified day, and fails to pay it. The agreement for forfeiture amounts to nothing in a court of equity. Hughes v. Johnson, Trustee. 285

5. *Parol agreement to extend to other debts.*

A mortgage of lands cannot, by parol agreement, be made to cover any other debt, or any larger amount of debt than that expressed in it. (The case of *Bell, Trustee,* v. *Radcliff,* 32 *Ark.,* 635, reviewed and explained.) Id.

6. MORTGAGEES: *Reimbursed for advances to preserve mortgaged property.*

One having an interest in a security may advance what is fairly necessary for its preservation, and retain such advances out of the proceeds before crediting anything on his debts. (In this case necessary advances for picking a mortgaged cotton crop, and for a gin to gin it, were allowed out of the first proceeds of the crop, as necessary expenses to preserve it.—REP.) Id.

7. *Power of sale must be executed fairly and impartially.*

Less than actual fraud in the sale of mortgaged property, will justify a Court of Chancery in setting aside the sale. Equity watches with much jealousy deeds of trust and mortgages containing a power of sale *in pais;* and if the power be executed with partiality to the creditor, and with unfairness and oppression towards the mortgagor, and to his injury, it will set aside the sale. Littell v. Grady et al. 584

MUNICIPAL CORPORATION.

See JURISDICTION, 2.

1. *Long recognition by State cures illegal creation of.*

The State may by long acquiescence and continued recognition of a municipal corporation, through her officers, State and county, be precluded from an information to deprive it of franchises long exercised in accordance with the general law. State v. Leatherman. 81

NEGLIGENCE.

1. *Placing burning cars near another's property.*

A railroad company has the right to detach burning cars from the train and run them off on a spur of the track so as to save the train and main track, unless damages to the property of others are apparent, and the probable result; but if in doing so they stop them near the property of another and it is consumed, they are liable for the injury if by proper care under all the circumstances it could have been avoided. St. L., I. M. & S. Ry. Co. v. Hecht. 357

2. *Contributory negligence.*

Though a burning railroad car which is run off on a switch to save the train and main track, is negligently stopped so near another's property as to ignite and consume it, the company is not liable for the injury, if the owner of the property, or his agents, or employees, having charge of it, are present and can save it, but refuse to do so; or if they arrive after the property is on fire they must save what they can, or that omitted to be saved will go in mitigation of the

damages; but agents or employees of the owner in other business not connected with the property, are under no legal obligation to protect it, and *their* omission to do so is not contributory negligence on the part of the owner. Id.

NEW TRIAL.

See BILL OF EXCEPTIONS, 3. PRACTICE, 16.

1. *For newly discovered testimony.*

A motion for new trial upon the ground of newly discovered testimony must be corroborated by the accompanying affidavit of the new witness, or of some other person, if his can not be had. Campbell v. State. 498

2. SAME: *Impeaching witness.*

Newly discovered evidence that goes only to the impeachment of a witness, is no ground for new trial, Id.

3. *Newly discovered testimony.*

A motion for a new trial for newly discovered testimony must show why the testimony was not produced at the trial. Murphy v. The State. 514

OFFICER.

See SCHOOL DISTRICT, 1. SALE 7,

1. *De facto.*

What constitutes color of title by election, appointment or commission is not essential as between other parties to constitute one an officer *de facto*. An officer *de facto* is one who exercises an office either by virtue of some appointment or election, or of such acquiescence of the public as will authorize the presumption, at least, of a colorable appointment or election. Pierce v. Edington. 150

2. DE FACTO: *Deputy sheriff, etc.*

A deputy sheriff, under a written appointment from the sheriff, and who has taken the oath of office, and has long acted and been recognized as deputy, is an officer *de facto*, although there is no record evidence of the approval of his appointment, as required by the Statute. (*Gantt's Dig. secs.* 5507–6000.) Youngblood v. Cunningham. 571

PARENT AND CHILD.

See JURISDICTION, 5.

PARTIES.

See MORTGAGES, 1. PRACTICE, 30.

PAUPERS.

1. *When Counties liable to support of.*

A county judge has no authority to adjudge an indigent person a pauper, or to contract for his support or medical treatment except in term time, or while he is holding a county court. Prewitt v. Mississippi Co. 213

PAYMENT.

1. *Pendente lite; Judgment for cost.*

Payment of the debt sued for, during the pendency of the suit, will not bar a judgment against the defendant for the cost. Greenhaw v. Arnold. 461

PLEADING AND PRACTICE.

See CHANCERY PRACTICE, 1. DIVORCE, 5, 6. INDICTMENT, 7. PRESUMPTION, 1.

1. PLEADING AND PRACTICE: *Parties—Misjoinder.*

In an action on a bond executed to two or more obligees for the payment of such sum as should be recovered in a pending suit in equity against the obligors, the obligees should be joined as plaintiffs, although the decree in that suit had adjudged to each of them separate sums; and this (under the code) though one of the plaintiffs be the personal representative of a deceased obligee. McLeod v. Scott et al. 72

2. PLEADING AND PRACTICE: *In actions on conditional bonds.*

In an action upon a bond given for the payment of such sum as should be recovered in a specified suit it is not necessary to aver or prove that an execution had issued against the obligor for the amount recovered in that suit, and returned *nulla bona.* Id.

3. PRACTICE: *Defects in service or summons waived by answer.*

Any defect in the summons or service is waived by filing an answer to the merits. Hibbard v. Kirby. 102

4. JUSTICE OF THE PEACE: *Practice.*

In an action before a justice of the peace on an open account for wages, (no formal complaint being filed) the plaintiff may prove a verbal contract for stipulated wages if any was made, or if not, the value of the services rendered. Id.

5. PLEADING: *Dependent contracts.*

In an action at law upon an instrument setting forth mutual stipulations of the parties, performance or offer to do so by the plaintiff, must be averred in the complaint; but when the stipulations do not so appear the defendant may plead them. Sorrells v. McHenry. 127

6. SAME: *Exhibits, when part of.*

When a writing is the foundation of an action, counter claim or set-off, and is filed with the complaint or answer, it is part of the pleading; but if not such foundation, it is mere evidence to be used on the trial, and does not become part of, or help defective pleading. Id.

7. PLEADING: *Defense of another suit pending, &c.*

A plea to an action for a debt that, prior to the commencement of the action, the plaintiff had sued in another State and attached the property of the defendant sufficient to satisfy the debt, and that since the action the property has been sold, and the debt fully satisfied, will not bar a judgment for cost against the defendant in the pending action. Moore & Co. v. Emerick. 203

8. PLEADING: *Allegation of title: Denials.*

In an action for the destruction of property the allegation of ownership in the plaintiff is material, and a failure to deny it in the answer is an admission of its truth. St. L. I. M. & S. Ry. v. Hecht. 357

9. PLEADING: *Form of complaint; Indebtitatus assumpsit.*

The old form of *Indebtitatus Assumpsit* is a sufficient statement under the Code, except when the action is in the nature of the old *quantum meruit* or *quantum valebat;* and even in the excepted cases a more definite statement can be obtained only by motion, and not by demurrer. McCreary v. Taylor. 393

10. *Pleading and Practice: Sale by plaintiff of attached property, no defense to the action.*

A paragraph in an answer to an action of debt by attachment, that the plaintiff had obtained and sold the property attached, and praying for damages for its value, is not admissible, and should be stricken out. Wanton or illegal proceedings under an attachment resulting in injury to, or loss of the attached property, although otherwise remediable, cannot be pleaded in defense of the action. Atkins v. Swope. 528

11. CRIMINAL PLEADING: *Immaterial allegations.*

It is a rule of criminal pleading, that material allegations must be proved; and if an allegation need not be proved it is not material. State v. Porter et al. 637

PRACTICE.

See ACTION, 1; ATTORNEYS, 1; BILL OF EXCEPTIONS, 1; COMMON PLEAS COURT, 2; INDICTMENT, 7; PLEADING AND PRACTICE, 1, 3, 10; PRACTICE IN SUPREME COURT, 1; PROBATE COURT, 1, 2, 3; SALE, 1. 2.

1. *Improper evidence must be excepted to.*

In criminal as well as civil cases, the admission of improper evidence must be excepted to and made grounds of the motion for new trial, in order to make the error available in the Supreme Court. Burris v. State. 221

2. *Giving instractions.*

In giving a series of instructions relating to the grades of homicide, the court should be careful to make the jury understand which of them is intended to apply to murder in the first, and which in the second degree. Id.

3. SAME:

Where there are mitigating circumstances in a homicide, an instruction that "if the jury believe from the evidence that the defendant had threatened the life of the deceased, and, being armed with a deadly weapon, met the deceased unarmed, and that without any provocation or effort on the part of deceased to take defendant's life, or to do him a bodily injury, the defendant shot deceased, intending at the time to kill him, and did kill him, he is guilty of murder in the first degree," should be so framed as to submit to the jury the consideration of the mitigating circumstances in evidence, or another given with that view. Id.

4. BILL OF EXCEPTIONS: *When must be filed.*

The time for filing a bill of exceptions is limited by the Statute to the next succeeding term, and cannot extend beyond it, and ought not, as a matter of sound discretion. to extend beyond the time fairly necessary to allow the attorney, with reasonable diligence, to prepare it.

Courts of Chancery are competent to relieve against any hardships arising from accident, mistake, or fraud, if from any such cause the bill could not be presented in the time allowed. Carroll v. Pryor. 283

5. CRIMINAL PRACTICE: *Discharging prisoner.*

A prisoner convicted of murder in the second degree when he should have been convicted of murder in the first degree, cannot claim to be discharged upon the ground that he has been acquitted of the crime of which he was actually guilty. Green v. The State. 304

6. SAME: *Giving papers to Jury.*

It is the better practice not to give to the jury in a criminal case, upon retirement, an indictment on which is endorsed a verdict of guilty at a former trial. Id.

7. SAME: INSTRUCTION: *Reasonable doubts, etc.*

An instruction "That in cases of circumstantial evdence, before the jury can convict, the guilt of the accused must be made out not only beyond a reasonable doubt, but to the exclusion of every other reasonable hypothesis," should not be given; either one is sufficient. Id.

8. SAME: *Furnishing prisoner with list of jurors.*

The Code of Criminal Practice makes no provision for furnishing to the prisoner a list of the jurors before going into the trial. Id.

9. SAME: *Evidence of a deceased witness.*

The evidence of a witness on a former trial, since deceased, may be proven on a subsequent trial for the same offense. Id.

10. *Order of argument, etc.*

The order of argument where several counsel are engaged, the subjects, length, and range, of their discourses before a jury, must necessarily be left to the discretion of the presiding judge, and unless the bill of exceptions shows an abuse of the discretion, it will not be reviewed here. Id.

11. *Giving instructions.*

Where the length, intricacy or number of instructions asked by the parties may be confusing to the jury, the court should reject both lists, and give such, applicable to the facts, as will clearly present to the jury the main points of law governing the case. Hanger et al. v. Evins & Shinn. 334

12. INSTRUCTIONS: *Modifications; Bill of exceptions must show.*

When modifications to instructions are excepted to the bill of exceptions must show the modification, and what the instructions are, as amended; otherwise this court cannot tell whether they are right or wrong. St. L., I. M. & S. R'y. v. Hecht. 357

13. *Notice served on Sunday.*

The objection that notice of the proceedings was served on Sunday must be made before answer or the hearing of the cause on its merits, or it will be considered as waived. Grider, Adm'r, v. Apperson & Co. 388

14. APPEALS FROM PROBATE COURT: *Practice in Circuit Court.*

Upon appeal from the probate court the Circuit Court tries the case *de novo*, and makes such orders as the probate court should have made, and may order a sale of land to pay a decedent's debts where the Probate Court has improperly refused to do so. Id.

15. *Non-resident infants must defend by guardian.*

It is not correct practice to appoint an attorney *ad litem* for non-resident infants; they must defend by guardian. Bonner v. Little. 397

16. *Exceptions; Motion for new trial.*

Exceptions to the rulings of the court in excluding testimony are considered abandoned unless the rulings are made grounds for new trial. Knox v. Hellums. 413

17. *Appearance; What the record should show.*

When there has been service on the defendant, the record should show it. Where there has been none, it should show an appearance; and where there are several defendants, it is not sufficient that the record state that the "defendants" appeared. Such a term applies only to those who, by service or appearance, have already been made parties, and does not include all who have been named in the complaint. Davis et al. v. Whittaker et al. 435

18. PRACTICE IN CIRCUIT COURT: *Upon trial of exceptions from Probate Court.*

Upon trial in the Circuit Court of exceptions to a guardian's annual account from the Probate Court, the Circuit Court can only settle the balance, and then remand the cause to the Probate Court for further proceedings, on the basis of the balance so ascertained. Crow, Guardian, etc., v. Reed. 482

19. EVIDENCE: *Production of.*

It is the usual and regular order in the production of evidence, for the State to call all her witnesses before closing her case, but the general course of examination of witnesses is subject to the discretion of the court, and it may permit a departure from the usual order. Campbell v. The State. 498

20. CRIMINAL PRACTICE: *Trial in absence of defendant; Discretion of Circuit Court.*

It is within the discretion of the Circuit Court to refuse a trial of a misdemeanor in the defendant's absence, and in matters of discretion there is no review in this court except in cases of abuse. Bridges v. The State. 510

21. CRIMINAL PRACTICE: *Trial in absence of defendant.*

The defendant in a criminal case has the constitutional right to be present and confronted with the witnesses against him at the trial, and the State cannot demand a trial in his absence. The provision of the Statute (*Gantt's Digest sec. 1888*) authorizing the trial of a misdemeanor in the absence of the defendant, applies to cases in which he waives the right to be present. Owen v. The State. 512

22. SAME: *Same.*

The Circuit Court may, in its discretion, refuse to try a misdemeanor in the absence of the defendant, even with his consent; and *should* refuse, if the verdict and judgment may be for imprisonment. And if the case be an appeal from the judgment of a justice's court, the Circuit Court may compel his presence by bench warrant or capias, or dismiss his appeal and leave the justice's judgment to be enforced. Ib.

23. SAME: *Hiring out misdemeanor convicts.*

Where there is no public county contractor for keeping and working misdemeanor convicts, under Sec. 5 of the act of March, 22, 1881, the Circuit Court should direct in the judgment for the fine and cost, that the convict be put to labor or hired out as provided by Sec. 4, Act of 10th of March, 1877; bu the failure to make such direction is no ground for reversal. It may be corrected on application to the Circuit Court by amendment of the judgment; and on appeal, this court will affirm the judgment for fine and costs, and certify the affirmance to the Circuit Court, that the correction may be made by a further order if desired. Murphy v. The State. 514

24. STATUTE OF LIMITATIONS: *In criminal prosecution.*

In criminal prosecutions the State must prove that the offense was committed within the period of the Statute of Limitations next before the finding of the indictment, or that there was a previous indictment within the time, which had been quashed, or set aside, and the new indictment found in due time afterwards. Gill v. The State. 524

25. INSTRUCTIONS: *General objection to several in gross.*

A general objection to several instructions in gross, will not be entertained if any one of them be good, and is objectionable if all be bad. Their errors should be specifically pointed out. Atkins v. Swope. 528

26. OBTAINING MONEY BY PERSONATING ANOTHER: *Personation must be proved as alleged.*

The allegation of the false personation in an indictment for obtaining money by personating another, is descriptive of the offense, and must be proved as alleged; and proof that two were acting in concert and one of them personated the assumed party with the assent and concurrence of the other, will not sustain the charge of false personation by the latter. Kirtley v. The State. 543

27. INDICTMENT FOR FELONY: *Convicted of misdemeanor.*

On an indictment for a felony, the accused may be convicted of a misdemeanor, if both offenses belong to the same generic class, and th higher includes the lower offense, and the indictment contains all

the substantive allegations necessary to admit proof of the misdemeanor; and a conviction of the misdemeanor is a bar to any further indictment for the felony. State v. Nichols. 550

28. EVIDENCE: *Must be in bill of exceptions, not in judgment entry.*
Unless the evidence on a trial be brought to this court by bill of exceptions, the judgment of the Circuit Court will be presumed correct. The evidence cannot be imported into the record of the judgment. Id.

29. *Motion to set aside default judgment must be in bill of exceptions.*
A motion to set aside a judgment by default, and the answer tendered with it, must be incorporated in the bill of exceptions, and not in the record. The record should show the filing of the motion, but its recital of the grounds of the motion, and of the accompanying papers, will be no evidence of them in the Supreme Court. Hulburt et al. v. W. & W. Manf. Co. 594

30. PARTIES: *Purchaser pendente lite not necessary*
Purchasers *pendente lite* are not necessary parties to the suit. Litigants need not notice a title acquired during the litigation; otherwise litigation would be interminable. Galbreath et al v. Estes, Ad., etc. 599

31. CONTINUANCE: *Absent witness.*
A motion for continuance for the absence of a witness should be overruled, if the adverse party will admit that the witness, if present, would testify as stated in the motion. Hibbard v. Kirby. 102

PRACTICE IN CHANCERY.

See APPEALS, 3; JURISDICTION, 5, 6, 7; MORTGAGE, 7; PRACTICE IN SURREME COURT, 6.

1. *Presumption; Confirmation of Probate Court sale; Pleading; Tender of deed.*
In a suit to enforce an administrator's sale of real estate against the purchaser, the court will not presume that the sale has been confirmed. If confirmed it should be so averred in the complaint. If not confirmed, the sale is void, and confers no title upon the purchaser. And if confirmed, the court should require the administrator to bring a deed into court for the purchaser, before decreeing a foreclosure and sale of the property. Bell et al. v. Green, Adm'r, et al. 78

2. *Non-resident defendants.*
It is the duty of the court without any demurrer, to see that a complaint against a non-resident who is represented only by a guardian *ad litem*, appointed by the court, states a cause of action within its jurisdiction, before rendering a decree against him. Bonner v. Little et al. 397

3. *Specific performance for part, and compensation for residue.*

Where a vendor cannot convey all the lands he has contracted to, the vendee may have specific performance for the part he can convey, and as an incident to the suit, compensation for the residue; but courts of equity will not assume jurisdiction for the sole purpose of awarding damages for a breach of contract to convey, where the vendee knows at the institution of the suit that the vendor cannot convey. Id.

4. *Specific performance; compensation.*

The plaintiffs filed their complaint in equity against Oliver Bonner and his minor son, James, alleging that Oliver had sold them several tracts of land and executed to them his bond to convey upon payment of the purchase price; that they had paid, but said vendor could convey only a part of the lands, having no title to the residue; that both defendants were non-residents; that the vendor owned another tract of land in the county, and to escape liability on his title-bond, and defeat plaintiffs' recovery of compensation, had fraudulently conveyed it to said minor son. Prayer fo: pecific performance as to the tracts he had title to, and compensation as to the residue, and that the tract conveyed to the minor son be sold to pay it. The defendants were notified by warning order: A demurrer to the complaint filed by an attorney *ad litem* appointed by the court was overruled, and a guardian *ad litem* for the infant defendant filed a formal answer to the complaint.

Held: That the answer was no waiver of the demurrer; that the complaint was sufficient as against the vendor, but not as against the defendant, James; the plaintiffs having no judgment against the vendor, and no attachment upon the land conveyed to the son. Id.

5. ATTACHMENT: *In Equity*

An attachment against a non-resident lies in equity as well as at law. Id.

6. SPECIFIC PERFORMANCE:
ured.

Where a vendee of land by title-bond elects to take under the contract the part which the vendor can convey, and compensation for the residue, the price should be abated in the same *proportion* to the whole amount as the value of the *whole tract* is diminished by the deficiency. Id.

7. DIVORCE: *Alimony not to be made a lien: How enforced.*

Alimony should not be declared a lien upon the husband's lands. Its payment may be secured by sequestration or by exacting sureties from him. Casteel v. Casteel. 477

8. PARTIES: *Defendants in bill to vacate mortgage sale:*

In a mortgagor's bill to set aside a sale of the mortgaged property, for unfairness and oppression in the sale, the mortgage creditor, as well as the purchaser, should be made a defendant. Littell v. Grady et al. 584

9. TRUSTS: *Setting aside trust sale. Return of purchase money. Subrogation. Improvements..*

If a trustee's sale of the trust property be unfairly and oppressively made, and the purchaser knowingly aid in the oppression, the owner need not return or offer to return to him the purchase money in order to set aside the sale. If the sale be set aside, the purchaser may be subrogated to the lien of the creditor. Nor can the purchaser claim the value of his improvements on land so purchased, un ess the owner claims rents from him. He may then be allowed for his improvements *pro tanto*. Id.

PRACTICE IN SUPREME COURT.

1. *Original book of accounts brought up with transcript.*

The circuit court has no authority to order an original book of accounts used as evidence on the trial, to be sent up with the transcript of the cause to this court; and if sent here it will form no part of the record, and cannot be noticed by the court, unless incorporated into the bill of exceptions. The proper practice where ponderous books are used as evidence, is to transcribe into the bill of exceptions such portions as were used, or to have some witness testify with the books before him, as to what they show, with any circumstances touching their condititition and appearance material to the case. Pierce v. Edington, Treas. 150

2. *Bill of Exceptions.*

Unless the bill of exceptions show whether the instructions copied in it were given or refused by the Circuit Court, and what was the ruling of the court upon appellant's right to close the argument in a cause, no question upon the instructions or the right to close the argument is before this court. Ferguson et al v. Fargason et al. 238

3. *Bill of Exceptions; Instructions.*

Unless the ruling of the Circuit Court, in giving or refusing instructions, be excepted to and made ground of the motion for new trial, it cannot be reviewed in the Supreme Court. Fry & Co. v. Ford. 246

4. *Bill of exceptions on overruling motion; presumption.*

When there is no bill of exceptions showing upon what evidence the Circuit Court sustained or overruled a motion, this court will presume that the court ruled correctly. St. L. I. M. & S. Ry. v. Murphy Bros. 456

5. *Bill of exceptions in Chancery causes.*

Though a decree for divorce appear shocking from the depositions in the transcript, it will not be reversed if it appear from the record that oral testimony was heard which does not appear in the transcript by bill of exceptions or by being reduced to writing and filed in the cause. It will be presumed that the oral testimony justified the decree. Casteel v. Casteel. 477

PRESUMPTION.

See CHANCERY PRACTICE, 1. COUNTY COURT, 1. PRACTICE, 28. PRACTICE IN SUPREME COURT, 4, 5. REPLEVIN, 1.

1. PLEADING: *Presumption from pleading, as to kind of contract.*

In this State an alleged contract within the Statute of frauds, will be presumed to have been made in writing, or as required by the Statute, and proof of a written contract will be necessary to sustain the allegation. Hurlburt et al v. W. & W. Manf. Co. 594

PROBATE COURT.

1. GUARDIANS: *Exceptions to their accounts not triable by jury.*

A trial by a jury in the Probate Court, of exceptions to an account, is not contemplated by law. The Statute conferring power upon the Circuit Court to order an issue to be tried by a jury, has no application to Probate Courts. Crow, Gdn. etc. v. Reed. 482

2. SAME: *Must file separate accounts for each ward.*

A guardian must file separate accounts with each ward. A consolidated account for several wards should be stricken out by the court of its own motion. Id.

3. SAME: *Duty of Probate Courts as to errors in accounts.*

Probate Courts should not wait to be moved to correct errors in accounts of such fiduciaries as it is required to supervise, but should refuse to confirm any settlement obviously improper. Id.

4. SAME: *Liability to account; Jurisdiction of Probate Court.*

Upon the death or marriage of a female ward, the powers of her guardian may cease, but not his obligations to account for her estate; and the Probate Court has power to compel him to do so. Price, Gdn. v. Peterson. 494

5. SAME: *Power of Probate Court to compound interest.*

The Statute, *Gantt's Digest, secs. 4277, 4283,* has no application to cases in which fiduciaries upon equitable principles become chargeable with

compound interest; and Probate Courts have the same discretion to compound interest, as to fiduciaries under their supervision, as appertains to a Chancellor. Id.

PURCHASER PENDENTE LITE.

See PRACTICE, 30.

QUO WARRANTO.

See JURISDICTION, 1.

RAILROAD.

See NEGLIGENCE.

RECORD.

See APPEALS, 3,

REMITTITUR.

See VERDICT, 2.

REPLEVIN.

1. *Evidence of title; Possession.*

In an action for the conversion of personal property, the mere facts of lawful possession in plaintiff, and wrongful taking by the defendant, are sufficient. Proof of the transfer by which the plaintiff acquired title is unnecessary. The possession is presumed lawful until the contrary appears. Hellums v. Knox. 413

3. *Laudlord's Lien will not support.*

A landlord's lien will not sustain replevin for the crop. He must enforce it by attachment or bill in equity. Id.

RESCISSION.

1. *Of purchase, for fraud, what necessary.*

When a purchaser is entitled to rescind a purchase for fraudulent misrepresentations of the seller, his offer to return the property is equivalent to a return; but the offer, to be effective, must be promptly made upon the discovery of the fraud, and accompanied with an offer of compensation for intermediate use; and the condition of the article should be substantially as good as when received. Hanger et al. v. Evins & Shinn. 334

2. *Failure of consideration: Agency.*

Berman ordered of Woods & Co., of Boston, a small printing press, based upon the representations of its value and efficiency contained in their circular or catalogue. Upon arrival it was visible to the eye, or could have been easily ascertained by measurement, that it was smaller and of less capacity than represented. Berman was concerned in the purchase with a clerk in his store, who first commenced the negotiations for it, which were afterwards taken up by Berman, and the press was intended for the use of both. When received, Berman was absent, and the clerk, who was to work the press, unpacked and set it up, and partly worked it. Four days after Berman returned, and about a month after it was shipped from Boston, he reshipped the press to Woods & Co., who refused to accept it, and sued Berman for the price.

Held: 1st. That the jury might well conclude that Berman had authorized the clerk to unpack, set up, and work the press, and might find that by such acts of his agent, and his own delay to return it after his return home, he had lost the right to rescind. Berman v. Woods & Co. 351

RES JUDICATA.

1. *Consent order in the Probate Court.*

To a bill by Jessup as administrator of Herrill's estate to foreclose a mortgage executed by Spears to secure his note, Spears answered that he had delivered to Herrill in his life time, a certain number of bales of cotton sufficient to pay the note. Upon the trial the administrator proved by the records of the probate court that Spears had before presented his claims for the cotton to him, and he had rejected it and referred it to the probate court, and upon trial there the court had, by consent of the parties, ordered that the administrator credit Spears' note with an amount equal to about one-third of his claim, and that Spears pay the cost of the proceeding, and that no appeal had been taken from the judgment. The credit appeared upon the note leaving a balance due on it.

Held: That the probate court had jurisdiction of the claim and the parties, and its judgment was as conclusive as if rendered upon hearing evidence; and Spears was estopped from going back of it on re-litigating the matter in the circuit court. Jessup, Ad. v. Spears. 457

SALE.

See ADMINISTRATION, 7.

1. *On execution running over sixty days.*

Where an execution is made returnable more than sixty days from its date, a sale of land under it within the sixty days is within its legal life, and is not void. The execution is only voidable, and may be quashed or amended at the discretion of the court issuing it, on the application of either party to the judgment. Youngblood v. Cunningham. 571

2. *On voidable execution to bona fide purchaser.*

It is a general rule that a sale to a *bona fide* purchaser under a voidable execution, is valid. Application should be made to the court that issued it to recall or quash it before the sale. Id.

3. *Under execution; failing to advertise the property.*

The failure of the sheriff to advertise lands for sale under execution, will not invalidate the title of a *bona fide* purchaser. Id.

4. *Selling land in a body. Estoppel.*

An execution debtor consenting that his land be sold in a body, instead of separate tracts, as directed by the Statute, cannot afterwards object that they were sold in a body. Id.

5. ESTOPPEL: *Execution debtor inducing purchaser to buy his land at irregular sale.*

If an execution debtor induces one to purchase his land at the sale, he is estopped from setting up irregularities in the process, advertisement, or sale of the land to defeat the title of the purchaser. Id.

6. ACKNOWLEDGMENT OF DEED: *By officer after his term expires.*

The acknowledgment of a deed by a sheriff after the expiration of his term, for land sold under special execution from a Chancery Court, will not invalidate the sale The purchaser may apply to the court to confirm the sale if it has not been done, and order the sheriff in office to make him a deed. Id.

SCHOOL DISTRICTS.

1. *Are corporations; capacity; liability.*

School districts are by Statute *quasi* public corporations with capacity to sue and be sued, but are not liable for trespasses committed by their officers. For these the officers are personally liable. School District v. Williams. 454

SCHOOL TAX.

1. *Levying tax for special school districts: Injunction.*

So much of *section* 5524 *of Gantt's Digest* as authorized the board of supervisors to levy the district school taxes in cities and towns organized into single school districts, upon the estimate of the board of school directors, and without a vote of the electors of the district, was abrogated and repealed by section 3, Art. XIV, of the Constitution of 1874, and the collection of a tax so levied may be enjoined. Cole, as Shff. and Col. v. Blackwell. 271

SET OFF.

See ADMINISTRATION, 2.

SIGNATURE. 1.

1. *When a mark is.*

The mark of one who cannot write, made since the adoption of the Civil Code, is not a signature or subscription, unless the person writing his name writes his own name as a witness to it. Watkins v. Billings. 278

SPECIFIC PERFORMANCE.

See PRACTICE IN CHANCERY, 3, 4, 5, 6.

1. *Mutuality.*

Where a husband, having use of his wife's lands, contracts to convey them, with her approbation, to one who knows that the fee is in the wife, and the husband and wife promptly join in the execution of a deed, and tender it to the purchaser, and he, for no good reason, declines to accept it, and they join in a bill for specific performance, and tender a good deed in court, and the Chancellor decrees performance, the decree should not be reversed on appeal. SMITH, Special Judge, dissenting. Chrisman v. Partee & Wife. 31

STATUTE.

See CONSTRUCTION, 2, 4.

1. CARRYING PISTOL: *Act of April 1st, 1881, constitutional.*

Sections one and two of the Act of April 1st, 1881, prohibiting the carrying of army pistols except uncovered and in the hand, is not unconstitutional. Haile v. State. 564

2. *Sec. 1659 Gantt's Digest. Constitutionality of.*

The Statute (*Gantt's Dig., sec. 1659*), which authorizes the prosecution of a thief in any county in this State where he may be found with property stolen in another State, is not abrogated by the provision of the Constitution of 1874, which secures to parties a trial in the county in which the crime was committed. State v. Johnson. 568

STATUTE OF LIMITATIONS.

See INDICTMENT, 5; PRACTICE, 24.

1. *A statute of title. Extent of possession.*

The Statute of Limitation is not merely defensive, but confers title which may be asserted by ejectment by the original holder, his heirs or assigns, and possession under a deed, for the statute period, of a part of the tract described in it, confers title to the whole. Wilson and Wife v. Spring. 181

2. ADVERSE POSSESSION: *Presumption of continuance.*

Adverse possession of land once taken under color of title, is presumed to continue, when there is no proof of an interruption in the possession within seven years. The burden of proof of abandonment or interruption is upon the adverse party. Id.

3. *When it commences on actions accruing to a deceased's estate.*

The Statute of Limitations does not commence to run against an action accruing to an estate after the death of a testator or intestate, until there is a personal representative of the estate competent to sue. Word, Adm'r, v. West. 243

4. *Ten years as to Justice of the Peace judgments.*

A plea of the Statute of Limitations of five years is no bar or defense to an action upon a judgment of a justice of the peace. The Statute limiting the time to five years within which an execution may be issued on a justice's judgment is no limitation to an *action* upon the judgment. Hicks v. Brown. 469

5. *None against Probate Court allowances.*

The Statute of Limitations does not run in favor of an estate against a claim which has been duly allowed and before the administration has been entirely closed. Fort v. Blagg et al. 471

6. *As to holders of the property of an estate.*

In a suit to collect an allowed claim out of property of th estate, the Statute of Limitations will run in favor of all persons holding the property adversely, whether under or against an administration; although the allowance as against the estate may not be barred. Id.

STOPPAGE IN TRANSITU.

1. *Who has the right to.*

F., a merchant at Dardanelle, ordered goods of W. B. & Co., merchants at St. Louis. They sent the order to L. A. & Co., merchants at New Orleans, with directions to ship the goods to F. at Dardanelle, and send them the bill and bill of lading. L. A. & Co. filled the order, shipped the goods to F., and sent the bill and bill of lading to W. B. & Co., and charged the goods to them, and they charged them to F. During the transit W. B. & Co. failed, and L. A. & Co. claiming the right of stoppage *in transitu*, demanded the goods of the M. & L. R. R. R. Co., who were transporting them to F., and the company delivered them up to them. F. then sued the company for the value of the goods. Held: that L. A & Co. were not the vendors of F.; there was no privity between him and them, and they had no right to stop the goods, and the defendant was liable to F. for their value. M & L. R. R. R. Co. v. Freed. 614

SUBROGATION.

See PRACTICE IN CHANCERY, 9.

1. *Purchaser of encumbered property paying the encumbrance.*

Where a judgment creditor purchases, under his judgment, the land of his judgment debtor, on which there is a subsisting attorney's lien against the debtor for services in recovering the land for him, and such purchaser afterwards pays off the lien, or the land is sold to satisfy it, he is entitled to be subrogated to the rights of the attorneys to an execution on their personal judgment rendered against the debtor for their fee. Lane et al v. Hallum et al. 385

SUNDAY CONTRACT.

See ACTION, 2.

SUPREME COURT.

See JURISDICTION, 1; VERDICT, 1.

SURETIES.

See CLERK CIRCUIT COURT 1.

TAX.

1. TAX ON CRIMINAL CONVICTION: *Not unconstitutional.*

The tax imposed by Statute (*Gantt's Dig., sec.* 5053,) on each criminal conviction, is a fee to the public and not a tax within the meaning of the clause of the constitution requiring all property to be taxed *ad valorem.* Murphy v. The State, 514

TENDER.

See LANDLORD AND TENANT, 2.

TRANSFER OF CAUSE.

See JURISDICTION, 7.

TRESPASS.

See SCHOOL DISTRICT.

VENDOR AND VENDEE.

See CONSIDERATION, 1. PRACTICE IN CHANCERY, 3, 4, 6.

1. *When action accrues to, on dependent contract.*

Where in a contract for the sale of land, the agreements of the vendor to make title and the vendee to pay the purchase money are dependent, the vendor cannot sue at law for the purchase money, without first tendering the deed and demanding the purchase money; but the rule is otherwise in equity where costs are under the control of the chancellor. Sorrells v. McHenry, 127

2. *Action on purchase note; want of title, when good defense.*

When a purchaser accepts a deed to land with covenants of warranty, and the title fails, he cannot successfully plead a total failure of consideration, unless there has been an eviction or its equivalent; but this rule does not apply where the sale was void and the vendor has made no deed, and has no power to make one. Id.

3. *Vendee in possession cannot dispute title.*

A purchaser of land who has received a deed with covenants of warranty, and entered into possession, cannot, while he retains possession, deny his vendor's title or refuse to pay the price; and unless a plea in such case avers that the defendant is not in possession it will contain no defense to the action for the purchase price. Bramble v Beidler. 200

VENUE.

1. CHANGE OF: *When transfer of jurisdiction is complete.*

Until the transcript of the record and proceedings in a cause, of the court from which the change of venue is taken, is lodged in the court to which the venue is changed, the latter has no jurisdiction to try the cause. Burris v. The State. 221

VERDICT.

1. PRACTICE IN SUPREME COURT: *Finding of Court conclusive as a verdict of a jury*

The finding of the Circuit Court sitting as a jury, is equally as conclusive in the Supreme Court as the verdict of a jury. Bell & Carlton v. Welch, Ad. 139

2. *Excessive, cured by remittitur.*

An excessive verdict is cured by a remittitur of the excess. Ferguson et al. v. Fargason et al. 238

[NOTE:—In the last line of the second paragraph of the syllabus to *Tyner v. Hays*, page 599, vol. 37, the words "part of" should follow the word "remit."—REP.]

WARRANTY.

See EVIDENCE, 7. FALSE REPRESENTATION, 2.

1. *Puffing: False representations in circulars, etc.*

A purchaser of an article cannot rely upon all statements and assertions made by the maker in circulars concerning it, as a warranty that it will do what is stated. It is folly to rely upon them when made by unknown dealers. Purchasers should examine for themselves, or seek the advice of competent disinterested parties. Such statements should not come even within the rules of false representations, but if they do, they require the same promptitude in the rescission of the contract. Berman v. Woods. 351

WIDOW.

See ADMINISTRATION, 3, 4.

WILL.

1. *Construction of; Limitations over, when not too remote.*

Henry Gregg's will contained the following provision, viz:

"I give and bequeath to my beloved wife, Esther Gregg, the following tract of land, to-wit: The S. W. 1-4 Sec. 26, T. 2, N., R. 7, W., in Prairie county, Arkansas. Also, after all legal demands against my

estate are paid, I give, bequeath and desire that all moneys (specie excepted) and personal property, that I may possess at my death, in Arkansas, go to and vest in said Esther Gregg and *my bodily heirs*, the issue of said marriage, to have and to hold forever; the said Esther Gregg to have the use and benefit of said land, and full control of said personal property, to be disposed of as she may think best, in the way of supporting the aforesaid parties, and educating said heir or heirs, so long as she may remain a widow, or until the maturity of said heir or heirs. Should said Esther marry again, or at the maturity of said heir or heirs, the aforesaid land, with all the personal property that may be on hand, to be divided equally between said Esther and said heir or heirs; and should said heir or heirs die before maturity, all of their part of said property to revert to said Esther. And should said heir or heirs die, before maturity, and said Esther die without other lawful issue, then said property, both real and personal, to revert to my heirs at law."

Held: 1st. That the testator made a distinction between his descendants, the issue of his marriage with said Esther, and his heirs generally. and did not intend that the latter class should take anything until the former class had all died before maturity, and his wife, Esther, had died without other lawful isssue.

2nd. That the limitation over upon the death of Esther, without lawful issue, meant lawful issue living at the time of her death, and not an indefinite failure of issue, and was not too remote. Clark et al v. Stanfield et al. 347

2. *Ademption, by gifts in life of testator.*

The application of the doctrine of *ademption*, by gifts during life, is confined o specified gacies; or to generall gacies of definite amounts in money, or someth ng of the same nature. It is not applied to the bequest of a residue or part of a residue. Davis et al. v. Whittaker et al. 435

3. *Construction of*

(For the construction in this case, see the opinion. T e w ll i construed as a whole, and is too long to be formulated in o a sylla' us.—REP.) Id.

WITNESS.

See DIVORCE, 1.

1. *Party in suit against executor.*

A party in a suit against a surviving executor, may testify of his transactions with a deceased executor in relation to the matters in controversy. McDearman, Exec'r. v. Mansfield et al. 631

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Kor. L. A. A.

ERRATA.

On page 102, second line, first paragraph of Syllabus, read "*evidence*" for "service."

On page 181, in first line from bottom, read "*chain*" for "claim."

On page 210, in thirteenth line from bottom, read "*appealed*" for "approved."

On page 457, last line of Syllabus, read "*the Circuit*" for "this."

On page 522, last line, first paragraph of Syllabus, read "*bar*" for "bear."

On page 557, first line of Syllabus, read "*relieve*" for "retrieve."

On page 592, volume 37, second paragraph of Syllabus, read "*part of*" after the word "remit."

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,

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