REPORTS

OF

CASES AT LAW AND IN EQUITY

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF THE

STATE OF ARKANSAS,

CONTAINING CASES DECIDED AT THE NOVEMBER TERM, 1883, AND NOT REPORTED IN VOLUME 41, AND PART OF THE CASES DECIDED AT THE MAY TERM, 1884.

By B. D. TURNER,
SUPREME COURT REPORTER.

VOLUME XLII.

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Rec. March 16, 1885

OFFICERS

OF THE

Supreme Court of the State of Arkansas

DURING THE PERIOD COMPRISED IN THIS VOLUME.

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

HON. JOHN R. EAKIN,
HON. WILLIAM W. SMITH, } .....ASSOCIATE JUSTICES.

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

LUKE E. BARBER.....CLERK.

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

CHANCELLOR:

HON. DAVID W. CARROLL.

JUDGES OF THE CIRCUIT COURTS:

1st Circuit.....Hon. M. T. SANDERS.

2d Circuit.....Hon. J. G. FRIERSON.*

2d Circuit.....Hon. W. H. CATE.†

3d Circuit.....Hon. R. H. POWELL.

4th Circuit.....Hon. J. M. PITTMAN.

5th Circuit.....Hon. GEO. S. CUNNINGHAM.

6th Circuit.....Hon. FRANK T. VAUGHAN.

7th Circuit.....Hon. J. B. WOOD.

8th Circuit.....Hon. H. B. STUART.

9th Circuit.....Hon. C. E. MITCHEL.

10th Circuit.....Hon. J. M. BRADLEY.

11th Circuit.....Hon. JOHN A. WILLIAMS.

12th Circuit.....Hon. R. B. RUTHERFORD.

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*Died, March 13, 1884.

†Appointed by the Governor, March 17, 1884, to fill the vacancy of Hon. J. G. Frierson, deceased.

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CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF ARKANSAS,

AT THE

NOVEMBER TERM, 1883.

[Continued from Volume XLI.]

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LOCKHART v. LOCKE.

JUDGMENTS: *Of other States unimpeachable collaterally.*

Where it appears that a superior court of another State has jurisdiction of the subject-matter of the suit and the person of the defendant it will be presumed, in the absence of evidence to the contrary, that the jurisdiction continued to the judgment, and the judgment can not be impeached or its verity denied in a collateral proceeding.

APPEAL from *Crawford* Circuit Court.
Hon. JAMES A. YANTIS, Special Judge.

Jesse Turner for appellant.

1. It must be presumed, in the absence of evidence to the contrary, that the Texas court proceeded according to law. *Broom's Leg. Max., pp. 696, 703; 2 How., U. S., 341; Freeman on Judg., sec. 565; 22 Ark., 389.*

2. If there *was error* in the proceedings of the Texas court, it could be corrected only by some direct proceeding, and can not be taken advantage of in a collateral proceeding. At most, it could only render the judgment *voidable*, not *void*. *Freeman on Judg., secs. 116, 135, 135 a, 153, 142.*

3. Appellee can not be heard to controvert or deny the truth of *any* of the recitals of the record. *7 Eng., 756; 4 Scam., 536; 13 Ind., 83; 32 Ill., 309; 2 McL., 511; 1 Ohio, 359; 4 McL., 96; 27 Vt., 26; 2 McL., 473; 5 Dana, 512; 2 Mich., 165; 5 Harrington, 63; 16 Mo., 102; 20 Mo., 314; 17 Vt., 302; 2 Dill. Ct. Ct., 421; 65 Pa. St., 105; 2 Am. Leading Cases, 785; 5 Dana, 11, 512; 4 Vt., 58; 17 Id., 302; 1 Pet. C. C., 155; 11 Ark., 368; 70 N. Y., 253.*

4. It is not necessary to *prove* the laws of Texas. This court may have recourse to every means of judicial knowledge to ascertain them. *2 Am. Lead. Cases, 784; 27 Pa. St., 479; 10 Mo., 330; 11 R. I., 411; 2 Kans., 70; 15 Id., 277; 17 Ill., 572; 8 Wall., 513.*

5. No revivor was necessary after Porter's death; no notice to appellee of the intervenor's petition, required by the law of Texas. *33 Texas, 668; 27 Texas, 188; 25 Texas, 98.*

STATEMENT.

In April, 1861, John Porter sued appellee (Locke) in the District Court of Upshur County, Texas, on a promissory note executed by Locke to one Abraham Harrison. Locke was served with process, and appeared and filed an answer consisting of a general demurrer and general denial. In 1865 the death of Porter was suggested, and the case ordered to be revived in the name of his legal representatives, when discovered. At the October term, 1872, John R. Weir, the appellant's intestate, petitioned to intervene, showing that he was the real owner of the note, and had delivered it to Porter in 1861, as collateral security for a

debt he owed Porter, which debt he had fully paid to Porter's heirs since his death, and that Porter owed no debts and had no administrator. His petition was granted, and he was made party plaintiff; and thereupon, the record further recites, "the parties appeared by attorneys," and there was a trial, verdict and judgment for Weir. Afterwards Weir died, and his son, Richard Weir, was appointed in Texas as his administrator, and he brought this suit against Locke in the Circuit Court of Crawford County, on the judgment recovered in Texas. Since then Richard Weir died and the suit was revived in the name of Lockhart, who was appointed administrator *de bonis non* of John R. Weir's estate. To the action in Crawford County Locke filed his answer, alleging that in April, 1861, Porter brought suit against him on the note, in Upshur County, Texas. That he appeared by counsel to the action, and made defense, but no further action was had until the spring of 1865, when the death of Porter was suggested, a *scire facias* ordered against his representatives, and the same order repeated at every subsequent term of the court until the fall term of 1872, when the plaintiff's intestate, John R. Weir, petitioned to be made plaintiff, claiming to be the real owner of the note. That the petitioner (Weir) was permitted to prosecute the suit, and recovered the judgment sued on. That one of his (appellee's) attorneys died during the war, and the other moved to a distant part of the State, and never appeared in the case after Porter's death was suggested, and the action had never been revived. That he moved from Texas to Crawford County in Arkansas, soon after Porter's death was suggested in the action, and ever since then has been a resident citizen in Arkansas, and was not served with process of Weir's petition to prosecute the action; had no notice of its being filed, and never appeared thereto in person or by attorney.

A demurrer to this answer was overruled, and, appellant resting, there was judgment for the appellee, and appellant appealed.

OPINION.

JUDGMENTS Of other States conclusive.

EAKIN, J. It appears from the admissions and statements of the answer, that the District Court of Texas had undoubted jurisdiction of the subject matter of the suit, in which the judgment, sued upon here, was rendered; and also had obtained, by personal service, jurisdiction of the person of the defendant, who was then a resident of Texas.

The presumption is in favor of the continuing jurisdiction of the court until judgment, unless it be clearly shown that jurisdiction was lost. In the absence of any showing to the contrary, the comity of States forbids us to presume that the superior courts of sister States would pursue any course not justified by their own laws and course of practice. The jurisdiction being granted, the Constitution of the United States then requires that "full faith and credit shall be given, in each State, to the public acts, records and judicial proceedings of every other State." They can not be impeached or their verity denied in collateral proceedings. *Nunn v. Sturgis et al., 22 Ark., 389.*

It is obvious that mere error in the proceedings will not vitiate a judgment which stands uncorrected by any appellate, revisory or direct proceedings. It is at most only voidable—not void. It must be respected until avoided, and it can not be avoided in any collateral proceeding.

The law of Texas regulating the practice in cases like the one in question, has not been brought judicially to our notice, and even if it were of importance, we could not say even that there was error in allowing the plaintiff's

intestate to become the party plaintiff, without a revivor in the name of the personal representative of the original plaintiff and proceeding, without additional or further notice against the defendant. There would be nothing unreasonable in such practice. Certainly nothing unconstitutional. It is fit that defendants once summoned should attend the suits till judgment, and take notice of every step; and it is in furtherance of justice for courts to permit the real party in interest to become plaintiff, instead of one merely nominal, on being satisfied of the fact. Whether the defendant really appeared at the rendition of the judgment, as the record recites, or not, is a matter of indifference. He should have been there in person or by attorney, and his removal to Arkansas need not have prevented that, nor will it excuse a failure.

The substitution of a plaintiff is not an original suit, but an incident of an existing one. A step in it, and nothing more.

The answer showed nothing invalidating the record. This view of the case relieves us from the discussion of the much mooted question, whether the recital of the defendant's appearance can be traversed. It is not, in this case, a jurisdictional point, as the original service, appearance and defense are all admitted.

The demurrer to the answer should not have been overruled. For error in this, reverse and remand for further proceedings consistent with law and this opinion.

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WINSHIP & BROS. v. MERCHANTS NATIONAL BANK.

1. PROMISSORY NOTES: *Bona fide purchaser, etc.*

Where negotiable promissory notes are taken by an agent to himself for debts due his principal, and before their maturity are transferred to a bank as security for advances to himself, the bank making advances on them before maturity, in good faith, in the usual course of business, and without notice of the principal's equity, the principal can not recover them or their value from the bank. They would stand good to the bank for all advances made on them before notice of the agent's want of title.

2. SAME: *Possession of, evidence of title.*

Possession by the payee of a promissory note, is *prima facie* evidence of his title, and without notice to the contrary, a purchaser may safely buy it without inquiry as to his ownership.

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

Thomas B. Martin for appellant.

Where a note is transferred only by way of *collateral security* or indemnity against probable future loss, it is not such a holding for value as comes within the rule that protects the holder against all equities of others interested. *13 Ark., 150; 5 Johns. Ch., 54; 20 Johns., 637; 6 Hill, N. Y., 93; 4 Barb., 304; 2 Land Ct., 166; 18 Barb., 187; 2 Kern., 561; 6 Penn. St., 123; 11 Serg. & R., 377; 10 N. H., 266; 3 Geo., 47; 1 N. J., 265; 31 Mo., 205.*

The clause in Camp's note "or any other liability or liabilities of the undersigned," can not be construed to have a prospective operation against the equities of appellants, and to cover any future advances made by the bank to Camp.

SMITH, J. Winship & Brother were manufacturers of cotton gins, presses and fixtures, residing at Atlanta, Geor-

gia. Camp was the agent in Arkansas for the sale of their machinery. He was authorized to sell partially upon credit, and to take notes payable to his principals. He did make certain sales, but in disregard of his instructions, the purchase notes were drawn payable to his own order. Before maturity of these notes, amounting in the aggregate to $850, he pledged them to the bank as collateral security for a loan of $200, then made to him, and also for the payment of any other liability that he might incur to the bank. Afterwards, but still before the pledged notes had fallen due, and before the bank had notice that Camp was not the real owner of them, Camp procured the bank to discount a certain draft payable to the order of one Kirksey, and by Kirksey indorsed to Frick & Co., Camp signing the name of Frick & Co., and representing that he had authority so to do; and also indorsing his own name on the paper. It afterwards turned out that Camp had no authority to bind Frick & Co. by his indorsement; and they by action recovered of the bank the proceeds of the draft so fraudulently indorsed. It also turned out that Camp, in taking the notes of his principal's customers, payable to himself, and in pledging them for the payment of his own debt and future advances, had violated his instructions and the trust reposed in him. Winship & Brother served a notice on the bank that the pledged notes were their property, and demanded their surrender. But the bank refused to deliver them up and has since collected $530, part thereof. Winship & Brother now sue the bank for so much money had and received. The bank claims to be a *bona fide* holder for value, of the paper, without notice, at the time it was taken and at the time that advances were made upon the faith of it, of any equities between Camp and the plaintiffs. A jury being waived, the cause was tried before the court upon an agreed

statement of facts. And the court below found the law to be favorable to the defendant, and gave judgment accordingly.

PROMISSORY NOTES: *Bona fide* purchaser before maturity, protected against equities of others.

Counsel for appellants contends that the bank having received the notes merely by way of security for a debt, is not entitled to be protected as a *bona fide* holder. Our reply to this is, that the notes were in form negotiable; that they were transferred to the bank before maturity; that the bank received them in good faith and in the usual course of business, and is consequently unaffected by equities of which it had no knowledge. The facts that Camp was the payee of the notes, and that they were in his possession, were *prima facie* evidence that they were his property; and without notice to the contrary the bank had a right so to treat them, and was under no obligation to inquire whether they were held by him as agent or as owner. *Swift v. Tyson, 16 Peters, 1; Bank of Metropolis v. New England Bank, 1 Howard, 234; Goodman v. Simonds, 20 Ib., 343; Oates v. National Bank, 100 U. S., 239; Railroad Co. v. National Bank, 102 Ib., 14; Fisher v. Fisher, 98 Mass., 303; Bank of New York v. Vanderhost, 32 N. Y., 553; Brookman v. Metcalf, 1 b., 591; Belmont Branch Bank, v. Hoge, 35 1b., 65; Tucker v. N. H. Sav. Bank, 58 N. H., 83; Morris v. Preston, 93 Ill., 215.*

Bertrand v. Barkeman, 13 Ark., 150, decided before our Legislature had adopted the rules of the Law Merchant, concerning negotiable paper, has no application. *Gantt's Digest, sec. 566.*

And of course, if the notes could be pledged as collateral security for a present advance of money, they might also be for future advances. They would stand good for all advances made before the bank had notice of the defect in the title of the presumptive owner. *Jones on Pledges, sec. 106.*

The appellants constituted Camp their agent to sell their machinery, and take notes for the purchase-money. They thereby enabled him to take them payable to his own order, thus clothing himself with all the *indicia* of apparent ownership. Camp has abused the confidence reposed in him. But the appellants, who put themselves in his power and enabled him to hold himself out as the owner of the notes, must bear the loss.

Judgment affirmed.

CULBERHOUSE V. SHIREY.

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1. ADMINISTRATOR: GUARDIAN: *Can not purchase intestate's lands.* Neither the guardian of an intestate's heirs nor the administrator of his estate can buy up an adverse title to his lands. No one is permitted to purchase property when he has a duty to perform in relation to it which is inconsistent with the character of a purchaser.

2. ADMINISTRATION: *Title and possession of deceased's land: Ejectment.* The legal title to an intestate's lands descends and vests, upon his death in his heirs at law, subject alone to his widow's dower and payment of his debts. Except as against the widow's dower, the administrator is entitled to the possession and control of his lands until the debts are all paid and the administration closed, and to enforce this right may defend or maintain ejectment.

APPEAL from *Craighead* Circuit Court.
Hon. L. L. MACK, Circuit Judge.

U. M. & G. B. Rose and *W. H. Cate*, for appellant.

The deed of Amanda Nichols and Mary Holden to Fergus Snoddy was not properly identified or proved, and was inadmissible in evidence. *Gantt's Digest, sec. 854; Wilson v. Spring, 38 Ark., 181.*

The third instruction asked by defendant was in the

words of sec. *4113 Gantt's Digest*, and was applicable to the facts of the case.

Mrs. Shirey was 32 years of age and was barred. *Carter v. Cantrell, 16 Ark., 154; Brinkley v. Willis, 22 Id., 5.*

J. E. Reddick for appellees.

At the commencement of this suit Moody and Hettie Snoddy, both being under 21 years of age and entitled to the possession, could bring ejectment against the administrator. *Const., sec. 6, art. 9; 29 Ark., 633.*

McCall was guardian and his purchase was void, being against the interest of his wards. *30 Ark., 44; 33 Id., 586; Bisp. Eq., 3d ed., secs. 92–93.*

Culberhouse was administrator, and his purchase was against the interest of the estate. No fiduciary can gain any advantage touching his trust. *Supra.*

No question of limitation can arise in this case. A guardian can not hold adversely to his wards, nor an administrator acquire title by adverse possession against the heirs.

The charge or lien on the land for payment of debts is lost by delay of ten years, without good cause shown. *Mays v. Rogers, 37 Ark., 155.*

Smith, J. This was ejectment for a quarter section of land. One Rufus Snoddy was the original owner of the land. He died in 1858, and the land descended to his children, Fergus Snoddy, Mary Mosley and Amanda Nicholls. Fergus Snoddy was the father of the plaintiffs, and he had in his lifetime purchased the interest of his two sisters in the property, and received a deed therefor. He died in 1862 in possession of the land, and claiming to be the owner thereof. After his death the widow and children of Fergus resided upon the land. The widow married one McCall in 1864 or 1865, and died in 1868. After her death McCall and the heirs of Fergus Snoddy continued to live on the

land. McCall took letters of guardianship for his step-children and procured an order of the Probate Court declaring the land to be their homestead, and reserving it from sale for the payment of Snoddy's debts, until his children should become of age.

Afterwards McCall seems to have discovered or suspected that there was a defect in the title of Fergus Snoddy, and under the pretext that it was necessary for the protection of his wards, he persuaded Mrs. Mosley and Mrs. Nicholls to convey the land to him. He was informed they had no further interest in it, but that it belonged to the estate of Fergus. No consideration was paid for this deed. McCall promised to give a horse and saddle to each of the ladies for complying with his request, but had never done so.

In 1878 McCall sold his interest in the land, and conveyed it by a quit-claim deed to the defendant, Culberhouse, who was the administrator of Fergus Snoddy. The consideration for this conveyance was $275 in money and a debt which McCall owed to the grantee. Culberhouse bought, however, not for the benefit of the estate, but for his own aggrandizement. He claims to be the owner of two undivided third parts or shares by virtue of such purchase, and to hold the remaining share in his capacity of administrator, in trust for the payment of his intestate's debts, of which he alleges that $2,500 are still outstanding, and that the personalty has been exhausted.

He also pleaded the statute of limitations of seven years in bar of the action. On the trial it was proved that one of the plaintiffs was thirty-two years old, but the others had recently attained their majorities. It was also proved that the defendant was still acting as the administrator of Fergus Snoddy and that debts to a large amount had been proved against his estate, which were still unpaid. The jury returned a verdict for the plaintiffs.

1. Neither administrator nor guardian can purchase intestate's lands.

Fergus Snoddy must be regarded as the common source of title to all the parties to this action. He was the ancestor of the plaintiffs and the intestate of the defendant. He died in possession of the land, claiming the fee in the whole of it. Whether his title was good or bad is a matter which did not personally concern his administrator. The latter was a trustee, incapable of acquiring any adverse interest in the trust property. And his grantor, McCall, being guardian for the heirs of Snoddy, was in no better situation for taking advantage of any defect in the title. No one is permitted to purchase property when he has a duty to perform in relation to that property which is inconsistent with the character of a purchaser. *Wormley v. Wormley, 8 Wheat., 421; Lenox v. Notrebe, Hempst., 225–251; Brittin v. Handy, 20 Ark., 381; Imboden v. Hunter, 23 Id., 622; White v. Ward, 26 Id., 445; Wright v. Walker, 30 Id., 44; West v. Waddill, 33 Id , 575.*

Moreover, McCall and Culberhouse, if they had been strangers, would have taken only what Mrs. Mosley and Mrs. Nicholls could lawfully convey, and that was simply nothing. They had previously parted with their interest to their brother. And this was known both to McCall and to the defendant.

2. Title and possession of deceased's lands.

Upon the death of Snoddy the legal title to his lands descended upon and vested in his heirs at law, subject alone to his widow's dower and the payment of his debts. Snoddy's widow is dead; but the right of the administrator to the possession and control of his lands continues until the debts are paid and the administration closed. And to enforce this right he may defend or maintain ejectment. *Gantt's Digest, secs. 2162, 68, 167; Menifee's Adm'r v. Menifee, 8 Ark., 9; Carnall v. Wilson, 21 Id., 62.*

This aspect of the case was lost sight of in the court below, because it did not suit the interests of either party

to call attention to it. Nevertheless, both the pleadings and the evidence show that the administration of the decedent's estate is still open and that his debts have never been paid. Consequently the land and all rents and profits that the defendant may have received since he obtained possession, are assets in his hands to be administered as the law directs, and to be accounted for in the proper court. And he is now and will be entitled to hold possession until the purposes of his trust are accomplished or he is removed from the administration of the estate.

The statute of limitations is not involved. There has been no adverse holding, nor could there be. The land was set aside by the Probate Court as a homestead for the infant heirs of Snoddy. This was done at the instance of McCall, their guardian. It was probably an error, since Snoddy did not live on the land at the time of his death. But the creditors acquiesced, and they alone were injured. This appropriation for homestead purposes explains why the land has not been heretofore sold to pay debts. McCall's possession was the possession of his wards, and Culberhouse is in as administrator.

Reversed and remanded for a new trial.

Potter v. The State.

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1. Criminal Law: *Once in jeopardy.*

A mistrial in a felony case, from the disagreement of the jury on a verdict, is not a jeopardy; and the defendant can not plead it as a former jeopardy to a new indictment for the same offense.

2. Criminal Practice: *Venue: Change of: Jurisdiction.*

When after change of venue in a criminal case there is a *nolle prosequi* of the indictment, a new indictment must be found in the county in which the crime was committed; and thereupon the defendant may have another change of venue.

3. STATUTES: *Dividing county into judicial districts, constitutional. Ex post facto, when.*

The act of March 6, 1883, dividing Craighead County into judicial districts is constitutional, and the selection of a jury exclusively from one district to try an indictment for felony pending in that district at the time of the passage of the act, is no infringement of the defendant's constitutional right to be tried by an impartial jury of the county. Nor is the act an *ex post facto* law as to offenses committed before its passage, as it relates only to the procedure and not to the punishment.

4. BILL OF EXCEPTIONS: *Must contain all the evidence.*

Unless the bill of exceptions purports to contain all the evidence, the rulings of the Circuit Court as to the admissibility of evidence and the instructions, etc., will be presumed to be correct.

ERROR to *Craighead* Circuit Court.
Hon. J. G. FRIERSON Circuit Judge.

A. J. Potter pro se.

1. Plaintiff in error had been once before in jeopardy for the same offense. *Const., art. 2, secs. 8 and 10; 26 Ark., 260; 17 Mo., 541; 41 Ib., 254; 7 Ind., 324; 32 Mo., 480; 48 Cal., 323; 14 Ind., 139; 14 Ohio, 295; 20 Pick., 336; 7 Allen, 328; 12 Ohio St., 214; Kelly Cr. Prac., secs. 218-19-22; 4 Ark., 162; 9 Ib., 497.*

2. By the change of venue to Cross County the Craighead Circuit Court lost jurisdiction of the cause. *Gantt's Digest, secs. 1868, 1886; 4 Ark., 162; 9 Ib., 497.*

3. The motion for a continuance should have been granted. *21 Ark., 460.*

4. The clerk failed to furnish prisoner with a full list of the regular panel of petit jurors. *13 Ark., 720; 16 Ark., 568.*

5. Plaintiff in error was entitled to a jury from the *body of the county*, and this right could not be abridged by any subsequent act of the Legislature, forming two judicial districts. *Const., art. 2, sec. 10; art. 5, secs. 24, 25, 26; Gantt's Digest, secs. 3673-4.*

6. The court erred in excluding all evidence of threats made and communicated, unless made within twenty-four hours before the killing, and all evidence as to the character of deceased. *29 Ark., 248; 22 Ib., 555; 20 Ib., 53; 16 Ib., 584; 47 Mo., 604; 50 Ib., 337; 17 Mo., 544; 59 Ib., 550; 53 N. Y., 164; 33 Ind., 418; 31 Ib., 194; 37 Ib., 57.*

Moore, Attorney General, for the State.

1. As to the fifth ground for new trial that the jury was only from Jonesboro district, see *Act of March 6, 1883*, and as to its constitutionality, *35 Ark., 386.*

2. As to the first and eighteenth grounds, that Craighead Circuit Court lost jurisdiction by change of venue, and that the dismissal of a valid indictment amounted to an acquittal, see *26 Ark., 260; 4 Ark., 162;* and *9 Ark., 497.*

3. The other grounds are frivolous, and the points raised have been time and again decided by this court.

STATEMENT.

English, C. J. At the March term, 1878, of the Craighead Circuit Court, Andrew Potter was indicted for murder; the indictment charging, in substance, that on the twentieth of November, 1877, in Craighead County, he murdered Moses Stephens, by shooting him with a pistol.

On his application, the venue was changed to the Circuit Court of Cross County, where at the Spring term, 1878, the case was submitted to a jury, on plea of not guilty; who, after hearing the evidence, argument of counsel and instructions of the court, failed to agree upon a verdict, and were discharged by the court, and the case continued to the next term.

At the next term, it was made known to the court that

the defendant had escaped from custody, and left the country.

No further order seems to have been made in the Cross Circuit Court in the case until the April term, 1882, when a *nolle prosequi* was entered by the State.

Afterwards one Nesbit, during the same year, ascertained that the defendant was in Grayson County, Texas, and went there and captured him, and brought him back to Craighead County, and at the September term of the Circuit Court of Craighead County, 1882, he was re-indicted for the same murder.

Upon this indictment he was tried at the September term, 1883, on plea of not guilty; found guilty of murder in the second degree, sentenced to the penitentiary for seven years, and refused a new trial. He took a bill of exceptions and brought error.

OPINION.

1. CRIMINAL LAW: Once in jeopardy.

I. Before the plaintiff in error was put upon trial on plea of not guilty, he pleaded the mistrial in the Cross Circuit Court as a former jeopardy and bar to further prosecution on the second indictment, and the court sustained a demurrer to the plea.

By section 8 of the Declaration of Rights, it is provided that "no person for the same offense shall be twice put in jeopardy of life or liberty; but if in any criminal prosecution the jury be divided in opinion, the court before which the trial shall be had, may, in its discretion, discharge the jury and commit or bail the accused for trial at the same or next term of the court."

The mistrial was therefore not a jeopardy, and if the plaintiff in error was not tried at the next term it was his own fault, he having escaped from custody and fled the country.

II. The plaintiff in error also pleaded to the jurisdiction of the court, that by reason of the change of venue to the Circuit Court of Cross County, upon the original indictment, the Circuit Court of Craighead County had lost jurisdiction of the offense and could not regain it. 2. Venue. Change of: Jurisdiction.

The court also sustained a demurrer to this plea, and very properly.

Whilst the case was pending in the Cross Circuit Court, on change of venue, the Craighead Circuit Court had no jurisdiction of it, but after the *nolle prosequi* had been entered by the State in the Cross Circuit Court, then the second indictment had necessarily to be found in the Circuit Court of Craighead County, where the crime was committed.

III. It was also submitted as a matter of defense, that the State by entering a *nol. pros.* in the Cross Circuit Court and causing him to be re-indicted in the Craighead Circuit Court, deprived the plaintiff in error of the benefit of a change of venue. This defense was overruled; but it was intimated to the plaintiff in error that he had not been deprived of the benefit of a right to change of venue on the new indictment. SAME.

The statute provides that there shall be but one change of venue in a criminal case or prosecution. (Gantt's Digest, section 1886); but, no doubt, where there has been a *nol. pros.* after a change of venue and a new indictment in the county where the crime was committed, as in this case, the accused would be entitled, upon proper application, to a second change of venue. Though it was intimated to plaintiff in error that he had such right, he made no application for a change of venue.

IV. Between the finding of the second indictment and the trial, the act of March 6, 1883, dividing Craighead County into judicial districts was passed. (See Acts of 3. Statute dividing county in two districts, constitutional.

1883, p. 90). The plaintiff in error was tried at Jonesboro, the county seat, in the Jonesboro district, where the prosecution was pending at the time of the passage of the act, and as provided by it. The trial jurors were summoned from the Jonesboro district, in accordance with a provision of the act, and the plaintiff in error challenged the array, insisting that the act was unconstitutional, and that he had a right to be tried by a jury taken from the body of the county; but the court overruled the challenge.

In *Walker v. The State, 35 Ark., 386*, the same question was presented under a similar act, and it was decided that taking a jury from such a district was no infringement of the constitutional right of the accused to be tried by an impartial jury of the county in which the crime is committed.

Ex post facto, when.

The act now in question was passed after the commission of the crime, but it was not an *ex post facto* law within the constitutional meaning of that term. It does not relate to the punishment of the crime, but to the procedure. *1 Bishop on Criminal Law (6th ed.), secs. 279, 284.*

V. But little need be said on the merits of the case. Before the day of the killing, Potter and Stevens had quarrelled and were at enmity. About an hour before sundown of that day, Stevens went to a spring about a quarter of a mile from his house, to water his mules and to drive up his sheep. He rode one mule and led another, and was unarmed. When returning to the house he was met by Potter, who shot him with a pistol in the breast and in the back, and he fell from his mule and soon bled to death.

The jury, no doubt, would have found Potter guilty of murder in the first degree, but for some credit they attached to a statement of his that, before he shot Stephens, the latter dropped his hand to his side as if to draw a weapon.

Quite a number of questions were reserved at the trial, relating to the admission of evidence, the instructions of the court, etc., which were made grounds of the motion for a new trial, as well as that the verdict was not warranted by the evidence. There is no novelty in any of the questions thus presented, and nearly all of them have been repeatedly ruled upon by this court. We have no occasion, however, to consider any of these questions again in this case, because the bill of exceptions does not purport to set out all the evidence introduced at the trial, and the presumption is, therefore, in favor of the correctness of the judgment of the court below, and it must be affirmed.

4. Bill of exceptions.

WILLIAMS V. THE STATE.

1. CRIMINAL LAW: *In jeopardy; what is.*

When a trial jury is impanneled and sworn in a criminal case, the defendant is in jeopardy, and a dismissal of the prosecution and discharge of the jury before verdict, without his consent, is equivalent to an acquittal of the offense charged in the indictment, and a bar to any subsequent indictment for the same offense; but a dismissal for variance between the indictment and the proof is no bar to another prosecution for the same offense.

2. SAME: *Same.*

If upon the first indictment, the defendant could not be convicted of the offense described in the second, then a dismissal of, or acquittal upon the first, is no bar to the second.

3. SAME: *Same: Money differently described.*

If upon the first indictment, charging larceny of money of various descriptions, the defendant could be convicted of stealing the money or any part or piece of it described in the second indictment, a dismissal of the first after the jury was impanneled and sworn, would be a bar to the second.

APPEAL from *Miller* Circuit Court.
Hon. C. E. MITCHELL, Circuit Judge.

C. B. Moore, Attorney General, for the State.

The second indictment was for larceny of *entirely different denominations* from that charged in the first, not a single item being the same. The variance between the proof adduced on the first indictment, was no bar to another prosecution. *State v. McMinn, 34 Ark., 160, 163–4.*

ENGLISH, C. J. At the November term, 1883, of the Circuit Court of Miller County, Reuben Williams was indicted for stealing money of Mrs. Fannie Elliston, described as follows:

"Two certain greenback bills, currency of the United States, of the denomination and value of ten dollars each.

"Two certain national bank bills, current in the United States, of the denomination and value of ten dollars each.

"Two certain United States silver certificates, current in the United States, of the denomination and value of ten dollars each.

"Five pieces of silver money of the United States, commonly called dollars, of the value of five dollars.

"Ten pieces of silver money of the United States, commonly called half dollars, of the value of five dollars.

"Ten pieces of silver money of the United States, commonly called quarters, of the value of two dollars and a half."

The defendant was arraigned upon this indictment, pleaded not guilty, a jury was impanneled and sworn to try the issue in the case, and after the witnesses had been examined, the argument of counsel, and the instructions of the court, the court upon the motion of the prosecuting attorney, dismissed the case, discharged the jury, referred

the indictment to the grand jury for further action, and remanded the prisoner to jail to await such action.

At the same term of the court, the grand jury returned a second indictment against the defendant for the same larceny, differing from the first in the description of the money stolen from Mrs. Elliston, only, and describing it as follows:

"Two certain twenty dollar greenback bills, current money of the United States, of the denomination and value of twenty dollars each.

"Two certain twenty dollar national bank bills, current as money in the United States, of the denomination and value of twenty dollars each.

"One hundred certain pieces of current silver coin of the United States, commonly called dimes of the denomination and value of ten cents each.

"And one hundred pieces of the current nickel coin of the United States, commonly called nickels, of the denomination and value of five cents each."

To this indictment defendant pleaded as a jeopardy and acquittal, the trial and discharge of the jury on the first indictment; the State demurred to the plea, the court overruled the demurrer, and an issue to the plea was then submitted to a jury, and there was a verdict in favor of the State.

Defendant was then tried on plea of not guilty to the indictment, convicted, and sentenced to the penitentiary for eighteen months.

He moved for a new trial on the plea of former jeopardy, which the court refused, and he took a bill of exceptions, and prayed an appeal, which was allowed by one of the judges of this court.

On the trial of the plea, appellant read in evidence the first indictment, and the record entries showing his ar-

raignment and plea thereto, the impanneling of a jury, etc., and their discharge after they had heard the evidence, the argument of counsel and the instructions of the court, etc.

The attorney for the State admitted all the allegations of the plea of former jeopardy, except that the appellant might have been convicted under the first indictment on the evidence that was or might have been introduced.

Appellant then called Mrs. Fannie Elliston, who testified in substance as follows:

"On the sixth day of April, 1883, in Miller County, etc., two twenty dollar greenback or national bank bills, and some silver money belonging to me were stolen from my purse in my trunk, which was in my room. On searching, I also missed about three dollars in money of silver, with the two twenty dollar bills. It was in the purse with the two twenty dollar bills. I can not say positively of what denomination the pieces of silver were, but am satisfied the silver money was not all in nickels and dimes. I think there was one or two dollar pieces in that taken. I had also some nickels and dimes in another room adjoining the one from which the two twenty dollar bills and silver were taken. I think there was a quarter among the nickels and dimes in said adjoining room; these were also missing, but I do not know when taken. The defendant was in the room nursing my baby the evening the money was missing. He was in the room alone while all the members of the family were at the supper table in a different room, with the exception of a part of the time, when the little girl, Miss Jones, a witness in the case, was in the room with him. There was no one about the house except the defendant, who could have stolen the money. The front doors were locked, and no one could come in the back way without being seen. The defendant after being alone in

the room went away. I had seen the money in the trunk about fifteen minutes before the defendant left the house. The reason I remember distinctly about the money being there is, I had bought some milk and took the money from the purse to pay for it. I saw defendant afterwards under arrest, and he told me that he had taken the two twenty dollar bills," etc.

Appellant also called Miss Jones, eleven years of age, who testified that she saw him in the room from which the money was taken, and in the trunk where the money had been put.

Appellant also introduced J. A. Williams, a deputy Sheriff of Bowie County, Texas, who testified that having learned that appellant had stolen some money from Mrs. Elliston, he followed him to Jefferson, Texas, arrested him there and brought him back to Texarkana. On the way back, appellant voluntarily told witness that he had stolen forty-three dollars in money from Mrs. Elliston. Witness was afterwards present when appellant told Mrs. Elliston he had stolen two twenty dollar bills.

The above was all the testimony introduced on the trial of the plea of former jeopardy.

1. CRIMINAL LAW: "In jeopardy." What is.

I. When the trial jury was impannelled and sworn under the first indictment, appellant was placed in jeopardy, and the dismissal of the prosecution, and discharge of the jury before verdict, without his consent, was equivalent to an acquittal of the larceny charged in that indictment, and a bar to any subsequent indictment for the same offense. *Sec. 8 Declaration of Rights; 1 Bishop Cr. Law (6th ed.), secs. 1014, 1016.*

2. SAME: Dismissal of indictment.

II. But the dismissal of an indictment for variance between the indictment and the proof, is no bar to another prosecution for the same offense. *Gantt's Digest, sec. 1844; State v. McMinn, 34 Ark., 160.*

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

3. SAME: Money differently described.

If upon the first indictment, appellant could have been convicted of stealing the money, or any part or piece of it, described in the second indictment, the verdict on the plea of former jeopardy should have been in his favor.

The instructions given by the court below to the jury, on the trial of the plea, were substantially in accordance with the above legal propositions.

The jury in effect found by their verdict, that no part or piece of the money actually stolen by appellant, from Mrs. Elliston, was properly described in the first indictment, and that he could not have been convicted under it upon any evidence that might have been legally adduced.

The burden of the issue was upon appellant. He must have known what description of money there was in the purse stolen by him from Mrs. Elliston, and should have proved to the satisfaction of the jury that some of the stolen money was described in the first indictment.

In the first indictment appellant was charged with stealing, among other moneys, five United States silver dollars. Mrs. Elliston stated that she thought there was one or two dollar pieces in that taken. Had her statement been positive as to that, and properly identified the coin, appellant would have been entitled to a verdict on the plea. But it was not positive, nor did she identify the coin, and it was a question of fact for the jury upon the evidence, and not of law for the court. If a new trial were awarded, the jury would be at liberty to find the same way, on the same evidence.

Affirmed.

ALEXANDER ET AL. V. THE STATE, USE LOWENSTEIN & BROS.

1. PRACTICE IN CIRCUIT COURT: *Declarations of law.*

In trials before the court it is not necessary that the declarations of law should precede the finding of facts.

2. SHERIFFS AND CONSTABLES: *Liable for insufficient levy.*

A constable to whom a writ of attachment for $350 was delivered was instructed by the plaintiff's attorney to levy on such goods as the debtor should designate, but to get enough to pay the debt. He levied upon goods designated, of the value, as he testified, of $700 at their cost price as represented to him by the debtor's clerk. When they were afterwards sold at public auction they brought only $90, though they had not depreciated in value since the levy. *Held*, that the great disparity between the debt and the proceeds of the sale, in the absence of proof of any depreciation since the levy, was evidence of carelessness and negligence in not making a sufficient levy, and that the constable and his sureties were liable to the plaintiffs for the amount of their debt.

3. FEES: *Non-prepayment, when no defense for official neglect.*

An officer may refuse to execute civil process until his fees are paid or tendered; but if he accepts it and either expressly or tacitly assumes to execute it without demanding his fees, he must do so as promptly and faithfully as if they had been paid in advance.

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

McCain & Crawford, for appellants.

1. An officer must exercise a reasonable discretion in making a levy, and he is not liable for an inadequate levy unless his estimate in making such levy is so far from that which a prudent and discreet man would make as to render him liable from a presumption of negligence or a design to injure. *Lawson v. State, 10 Ark., 28; Freeman on Ex., sec. 253; 7 B. Mon., 298; 8 Wend., 46; 24 Am. Dec., sec. 46.*

2. No fees were paid or tendered to the officer, and he was not liable. *Acts 1874–5, p. 181, sec. 22.*

EAKIN, J. This is an action by Lowenstein & Bros., in the name of the State, against Alexander, a constable, and his sureties upon his official bond. The complaint sets forth that the plaintiffs had placed in Alexander's hands two attachments, issued by a justice of the peace against Mrs. C. Reinach, who it seems was a milliner and had a stock of goods; that he had failed to levy them upon sufficient goods when he might have done so; and that the remainder of her goods having been immediately afterwards attached by others, the debt was lost. The amount claimed in the plaintiffs' attachments was about $350. The goods attached, and afterwards sold by order of the court, brought in gross about $90, which the plaintiffs declined to receive, less expenses.

The answer set up, by way of defense only, that the constable was instructed by plaintiffs' attorney not to close up Mrs. Reinach's establishment, but to levy on such goods as she might designate; and that he simply followed instructions.

The cause was heard by the court without a jury, which rendered judgment for plaintiffs for the amount of the debt. Defendants took a bill of exceptions and appealed.

The facts developed in evidence are substantially these: The attorney for plaintiffs in placing the writs of attachment in the constable's hands advised him that Mrs. Reinach might select the goods to be levied on, but told him to get enough; that he went to levy on them, and was referred by her to her clerk for their designation; that he obtained from the clerk information of the cost prices of the goods, and, guided by that, levied upon about $400 worth. Upon reporting his action to the attorney, the latter expressed doubt of the sufficiency, whereupon the constable returned and added to the levy about $300 worth, all of which he took into possession. In making the estimates

of value he applied cost prices. The goods were not in any manner deteriorated before sale, but, from some unexplained cause, brought only the trifling amount above named.

It is urged that the court erred as to the findings and declarations of law. With regard to the latter, there can be, in cases submitted to the court, no such thing as the misleading of juries, and they can not be viewed exactly in the light of instructions. The finding of facts and the application of law are the combined and simultaneous operations of the same mind, which is trammeled with no instructions to mislead the judgment, and under no obligation but to apply the correct law to the exigencies of the case. The object of requiring declarations of law is to enable the appellate court to determine whether or not the judge had been misled by his own erroneous views.

1. Declaration of law need not precede finding of facts.

This is to be determined by the effect and purport of his declarations taken altogether and considered in the light of the facts. Although the court in trials by it discharges one of the functions of a jury in finding the facts, it is not required to sit as a jury any more than a Chancellor does in equity. It is not required to instruct itself in advance, by writing or otherwise, as juries are instructed. It determines the facts and law together, and then is required to put in writing its views of the law separately from its findings of fact. Instructions are not in their nature applicable to trials by the court, although counsel may very properly request, on the decision of a case, a statement of the conclusions of the court on any point of law involved. The common practice of settling declarations of law in advance is not required by the Code.

Although the judge declined to make certain declarations *ipsissima verba*, as requested by the defendants, we may take them altogether, qualifying each other, as indicative of his views. Substantially they are as follows:

1. Officer liable for insufficient levy.

That a neglect of an officer to levy on sufficient property, when he may do so, renders him and his securities liable for any loss; that in estimating sufficiency he must have in contemplation the time, manner, etc., of the sale, and the probable price which under all the circumstances might be obtained; and make a levy sufficient to pay the debt in full—that is, according to his best judgment; and if the goods do not bring the debt, when he might have taken more, it devolves upon him to show that from some unforeseen accident between the levy and sale the goods did not bring such value as might fairly have been anticipated. The court declared also that the great disparity between the debts in the attachments and the actual proceeds of sale, in the absence of any explanation to account for depreciation in value of the goods, was a circumstance which might be taken to show the true value of the goods when taken, and afforded ground for attributing to the constable carelessness and negligence in not making a larger levy.

At the request of defendant the court also declared that it was the duty of the officer in this case not to make an excessive levy; and that if under the responsibility of the two duties he did all that was prudent in the premises, he was not responsible for an inadequate levy; that he might exercise a reasonable discretion as to the amount levied on, and would not be responsible for loss after the exercise of a sound discretion; that he had the right, and it was necessary for him, to exercise his judgment in avoiding an inadequate levy on one hand and an excessive one on the other; and if in the outset he made an adequate levy and from subsequent facts the property failed to produce enough to satisfy the debt, he would not be liable.

Such, in substance, was the tenor of the declarations made. Those refused were, all but one, either repetitions of the same principles, or were not justified by the facts.

2. Non-payment of fees no defense for official neglect.

One was to the effect that the constable was not liable unless he had been paid or tendered his fees. This was properly refused. An officer need not execute civil process until his fees are paid or tendered, but if he receives the process, and either expressly agrees or tacitly assumes to execute it without demanding his fees, he must do so with the same promptness and fidelity as if he had been paid in advance. It is only a personal privilege for him to decline the service until paid, and not a license to neglect his duty and sacrifice the interests of those who have relied upon him and who may be supposed to have been ready to pay when required. The declarations of law were sound and supported by authorities.

The question reverts, did the officer fail in official duty? The court found in effect that he had done so in making an inadequate levy, whereby a great portion of the plaintiffs' debt had been lost. The grounds of that finding are expressed in one of the declarations of law above set forth, to-wit, that the gross inadequacy of the proceeds compared with the debts, afforded proof of negligence.

Certainly it seems such as can not be reconciled with any sound judgment. There is no proof, it is true, of any intention to act in bad faith towards the plaintiffs or to favor Mrs. Reinach or her other creditors. That is, no direct proof. But it does, at least, indicate culpable carelessness on the part of the officer in informing himself of the true value of the goods taken. A man of ordinary good judgment would not make such a mistake, if he had taken reasonable care to be advised of the nature and salable character of the goods. They were not deteriorated in the interval between seizure and sale. From all that appears they were as valuable when sold as when taken. The officer does not seem from the evidence to have estimated their value at all, but is shown to have taken the clerk's

statement of the cost price as the criterion. This may have been, and often is, and in this case evidently was, very fallacious. It was carelessness to rely upon it, and the officer did so at his peril and that of his sureties. He had no right to impose on the plaintiffs in attachment the obligation to rely upon the cost price for their security. They were entitled to a levy of the full amount in actual value, or at least to have the officer exercise a careful judgment as to such actual value, whether the goods had cost much or little.

The honorable circuit judge thought he had not done so, and we see no reason in the evidence to disturb his finding.

Affirm.

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SONFIELD V. THOMPSON ET AL.

ACKNOWLEDGMENT OF DEEDS: *Notary's certificate: Seal, emblems, devices, want of.*

The absence from a notary's seal of the emblems and devices required by the statute does not invalidate his certificate of the acknowledgment of a deed.

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

Jacob Triebor, for appellant.

While the seal used was not as prescribed by statute, yet it might properly be held to be a private seal, within the meaning of the statute. (*Sec. 4302, Gantt's Digest.*) The strict construction of the statute contended for, is neither necessary for the protection of creditors or subsequent purchasers, nor is it just or equitable.

The record in the recorder's office showed a perfect deed,

for the seal did not appear of record, except as a scroll, and that was all the notice appellee was legally entitled to, and sufficient to charge him with notice.

The defense is technical, opposed to equitable principles, and is not within the spirit of the law.

M. T. Sanders, for appellees.

The statute requires each notary to provide a seal of a *particular description*, with which he shall authenticate all his official acts. (*Gantt's Digest, sec. 4302.*) The seal used in this case does not comply with the statute. Officers whose official acts are required to be authenticated by a seal, must follow the law strictly. Their acts are of no force or validity unless attested by the kind of a seal which the law prescribes. To use a seal unknown to the law, or a wrong seal, is as fatal as the omission of a seal altogether. The certificate was no evidence of acknowledgment and insufficient to entitle the instrument to record. *15 Ark., 246; 32 Ib., 454; 6 Ark., 252.*

EAKIN, J. Appellant, Sonfield, is the trustee in a certain deed of trust, which is, in effect, a mortgage of personal property with power to take possession and sell, executed by Thompson on the second day of April, 1881, to secure a debt to Herman Fuerst. Default having been made, he brought replevin against Thompson to get possession. Thompson made no defense, but H. P. Grant and L. Hough were allowed to come in and defend as interpleaders; claiming the property by better right.

They set up another trust deed of the same property, executed by Thompson to Hough, in November, 1881, to secure a debt to Grant, which was then duly filed for record; and allege that the trust deed to plaintiff does not appear to have been duly acknowledged and recorded so as to effect them with notice.

NOTARY'S SEAL: Emblems, devices.

The alleged defect in the plaintiff's deed is that it was acknowledged before a notary public and authenticated by a seal which does not purport to be the private seal of the notary, and is not the proper seal of his office, as prescribed by law.

The figure of the seal which appears in the clerk's certificate of record, and upon the book of records, only as a scroll, is represented to us in the bill of exceptions, as the impression appears in the original. It is circular with an outer rim, on which appears at the top, "Jas. R. Turner," and at the bottom "Notary Public." In the center appears "Poplar Grove, Phillips Co., Ark." It is affixed as his seal "as notary public."

The court upon hearing, found for defendant Grant, and rendered judgment that he retain the property, from which Sonfield appeals.

The statute provides that every officer taking an acknowledgment of instruments for record, shall seal the certificate if he have a seal of office. (*Gantt's Digest, sec. 844.*) Notaries public were authorized to take the acknowledgments of deeds, etc., executed within the State. *Ib., sec., 841.*

With regard to notaries, a separate statute provided that they should certify under their official seals, the truth of all matters and things done by virtue of their office (*Ib., sec. 4299*); and in another section, prescribed certain emblems, devices and legends, which the impression of a notary's seal should present. Suffice it to say, on this point, that the impression in this case does not fulfill the requirements, with regard to the emblems and devices, although it does contain the legend, somewhat differently arranged from the mode prescribed. It is not a good seal, if the act in regard to acknowledgments before notaries, and the act prescribing their seals, are both to be taken together as mandatory.

It must be confessed that the power which the courts have

assumed of construing statutes according to their equity, and of distinguishing between mandatory and directory provisions, and of treating those held directory as if they were merely advisory, is a very dangerous one, productive of much confusion and uncertainty with regard to individual rights, until each particular statute has been "licked into shape" as it were by judicial decisions. Upon the other hand, it is quite apparent that the power and the duty to exercise it, are absolutely essential to guard against absurd conclusions, which the Legislature can not have contemplated, and to prevent the most shocking invasions of natural justice, and individual rights, which would often result from obedience to the letter of the law, however plainly expressed. Courts are properly reluctant to stultify the legislative department, and to become the instruments by which hardships are perpetrated, which the Legislature never had in view.

Courts have the legitimate power to ascertain the will of the Legislature, and in doing that have often felt the necessity of departing from the letter and strict grammatical construction of acts, and sometimes from the ordinary significance of words. And it is in pursuance of this power of ascertaining the true intention, and giving effect to the general purpose of acts, that they have drawn the distinction, or attempted to do so, between such directions as avoid an act done without their strict observance, and those which are prescribed rather for convenience and correct form, and which in general should be observed, but which are not considered of such importance as to fairly raise the presumption that the Legislature intended them to be in all cases indispensable. No formal rules have been, or can be laid down for the exercise of this power. Reference must always be had to the will of the Legislature, to be judicially ascertained from the language,

policy and manifest purposes of the act, taken altogether. Of course this discretion may be abused, and from its delicate nature, is one which courts have not unfrequently been desirous of abnegating entirely, yet none of them have as yet dared to face the consequences of a strict literal interpretation.

Notaries are public officers of the whole commercial world. Strict notarial duties concern commerce alone. Their acts duly authenticated are valid everywhere, and prove themselves by comity of nations. It was eminently fit that our Legislature in providing for the creation of notaries, should prescribe for them minutely, the seals which should be the attestation of their authority in sister States and foreign nations. In commercial affairs, their original certificates come under the inspection of all who act upon them, or can be affected by them, and the conformity of their seals with the devices, emblems and legends prescribed by law, gives abroad some additional assurance of authenticity. It renders imposture somewhat more difficult. It is a wise direction for proper notarial purposes, and very useful for general observance.

The directions occur in the act providing for the appointment of notaries, as follows:

"Every notary shall provide a seal of his office, which shall be engraved so as to present, by its impression, the emblems and devices presented by the great seal of the State, surrounded by the words 'Notary Public, County of ———, Ark.,' and he shall authenticate all his official acts therewith, and until an official seal shall be procured, each notary may use his privy seal, which shall be of the same force and effect as a public seal." *Gantt's Digest, sec. 4302.*

This does not purport to be a private seal, all of which indeed are abolished since the Constitution of 1868. *Art. 15, sec. 16.*

The definition of a *directory*, as distinct from a *mandatory* provision in a statute, is that it enjoins something which it is the duty of the officer or person to perform, and for willful neglect of which he may be held liable in damages to any one injured, but the failure to do which does not have the effect of invalidating the act.

There are in the section quoted two marked indications that it was intended to be directory. Without the section each notary might have devised his own seal. The section refrains from declaring expressly that any other seal than that designated shall be unlawful, or that an official act authenticated by any such other seal shall be void. This want of negative or condemnatory words with regard to other modes, has been, in several cases, taken as one of the *indicia* of a statute merely directory, although, of course, it is not decisive. Indeed, no rule on the subject can be laid down as decisive. The courts must often grope in very dim lights. (*Bishop on Written Law, sec. 254, et seq.; Sedgwick on Stat. & Const. Law, p. 318, note a,* where many examples are collected.) It is well, therefore, to say, in passing, that this rule is to be applied with caution, and only in aid of efforts to reach the true meaning. Many directions wanting negative or avoiding words are nevertheless from their own nature and importance held mandatory.

The second, and more persuasive *indicium* of intention is found in the provision for the use of his private seal by any notary until an official seal shall be procured, without any injunction upon him to procure one with convenient dispatch. This is wholly inconsistent with any supposed view in the legislative mind, that the special devices of the State seal were essential in the nature of things, or for any cogent reason, to give validity to a notarial act. *Some* seal is necessary, as this court has held. To affix one is a sol-

emn act, and any one which may be afterwards identified as the actual seal of the notary, may well have been considered as giving assurance, in addition to the signature, that the act is genuine. It might make the detection of a spurious instrument more easy. Such has always been the object and purpose of all seals, and in ruder ages the purpose was pretty effectually accomplished, more especially by private seals, which have always been various and peculiar, since the time when William the Conqueror, in token of sooth, did "bite the white wax with his tooth." The more obvious construction of the section thus seems to be, that whilst the Legislature meant to insist on some seal as essential, and to direct the use of the State emblems as the best for uniformity, it did not intend that an instrument should be void without those particular impressions upon the seal; *provided*, the notary should actually use the seal with which he was used to authenticate his official acts. He certifies in this case that he does so, by declaring that it is his seal as notary public.

Again: The functions of notaries principally regard commerce. They have by the law merchant no inherent power to take the acknowledgment of instruments of conveyance between individuals, for the purpose of registration. This is given them by statute, and *quoad hoc*, their powers and duties, and the legal effect of their acts, must be viewed as a part of the system of registration, and must be construed and determined with reference to, and in harmony with, the policy of that system. The system is the important thing. The agency of notaries is only called in as ancillary to it. The policy of the system is to give notice of all conveyances, to the world, for the protection of purchasers, obligees and grantees. It would entirely defeat that policy and give unbounded license for fraud if a recorded deed, effective in its terms as a conveyance, and appearing, on

any record that could be made of it, regular as to acknowledgment and filing, could be afterwards set aside in favor of a subsequent conveyance, from any defect of form which *could not possibly have appeared upon the record.* The recorder is not required to make a *fac simile* of the impression of a seal upon his books, and certified copies of them. He generally could not if he were. He does it by a scroll. His books show the acknowledgment and the terms of it, and the officer who takes it, and the date of filing, and that a seal was used which purports to have been a seal of office, and all this truthfully. If he were to record an instrument which, from any of the things required to be shown of record, appears not to have been properly acknowledged and filed, it would reasonably be held, and is so held, to be no notice. But if all he shows or is required to show be proper, it would be monstrous if persons dealing upon the faith of the record could not be protected by it.

One might, in a contrary state of the case, make a deed to a purchaser and acknowledge it before a notary not using the statutory seal. The purchaser might record it and make other conveyances upon it; and the land might pass on to other vendees who might make valuable improvements, relying upon perfect abstracts of title, from the legal source, and be afterwards ejected by some junior vendee of the original grantor. If it be said that such a successive purchaser should have demanded all the original papers in the chain and inspected the seals, of what value are the registration laws at all? that is, in view of giving assurance of title? They would be worth this, it is true, that finding his chain regular, after going back through all originals, he would then be protected against all elder unrecorded or junior recorded deeds; but that is not all or the principal policy of the law. In the rapid transitions of property in the American States, and the constant danger

of loss of originals, from the shifting habits of our people, they were intended to give evidence of title which might be relied on, whilst showing in the contents of the instruments, and upon the face of the certificates, everything of which a purchaser should equitably take notice. If the doctrine be established that a seal like this avoids the notary's certificate, then it would be better to burn every deed acknowledged before a notary as soon as recorded. There might, on close inspection, be found some difference between the impressions made by the notary's seal and that of the State, which the fire would cure and leave the record good.

We do not think the Legislature meant the section in question to be mandatory, and conclude that the court erred in finding for the defendant.

Reverse and remand for a new trial, with usual directions.

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PULASKI COUNTY v. REEVE.

1. COUNTIES: *Funding warrants: Act of* 1873 *constitutional.*

The act of April 29, 1873, authorizing certain counties to fund their outstanding indebtedness is not in conflict with the Constitution of 1868.

2. COUNTIES: *Not corporations.*

A county is not properly a corporation, but a political subdivision of the State, which, for the more convenient administration of justice and for some purposes of local government, is invested with a few functions characteristic of corporate existence.

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

P. C. Dooley and M. W. Benjamin, for appellant.

The act approved April 29, 1873, is unconstitutional because:

1. Under our statute counties are corporations, and the act authorizing the issue of the bonds was a special act conferring corporate powers in violation of section 48, article 5, Constitution 1868. *Gantt's Digest, sec. 937; 49 Ala., 507; 11 Ga., 207; 46 Md., 500; 22 Mich., 97; 4 Hill, 384; 11 Ill., 654; 39 Ib., 166; 2 Otto, 308; 20 Wend., 467; 6 Ohio St., 269; 77 Ib., 338; 19 Iowa, 43; 84 Ill., 590; 103 U. S., 707; 8 Neb., 178.*

2. The act authorizes the levy of a tax in excess of that prescribed by *section 47, article 5, Constitution 1868*, and is void. *20 Wal., 655; 102 U. S., 287; 37 Iowa, 42; 106 U. S., 183.*

E. W. Kimball, for appellee, *contra.*

1. Section 48, article 5, only applies to private corporations, and not to counties. See *20 Ohio St., 37; Dillon on Mun. Corp., 3d edition.*

Our statutes are full of legislation, special acts, in favor of counties. Whenever the Constitution speaks of this political division of the State, it calls them counties and not corporations. See *art. 5, sec. 47, and sec. 28, and 49, and art. 10, sec. 6, and art. 15, sec. 12.* See also, *32 Ark., 496; 36 Ib., 177; 35 Ib., 56; 34 Ib., 323.*

2. No additional indebtedness was created by the act, and section 5 confers no power to tax beyond the constitutional limit. Besides, section 5 may be stricken out, and the bonds would remain valid obligations of the county.

1. COUNTY WARRANTS: Funding act of April 29, 1873, constitutional.

SMITH, J. Reeve recovered a judgment against Pulaski County upon certain bonds issued by it under the act of April 29, 1873, to authorize certain counties to fund their outstanding indebtedness. It is conceded that the judg-

ment was correct, provided the act was not unconstitutional. In *Worthen v. Badgett, 32 Ark., 496*, it was determined that this statute had been enacted in accordance with constitutional forms, and that it was not open to the objection of embracing more than one subject.

The act is now assailed as special legislation conferring corporate powers, and therefore forbidden by *section 48 of article 5, Constitution of 1868.*

2. COUNTIES: Not corporations.

Although each county in the State was, by section 937 of *Gantt's Digest*, declared to be a body politic and corporate, yet the term corporation, nowhere in that Constitution includes counties. There are numerous provisions in the instrument affecting counties, but they are always spoken of as counties, and not as corporations. A county is not properly a corporation, but a political subdivision of the State, which for the more convenient administration of justice and for some purposes of local government, is invested with a few functions characteristic of corporate existence. *Commissioners v. Mighels, 7 Ohio St., 109.*

The very same section, under consideration, requires corporations to be formed under general laws. Yet every county is, and from the nature of the case must be, created by a special law. It further provides that dues from corporations shall be secured by the individual liability of stockholders, and that the property of corporations shall be forever subject to taxation, the same as that of individuals. But no individual's own stock in a county and its property is exempt from taxation.

Several of the recent American constitutions contain this identical provision. But the courts have uniformly, so far as the cases have come under our observation, refused to apply it to counties. *County of Sherman v. Simonds, decided by Supreme Court of United States, January 7, 1874, 3 Sup. Court Reporter, 502; Jefferson County v. People, 5*

Neb., 127; State v. Cincinnati, 20 Ohio St., 37; Beach v. Leahy, 11 Kan., 23.

The act is also supposed to conflict with section 47 of the same article, which reads: "The General Assembly shall not have power to anthorize any municipal corporation * * * to levy any tax on real or personal property to a greater extent than two per centum of the assessed value of the same."

The second section of the act provides that the bonds to be issued shall be payable in not less than three nor more than ten years from the date thereof. And the fifth section makes it the duty of the board of supervisors to levy a special tax of sufficient amount to pay the principal and interest of the bonds as they mature. It is argued that a levy exceeding two per cent. might be necessary to meet the payment of the funded bonds. It is only necessary to say of the objection, that the act confers no power to tax beyond the constitutional limit.

No new obligation or increase of debt is authorized, but only the evidences of the debt are changed, negotiable bonds being substituted for warrants.

Affirmed.

Burke, Ex., v. Snell.

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1. Amendments: *When allowed.*

Additional pleadings to correspond with the issues established by the evidence may be filed after the case has been argued to the jury.

2. Evidence: *Satisfaction of mortgage on the record.*

The indorsement on the record by the mortgagee, of satisfaction of a mortgage, is *prima facie* evidence of the extinguishment of the debt, as well as of the security, and the burden of showing the contrary is upon the creditor; but a cotemporaneous indorsement by him on the original mortgage, of only part satisfaction is admissible to explain the record entry.

3. INSTRUCTIONS: *Must be applicable to the evidence.*
It is error to give an instruction upon a state of facts not in evidence.

APPEAL from *Nevada* Circuit Court.
Hon. G. B. DENISON, Special Judge.

Smoote & McRae for appellant.

1. The court erred in permitting appellee to file their second answer pleading payment, after the testimony had been concluded and the argument of counsel made, and in remarking in the presence of the jury, that evidence had been introduced to sustain two defenses, accord and satisfaction and payment. *Secs. 4611 to 4624, Gantt's Digest; Const., art. 7, sec. 24.*

2. The first instruction for appellee was abstract and misleading. *16 Ark., 617; 23 Ib., 289.*

3. The second instruction for appellee should not have been given. A mortgage or deed of trust may be fully satisfied as to the property conveyed, by applying the whole of it, or its proceeds, to the debt, without fully discharging the debt itself. *Herman on Ch. Mort., sec. 170; Jones on Ch. Mort., sec. 665.*

4. It was error to exclude the pencil memorandum on the original mortgage, and to admit the record entry of the satisfaction of the mortgage.

SMITH, J. This was an action against John E. Snell on a promissory note for $272.93, made by him and Stephen A. Snell, May 28, 1875, and credited January 26, 1876, with $132.15. Before answer filed, Burke, the plaintiff, who was the payee and holder of said paper, died, and the cause was revived in the name of his executrix. The defendant pleaded that in July, 1875, Burke had accepted the individual note of Stephen A. Snell, secured by deed of

trust, in full satisfaction of the original debt, and had agreed to deliver up the note herein sued upon, and to release defendant, and that said deed of trust had been afterwards satisfied. The evidence wholly failed to establish the plea of accord and satisfaction, but did show that on the same day the note was made, Stephen A. Snell had executed to Burke a deed of trust upon his growing crop to secure the payment of this same note, and any future advances that might be made to the grantor therein; and that satisfaction of the deed of trust had been entered of record.

1. AMENDMENTS: When allowed.

After the testimony was all in, and the case had been argued to the jury, the court suggested to the defendant's counsel, the propriety of adding a plea of payment, and a formal plea of payment was accordingly filed.

This was objected to below. And it is insisted here that the permitting of such a material amendment at that stage of the trial was a gross abuse of the court's discretion.

The primary object of the Code is the trial of causes upon their merits, and that the rights of suitors shall not be sacrificed to technical mistakes, omissions or inaccuracies. To this end the provisions for amendment are exceedingly broad and liberal.

"The court may at *any time*, in furtherance of justice, and on such terms as may be proper, amend any proceedings or pleadings by adding or striking out the name of any party, or by correcting a mistake in the name of any party, or a mistake in any other respect, by inserting other allegations material to the case; or when the amendment does not change substantially the claim or defense by conforming the pleading or proceeding to the facts proved." *Gantt's Digest, sec. 4616.*

"No variance between the allegation in a pleading and

the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it is alleged that a party has been so misled, that fact must be shown to the satisfaction of the court, and it must also be shown in what respect he has been misled; and thereupon the court may order the pleading to be amended upon such terms as may be just." *Ib., sec. 4611.*

"The court must in every stage of an action, disregard any error or defect in the proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect." *Ib., sec. 4619.*

Accordingly, under similar provisions elsewhere, the courts have determined that when testimony is introduced without objection, tending to prove a different issue from that made in the pleadings, the pleadings may, even after the trial, be amended to conform to the proof. *Catron v. Shepherd, 8 Neb., 308; Hodge v. Sawyer, 34 Wis., 397; Bowman v. Van Kuren, 29 Ib., 209; Bullard v. Johnson, 65 N. C., 436; Robinson v. Willoughby, 67 Ib., 84; Oates v. Kendall, Ib., 241.*

2. EVIDENCE Satisfaction of mortgage.

On the trial the defendant procured from the plaintiff and read in evidence the original deed of trust. Upon this was the following indorsement in the handwriting of the beneficiary:

"Settled in full on record for the cotton called for.

"F. BURKE."

The court first admitted this memorandum to be read, and afterwards excluded it; and its action in this respect is assigned as error. The admission of a writing involves the admission of all self disserving indorsements thereon made by the holder. Whether an entry is self-serving or

the opposite depends often on the time when it is made. *Wharton on Ev., pp. 619, 1103, 1135.*

Thus, if it had been shown that this memorandum had been made contemporaneously with the entry of satisfaction on the record, it might explain such satisfaction. But if made several years afterwards and recently before the commencement of this action, it would be inadmissible and a mere declaration of the interpretation placed upon a transaction by an interested party. No evidence of the time when the memorandum was made being offered, it was no error to exclude it from the jury.

2. INSTRUCTIONS: Must be applicable to evidence

The court charged, in substance, (1) that if the jury should find from the evidence that the new note and mortage set up in the plea of accord and satisfaction had been made, their verdict should be for the defendant; and (2) that the record entry noting the satisfaction of the trust deed was in the nature of a receipt for the debt secured thereby, and *prima facie* evidence of its full payment.

The first instruction was abstract and misleading. There is no evidence in the bill of exceptions of but one note and one deed of trust; and these were both executed on the same day. It is error to give an instruction with reference to a state of facts not in evidence. *Owens v. Chandler, 16 Ark., 651; Morton v. Scull, 23 Ib., 289; Thompson v. Bertrand, Ib., 730; Thompson's Charging the Jury, p. 62.*

The second instruction was substantially correct. An acknowledgment by a mortgagee of having received satisfaction in full of the mortgage, entered on the record, *prima facie* imports extinguishment of the debt as well as of the security, and the burden of showing the contrary rests upon the creditor.

But for the error aforesaid, the judgment is reversed, and a new trial awarded.

GERMAN BANK v. HIMSTEDT.

1. MARRIED WOMAN: *Need not schedule her property.*
   Since the act of December 15, 1875, the neglect of a married woman to schedule her property does not prejudice her right and title to it. She may still show that it is hers.
2. HUSBAND AND WIFE: *Title to money in possession of wife.*
   There is no presumption of law that money or transferable securities in possession of the wife belongs to the husband instead of to her.
3. BANKS: *Must pay depositors money deposited.*
   A bank is bound to pay to a depositor or to his order, money deposited by him, and can not refuse on the ground that it belongs to another.

APPEAL from *Pulaski* Circuit Court.
Hon. F. T. VAUGHAN, Circuit Judge.

U. M. & G. B. Rose, for appellant.

Money belonging to a married woman need not be scheduled. (*22 Ark., 432.*) But if it must be, the act of 1875 (Acts 1875, p. 173) does not confiscate the wife's property for a failure to record, but merely casts upon her the burden of proof.

Mrs. Marko was in possession of this money, and possession is *prima facie* evidence of title to personal property, and it devolved upon appellee to show that the money belonged to her husband. *11 Ark., 271; 38 Ark., 417.*

The bank acted in good faith, and the courts will not make a garnishee who has so acted pay a debt twice. *3 Met., 301; 5 Cush., 544; 4 Allen, 485.*

T. J. Oliphint, for appellee.

Money is personal property (*Gantt's Digest, sec. 4629*), and subject to execution. (*Ib., sec. 2630.*) Personal property of a married woman is *prima facie* her husband's, but under Acts 1875, p. 173, she can overcome the *prima facie*

case by proof of ownership. None of the enabling statutes change the common law rule, except she may own personal property by scheduling it, or in a contest by proving her ownership. *Prima facie* it is her husband's. (*33 Ark., 611.*) Before the act of 1875 she was absolutely required to schedule, and the difficulty in describing money can not change the rule.

Cites *secs. 422–423, Gantt's Digest*, and *29 Ark., 470*, in support of the finding of the court below.

SMITH, J. Himstedt brought an action by attachment before a justice of the peace against Frank and Elizabeth Marko and caused the bank to be summoned as garnishee. The bank answered that it held no money belonging to Frank Marko, but had a certain sum, within the jurisdiction of the justice and sufficient to cover the plaintiff's demands, deposited by Elizabeth Marko.

As to her the action seems to have been discontinued by the plaintiff, and the bank, upon production of a certificate by the justice that the action had been so dismissed, paid her the amount standing to her credit. The action proceeded against Frank Marko to trial, when the attachment was dissolved. But on appeal to the Circuit Court the attachment was sustained and judgment rendered against Frank Marko for a small amount.

The plaintiff then took issue to the answer of the garnishee, alleging that Elizabeth was the wife of Frank, but not asserting, except inferentially, that it was Frank's money which had been on deposit. This issue was submitted to the court instead of a jury, and the court found that Frank and Elizabeth were husband and wife, and that, as the money had not been scheduled as her separate property, it was liable for her husband's debts. The bank was accord-

ingly directed to pay into court the amount of the plaintiff's debt and costs.

1. MARRIED WOMAN: Need not schedule her personal property.

It may well be doubted whether money falls within the spirit and policy of the act providing for the scheduling of the separate estate of a married woman. The purpose of such legislation is to prevent creditors from being defrauded who have extended credit to the husband under the impression that he is the owner of such property. Now, when the property is visible and tangible, like horses, cattle, furniture, etc., the husband may obtain a fictitious credit by delusive appearances or false representations as to its ownership. But this is not likely to happen in the case of money, which is usually kept secretly and not exposed to public view.

Moreover, money, as it is constantly changing its form and character, as the necessities for its use arise, is not a thing capable of a permanent and definite description. There is an intimation to this effect in *Beeman v. Cowser*, *22 Ark.*, *432*, which arose under a statute absolutely requiring the property of a married woman to be recorded in order to enable her to hold it against her husband's creditors.

But this point is waived, as not necessary to the decision of this cause and of no practical importance in itself, since under the act of December 15, 1875, the neglect to file a schedule does not prejudice the wife's right and title to her property. She may still show that it was hers.

2. Money in possession of wife presumed to be hers.

The only circumstance in proof tending to show who was the owner of this money was that Elizabeth Marko had deposited it in bank in her own name. Frank Marko, so far as appears, had never claimed it; nor did the plaintiff offer any proof that it was his. But the court presumed as matter of law that it belonged to him. But there is no such legal presumption, at least with regard to money and securities that are transferable by delivery. There for the

benefit of trade a property is created in the bearer. A bank note or a coin may have been stolen; yet one who takes it in good faith for value may hold it against the loser. Possession is evidence of ownership; and the burden of proof is on the party who assails the possession. *Murray v. Lardner, 2 Wall., 110.*

3. BANKS: Must pay to depositors money deposited.

A bank receiving a sum of money of a depositor is bound to pay it to him or his order, and can not refuse payment on the ground that it is the property of another. *First National Bank v. Mason, 95 Pa. St., 113.*

Payment of this money to Marko might have been stopped by the delivery of a proper notice to the bank, specifying that it was attached as the property of Frank Marko. *Gantt's Digest, sec. 399, third subdivision.*

But nothing of the kind was attempted, and the bank had no sort of notice, before it paid out the money, that the plaintiff claimed that the money did not belong to the wife. The writ of garnishment did not impart such notice; for that only commanded the bank to disclose what funds it held belonging to either of the defendants.

And after the discontinuance of the action as to the female defendant, no issue being pending upon the truth of its answer, the bank had the right to take for granted that its liability in that action was at an end.

If the law were otherwise than we have declared it, no bank could with safety receive the deposits and pay the checks of a married woman. Nor could any merchant sell her goods, even for cash. For, after she had drawn out her deposits in the one case, or after the goods had been delivered and used in the other case, the husband could claim the refunding of the money upon the ground of constructive notice that the money was his. For we take it to be clear that if the plaintiff can make the bank pay this debt twice, then Frank Marko, had there been no judg-

ment against him, could have done the same thing, upon the same evidence.

Such a doctrine would lead to novel consequences in the commercial world.

Reversed and remanded for a new trial.

MOORE ET AL. V. CITY OF LITTLE ROCK.

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1. CITIES: *Annexation of territory: Dedication.*

If the owner of land contiguous to a city of the first class lays it off into blocks and lots as an addition to the city, he thereby constitutes it an annexation, and dedicates the intervening streets and alleys to the city.

2. SAME: *Mortgagor can not annex: Taxes: Injunction.*

A mortgagor can not annex the mortgaged land to a city so as to affect the rights or security of the mortgagee; and the latter may enjoin the collection of taxes on such land annexed without his consent.

3. SAME: *Sale under mortgage avoids dedication.*

A foreclosure sale under mortgage, of land dedicated to a city by the mortgagor since the mortgage, avoids the dedication and the purchaser buys free from it.

4. ACKNOWLEDGMENT: *Defective: Who may not avoid.*

A defective acknowledgment of a mortgage can not be avoided by one acquiring the mortgaged property without value.

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

U. M. & G. B. Rose for appellants.

1. A mortgage remains a valid lien until the debt has been discharged; it can be satisfied only by payment. Extension of time; giving new notes, or execution of subsequent mortgages, does not discharge it, but the original remains in force until discharged by payment. *33 Iowa, 373; 5 Cal., 455; 9 Ib., 104; 23 Ind., 397; 14 Conn., 260;*

Ib., 334; 10 N. H., 210; 23 Miss., 173; 18 Ind., 496; 58 Mo., 213; 23 Ala., 797; 37 Me., 11; 37 Ark., 91; 36 Ark., 69; 13 N. Y., 556; 14 Ark., 86; 20 Wend., 17; 2 Jones on Mort., sec. 929.

The donation of the streets and alleys to the public was made subject to the mortgage for the purchase money, and that dedication was cut off by the foreclosure. The mortgagor had only an equity of redemption in the premises, and his rights and those of his grantees were terminated by foreclosure. *Hague v. Inhabitants, etc., 23 N. J. Eq., 354.*

2. Paying taxes on the quarter section of land as "McDonald & Wheeler's addition, etc.," is no ratification of the action of the parties laying it out into lots and blocks. Nor is this a case of equitable estoppel, for no act has been done by which another has been misled to his injury.

W. L. Terry, City Attorney, argued the case orally.

SMITH, J. The object of this suit was to enjoin the collection of city taxes on a quarter section of land adjacent to the city, but wholly unimproved, according to the uncontroverted averments of the bill. The plaintiffs were two married women, non-residents of the State. In the latter part of the year 1870, or beginning of 1871, they had sold and conveyed the land to Alexander McDonald, and had taken a mortgage back for the purchase money. This mortgage was in good form, properly executed and acknowledged, and duly recorded. Afterwards, upon an extension of time for the payment of the purchase money, McDonald executed a new mortgage, but the acknowledgment of this was defective.

In 1872, McDonald and one Wheeler, who had in the meantime acquired an interest in the property from McDonald, conveyed it in trust to John W. Faust as trustee,

to lay it out in lots and blocks. And in 1873, Faust by bill of assurance, laid the land off as McDonald and Wheeler's Addition to the City of Little Rock, and donated the streets to the public.

The purchase money not having been paid, the plaintiffs filed their bill and obtained a decree of foreclosure, and at the sale bought the land in.

Upon the final hearing, the Chancellor held that the land was within the corporate limits of the City of Little Rock, and dismissed the bill for injunction.

1. CITIES: Annexation of territory: Dedication.

No doubt causing the land to be laid off as an addition, and subdividing it into lots and blocks, was a dedication of the intervening streets and alleys, so far as McDonald, or any title derived from him, is concerned. The statute declares the legal effect of such acts, when done in relation to territory contiguous to a city of the first class, to be annexation. *Gantt's Digest, sec. 3317; Act of March 9, 1875, sec. 94; City of Little Rock v. Parish, 36 Ark., 166.*

But could a dedication by McDonald affect the plaintiffs' mortgage?

2. Mortgagor can not annex after mortgage.

A dedication must be by the owner of land or of an estate therein. If a mere intruder upon this land had attempted to lay it off as an addition, the true owner would not be bound. And the dedication of the owner of a particular estate will not bind the remainder-man, when the estate comes into his possession. *2 Smith's Lead. Cas., [90], notes to the case of Dovaston v. Payne.*

And a dedication by an agent without authority would not bind his principal.

Now a mortgagor is, for most purposes, regarded in equity as the beneficial owner. But he can do nothing to diminish the security. And the mortgagee is not affected by his acts in passing any right of his in the premises to

third persons. Thus, if he conveys the land, his grantee takes only an equity of redemption. If he confesses judgment, the lien which his creditor obtains is subject to the mortgage. If he gives a lease or a license, the mortgagee need not respect it after he gets possession upon foreclosure.

It is plain McDonald could not have dedicated the whole tract, as for a park or pleasure ground, to the prejudice of plaintiffs. Neither could he dedicate, let us say, one-fourth of it for streets and alleys, so as to bind them. The plaintiffs had a right to the whole premises as security for their debt. They could not be compelled to take three-fourths of the land as payment. A foreclosure sale under a mortgage to secure the purchase money avoids a previous dedication by the mortgagor, and a purchaser at such sale buys free from it. *Hague v. Inhabitants of West Hoboken, 23 N. J. Eq., 354.*

The defect in the certificate of acknowledgment is a matter with which the city has not the remotest concern, and of which it can take no advantage. It was not a purchaser for value. *Mastin v. Halley, 61 Mo., 196; Bishop v. Schneider, 46 Ib., 472.*

The payment of city taxes for 1875 and 1876, and of State and county taxes for the four following years, upon the land, under the description of "N. W. ¼ of Sec. 9, T. 1, N. R. 12 W., being all of McDonald & Wheeler's Addition to the City of Little Rock," are considered as acts of ratification and acquiescence of too slight and indecisive a character to affect the result.

The decree is reversed and an injunction will be awarded here.

FRAZIER v. THE STATE.

1. EVIDENCE: *Contradicting witness by his contrary statements.*

A material witness against a defendant on trial for murder was asked on cross-examination, "if he had ever expressed to Washington Smith or others, feelings of hostility towards the defendant," to which he answered: "I am on good terms with the defendant; never had a falling out in our lives; have known him a long time, and we have always been friends." The defendant then offered to prove by Washington Smith that he had heard the witness say that if necessary, he would swear the life of the defendant away, and that he knew that the witness and defendant had had differences and were not friendly. This testimony was refused. *Held,* that the defendant had laid sufficient ground for the admission of Smith's testimony, and its refusal was error.

2. EVIDENCE: *Confessions: The whole must be admitted.*

When a defendant's confession is given in evidence against him, all that he stated in the confession, as well that for him as that against him, must be admitted.

APPEAL from *Dorsey* Circuit Court.
Hon. J. M. BRADLEY, Circuit Judge.

W. P. Stephens, for appellant.

1. It was error in not permitting appellant to prove by Ross, who held the inquest, the other and additional material statements—in short, all of the declarations made at the same time and on the same occasion. *34 Tex., 659; 39 Ib., 52; Pomeroy's Arch. Cr. Pr. & Pl., 385, and notes, etc.*

2. The court should have permitted appellant to prove by Washington Smith the hostile feelings of Bill Nick Marks, witness for the State, against appellant. *12 Ark., 800; 30 Ib., 340; 37 Miss., 402.*

3. It was error to exclude the evidence of Ed Marks. See *supra.*

C. B. Moore, Attorney General, for the State.

The proper foundation was not laid for the introduction of the evidence of Washington Smith and Ed Marks. *Benton v. The State, 30 Ark., 340.*

It might have been better to permit the witness Ross to state all that appellant said at the time he made the confession, but numerous other witnesses had testified to *all* that he did say on the occasion, and the error is too unimportant to reverse the case on.

English, C. J. At the September term 1883, of the Circuit Court of Dorsey County, Abe Frazier was indicted for murder, the indictment charging in substance, that on the twenty-seventh December, 1882, he murdered Lewis Davis, by shooting him with a double barreled shot-gun. The jury found him guilty of murder in the first degree, as charged; he was refused a new trial, sentenced to suffer the death penalty, and obtained an appeal.

On the trial there were two theories of the homicide. The theory of the prosecution, in brief, was, that appellant having malice against Lewis Davis, induced him to come to his house at night, on a promise to pay him a debt which he owed him, and when Davis approached the house appellant being in readiness with his gun, murdered him.

The theory of the defense, as briefly stated, was, that Davis went upon the premises of appellant late at night, entered his crib and took from it a sack of corn, and was being chased from the crib by the yard dogs, when appellant, not knowing at the time who he was, shot him.

Bill Nick Marks, a witness for the State, testified to a private confession made to him by appellant, after the homicide, which tended to establish the theory of the prosecution; indeed, it must have been measurably upon

the testimony of this witness that the jury found appellant guilty of murder in the first degree.

On cross-examination he stated:

"I am on good terms with defendant; never had a falling out in our lives. I have known him a long time, and we have always been friends."

These statements were made upon being asked by defendant "if he had ever expressed feelings of hostility towards defendant, to Washington Smith or others."

Defendant offered to prove by Washington Smith, that he had heard the witness for the State, Bill Nick Marks, say that, if necessary, he would swear the life of defendant away.

To the introduction of which evidence the State objected on the ground that the defense had not called the attention of witness, Marks, to said statement, with time and place, when he was on the stand, and the court sustained the objection, and defendant excepted.

Defendant then offered to prove by Ed Marks that he knew that defendant and witness, Bill Nick Marks, had difficulties, and were not on friendly terms. Which evidence the court, on its own motion, refused to permit defendant to introduce, and defendant excepted.

These exceptions were made grounds of the motion for new trial.

I. The court erred in excluding the proposed testimony of Ed Marks, a sufficient foundation having been laid for its admission. (*Cornelius v. The State, 12 Ark., 800; Benton v. The State, 30 Ark., 340.*) Proof that Bill Nick Marks was unfriendly to appellant, which he had denied on his examination in chief, might have lessened the value of his testimony in the estimation of the jury.

II. The State introduced in evidence the voluntary confession made by defendant at an inquest held on the body

of Lewis Davis by a justice of the peace. The appellant offered to prove by A. L. Ross, the justice of the peace who held the inquest, all that he said in that confession, and among other things, that he had stated as a part of the confession, that when he fired the first shot, he did not know that he was shooting at Lewis Davis, and that as soon as he shot the last time, he went to J. H. Marks, and acting under his advice, surrendered himself into the custody of witness, and that when he fired the second shot he heard a noise, and was afraid that the person might shoot him; which evidence the court excluded, to which defendant excepted, and made the exclusion a ground of the motion for a new trial.

The State having introduced the confession of appellant, all that he said at the time was competent, and he had the right to prove any part of the confession omitted in the evidence of the State. *Atkins v. Hershey, 14 Ark., 442; Wharton Cr. Evidence, 8th ed., sec. 688.*

There were other grounds in the motion for a new trial, but they presented nothing novel.

For the errors above indicated, the judgment must be reversed and the cause remanded for a new trial.

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Scott v. The State.

1. Larceny: *Indictment: Ownership of the property.*

When the stolen property belongs to joint owners, the ownership must be laid in all of them, unless it was, when stolen, in the control and management of one of them; in which case the ownership may be laid in him.

2. Criminal Law: *Venue: Proof of.*

If the State fail to prove the venue in a criminal case, but it is proven by the defendant in the progress of the trial, this will be sufficient.

APPEAL from *Monroe* Circuit Court.
Hon. M. T. SANDERS, Circuit Judge.

S. P. Hughes, for appellant.

The presumption that one in possession of stolen property is the thief, is not one of law, and a weak one of fact; is not at all conclusive, and of itself is not sufficient for a conviction. *Boykin v. The State, 34 Ark., 443.*

When a man in whose possession stolen property is found, gives a reasonable account of how he came by it, it is incumbent on the prosecutor to show that the account is false. (*3 Greenl. Ev., sec. 32.*) It is sufficient for the prisoner to raise a doubt of his guilt. *State v. Merrick, 19 Me., 398; 1 Leading Cr. Cases, 360; 3 Greenl. Ev., 161.*

C. B. Moore, Attorney General, for the State.

In this case there was possession of stolen property and *unexplained*, which is *prima facie* evidence of guilt, and not *rebutted. Boykin v. The State, 34 Ark., 443.*

ENGLISH, C. J. Marion Scott was indicted in the Circuit Court of Monroe County, for grand larceny, the indictment charging in substance that, on the fifteenth of March 1882, in said county, he stole a cow of the value of $15, the property of Bony Robinson.

He was tried on plea of not guilty, convicted and sentenced to the penitentiary for one year; refused a new trial, took a bill of exceptions and obtained an appeal.

It is submitted by his counsel here, as in the motion for a new trial, that the verdict was not warranted by the evidence, and *Boykin v. The State, 34 Ark., 443*, is relied on.

1. LARCENY: Indictment: Ownership in the property.

I. The indictment alleged the stolen cow to be the property of Bony Robinson.

On the trial it was proved that the cow in question belonged to Bony Robinson and his sister, Jessie Robinson;

that they inherited this cow with a large lot of cattle from their father, F. M. Robinson, and that Bony Robinson had the control of the cow.

When the goods belong to joint owners the ownership must be laid in all of them. But if one of them has such a separate possession as to give him a special property by reason thereof, it will not be ill to lay the ownership in him alone. *2 Bishop on Criminal Procedure, sec. 723.*

It appears from the evidence that though the cow was the joint property of Bony Robinson and his sister Jessie, yet she was under the control and management of the brother, and it was sufficient to lay the property in him.

2. VENUE. Proof of.

II. The value of the cow was proven to be eighteen dollars. The State failed to prove by any witness examined on her part the venue as alleged. The witnesses introduced by her proved that the missing cow was found in possession of the appellant at his residence, about twelve miles from Bony Robinson's residence. But they did not state that the residence of appellant was in Monroe County. This omission, however, was cured by appellant, who introduced evidence showing that he resided in Duncan township, Monroe County.

III. The cow in question, as well as the other cattle inherited by Bony Robinson and his sister Jessie from their father, F. M. Robinson, was in his mark and brand, the mark being a swallow fork in the right ear and an underbit in the left ear, and the brand being O on the hip.

About the first of February, 1882, the premises of Bony Robinson being overflowed, the cattle belonging to him and his sister, marked and branded as above, were driven from home out of the overflow in the direction of the neighborhood where appellant resided.

Mrs. Richie, who lived within a few hundred yards of Bony Robinson's house, and who knew the cow in ques-

tion, went to the appellant's neighborhood some time in March, 1882, looking for some of her own cows that had been driven out of the overflow, and saw the cow in controversy in the possession of appellant, and told him that it was Robinson's cow. Defendant answered that the cow was not Robinson's, but belonged to a man down in Pine City. Witness noticed that the cow was then in the Robinson mark, with which she was familiar.

Afterwards, about the middle of March, 1882, Bony Robinson and his brother, F. J. Robinson, went to the residence of appellant and found the cow in his possession, but her marks had been changed by a fresh crop off of the right ear and a fresh hole in the left ear. Appellant said he got the cow of W. T. Washington, and claimed it as his own, but finally surrendered it to the Robinsons on their promise to return it to him if W. T. Washington said he sold such a cow to appellant. At that time Washington was out of the county, but afterwards returned, and after his return appellant did not lay any claim to the cow.

After Robinson had brought the cow home, Mrs. Richie saw it again, and testified that the marks had been changed. It was proved that Washington did not live at Pine City, and that the cow was not in his mark. It was also proved that appellant's mark, as recorded, was a smooth crop off the right ear and two swallow forks and a hole in the left ear, and that the mark of a near neighbor of his, as recorded, was a smooth crop off the right ear and a hole in the left ear.

So it seems that appellant in changing the mark of the cow did not use his own mark as recorded, but that of a near neighbor.

His statements about the ownership of the cow were contradictory. To Mrs. Richie he stated that the cow belonged to a man down in Pine City, and to the Robinsons he

claimed to have bought the cow from Washington, who did not live at or near Pine City. It is also probable from the evidence that he changed the mark of the cow after he was told by Mrs. Richie that it was Robinson's cow.

Appellant did not think proper to put his character in issue.

Upon the whole, the evidence made a stronger case against appellant than was made by the testimony against Boykin in *Boykin v. State*, *supra*, relied on by counsel for appellant, and we can not undertake to say that the evidence did not warrant the verdict.

It is not insisted here that either of the instructions moved for appellant and refused by the court should have been given, and the general charge of the court was certainly fair and unobjectionable.

Affirmed.

BAGLEY v. CASTILE.

1. TAXATION: *Power of the Legislature.*

The general powers for raising revenue granted to the Legislature by the Constitution must be measured by usages obtaining and well recognized at the time of its adoption, and any disposition of property for taxes that would arbitrarily cut off from the owner all possibility of benefit from the excess of value over the taxes would be an abuse of power.

2. TAX SALES: *Act of March* 16, 1879: *Purchasers under.*

The act of March 16, 1879, "to provide for the redemption of delinquent lands" is unconstitutional and void; but a purchaser of lands for taxes under said act, and his vendee, has a lien upon the land for the burden discharged, both in the purchase and for subsequent taxes.

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

Paul Bagley, pro se.

Contends that the act is constitutional. That the law contemplated a *sale* of the lands after one year, and not a *redemption*, and that the Chancellor erred in sustaining a general demurrer to the bill, and in not granting the alternative relief prayed, citing numerous authorities.

S. P. Hughes for appellant.

The law contemplated a *sale*, not a redemption. The *title* of the act is not a safe criterion to judge of the intention of the Legislature. (*Sedgwick on Stat. and Const. Law, 51; Am. Law Rev., August, 1883.*) The intention of the Legislature must always control. (*2 Cranch, 10, 258; 3 Cow., 89; 3 Scam., 153; 12 John., 176; 4 Cush., 314; 1 Miss., 147; 2 H. & J., 69, 167; 1 Peters, 64; 2 Ib., 662.*) And this intention must be collected from the whole act. *1 Kent Com., 461; 12 John., 175; 2 Cranch, 358; 2 Scam., 224: 3 Ib., 35, 153; 10 Ga., 190; Cooley Const. Lim., 184.*

The act is constitutional. The State had a right to sell for taxes, and was not obliged to first have the lands condemned or forfeited; nor need there be a public advertisement, notice and sale. (*Cooley Const. Lim., 318.*) "Law of the land" means "due process of law," and constitutional provisions securing trial by jury and due process of law *do not* apply to proceedings for the assessment and collection of public revenues, or the exercise by government of political rights. (*54 Ill., 39; Cooley on Taxation, 36 to 40, 302–3.*) But the act of 1879 is the "law of the land." *Cooley on Taxation, 38, n. 1.*

The power of taxation, and the policy and mode of enforcing it, is with the Legislature, and the courts have nothing to do with it. *Cooley Const. Lim., 479; 8 Otto, 392; Cooley on Taxation, 32 to 36; 2 Story on Const., 397.* See also *Cooley Const. Lim., 160, 169, 164 171, 177, 182–3; 2 B. Mon., 179.*

Blackwood & Williams for appellee.

1. Until land is forfeited to the State, she has no power to sell. (*Blackwell on Tax Titles, ch. 82.*) The whole period prescribed by statute must elapse before a sale can take place. *Burroughs on Taxation, p. 297; 30 Me., 226; 3 G. Greene (Iowa), 133; 16 How., 610.*

If the State had a right to sell, she must sell at public sale to the highest bidder, or the sale will be depriving the citizen of his property without process of law, or the law of the land contrary to *sec. 21, art. 2, Const., 1874.*

As to what is "due process of law," and "the law of the land," see *Cooley Const. Lim. (4th ed.), 353 et seq.; 4 Wheat., 235; Ib., 519; 1 Bay., 384; Blackwell on Tax Titles, p. 17; Story on Const.; Sedgwick on Stat. and Const. Law, pp. 534, 619; Smith's Com. on Const., p. 722.*

To make a valid sale, the State must sell at public sale, to the highest bidder. *Blackwell on Tax Titles, 267; Burroughs on Taxation, p. 297; Cooley on Taxation, pp. 339 and 344.*

J. M. Moore, also for appellee.

The act is unconstitutional. *Cooley on Taxation, p. 339; 4 Hill, 144-5; 32 Miss., 424; 11 Minn., 480; 4 Dev. (N. C.), 15; 13 N. Y., 394; 2 H. & M. (Va.), 317; 18 Grattan, 140, 144, etc.; Blackwell on Tax Titles, p. 608 et seq.*

EAKIN, J. In January, 1882, appellant by petition applied to the Chancery Court for confirmation of a tax title to certain lands, which on the fourteenth day of July, 1879, had been returned by the collector to the county clerk as delinquent for the taxes of 1878. After one, and in less than two years from the date of said return, Bagley "redeemed" them from the county clerk, and obtained a deed of conveyance, which he sets forth. There is no

question of the regularity of the proceedings or of the delinquency up to the time of the return of the list. Notice was given of the petition by proper publication. Two of the former owners in whose names some of the lands were listed, appeared, and severally demurred, alleging that the petition showed no ground for relief. After several amendments of the bill, the court sustained the demurrer of one of the parties, and Bagley rested. The petition was dismissed, and he appeals.

The act upon which he relies was passed on the fourteenth of March, 1879, "to provide" as its title expresses, "for the redemption of delinquent lands." By the first section, it directs that all lands thereafter returned as delinquent, shall remain in the office of the county clerk for one year; during which time they may be redeemed by the owner, or the person in whose name they were listed.

By section 2 it is provided that if not thus redeemed, they shall remain in the clerk's office a year longer, during which time they shall be "subjected to redemption by any person whatever, who will pay the tax, penalty and costs," and that the clerk shall execute and deliver a "*proper deed of conveyance.*"

If redeemed in neither mode, it is provided in section 3, that they shall be "deemed and held as forfeited, and the property of the State," and certified as such to the Commissioner of State Lands. There is a saving as to the rights of minors, *femmes covertes* and persons in confinement. Bagley has conformed with the statute. His title should have been confirmed, if the act contemplates that the clerk's deed of conveyance shall operate as a complete investiture of title; and, if so construed, the act be not unconstitutional. These are the questions presented for our consideration. With the policy of the act, or its hardship, we have nothing to do, save as they may affect the question of constitutional power.

It is contended, in support of the demurrers, that the object of the act is clearly indicated in the title, and that it contemplated *redemption* alone, and not a sale. That the terms "redeemed" and "redemption," which alone are used in the effective sections, are not words of purchase. That they properly mean a restitution of something previously owned, but burdened or lost; and are not applicable to a purchase by a stranger who never had any previous interest.

That the transaction contemplated must occur before the forfeiture is provided to take place, and whilst the title remains in the former owner; and, in short, that the whole effect intended was to prevent a forfeiture at the end of two years, and to sanction a friendly redemption by another; or to subrogate the person who redeems to the lien of the State for the repayment of advances, and that in any other view the act is unconstitutional.

To this it is answered that such a construction is not reconcilable with a provision for a "deed of conveyance," which is a term only applicable to a transfer of title, and has been heretofore the usual mode of vesting tax titles, in contradistinction to a mere certificate of purchase. That the terms "redeem" and "redemption" have a popular sense wider than their strict derivative signification; and that a different construction would contravene the true policy of the act by defeating all inducement to others to pay the taxes and take the land, after an original default by the owner, and a persistent delinquency of a year.

In short, that the power to redeem means, in the act, the power to get from the State a title to the land itself; and that the State has the power to give that, under its right to take control of the delinquent lands, and dispose of them for the taxes, after such time as she may have prescribed by law for their redemption by the owner.

It is very plain that the statute, throughout, can not be literally construed; that the Legislature has not been careful to express its meaning in explicit terms; that, in one place or another, it has used language not to be taken in its ordinary sense. In such cases, verbal criticisms and exact definitions can lead to no satisfactory result. They only aggravate perplexity. The courts must seek the true legislative intent in the objects and purposes of the act, not disregarding the language, but giving it such meaning as they may fairly suppose the Legislature intended.

Discarding all hypothesis of a fraudulent, oppressive or otherwise improper object, the act could have had but one. That was, obviously, to relieve delinquents, the counties and the State from the expenses of publication and sales. Whether that were wisely done is not the question. No other intention is imputable, for publication and public sale could have no other conceivable mischief.

At the same time the State could not wholly renounce her revenues, and as this time had been given to delinquents without accumulation of costs, some means were necessary of inducing speedy payment. It was not unnatural to provide that if the delinquents should delay another year, they might have reason to fear that their property might be lost; and, to make this effectual, to provide that the clerk, as an officer of the State, might convey the title to any one who might advance the taxes.

It had never been the practice under the revenue laws of the State to make conveyances to tax purchasers whilst a right of redemption remained outstanding, save in cases of persons under disability. Certificates of purchase only had been issued to purchasers. It is much more probable that in the directions to execute a proper conveyance, the Legislature meant it to have the effect which conveyances had always had, than that they meant to use the word re-

deem in its strict derivative sense of buying back, or taking for the benefit of one who had a former interest.

We therefore construe the act as limiting the right of the owner to redeem, to one year. After that, he has no peculiar privilege over any one else who will pay the taxes. There is, it is true, no express repeal of the power given by the general revenue act to redeem in two years, nor do we mean to hold that such a right is inconsistent in the nature of things with a deed given to a tax purchaser. They co-exist in the revenue system of other States (*Baker v. Kelley, 11 Minn., 480*), and in our State also, in favor of persons under disability. They co-exist in favor of minors, *femmes covertes*, and persons in confinement under the law now in question. It may be remarked in passing, too, that the saving of these classes in the section providing for the deed, affords an additional indication that the Legislature never intended with regard to others that their right to redeem should survive the execution of the deed. If it did, why not include them also in the proviso?

It is not, therefore, because there might not be a deed of conveyance, which would be subject to redemption, if the Legislature had intended it; but that we think, in view of the general revenue system which had always prevailed here, the Legislature did not intend that the deed of conveyance, in contradistinction from a certificate of purchase, should have no other effect than the latter would have had. The act meant to pass full title save as to the classes in the proviso.

1. TAXATION: Power of the Legislature.

Thus construing the statute, the next consideration regards the power to pass it. Can we say with any tolerably firm conviction of mind that it violates any constitutional provision? If not, we must sustain it, regardless of its policy or our doubts.

The members of the legislative department are bound by the same oath with those of the judiciary, to support the Constitution, and have the same opportunities for understanding it. They must, in the first instance, determine whether their acts are authorized by that instrument; and all courts, now, everywhere, recognize the duty of respecting their conclusions, unless they be clearly erroneous.

The Constitution of 1874 declares, in section 8 of article 11, that no one shall be deprived of his property without due process of law; and in section 21 of article 11, that no one shall be deprived of his property except by the judgment of his peers, or the law of the land. In section 22 it is declared that the right of property is before and higher than any constitutional sanction.

But the same section does further declare, what is practical and very important, that private property shall not be taken, appropriated or damaged for public use, without just compensation therefor. It is contended that the law, if construed as we have done it, infringes some or all these provisions.

As to what is "process of law" and "the law of the land," has been much discussed by the able jurists, both in courts and text books on constitutional law. It is useless to add to the mass of discussions. Suffice it here to say, that it is now universally conceded that this clause does not apply to inhibit summary proceedings of States to collect the revenue essential to their existence, operating equally on all citizens. The principal object of revenue laws is not to deprive any individual of his property, as property. The State does not desire his property, and has no use for it when taken. It simply desires and commands each citizen to contribute to the State his due proportion of the State expenses in money, uniformly, each with all others, in proportion to the amount of benefit received in

the protection of life, liberty, tranquillity, and property. It calls upon him to perform *a duty* in paying his taxes—one indispensable to the existence of the very government which calls—a duty which only citizens or property holders can discharge—a duty which will brook no delay. It is a political necessity that each government shall have the power to enforce this duty by summary process; by forfeitures and penalties. If it can not do that it would be absolutely helpless. It could not await the "process of law" if that term be confined, as some have done it, to judicial determinations. In a larger sense, tax proceedings under uniform laws *are* due process of law, and tax laws are laws of the land.

In either view the forfeiture and sale of lands by summary process, for the purpose of enforcing the payment of taxes, have not been considered by most courts as that deprivation of property which our and similar constitutions meant to prohibit. All have recognized their necessity.

The twenty-second section simply regards the exercise of the right of eminent domain, which is something wholly different in nature from the taxing power. The latter calls upon all persons alike for the performance of a civil duty, and enforces that duty, which each and all owe the State, without any compensation beyond protection. If in compelling that performance by the only practical means suitable to the emergency the State causes a citizen to lose his property, it is an incidental consequence, from which the State derives no benefit beyond her dues. The property is not taken for public use. It is lost to the owner by his own default, in favor of one who has discharged the owner's duty.

By the exercise of the right of eminent domain, property in kind, more than the owner's fair share of the public burdens, is taken for the public use, and either held by the

State or given to those who construct and keep up works useful to the public, in view of the public benefit. No one is under an obligation to suffer this peculiar burden for his fellow-citizens, and if his property be taken he must be paid.

The Constitution seems to have guarded against its own misconstruction very carefully, with regard to the prohibitions commented upon. Section 23 of the same article provides that "the State's ancient right of eminent domain *and of taxation* is herein fully and expressly conceded." This must mean the power to impose and collect taxes by the ordinary methods.

It can not, then, be reasonably said that either of the above mentioned inhibitions are violated by providing for a sale of the lands for delinquent taxes, and by taking the title from the former owner to vest it in another, without such process of law *as consists in judicial proceedings and determinations.* If there be any constitutional objection to the act under consideration it must be to the *modes* by which the Legislature has endeavored to make the property taxed subservient to a reasonably expeditious collection of the taxes which are imposed upon it.

We have concluded that the power to seize and dispose of the lands by these exceptional methods, for purposes of revenue, are based upon necessity and immemorial usage. If the State, with regard to her revenue, were brought within the scope and purview of the clause of the Constitution by which the inviolability of private property is in all other cases guaranteed to the citizen, not only against violence from others, but against aggressions from the State itself, it would be apparent at once that this act is unconstitutional. But as she is not, then the further inquiry arises as to what really *is* the extent of her powers; or are they wholly unlimited or uncontrolled save by the

sense of responsibility on the part of legislators as individuals?

The Constitution recognizes her "*ancient* right of eminent domain and of taxation." *Art. 2, sec. 2.*

Ancient means old, that existed in former times. (*Webster in verb.*) The right to tax implies the power to collect. The use of the word ancient is not rhetorical, for the purpose of conveying the information that such rights always existed here, and in the governments whence ours is derived. It is limiting and qualifying, and alludes to those powers of imposing, and modes of collecting, based upon necessity and immemorial usage, or rather common usage, which had been theretofore employed. It justifies them, and such analogous modes of collection as might rest upon the same principle with the others.

Concomitant with this, and in the same bill of rights, occurs the recognition of the ancient, absolute and universal right of private property, which is before and *higher* than any constitutional sanction. (*Art. 3, sec. 22.*) Why this? It is mere fourth of July declamation, if it does not mean that the sanctity of private property is the primal underlying idea of all free governments, taken for granted as the basis of all written constitutions, and needing no express guarantees in the instrument. The declaration would be pompous nonsense, if the legislative body, finding no express protection of private property in specific inhibitions, might destroy it at will, through the crevices of the shield. By the Constitution itself, the sanctity of private property is the *prima facie status.* It may not be invaded save as allowed. That being the voice of the Constitution itself, does not contravene the well established doctrine that the State Legislature may exercise any powers of a legislative character not forbidden by the Constitution of the State, or that of the Federal Government.

It would be a fallacy to say not expressly forbidden. It may in *no* case, unless empowered, violate rights which underlie all written constitutions, and are recognized to do so. No law, for instance, could be maintained which would make it even a misdemeanor to live with one's wife, or buy clothing for his children, and yet there is nothing in the Constitution expressly guaranteeing these rights against legislative invasion. They are tacitly recognized as underlying constitutions.

The revenue powers of the Legislature can not, we think, be extended beyond those modes for collection which the Legislature may fairly consider necessary and appropriate for the objects in view, or at least fairly convenient to effect them without wanton and unnecessary injury or sacrifice of private property, and the powers must be exercised in accordance with the principles, at least, if not according to the exact modes, which aforetime had been used in our own State, and in similar free governments. Neither the recognition of the State's *ancient* right of taxation, nor the ground of necessity, nor former recognized usage, which are the only grounds upon which summary proceedings can rest, will justify novel modes of collection, which are wanton and oppressive, and which violate the general constitutional guarantees by which all private property is guarded, and which do not appear to be necessary.

That the provisions of the law under discussion are not at all necessary to the support of the government, is apparent from the fact that nothing like them exists, or has ever existed in England, or in this State; and, so far as I am advised, do not now exist in any sister State, all of which maintain their governments by the collection of revenue.

It is complained of this law that it is a legislative forfeiture of property without legal form or procedure, and

without judicial determination. That has been a valid objection in several States, and especially with regard to a law of Congress passed for the collection of taxes in the "insurrectionary districts," as Congress was pleased to term them, in 1862. In a batch of cases depending on this law, brought to the Virginia Court of Appeals in 1868, and considered together, it was held that Congress had all the powers for enforcing the collection of taxes that were in use by the Crown of England, or were in use by the States at the time of the adoption of the Constitution of the United States. In that view it was held that Congress had not the constitutional power to impose the penalty of forfeiture of lands for the non-payment of taxes. Further, that the power to *sell* the lands for taxes was limited to the object, and that a law which required the sale of the *whole* land in all cases, without regard to the fact that it might be divided without injury, and the tax made by a sale of a part, was unconstitutional. *Martin v. Snowden, Trustee, 18 Grattan, 100.*

Of course this authority is not directly in point, nor directly applicable to this case, because modes of collecting taxes had been in use here, and gone unchallenged, different from those commonly in use before the adoption of the Constitution of the United States. But it *is* directly in point to establish two principles of judicial construction of the vague revenue powers of the legislative body. They are, first, that the general powers for this purpose expressly or impliedly granted by the Constitution, must be measured by usages obtaining and well recognized at the time of its adoption; and second, that any such disposition of the property as would arbitrarily cut off from the owner all possibility of benefit from the excess of value over the taxes, would be an abuse of a power resting on a necessity for a particular purpose.

In the case of *Kinney v. Beverly*, *2 Hen. & Mun.*, *317*, a law was discussed which provided that a delinquent list should be returned by the sheriff, and that the county court should direct it to be certified to the Auditor of Public Accounts. If the taxes were not then paid in three years, the statute provided that the right to such lands should be forfeited and lost, and that the Auditor might sell them. There was, as in this case, a saving of rights for infants, *femmes covertes*, etc. In an opinion delivered by that eminent jurist, Judge St. George Tucker, the court held the act invalid for several reasons. It was held to be in violation of Magna Charta and the English common law, to declare forfeitures without office found, or some legal proceedings; and, in the case then in judgment, it was specially noted that the plaintiff, by this law, had been disseized of his lands; and that they had been granted over to a *third person* without any notice or warning whatever. This, at least, is precedent for saying that the filing of a delinquent list in the county court, and a certificate made to the Commissioner of State Lands by order of the court, is not notice or warning to the delinquent.

A similar question arose in Mississippi in 1860 (*38 Miss.*, *9 George*, *424*), upon a statute very much like the one now considered. It began as ours, by cutting off all further sales of lands for taxes, and requiring the delinquent list to be returned to the board of police. The board were then to examine it, and order the clerk of the probate court to certify it, and post a copy at the court house, and send one to the Auditor. The Auditor was then required to record it, upon which it was provided that the title should vest in the State, subject to be redeemed in two years, by any person interested in the land. This law was held void, Judge Handy dissenting. The court, in an opinion delivered by Harris, J., concedes the power to the

Legislature "to pass laws providing for the collection of taxes in the most summary manner, without the tedious formalities which ordinarily environ the private creditor." But denies the power to pass the law in question there, because "the land of the defendant, without notice, actual or constructive, without his consent, without compensation, without necessity for public use, and without due course of law, is attempted to be wrested from him, and, for a nominal consideration, vested by the power of legislation alone in the plaintiff." In conceding the right to use summary modes, the court says "no private right, no constitutional provision, no great principle which lies at the foundation of our political system must be violated."

Adding for this court the word "unnecessarily," these views seem sound, and to recognize the true limit of legislative power.

There had never been in this State before the adoption of the Constitution of 1874 any proceeding for taking lands for taxes, without notice by publication and a competitive sale either of the smallest quantity for the taxes or the best price for a whole tract, with provisions to save the excess to the purchaser. This statute seems to violate all the commonly recognized rules of common justice; and being unprecedented here, and similar statutes in other States having been strangled by the courts in infancy, it is not presumable that the Constitution had such powers in contemplation when it declared the State's ancient right of taxation and eminent domain. The act is void.

Revenue act of 1879 void, but tax purchasers have liens for taxes paid.

The court is of the opinion, however, that, under the circumstances of the case, the petitioner Bagley would have an equity to be reimbursed the amounts paid out to relieve the lands from taxes. The act was short-lived and has been since repealed. Doubtless many purchases from the State have been made under it in good faith, and, as they

have inured to the benefit of the owners, it would be inequitable that the owners should be thus relieved at the expense of those who had relied upon what they had good reason to believe was a valid act of the sovereign power. For the equitable adjustment of all such cases growing up whilst the law was supposed to be in existence, it is reasonable that those who have paid the taxes should have a lien upon the lands for the burdens discharged, not only by the original purchase, but by the payment of the taxes of subsequent years.

This bill was framed with a view to such alternate relief. The constructive service was such as is prescribed for confirmation of tax titles, and does not bring in, for this purpose, any defendants not made parties and served by process appropriate to suits between parties to enforce a lien. The petitioner had dismissed the suit as to the tract claimed by one of the parties who had demurred.

With regard to other parties actually appearing, however, it would have been good practice to have retained the bill, and, unless proper defense had been made, to have granted the alternative relief against her and her lands. And leave might have been given to bring in other parties by actual, or fit constructive service, no question being made as to improper joinder of defendants.

The bill has some equities in this view, and it was error to sustain a general demurrer, although the Chancellor was correct in his opinion that the law was unconstitutional.

Reverse and remand, with instructions to overrule the demurrer, and for further proceedings in accordance with this opinion, and the principles and practice in equity.

JONES V. THE STATE.

TIME: *Computation of.*

When a certain number of days are required to intervene between two acts the day of one, only, of the acts is to be counted, but when a statute requires notice of at least a certain number of days before an act, this means so many full days, and the day of the notice and the act are both excluded from the computation.

APPEAL from *Yell* Circuit Court.
Hon. G. S. CUNNINGHAM, Circuit Judge.

S. R. Allen and T. M. Gibson, for appellant.

The use of the words "at least" means three clear days, as held in the English and Texas cases cited by the Attorney General.

C. B. Moore, Attorney General, for the State.

When a certain number of days are required to intervene between two acts, the day of only one of the acts may be counted. *Gantt's Digest, sec. 5648.*

But in England and Texas it has been held that the words "*at* least" mean so many clear or full days. *Robinson's Practice, vol. 1, ch. 78, pp. 430–1; 1 Texas, 107.*

SMITH, J. Jones was convicted upon an indictment which charged him with a failure to work upon the public roads. He was subject to road duty; but he alleges that he had not received timely notice of the proposed working. The statute under which he was indicted (*Gantt's Digest, sec. 5324*) provides for "at least three days' actual notice." He was warned late on Saturday evening to attend and work on the following Tuesday morning. The court charged that the notice was sufficient.

Section 5648 of Gantt's Digest directs that when a certain number of days are required to intervene between two acts, the day of only one of the acts is to be counted. This is the common practice everywhere. But it seems that when a statute requires notice of at least a certain number of days before a meeting, this means so many clear days; that is, the day of notice and the day of meeting are both excluded from the computation. Such is the rule in England. The cases are collected in *1 Robinson's Practice, ch. 78, pp. 430–1;* also in *Bishop on Written Laws, p. 110.*

The English rule was followed in *O'Conner v. Towns, 1 Texas, 107.* But in *State v. Gasconade, 33 Mo., 102,* the court, for the purpose of avoiding a forfeiture, departed from it; otherwise it would have been adhered to.

The defendant had but two full days' notice, when by law he was entitled to three.

Reversed and remanded for further proceedings.

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Wright v. The State.

1. Criminal Pleading: *Objections to grand jury; how raised.*

Objections to the organization of the grand jury must be made by a motion to set aside the indictment. A plea of "not guilty" waives the illegality of the grand jury.

2. Criminal Practice: *Serving defendant with copy of the indictment: Presumption.*

In the absence of any showing of a demand of a copy of the indictment, and of any affirmative showing that a copy was not furnished to defendant before the trial, it will be presumed that it was done, or that he waived it.

3. Criminal Law: *Murder; aiding and abetting.*

One who is present and participating, aiding and abetting in a murder is as guilty as if his own hand inflicted the fatal blow.

APPEAL from *Howard* Circuit Court.
Hon. H. B. STUART, Circuit Judge.
Newton, Jones, Williams, Conway, etc., for appellant.
Moore, Attorney General, contra.

SMITH, J. Wright was indicted, jointly with others, for the murder of Thomas Wyatt. Upon a separate trial he was convicted of murder in the first degree. Motions in arrest of judgment and for a new trial having been denied, he was condemned to be hanged, but prayed an appeal to this court, which was allowed because the names of the other defendants were not set out in the indictment copied into the transcript. This defect has since been cured upon the award of a writ of *certiorari.*

1. Objections to grandjury, how made.

Counsel have discussed an alleged irregularity in the formation of the grand jury and an alleged failure to furnish the defendant with a copy of the indictment forty-eight hours before his arraignment. But neither of these questions legitimately arises upon this record. They are both raised here for the first time. When he was arraigned he pleaded not guilty. If he had any objection to the organization of the grand jury, that was the time to make it. And the mode of making it was by motion to set aside the indictment. By pleading to the indictment he waived the illegality, if there was any. *Gantt's Digest, sec. 1829; Dixon v. State, 29 Ark., 165.*

2. Serving defendant with copy of indictment: Presumption.

The record does not show whether Wright was served with a copy of the indictment before he was put upon his trial or not. But he was represented by counsel who were aware of his legal rights. And in the absence of any demand for a copy, and in the absence of any affirmative showing that he was not so served, it will be presumed it was done, or else that he waived it. *Dawson v. State, 29 Ark., 116.*

No objection is perceived to the form of the indictment. It charged that the defendants "willfully, feloniously, of their malice aforethought and with premeditation, did kill and murder" Wyatt by shooting him with guns loaded with gunpowder and leaden bullets.

The motion for a new trial questioned the sufficiency of the evidence to support the verdict.

3. MURDER: Aiding and abetting.

Wyatt was killed by a mob of colored men. From indications in the record it is possible that a feud existed between him and them on account of some previous quarrel in which he had been involved with one or more of their race. On the day that the killing occurred he was peacefully plowing in his field. He lived near the line between the counties of Howard and Hempstead. The mob came from the direction of Hempstead. They were all armed, fifty or seventy in number, and some or all of them mounted. The defendant was recognized in the crowd by several witnesses. He was armed with a double-barrel shot-gun and a six-shooter. Threats were openly made against Wyatt, and indeed they announced that they were after him. The defendant was asked if they had any warrant for him, and he said they did not need one. They first went to Wyatt's house; but not finding him at home, went on to the field. Wyatt was informed that they were at hand and attempted to escape, but he was surrounded and hunted down like a rabbit. His friend who conveyed the intelligence that the negroes were coming, gave him a pistol with which to defend himself. And with this Wyatt, when he was brought to bay, appears to have killed one of the mob. But he was overpowered, his body was riddled with shot and his skull broken. A few hours afterwards Wright, still with a gun in his lap, stated that they had shot him all to pieces, and that he himself had fired at Wyatt at close range.

This is murder pure and simple. It is none the less

murder that it was done by a mob of ignorant negroes. It may not have been the defendant's hand that fired the fatal shot. But he was present and participating, aiding and abetting. And he is as guilty as if he was the one who did kill him.

There are other assignments in the motion for a new trial; but they have not been pressed upon us, and there is no merit in any of them.

Judgment affirmed.

JACOBSON v. POINDEXTER.

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1. AGENCY: *When question of, left to jury.*

When one carries on a butcher's shop through an agent and that agent sells the hides of the slaughtered animals, it should be left to the jury to decide upon the evidence in a suit for the hides between the principal and the purchaser, whether the selling of the hides by the agent was within the fair scope of the business.

2. AGENT: *By what acts of, the principal is bound.*

The principal is bound by all acts of his agent within the scope of the authority which he holds him out to the world to possess, although he may have given him more limited private instructions unknown to the persons dealing with him.

3. DAMAGES: *Loss of time attending court: Attorney's fees, etc.*

The law makes no allowance to the successful suitor for his time, indirect loss, annoyance or counsel fees. It considers in general the taxed cost as the only damages which a party sustains by the defense of a suit.

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

U. M. & G. B. Rose, for appellant.

1. The first instruction for defendant should have been given. *1 Parsons on Partnership, p. 122.*

2. It was error to refuse the second. *1 Ga., 418; 44 Am. Dec., 665; Meigs, 502; 33 Am. Dec., 161; 1 Met., 193; 35 Am. Dec., 358.*

3. Expenses and time of plaintiff not allowed as damages. *34 Ark., 184.*

Ratcliffe & Fletcher, for appellee.

Instruction No. 1 properly refused; there was no evidence to support it. *2 Ark., 346.; 5 Ib., 61; 32 Ib., 733; Story on Agency, sec. 39.*

So was the second. There was no proof of agency, and no proof that selling of hides was in the scope of the butcher business. It should be in the *absolute*, not *seeming*, course of employment. *Story on Agency, sec. 87, et seq.*

SMITH, J. Poindexter brought replevin against Jacobson for the recovery of certain hides. The plaintiff lived in Perryville, but had established a butcher shop in Morrilton, of which he had put one Collins in charge. In the course of the business a number of hides had accumulated. The plaintiff and Collins went to the defendant's store in Morrilton and proposed to sell him these hides. There was evidence tending to prove that in the course of this interview they spoke of the hides as "our hides," from which Jacobson inferred they were partners. Jacobson made an offer, which was declined, but, upon leaving, Collins remarked that they would consider his offer. Afterwards Collins sold the hides to Jacobson and absconded. Poindexter denies that Collins had any authority over the hides.

Upon the trial the verdict was for the plaintiff.

1. AGENCY: When question of to be left to jury.

The denial of the defendant's prayers for directions to the jury, is the principal error complained of. They were, in substance and effect, first, that if the plaintiff held out

Collins as his partner, and thereby misled the defendant into purchasing the hides from him, the defendant would be entitled to the verdict; and second, if the plaintiff held Collins out to the world as his agent, and the selling of the hides was within the apparent scope of his agency, the plaintiff was bound by his acts.

The first request embodies a sound proposition of law, but there was no evidence that the plaintiff had ever held Collins out as a partner. The use of the word "our" in connection with the hides, is too slight a circumstance to warrant an inference of partnership. But Collins was the undoubted agent of the plaintiff in the management of the butcher shop, and it should have been left to the jury to say whether or not the sale of the hides of the slaughtered beasts was within the fair scope of the business.

2. AGENT: By what acts of, the principal is bound.

"The principal is bound by all the acts of his agent, within the scope of the authority which he holds himself out to the world to possess; although he may have given him more limited private instructions, unknown to the persons dealing with him. And this is founded on the doctrine that where one of two persons must suffer by the acts of a third person, he who has held the person out as worthy of trust and confidence, and having authority in that matter, shall be bound by it." *Story on Agency, 8th ed., sec. 127, n. 1; 2 Kent Com., 12th ed., 612, n. b; Insurance Co. v. McCain, 96 U. S., 84.*

3. DAMAGES Loss of time attending court: Attorney's fees, etc.

As there must be another trial, we call attention to an obvious error, which was not excepted to, however. The plaintiff testified that he had lost time and incurred expense by reason of his attendance in court upon this action to the amount of $25. The court charged the jury that in computing the damages, they should take into consideration the expenses and time of the plaintiff in attend-

ing the trial. And the jury gave the plaintiff $25 damages in addition to the value of the hides.

The law makes no allowance to the successful suitor for his time, indirect loss, annoyance or counsel fees. It considers, in general, the taxed costs as the only damages which a party sustains by the defense or prosecution of a suit. *Sedgwick on Damages, 6th ed., 37–8; Kelly v. Altemus, 34 Ark., 184.*

Reversed and remanded.

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42	100
57	527

ROGERS V. KERR.

1. REPLEVIN: *For timber: Title to the land: Transfer to equity.*

Rogers sued Kerr in replevin for a lot of cord wood and railroad ties cut upon his land. Kerr answered, claiming the timber and land as his own; exhibited his title, alleged that Rogers claimed under an illegal tax title, and that neither party was in possession; and prays that the cause be transferred to the equity docket, and Rogers' tax deed be canceled as a cloud upon his title, offering to pay the taxes paid by Rogers. Rogers demurred to the affirmative relief, and objected to the transfer. *Held:* That the demurrer was properly overruled and the cause transferred; and the tax sale appearing on the proof to be illegal, the tax deed was properly canceled; but Rogers was entitled to a decree for the taxes paid, and that they be made a charge upon the land.

2. TAX SALE: *School tax illegally levied.*

The county court has no authority to levy any tax for a district school, except as voted at the annual school meeting and returned by the judges of that election; and if it does, a sale of land for taxes including such levy will be void.

APPEAL from *White* Circuit Court, in Chancery.

Hon. J. W. MARTIN, Circuit Judge, on exchange of circuits.

W. R. Coody, for appellant.

1. The title to land can not be tried in this action, but

where the title of chattels depends upon the ownership of the soil from which they have been taken, the title may be incidentally investigated, with a view to determine the ownership of the chattels. *Wells on Replevin, secs. 58, 79 to 85, and cases cited.*

Trees or timber severed from the soil become personal property, and the owner of the land may sustain replevin for them. *Ib., sec. 73; 23 Ark., 23.*

In a legal proceeding of this kind the aid of a chancery court can not be invoked for the purpose of destroying plaintiff's title, and then use it against him to defeat his action. *Sec. 4465 Gantt's Digest; 22 Ark., 531; 37 Ark., 185–6–7; Wells on Replevin, sec. 105; 6 Allen (Mass.), 229.*

2. The law was sufficiently complied with in the levy of the tax by the county court, for School District No. 8. Where the law authorizes the people to tax themselves by vote, and that vote is had, and the matter submitted to the court, and the court judicially determines that the tax *was voted*, the irregularities or character of evidence inducing that decision can not be inquired into collaterally. Cites *Const., art. 7, secs. 28, 30; Act Dec. 7, 1875, p. 72–3; 31 Ark., 83; 37 Ib, 643; 32 Ark., 139–140 and 503; 36 Ib., 450–1.*

J. W. House, for appellee.

1. The cause properly transferred to equity docket. The *title to the land* was the main issue in the cause. The title to the chattels depended upon the ownership of the soil, and, if irregularities existed in plaintiff's title, defendant had the right to have them inquired into, and if found to exist, to have his deed canceled.

2. Plaintiff's tax deed was void. No rate was voted by the electors of School District No. 8, and the county court had no authority to fix a rate or levy the tax. *32 Ark, 131; 29 Ib., 340; 33 Ib., 716.*

1. REPLEVIN: For timber: Title to the land: Tranfer to equity.

SMITH, J. Rogers brought replevin against Kerr for a lot of cord wood and railroad ties alleged to have been cut and removed from the plaintiff's land. The defense was that the timber and the land from which it was cut, belonged to the defendant. The answer stated that neither party was in possession of the land, exhibited the evidence of the defendant's title, averred that the plaintiff claimed under an illegal tax purchase, and prayed a transfer of the cause to equity and a cancellation of the plaintiff's tax deed as a cloud upon the defendant's title. The plaintiff demurred to the paragraph of the answer which sought affirmative relief, and objected to the proposed transfer. But his demurrer was overruled and a transfer was made. He then replied to the counter-claim, admitting he was not in possession of the land, and that his sole title thereto originated in the tax sale mentioned in the answer, but alleging that the sale was regular and the deed made in pursuance of it valid. At the hearing, the court canceled the plaintiff's title, and awarded to the defendant the wood and ties, which were the original subject of controversy.

It is certainly an odd thing to turn an action for the recovery of personal property into a proceeding to determine the title to real estate. But the ownership of the chattels depended upon the ownership of the soil. *Brock v. Smith, 14 Ark., 431.*

The answer presented a flat bar to the complaint. But could the defendant assume the offensive and obtain affirmative relief? He could have maintained an original bill for this purpose, as his antagonist was not in possession, and he could not for that reason maintain ejectment; and being sued about a matter which incidentally involved the title to the land, no good reason is perceived why he should not adopt such proceedings as would settle the whole controversy between him and the plaintiff.

Accordingly we find such to be the practice in States whose codes of procedure are nearly assimilated to our own. Thus in *Pitcher v. Hennessy, 48 N. Y., 415*, which was an action to recover damages for failing to perform an agreement, the defendant prayed for and obtained a reformation of the contract; the correction of the mistake showing a complete excuse for non-performance.

In *Walsh v. Hall, 66 N. C., 233*, the defendant was sued for the conversion of a horse, and was permitted to set up the fact that he had sold the horse to the plaintiff in exchange for land, and to ask for a rescission of the contract of exchange upon the grounds that the plaintiff had fraudulently deceived him in regard to the situation of the land.

Massie v. Stradford, 17 Ohio St., 596, was an action for trespass to lands. The defendant caused the party under whom he claimed to be made a co-defendant, and the latter, by cross-petition, set up his equitable ownership of the land, and asked a decree against the plaintiff for the legal title, and an injunction against the further prosecution of the action for trespass.

The defendant traced his title back to the State, and it is apparently good, *provided* the tax sale of 1878, at which the plaintiff purchased, were out of the way.

2. TAX SALES: School tax illegally levied.

It is admitted on the face of the pleadings that the lands in dispute lie in School District No. 8, of White County, and that a tax of five mills for district school purposes was levied for the year 1877, by the county court, and extended upon these lands, and that this tax was included in the amount for which the lands were sold. The defendant contended that neither had the electors of the district voted such a rate, nor had the judges of election so certified.

The tax for the support of district schools is imposed upon the property of the district by the electors. The county court has no authority to make any levy for this

purpose, except as voted at the annual school meeting and returned by the judges of that election. *C. & F. R. Co. v. Parks, 32 Ark., 131; Hodgkin v. Fry, 33 Ib., 716.*

The fifty-sixth section of the common school act of December 7, 1875, directs that the ballots shall have written or printed on them the words "for tax" or "against tax," and the amount of tax the voter desires levied. A return is to be made to the county court, which is to ascertain whether a majority of the votes cast be for tax, and if so, then the amount of taxes voted. The rate to be levied is determined by the largest amount sanctioned by a majority vote. If no rate has received a clear majority, the votes cast for the highest rate are to be counted for the next highest rate voted for, and so on, until some rate shall receive a majority of all votes cast.

The return for this election is exhibited. From this we can see that fourteen electors attended; that directors were voted for; that thirteen voted for maintaining a school and for levying a tax. But it was impossible for the county court to determine with certainty, from an inspection of the record and proceedings of the school meeting, what particular rate was intended to be levied by the electors. No rate whatever is mentioned or indicated, and the county court had no right to assume that the maximum rate was intended.

This illegal levy vitiated the tax sale. *Worthen v. Badgett, 32 Ark., 496.*

Tax purchaser entitled to a lien for taxes paid when sale is illegal.

It follows that the decree below was substantially correct. But it neglected to provide for the refunding of the purchase money paid at the sale, and subsequent taxes. The answer offered to indemnify the plaintiff for any outlays he might have incurred on account of said taxes, and tendered $31.55, which was averred to be the amount so expended. The reply made no issue on this point. The

decree is therefore affirmed with this modification, that the defendant be required to pay to the plaintiff the aforesaid sum of $31.55, which is to be a charge on the lands. The costs of this court are adjudged against the appellee, and the cause is remanded for execution of the decree.

LAY v. THE STATE.

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1. INDICTMENT: *Statute of Limitations.*

Where an indictment against a party for a felony is dismissed and a new indictment found against him for the same offense, the time of the pendency of the first indictment must be excluded in the application of the statute of limitations to the second, although in the first he was indicted as principal and in the second as accessory.

2. SAME: *Principal and accessory in different counts: Misjoinder.*

An indictment in two counts, one charging the defendant as principal and the other as accessory before the fact, in the same felony, is no misjoinder of offenses, but a charge of the same offense in different modes.

3. STATUTE OF LIMITATIONS: *Fleeing from justice.*

It is not necessary in order to suspend the statute of limitations in a criminal prosecution, that the defendant should leave the State. It is a fleeing from justice within the meaning of the statute for him to abscond from his known place of abode and secrete himself in another county to avoid arrest and prosecution for the offense.

4. EVIDENCE: *Witnesses: Accomplice: Corroboration.*

(For the facts constituting the corroboration of an accomplice in this case see the opinion.—REP.)

APPEAL from *Cleburne* Circuit Court.
Hon. F. T. VAUGHAN, Circuit Judge.

S. R. Allen and E. A. Bolton for appellant.

1. The record does not show that the jury were properly sworn. *Sec. 1921 Gantt's Digest; 21 Ark., 144; 17 Ib., 332; 11 Ib., 455.*

2. The prosecution was barred by limitation, the indictment not having been found within three years. The finding of the first indictment did not stop the statute, as it was for a different offense, and does not come within the exceptions of the statute. (*Gantt's Digest, secs. 1667, 1664 and 1844.*) The first indictment was not quashed, reversed or set aside.

3. The conviction was had upon the uncorroborated testimony of an accomplice. *Sec. 1, act Jan. 25, 1883, pp. 2 and 3.*

C. B. Moore, Attorney General, for the State.

1. The record sufficiently shows that the jury were sworn. *34 Ark., 257.*

2. The second indictment was for the same offense (sections 1237–38 Gantt's Digest); and, counting out the time the first was pending, the second was not barred. *See 4 Blk. Com., 367; Arch. Cr. Ev., 11; 1 East P. C., 186; Bish. St. Cr., 261; 13 Bush., 142; 6 Jones, N. C., 42–43; 5 Ib., 221.*

3. Appellant was a fugitive from justice. *Sec. 1666 Gantt's Digest; 48 Mo., 240; 3 Dil., 381; 4 Day, 121.*

4. Evans was not an accomplice, but if he was, his testimony was sufficiently corroborated. *8 Tex. Ct. App., 230; 36 Legal Intelligencer, Nov. 14, p. 443; Ib., 444.*

STATEMENT.

English, C. J. On the twelfth of October, 1880, Thomas Neal, W. L. Lay, Robert J. Bowers and Alexander Evans were jointly indicted in the Circuit Court of Van Buren County for an assault upon John W. Sivils with a gun, with intent to murder him.

This indictment was pending in the Circuit Court of Van Buren County when the act of February 20, 1883, to

establish the County of Cleburne, was passed (Acts 1883, p. 39); and, after the passage of the act, was transferred to the Circuit Court of Cleburne County, the offense having been committed and the parties accused residing in that part of the territory of Van Buren County which was included in the County of Cleburne.

After the transfer, at the August term, 1883, of the Circuit Court of Cleburne County, the attorney for the State, by leave of the court, entered a *nol. pros.* as to the defendant, W. L. Lay, and the case as to him was referred to the grand jury.

At the same term a new indictment was returned against Lay for the same offense, in which the assault upon John W. Sivils was alleged to have been made by Thomas Neal, and Lay was charged as an accessory before the fact.

Lay was arraigned upon this indictment, pleaded not guilty, was tried by a jury, found guilty and his punishment fixed at four years' imprisonment in the penitentiary.

He moved in arrest of judgment, on the ground that the indictment did not state facts sufficient to constitute a public offense within the jurisdiction of the court; and the motion was overruled.

He also moved for a new trial, which was refused; he took a bill of exceptions, was sentenced in accordance with the verdict, and obtained an appeal.

OPINION.

Counsel for appellant have not submitted any objection to the form or sufficiency of the indictment in the extended argument filed by them. They insist that a new trial should have been granted on several grounds, which will be taken up and disposed of in the order in which they have been presented and discussed.

1. There is nothing in the point that the record fails to

show that the trial jury was sworn. The entry showing the impanneling of the jury, after naming the jurors selected, adds, "twelve good and lawful men, and qualified electors of Cleburne County, who were selected, accepted, tried, impanneled and sworn according to law," etc.

This entry sufficiently shows that the jurors were duly sworn. *Anderson v. State, 34 Ark., 257.*

1. INDICTMENT: Statute of limitations.

II. Under the assignment in the motion for a new trial that the verdict was contrary to law and evidence, it is submitted for appellant, that the second indictment under which he was convicted, was barred by the statute of limitations.

Section 1664 Gantt's Digest provides that no person shall be prosecuted, tried and punished for any felony not punishable with death, unless an indictment be found within three years after the commission of the offense.

Section 1665 limits prosecution for offenses less than felony to one year.

Section 1666 provides: "Nothing in the two preceding sections shall avail any person who shall flee from justice, and in all cases the time during which any defendant shall not have been a resident of this State, shall not constitute any part of the limitation prescribed in the preceding sections."

Section 1667 provides that: "When any indictment or prosecution shall be quashed, set aside or reversed, the time during which the same was pending shall not be computed as part of the time of the limitation prescribed for the offense."

It was admitted by appellant, on the trial, that he was indicted in the Circuit Court of Van Buren County, on the twelfth day of October, 1880, together with Thomas Neal and others, and that on the twenty-eighth day of August, 1883, said cause having been transferred to the Cleburne

Circuit Court, the attorney for the State entered a *nol. pros.* of the indictment against appellant, and asked to have the cause referred to the grand jury of Cleburne County; and that the cause being referred, the grand jury of said county, on the same day, returned into court an indictment against appellant for the same offense, which was substituted for the original indictment in this case, charging him as an accessory before the fact to an assault with intent to kill and murder.

Both of the indictments are in the transcript before us; the first charged appellant as a principal in the assault upon Sivils, and the second charged him as an accessory before the fact to the same assault, as above stated.

It was proved on the trial that appellant hired Thomas Neal to kill Sivils, but was not actually or constructively present when Neal shot Sivils.

2. SAME: Principal and accessory in different counts, no misjoinder.

If, therefore, appellant had been tried upon the first indictment charging him as a principal, he could not have been convicted; for, though by statute an accessory before the fact is punishable as a principal, he must be indicted as an accessory. *Boze Smith v. State, 37 Ark., 274; Matilda Williams v. State, 40 Ark., 172.*

It was no doubt because of this mistake or defect in the first indictment that a *nol. pros.* was taken as to appellant, and the second indictment substituted.

The offense charged in the two indictments was the same, but the agency of appellant in the crime was not charged in the second as in the first indictment. If the first indictment had contained two counts, one charging appellant as principal, and the other as accessory before the fact, it would have been no misjoinder of offenses, but as to appellant a charge of the same offense in different modes. *Thompson v. Commonwealth, 1 Metcalf (Ky.), 13.*

3. STATUTE OF LIMITATIONS. Time of first indictment excluded.

The offense was committed fifteenth of June, 1880, and, counting out the time during which the first indictment was pending, the second was not barred by the statute of limitations.

Entering a *nol. pros.* on the first indictment was the same in legal effect as setting it aside.

Fleeing from justice.

Moreover, if there can be any doubt about the effect of the pendency of the first indictment in preventing the statute bar to the second, it was proved on the trial that appellant absconded from Quitman, in Van Buren County, his place of residence and business, in a day or two after the commission of the offense, and remained absent until December, 1882, when he returned and surrendered himself into custody; and that during his absence he was in Cross County, under an assumed name.

This was fleeing from justice, within the meaning of the statute, and prevented the bar. It was not necessary for appellant to leave the State, to constitute a fleeing from justice, within the meaning of the statute; it was enough that he absconded from his home, his known place of abode, and secreted himself in Cross County, to avoid arrest and prosecution for the offense. *United States v. O'Brian, 3 Dillon, 381; State v. Washburn, 48 Mo., 240.*

4. EVIDENCE Witnesses: Accomplice: Corroboration.

III. It is next submitted that appellant was convicted upon the uncorroborated testimony of an accomplice.

The State proved the *corpus delicti* by John W. Sivils. At the time of the commission of the crime, fifteenth June, 1880, he and his family were living with William Ligon, his father-in-law, at Quitman, and appellant, Lay, lived about 250 yards from him. Between 12 and 1 o'clock of the night of the fifteenth June, after Sivils had gone to bed, he was called, went on to the front porch, and was shot, badly wounded but not killed.

The State proved by A. R. Evans that Sivils was shot by

Thomas Neal, who had been hired by appellant to kill him. The indications are that Evans was a boy, and he testified that he was with Neal under compulsion and fear, when appellant hired him to kill Sivils, and when he shot him.

The court, in its general charge to the jury, which was full and fair, and not objected to by appellant, defined an accomplice, and left it to the jury to determine whether Evans was in fact an accomplice. The court also read to the jury section 1932 of Gantt's Digest: "A conviction can not 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." And the court said to the jury: "If you find that Evans was an accomplice in the commission of the crime, then you can not convict defendant Lay, on his testimony alone. It must be corroborated as required by law." And, after reading to the jury the above section of the statute, the court continued: "The corroboration is not sufficient if the evidence merely shows that Sivils was shot, and the circumstances at the immediate time of the shooting. But if Evans' testimony is sustained and corroborated by other witnesses, facts or circumstances tending to connect defendant with the commission of the offense, and if, taking this evidence altogether, you are satisfied beyond a reasonable doubt of defendant's guilt, you should say so. You are the sole judges of the facts in evidence, and of the credibility of witnesses. You must find the facts, and apply the law as given by the court," etc.

The general charge sufficiently covered the ground of the third instruction moved for appellant, and refused by the court, which related to the credibility of an accomplice.

The story of the witness, R. A. Evans, was in substance as follows:

"He lived with his father, three miles from Quitman, where Thomas Neal, his brother-in-law, also lived. After he had gone to bed on the night of the fifteenth of June, 1880, Neal roused him up and asked him to go to Quitman with him. Said he had lost a letter between there and Quitman, and would not have any one find it for $3,000. He went with Neal, and when they came to a clearing made by his father, about a quarter of a mile from Quitman, they hitched their horses, and Neal pulled a shot-gun out of a brush pile, and then they went on to appellant's store. Appellant, Bowers and Hall were in the store. They got up, lighted a lamp and let them in. Appellant and Bowers took them into a back room, and the door was locked; they were given whisky, and appellant furnished Neal with powder and shot to load the gun. Appellant asked Neal what he brought witness for, and Neal replied, "to swear damned lies for him." After Neal loaded his gun, he said he was going to kill John Sivils, and Lay was to give him two hundred dollars, and if witness told his father or any one else, they would kill him. Lay said Sivils had indicted him for selling whisky, and it would cost him $500, and if Neal would kill Sivils he would give him $200. Witness did not halloo because he was afraid. Lay let Neal and him out at the front door of the store. They made him go. Neal and he went to William Ligon's house where Sivils lived. Neal told witness to halloo Sivils up, and he told him he would not. Neal said he must. Witness knew he was a dangerous man, and was afraid to refuse. Witness hallooed three times, Sivils came to the door, and Neal fired the gun. Witness saw Sivils fall, and then ran off with Neal. Witness felt bad about it and wanted to tell his father, but was afraid to do

so until after Neal was arrested, and then he told his father," etc.

It was proven by other witnesses that appellant had emnity against Sivils because he was a witness in a prosecution against him for selling liquor at Quitman, where it was prohibited.

John J. Hall, a witness for the State, was at appellant's store when Neal and Evans got there. He corroborated the testimony of Evans as to what occurred there, except as to what was said in the back room, where he was not admitted. He was suspicious that something wrong was going on, and left the store before the other parties came out of the back room.

The jury may have believed that Evans was not willfully an accomplice, but acted under duress. But if they believed him to be an accomplice, his testimony was well corroborated as to the assault on Sivils, and the circumstances thereof, and there was some corroboration of his testimony as to appellant's connection with the crime, so that, upon the whole, we can not say that the verdict was without evidence to sustain it.

IV. Appellant objected to the second instruction given by the court for the State, but the objection is not urged here, and there is nothing in it. The substance of instruction is, that if the jury believe beyond a reasonable doubt that Neal shot Sivils with a loaded gun, as charged in the indictment, and that appellant in any way or manner advised or encouraged such shooting, before the commission of the same, and that Neal acted upon such advice or encouragement, the jury should find defendant guilty.

The court read to the jury the sections of the Digest defining and providing for the punishment of principals and accessories before the fact, etc.

This disposes of all the questions presented to and decided by the court below, appearing in the transcript, and argued here.

Affirmed.

ALSTON V. FALCONER.

42 114
84 602

SHERIFF AND COLLECTOR: *When bond must be filed.*

The sheriff must file his bond as collector of revenue with the county clerk *before* the first Monday in January. *On* that day is too late. The Governor may appoint a collector on that day if the bond is not filed before it.

APPEAL from *Franklin* Circuit Court.
Hon. W. D. JACOWAY, Circuit Judge.
Mansfield and Henderson & Caruth, for appellant.
Clendenin & Sandels, contra.

EAKIN, J. Falconer, in January, 1881, had been appointed by the Governor as collector for Franklin County, upon the failure of the sheriff to file his bond as collector before the first Monday of that month. He gave bond and entered upon the duties of the office, and was by law entitled to hold it until the next general election, and until his successor should be elected and qualified.

He failed himself to give bond before the first Monday of January, 1882, for the collection of the taxes of 1881. Before 7 o'clock a. m. of that day the county clerk certified the fact to the Governor, who received the certificate at 4 o'clock p. m. He declared the office vacant and appointed and commissioned F. M. Elsey thereto, who on the

fourth filed his bond, as required by law, and took the oath of office.

Falconer, however, on the first Monday in January, at half-past 11 o'clock a. m., filed a proper bond, duly approved by the judge of the court. The certificate of the fact was sent by the clerk, by telegraph, to the Governor, who received it at twenty-five minutes past one p. m. A duplicate of the bond was sent the same day to the Auditor, who received it next day.

Falconer filed his petition in the Circuit Court, setting forth the facts as above stated, and alleging that Alston, the county clerk, refused to place in his hands the tax books with the warrant for collection, upon the grounds that Elsey was the collector. He prayed a mandamus on the clerk to compel him to turn over the tax books and warrant to petitioner, and for restraining orders to prevent him from turning them into the hands of Elsey.

By consent the cause was heard upon a motion to grant the prayer of the petition, and a demurrer thereto. The demurrer was overruled, and, the defendant resting, the mandamus issued. From this order the clerk appeals.

The Constitution, article 7, section 46, provides that the sheriff shall be *ex officio* collector of taxes "unless otherwise provided by law."

On the twenty-fifth of February, 1875, the General Assembly passed an act to provide for the filling of the office of collector in certain cases.

It provided that the county clerk, on failure of the sheriff to give bond as collector at the time required, should notify the Governor thereof immediately; and made it the duty of the Governor thereupon to appoint some suitable person as collector until the next general election, who was required to give bond and qualify within ten days after being notified of his appointment. By a subsequent

act of March 5, 1875, it was provided that this should be done if the sheriff should fail to give bond before the first Monday in January of *each* year. It was again repeated that if he should fail, the clerk should immediately give notice to the Governor.

The only question is, can the word "before" be construed in this connection to intend "on or before." Ordinarily it can not, as the word has no technical meaning, and its obvious meaning implies that the act required to be done should precede the day, and not be contemporaneous. If the latter intent had been in view, the ordinary expression of "on or before" would have been naturally suggested. Doubtless there may be cases in which it would be proper to construe "before" in the more extended sense of including the day named, but the legislative intent to that effect should be shown by other expressions; or be tolerably clear from the subject matter and general policy of the act. In this case such a construction would contravene to some extent the policy of the act, and not be quite consistent with other expressions. "Immediately," means on that day, not next day. It was the duty of the clerk to make and forward the certificate Monday, if the bond were not filed before. The language of the act is imperative. The failure to file the bond before the first Monday in January, is the *fact* upon which the power and duty of the Governor to appoint a successor is founded. There is no alternative to the clerk or Governor but to proceed. That fact exists when the first Monday arrives and no bond has been filed. It is incurable. There is no provision made, or intimated as intended, that the former officer on that day may arrest the proceedings for the appointment of a successor by coming in and filing a bond. The same obligation rested upon the appointed collector to file a bond for the next year of his term, as if he had been sheriff and *ex*

officio collector. When the law speaks of the sheriff in this connection, it speaks of him with reference to his office as collector.

It has already been settled in the case of Falconer v. Shores, 37 Ark., that it is not sufficient for the sheriff to file his bond at any time before the Governor appoints. The law is rigid, and must be construed with reference to the revenue policy. The whole people of the State are concerned in the prompt collection of taxes.

The appointment of Elsey was valid, and it appeared on the face of the petition that it showed no grounds for the action of the court. The demurrer should have been sustained and the petition dismissed. It obviously can not be amended so as to make it meritorious.

Reverse and remand with directions accordingly.

ELSEY V. FALCONER.

42 117
56 48

USURPATION OF OFFICE: *Failure of sheriff to file collector's bond in time vacates office.*

If a collector of revenue fails to file with the county clerk his bond as collector *until* the first Monday in January, the Governor may on that day appoint a collector, who may, by an action for usurpation of office, recover the office from the other, and all fees or commissions received by him since the plaintiff's appointment and qualification.

APPEAL from *Franklin* Circuit Court.
Hon. G. S. CUNNINGHAM, Circuit Judge.
Mansfield for appellant.
Yantis, Clendenin & Sandels, contra.

EAKIN, J. This case is submitted together with that of *Alston v. Falconer*, in which an opinion has just been deliv-

ered. The statement of facts is made in that case, to which reference is made.

After Falconer had been put in possession of the tax books by virtue of the mandamus granted by the Circuit Court, and had proceeded to act as collector, Elsey filed his complaint in this case, relying upon his commission, and the filing of his bond, and setting up all the facts. He claimed that Falconer usurped the office, and prayed for his own reinstatement, and for judgment against Falconer for such amount of fees, emoluments and perquisites as he had received. Falconer demurred and the demurrer was sustained. Elsey rested and appealed.

This was erroneous upon the principle decided in the other case. The demurrer should have been overruled.

Reverse and remand with the usual directions.

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42 118
54 611

PULASKI COUNTY V. THE STATE.

1. IMPROVEMENTS: *Title not acquired by.*

A land owner can not be improved out of his estate. Improvements placed upon his land belong to him, and can be used by the maker, at the utmost, only as a set-off against rents and profits—never for the purpose of acquiring title.

2. ADVERSE POSSESSION: *Permissive: Occupation by county: Presumption.*

In the absence of proof to the contrary, the use and occupation of the State's land by a county will be presumed to be by sufferance and without any intention of the county to appropriate it to itself; and mere permissive possession, however long, can never ripen into a title. Possession to be adverse must be hostile, and not subservient, to the rights of the true owner.

3. AGENTS: *Estoppel of State by acts of officers.*

The State can not be estopped by unauthorized acts of her officers or agents.

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

F. W. Compton, *R. C. Newton* and *George W. Caruth* for appellants.

1. Pulaski County was the beneficiary of the grant of June 15, 1832, and the State having used county funds in the construction of the east wing of the State House, holds that portion as trustee for the county. *Acts Congress, March 2, 1831; June 23, 1836; June 15, 1832.*

2. The rights of Pulaski were recognized by Governor Pope, and by the Legislature, and the State paid the county rent for two of the rooms in the east wing.

3. The State by her acts is equitably estopped from denying the county's title or right. *Bigelow on Estoppel, pp. 578–9; 6 Cranch, 53; 13 Pet., 107; Black, C. C., 325; 2 Penn., 546.*

4. The claim of the State is *stale. U. S., 2 Beebe, 17 Fed. Reporter, 36; Ib., 565; 15 Ib., 753, 758.*

C. B. Moore, Attorney General, for the State.

1. The State owns the legal title to the ground.

2. The payment of rent was wholly unauthorized by law, and the unauthorized acts of its officers can not bind the State.

3. The county fails to show any equitable right whatever to the premises.

SMITH, J. The State brought ejectment against the county for certain rooms in the east wing of the State House. Upon the coming in of the answer, which set up some supposed equities in the premises, the cause was, at the instance of the defendant, transferred from the Circuit Court to the Chancery Court. It was there heard upon

the pleadings and accompanying exhibits, and a decree rendered for the plaintiff.

The deeds filed with the complaint show that the legal title to the property is in the plaintiff. This the answer admits, and alleges that the east wing was built wholly or in part with the proceeds of the sale of the thousand acres granted to the territory by act of Congress, approved June 15, 1832, for building a jail and court-house at Little Rock. This, if it be true, can not help the defendant's case; for the donation was to the territory, and the plaintiff, not the defendant, is the legal successor to the property rights of the territorial government.

1. Title not acquired by improving land.

Nor does it alter the case that the defendant may have expended considerable sums of money in improving and repairing the rooms. A land owner can not be improved out of his estate. Betterments belong to the owner of the soil, and can be used at the utmost only as a set-off against rents and profits, never for the purpose of acquiring title. *West v. Williams, 15 Ark., 682; Jones v. Johnson, 28 Ib., 211.*

2. ADVERSE POSSESSION: Permissive: Occupation by county: Presumption.

The county has used and occupied the rooms for keeping its records, and for holding its courts for more than forty years. The circumstances under which it originally took possession are not shown. Probably it was because the State did not need the rooms for its own use. But be this as it may, in the absence of any contract or legislative recognition of a higher right, it will be presumed that such use and occupation were by sufferance merely, and without any intent on the part of the county to appropriate the land to itself. Now a permissive possession, however exclusive, and "however long it may in point of fact have endured, could never ripen into a title against anybody, for it was not considered as the possession of the precarious occupier, but of him upon whose pleasure its continuance

depended." *Chalmondely v. Clinton, 2 Jac. & Walk., 1; Ellsworth v. Hale, 33 Ark., 633.*

The whole doctrine of title by limitation rests upon the acquiescence of the owner in the hostile acts and claim of the person in possession. Hence possession, to be adverse, must be in hostility, and not in subserviency to the rights of the true owner. *Sedg. & Wait on Trial of Title to Land, secs. 749, 751; Angell on Limitations, 6th ed., p. 388.*

It appears that, during the era of reconstruction, the Chief Justice of this court audited and approved an account for rent for some of the rooms in controversy, and that this demand was actually paid to the county out of the contingent fund for this court. But no such payment was authorized by law, and the State can not be estopped by the unauthorized acts of its officers. *Woodward v. Campbell, 39 Ark., 580; Woodruff v. Berry, 40 Ib., 251.*

The county has never had the shadow of a title, legal or equitable, and the decree of the Chancellor must be affirmed.

SPRINGFIELD AND MEMPHIS RAILROAD CO. v. LAMBERT.

42 121
59 244

FEES: *Witnesses in several cases.*

In civil cases witnesses are entitled to their ferriage and *per diem* in every case in which they are summoned, however numerous.

APPEAL from *Lawrence* Circuit Court.
Hon. R. H. Powell, Circuit Judge.
Erb, for appellant.

SMITH, J. Witnesses were summoned on behalf of the defendants, in two civil cases pending in Lawrence Circuit

Court, wherein the railroad company was plaintiff. They attended to testify, and proved up their attendance in each case. The cases were determined against the company. The clerk taxed their ferriage and *per diem* allowance in both cases. The company moved the court for a retaxation of costs, insisting that the witnesses were entitled to claim their attendance in one case only. But the Circuit Court decided otherwise.

Sections 39 and 40 of the fees act of February 25, 1875, provide that witnesses shall be allowed compensation for each day's attendance before the Circuit Court in civil and criminal cases, $1.50; but in criminal cases, when the costs are paid by the county, they shall be allowed pay in but one case, no matter in how many cases they are summoned or called upon to testify. But for this exception, the county would be liable, when the cases are determined adversely to the State, for their fees in all the criminal cases, where they have attended in obedience to a subpœna, as decided in *Pulaski County v. Downer, 10 Ark., 588.*

The statute contains no exceptions as to double pay in civil causes, and the courts can make none, as they have no power to legislate. *Erwin v. Turner, 6 Ark., 14; State Bank v. Morris, 13 Ib., 291; Pryor v. Ryburn, 16 Ib., 671; Maclin v. Thompson, 17 Ib., 199; Smith v. Macon, 20 Ib., 17; Bennett v. Worthington, 24 Ib., 487.*

Affirmed.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN R. R. CO. v. HAGAN.

42 122
56 552

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42 122
180 73

1. RAILROADS: *Negligence: When presumed.*

When stock is killed by a railroad train, negligence is presumed against the company until excused or disproved. (For the facts constituting the excuse in this case, see the opinion.—REP.)

2. SAME: *Stock found wounded near track: Presumption.*

The fact that stock is found near a railroad, wounded, creates no presumption that the injury was done by the railroad train, as in cases of killing or mortally wounding stock; but when it is proved that the injury was done by the train, then the same presumption of negligence arises against the company as in cases of killing.

3. DAMAGES: *Practice of the court when excessive.*

When juries give excessive damages against a railroad company for killing stock, the court should compel the plaintiff to enter a remittitur or submit to a new trial.

APPEAL from *Pulaski* Circuit Court.
Hon. F. T. VAUGHAN, Circuit Judge.

Dodge & Johnson for appellants.

1. The statutory presumption of negligence arises only in case of *killing* or *mortally wounding* stock, and does not apply to the mere wounding of stock. In the latter case there should be evidence of *negligence* on part of the company or its agents. (*Sec. 8, Acts 1875, p. 134.*) The act only applies to animals *killed* or by fair intendment to those wounded unto death. Citing *33 Ark., 816; 37 Ark., 571; 36 Ib., 87; 36 Ib., 455, 651; 38 Ib., 205; 37 Ib., 697; 39 Ib., 414.*

2. As to the mule, the *prima facie* case was effectually and completely overcome, and the verdict was directly contrary to the instructions of the court. *36 Ark., 451; Ib., 87.*

3. The verdict was excessive. The jury found the *full value* of the mare, when she was only wounded.

George L. Basham and *Clark & Williams* for appellee.

There is no explanatory testimony as to the injury to the mare, and the statute makes the company liable for her value. *33 Ark., 816.*

The killing of the mule falls within the rule of *L. R. & F. S. Ry. v. Finley*, *37 Ark.*, *562* and *Ry. v. Jones*, *MS.*

The instructions were correct (see cases *supra*), and the damages not excessive.

No proof being adduced as to the sheep and ox, the statutory presumption of negligence arises.

1. RAILROADS: Negligence in killing stock.

SMITH, J. Hagan obtained a judgment against the railway company for $391 damages on account of the killing by its trains of one mule, one ox, two sheep, and the wounding of a mare and cow. Of its liability for the value of the ox and sheep, no question is made. They were killed on the railroad track. The burden under the statute was upon the company to show due care in the operation of its trains. And, since no attempt was made to do this, the *prima facie* case became conclusive.

The mule was killed in daylight by a passenger train. But the defendant claimed that it was unavoidable. The track was straight for a considerable distance at the place where the accident occurred; the surrounding country was level and clear of bushes or other obstruction to the view. The locomotive engineer swore that he saw the animal one hundred and fifty yards ahead. It was not then upon the track, but was approaching the track. The alarm whistle was not sounded until the mule got upon the track, nor was any effort made to stop or check the speed of the train, although the engineer had atmospheric brakes at his command. The excuse for this is, that, after the mule came upon the track, the distance was too short to bring the train to a full stop before striking the object; and to lessen the velocity of the train would have endangered the safety of passengers by increasing the liability of the cars to leave the track when the inevitable collision should take place.

We can understand that live stock may spring upon the track so near ahead of a rapidly advancing engine that it would be useless, and might be dangerous to check up. Under such circumstances, all the momentum which the train has acquired is needed to brush aside the obstacle with as little recoil as possible. But the jury might fairly have inferred, from the engineer's own version of the matter, that proper caution had not been used. Although he saw the mule approaching the track, he did not whistle until it was actually upon the track, nor put forth any effort to slacken speed and get his train under control. This branch of the case thus falls within the rule laid down in *L. R. & Ft. Smith Ry. Co. v. Jones, 41 Ark., 157.*

The same considerations dispose of the injury to the cow, which was in fact struck by the same freight train that killed the ox. It was in daylight, and the engineer could have seen the cattle for a quarter of a mile. The engineer blew his whistle and slackened the train, but did not stop. The cattle were running along the track, and there was a trestle immediately in front of them. The jury might well have concluded that they might have been saved by the exercise of due care.

2. SAME: Stock found wounded near track.

No witness saw the mare struck by the train, but she was found in a thicket near the railroad with her nose broken, her legs badly cut up, and her shoulder presenting the appearance of a car wheel having passed over it. She was down and could not get up, and the plaintiff abandoned her to the defendant's section boss, who took charge of her. A witness tracked her back to the railroad, and found horse hair, blood and other signs indicating that she had been thrown from the track. There is no explanatory testimony to rebut the statutory presumption of negligence, but it is contended that no such presumption arises unless the animal be killed outright or mortally wounded.

Our previous decisions have made no distinction in this respect between the killing and wounding of an animal. *L. R. & Ft. S. Ry. Co. v. Payne, 33 Ark., 816; Same v. Trotter, 37 Ib., 593; Same v. Henson, 39 Ib., 413.*

And the act of February 3, 1875, makes none, except that its eighth section declares the killing of stock on the track *prima facie* evidence that it was done by a train. When an animal is found wounded in the vicinity of a railroad, there must be evidence to connect its injury with the operation of the trains. But when the jury are satisfied that the injuries, from their nature and appearance, were inflicted by a passing train, the presumption of negligence attaches equally, whether those injuries be mortal or otherwise.

One ground of the motion for a new trial was, that the damages were excessive. Juries are prone to be somewhat liberal in this class of cases. But it is a matter with which we can not well interfere, when the evidence in any view of the case warrants their assessment. The only remedy for this evil is, that the circuit courts should in such cases compel the plaintiff to enter a remittitur or submit to another trial.

Affirmed.

GAITHER V. WASSON AND WIFE.

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SPECIAL JUDGE: *Parties can not agree on—must be elected.*

A special judge must be elected by the attorneys at the court, as provided by the Constitution, and not by agreement of parties to the cause to be tried. A judgment or decree rendered by a special judge selected by agreement, is *coram non judice* and void.

APPEAL from *Carroll* Circuit Court, in Chancery.
Hon. JAMES A. WILSON, acting as Special Judge.

Dodge & Johnson for appellant.

Hon. James A. Wilson was not duly elected special judge as by law required, but only presided by consent of counsel. The judgment was *coram non judice* and void.

English, C. J. It appears from the record, as amended, that this case being ready for hearing on bill, answer and depositions, and the regular judge being disqualified to sit in the case, it was submitted by consent of the solicitors of the parties, to James A. Wilson, Esq., as special judge, who as such heard the case, and rendered the decree in favor of Wasson and wife. Appealed from by Gaither.

A special judge must be elected by the attorneys of the court, as prescribed by the Constitution, and can not be agreed on by the parties to a suit, and a judgment or decree rendered by a special judge selected by agreement, is *coram non judice* and void, as held in *Dansby v. Beard*, *39 Ark.*, *254*.

The decree must be reversed, set aside and held for naught, and the cause remanded to be heard anew by a competent court.

Sternberg v. The State.

1. Bail: *Release: Surrender of his principal to sheriff.*

Bail may surrender his principal by procuring a certified copy of the bail bond and delivering it to the sheriff and having him to arrest the principal. The actual arrest by the sheriff is equivalent to a delivery of the defendant to him by the bail, and releases the bail from liability on the bond.

APPEAL from *Franklin* Circuit Court.

Hon. G. S. Cunningham, Circuit Judge.

M. Sternberg, pro se.

Where a defense is vaguely or badly stated, the remedy of plaintiff is by motion to make more certain, and not by demurrer. (*31 Ark., 379, 657; 32 Ib., 132, 315.*) The answer may have been defective in form, but enough appeared to meet a general demurrer.

I. L. Fielder for appellant.

Appellant complied with all substantial requirements of the statute. *Gantt's Digest, secs. 1732–3–4.*

English, C. J. William Lane being in custody under an indictment for a misdemeanor, M. Sternberg executed a bail bond for his appearance in the Circuit Court of Franklin County to answer the charge.

At the June term, 1882, a forfeiture was taken on the bond, and to a *scire facias* upon the forfeiture, Sternberg pleaded in substance as follows:

"That on or about the last day of January, 1882, he, Sternberg, applied to J. O. Alston, clerk of the said Circuit Court, for a copy of said bail bond upon which he was surety for the appearance of William Lane at said court from term to term, etc., to answer a charge made against him in an indictment for selling liquor, etc., and that accordingly said clerk caused his deputy, Bettis Alston, to make a duly certified copy of said bail bond, which was on said day delivered to this defendant; and by him placed in the hands of R. C. Shores, sheriff of said county, with positive directions to re-arrest said William Lane, which the said sheriff at once proceeded to do, and did do, the said William Lane then being in Ozark in said county. That immediately after said sheriff had arrested the said William Lane, as above stated, he, the said sheriff, stated to the said William Lane that M. Sternberg having sur-

rendered him, he, the said William Lane, could file another bond at his leisure; and thereupon said William Lane was released by the said sheriff in the manner as last above stated.

"[That, as defendant is advised, the said Lane afterwards escaped from the custody of said sheriff, but has since been re-arrested, and is now released from custody upon a new bond duly executed and now on file in said court. That his failure to take a receipt from said sheriff, Shores, was due alone to his ignorance of such requirement].

"All of which he is ready to prove. Wherefore he prays the court to set aside said forfeiture, and order said bail bond canceled and held for naught."

The above paragraph in brackets, was interlined by permission of the court after the plea was filed.

The court sustained a demurrer to the plea interposed by the State, and, defendant resting, final judgment was rendered against him for $250, the penalty of the bail bond, and he appealed.

Section 1732 Gantt's Digest provides that "at any time before the forfeiture of their bond, the bail may surrender the defendant, or the defendant may surrender himself to the jailer of the county in which the offense was committed; but the surrender must be accompanied by a certified copy of the bail bond, to be delivered to the jailer, who must detain the defendant in custody thereon as upon a commitment, and give a written acknowledgment of the surrender, and the bail shall thereupon be exonerated."

This section is the same as section 81 of the Kentucky Criminal Code (Myer's Kentucky Code, p. 587) under which the Court of Appeals held that the surrender must be made to the jailer and not to the sheriff, but it seems the sheriff there was not the jailer. See *Schnieder v. Commonwealth, 3 Metcalf, 410; Bruce v. Cobzan, 2 Littell, 288.*

But here the sheriff is *ex officio* jailer, though he may appoint a jailer, for whose conduct he is responsible. (*Gantt's Digest, chapter 77.*) And no doubt the bail may make a valid surrender of his principal to the sheriff. But the plea alleges no surrender to the sheriff in compliance with the section of the statute above copied. It alleges that the bail placed in the hands of the sheriff a certified copy of the bail bond with directions to re-arrest the principal. But this was not a surrender of the principal to the sheriff by his bail.

There are two further sections of the statute, however, as follows:

"Section 1733. For the purpose of surrendering the defendant, the bail may obtain from the officer having in his custody the bail bond or recognizance, a certified copy thereof, and thereupon at any place in the State arrest the defendant, or, by his written indorsement thereon, authorize any person over the age of twenty-one years to do so.

"Section 1734. The bail may arrest the defendant without such certified copy."

When appellant placed in the hands of the sheriff a certified copy of the bail bond, with directions to re-arrest Lane, as alleged in the plea, the sheriff was not obliged to make the arrest, and might have declined to do so, and required appellant to surrender him into his custody; but the plea alleges that the sheriff did at once proceed to arrest Lane, and stated to him that appellant had surrendered him, and that he could file another bond at his leisure, and thereupon released him, etc.

If in fact the sheriff arrested Lane, and took him into his custody, at the request of appellant, as alleged, this was in legal effect a surrender of him, and appellant was exonerated, and if the sheriff released him, or permitted him to escape after such arrest, he, and not appellant, was respon-

sible. When the sheriff took him into custody, he was no longer in the keeping of appellant as his bail.

The plea is not artfully drawn, but it presents a substantial defense to the *scire facias.*

The judgment must be reversed, and the cause remanded with instructions to the court below to overrule the demurrer to the plea, and it will stand for trial on the truth of its allegations.

No consequence is attached to the allegations of the plea that after Lane escaped he was re-arrested, and gave another bail bond. There may be successive bail bonds, and a liability upon each.

MORGAN V. THE STATE.

1. INDICTMENT: *Obtaining goods under false pretense.*

An indictment charged, in substance, that the prosecutor went from Kentucky to Hot Springs with the fixed purpose of lodging and boarding while there at the same hotel where one Dr. Welsh, an acquaintance of his, boarded, whose society while visiting the Springs, he greatly desired. That he went to the defendant's hotel for breakfast, and was there informed by the defendant that he well knew Dr. Welsh—that the doctor had been boarding at his hotel for some time, but had left two days before for Eureka Springs. That by means of said representations he was induced to take board and lodging for one month, at defendant's hotel, and to pay him thirty dollars in advance therefor. That said representations were willfully false and fraudulent. That said Welsh had not at any time boarded at defendant's hotel, had not left the city, but was still there and boarding at another hotel. *Held,* that the indictment charged no criminal offense.

2. CRIMINAL LAW: *False pretense: What is.*

The procuring by a hotel keeper of a guest to board with him, and to pay him money in advance for his board, by telling him falsehoods to induce him to become his guest, is not a false pretense for which he is criminally liable. A criminal false pretense must be the inducing motive to the obtaining goods by the defendant, and the result must be the obtaining of property.

APPEAL from *Hot Spring* Circuit Court.
Hon. J. M. SMITH, Special Judge.

A. Curl, and *W. J. Hughes* for appellant.

The fact that Fisher was induced to engage board by means of false representations as to a past or existing fact, not having any connection with the hotel or its business, is not a public offense. There must be something obtained feloniously, with intent to cheat or defraud the party from whom it is obtained. (*Gantt's Digest, sec. 1372.*) The ingredients of the offense are obtaining goods or money by false pretenses, and with an intent to defraud. *1 Caldwell (Tenn.), 333.*

The representations were not of such a character as were calculated to induce Fisher to part with his money unconnected with any other consideration. (*12 Ark., 65.*) The statute does not undertake to punish every wrong, or make a public offense of every fraud. (*Ib., 1 Russ and Ryan, 504.*) Nor to punish mere liars. (*28 Am. Dec., 547–8.*) It does not cover all moral delinquencies. *Ib., 549; 6 Mich., 504.*

Moore, Attorney General, for the State.

The indictment was good. *Gantt's Digest, sec. 1372.*

The false pretense was "a fraudulent representation both of an existing and past fact by one who knew it not to be true, which was adopted to induce him to whom it was made, to part with something of value." *2 Bish. Cr. Law, sec. 415; 35 Ark., 396.*

EAKIN, J. Morgan was indicted in Garland County, and, upon change of venue to Hot Spring County, was

convicted and sentenced to a year's imprisonment in the penitentiary. This is the indictment:

1. INDICTMENT: Obtaining goods under false pretense.

"The grand jury, etc., * * * accuse M. T. Morgan of the crime of 'false pretenses' committed as follows to wit: 'On the twenty-fifth day of May, 1882, one Walter Fisher, a resident of the State of Kentucky, arrived as a visitor in the city of Hot Springs, with the purpose fixed in his mind of procuring board and lodging at the same hotel, or boarding-house, in said city, where one Dr. John S. Welsh, an acquaintance of the said Fisher, and then in the said city, was boarding; and with such purpose, the said Fisher went to the Gwinn Hotel in said city, of which the said M. T. Morgan was then proprietor, for the purpose of getting breakfast, and ascertaining where in said city the said John S. Welsh was stopping; and while at the said Gwinn Hotel, in the county and State aforesaid, on the said twenty-fifth day of May, 1882, the said M. T. Morgan feloniously, willfully and designedly did falsely represent and pretend to the said Walter Fisher that he, the said Morgan, was acquainted with the said John S. Welsh, and that the said John S. Welsh was not then in the city of Hot Springs; that the said John S. Welsh had boarded with him, the said Morgan, two or three weeks, while in the city of Hot Springs, just prior to that day; and that the said John S. Welsh had left Hot Springs for Eureka Springs a day or two before that day; by means of which said false pretenses and representations so knowingly, feloniously and fraudulently made, the said M. T. Morgan did then and there feloniously induce the said Walter Fisher to engage board and lodging at the Gwinn Hotel for one month, and did feloniously obtain from the said Walter Fisher one piece of United States paper currency, commonly called greenbacks, of the denomination and value of twenty dollars; and one piece of

United States paper currency, commonly called greenbacks, of the denomination and value of ten dollars, of the money of the said Walter Fisher, with the felonious intent to cheat and defraud the said Walter Fisher of the same. Whereas, in truth and in fact, the said M. T. Morgan was not acquainted with the said John S. Welsh, the said John S. Welsh had not at any time boarded with the said M. T. Morgan; the said John S. Welsh had not left the city of Hot Springs for Eureka Springs, a day or two before that day; and the said John S. Welsh was then in the said city of Hot Springs, boarding at a hotel other than the said Gwinn Hotel. Against the peace and dignity of the State of Arkansas.

"'J. B. Wood,
"'*Prosecuting Attorney.*'"

A demurrer to this indictment, and also motions for a new trial and in arrest of judgment, were successively made and overruled. A bill of exceptions was taken, and the defendant appealed.

The transcript is unnecessarily voluminous, including much that might have been left out, and full of tiresome and burdensome repetitions of the same matter. It is safe to say that all that is really necessary might have been embraced in a third of the space. This is a great evil, but without the aid of attorneys in the cases moving to retax costs, or otherwise to correct the abuse, we can only add line upon line and precept upon precept, until the pride of the profession may be aroused to insist upon a better practice. Clerks ought not to inflate cost bills after this fashion.

Considering first the motion in arrest with the demurrer. They are based upon the ground that the facts charged do not disclose an indictable offense.

Section 1372 of Gantt's Digest, so far as applicable to

this case, provides that "every person who, with intent to defraud or cheat another, shall designedly, by color of any false token or writing, or by any other false pretense, * * * obtain from any person any money, personal property, right in action, or other valuable thing or effects whatever, upon conviction thereof, shall be deemed guilty of larceny, and punished accordingly."

Such has been the law of this State since the adoption of the Revised Statutes of 1838.

It was early held, in consonance with English authorities, that there could be no false pretense regarding an intention or future purpose. It could not be applied to a promise to do something, however fraudulent in design or hurtful in effect the promise may have been. The distinction is not based on any idea of difference in degrees of moral turpitude between the two sorts of scoundrelism, but upon the necessity of limiting in some way the broad significance of the words in the statute. To what extent that limitation is to be carried was left uncertain, but it was held in the case now referred to, that it must be a pretense regarding some existing fact or condition, to be felonious. (*McKenzie v. State*, *6 Eng.*, *594.*) It was remarked by Mr. Justice SCOTT delivering the opinion, that it could not be supposed "that the Legislature intended to make every imaginable case of fraud an indictable offense." I may add that if it did so intend, and could enforce the intention, one of two things would result—either we would have a Utopian condition of society, or the revenues of the State would be exhausted in the building and support of penitentiaries. Seriously, constituted as human nature is, in the struggles for wealth, social position, selfish indulgencies, political influence, or for food and clothing, so broad a construction, even within the letter of the statute, would be impractical; or if practical, more barbarous

than the most shocking legislation of the early Puritans. The court in that case declined to make any effort to fix all the limits of the operation of the words of the statute, deeming it safer to leave them to be fixed from time to time in each case, as they might arise. It certainly was a wise precaution, founded upon sound views of practical judicature, and a true forecast of the dangers and abuses to which such statutes may lead. For, in general, I suppose it will be admitted that it is wiser to leave the correction of ordinary cases of fraud and deceit to the civil tribunals, and most especially the equity courts, aided by social ostracism, than to create the temptation to enforce civil claims by the terrors of criminal prosecutions, or to inflict the most crushing punishments and everlasting disgrace for every kind of violation of fair and ingenious dealing. Human nature must be dealt with as found, and wisely corrected and restrained. The question of what would constitute a felonious false pretense had not been raised in the previous case of *The State v. Hand, in 1 Eng., 165*, but the indictment, which passed unchallenged, set up a false pretense of an existing fact of a very material character, upon the belief in which money was advanced. There it was *faith in the fact* which gave the assurance that the money would be returned.

In *Burrow v. The State, 7 Eng., 65*, upon the argument of the present Chief Justice, who was then of counsel for plaintiff in error, the court reasserted the rule in *McKenzie v. State* (*supra*), but went still further in the wary policy of guarding against the abuses to which a too literal construction of the words, and too wide a scope of the intention, might lead. In that case there was an actually false misrepresentation of existing facts, or rather a false pretense which did not exist, by which the defendant obtained from one Richard S. Hodge a conveyance of a negro slave

named Bill. The pretense charged in the indictment was, that Burrow represented to Hodge that certain persons had conspired to seize the slave, by which Hodge would be unjustly and unlawfully deprived of the value, and thereby induced him to convey the slave to Burrow for safe keeping, with the felonious intent to cheat and defraud him, and that the representations were untrue, and Burrow knew it. The court conceded that this count was not liable to the objection that the pretenses were not regarding existing facts. There was no question, either, but that the pretenses had been the immediate inducement to the conveyance, or had been properly alleged to have been. The court held this count bad. Chief Justice JOHNSON, delivering the opinion of the court, said that "it was not the intention of the statute to convert every fraud which might fall within the cognizance of a court of equity into a criminal offense." In that case it was considered that the representation complained of was not of so definite and plausible a character "as to drive from his propriety a man of ordinary capacity, and to induce him to divest himself of his property."

He said the statute "was designed to extend no further than to embrace such representations as were accompanied with circumstances fitted to deceive a person of common sagacity, and exercising ordinary caution." Another count in the same indictment was held bad upon the ground that it was not sufficient to charge false pretenses in general terms, but that they should be set out specifically and with strict certainty. The principles of construction were substantially reannounced in *State v. Vandermark, 35 Ark., 396*, and supported by authorities. Upon the authority of Mr. Bishop, Justice HARRISON in that case said the representation must be of such a nature as to induce the person to whom it is made to part with something of value.

In the subsequent case of *J. Johnson v. The State*, *36 Ark.*, *242*, which was a case of obtaining goods on the false pretense of having been sent for them, Mr. Justice HARRISON, delivering the opinion of the court, somewhat modified the doctrine laid down by Chief Justice JOHNSON in *Burrow v. The State* (*supra*), and announced that it was not necessary that the pretense should be such as is calculated to deceive a person of ordinary prudence or caution, but that it would be sufficient if the person were actually deceived or defrauded. Evidently there are shades of distinction on this point, and neither position can be followed to the extreme limits of its logical consequences.

1. FALSE PRETENSE: Inducing motive.

Without pausing to discuss the statutes of England and of other States of a similar character, which all seem pretty much in accord with each other, it is only necessary for the purposes of this case to say that the false pretenses must be the "*inducing motive* to the obtaining of the goods by the defendant."

In some States it is held that they must have been the *decisive* cause of the transfer, whilst in others it is sufficient if they have materially contributed with other motives to induce it. Acting upon the former caution of this court, and laying down nothing which this case does not require for its decision, leaving other points to be settled and determined as they arise, we proceed to examine this indictment in the light of our past decisions.

The false pretenses are all with regard to the matter of Welsh having been an acquaintance of the landlord, and a guest of the Gwinn Hotel whilst in town, and having left for Eureka. They were damning falsehoods, altogether unworthy of a respectable hotel keeper. The object of them, however, was not to get Fisher to pay him money because of the facts represented. It is not like the case

where one would go to another and say, for instance, "your family is suffering at home, and I am sent to you for money to relieve them," when that is false. Then the money is given because of the actual pretense. Was there any reason in the nature of things why Fisher should give money to defendant because he knew Welsh, and Welsh had patronized his house, and had then gone to Eureka? It is not pretended that there was, or that Fisher had been himself benefited by the conduct of the defendant towards Welsh, or would be benefited by Welsh's presence. It would simply have gratified his taste and sentiment to be with Welsh. No injury was alleged to have been done to him by not getting at the same hotel with Welsh. Evidently he gave no money or property to defendant upon account of the false representations. They induced him only to make a contract for board there. But of what did that defraud him? Only of the sentimental gratification (from all the indictment shows) of being with his friend Welsh. But the result of a felonious false pretense must be to obtain property.

Result must be to obtain property.

The money was paid for board in advance. No false pretense as to furnishing board and lodging is averred or shown. Nothing appears to show that it was not as good as any other hotel. The money was paid for value, and the defendant was willing to give value, all that he promised. Indeed, nothing more appears on a careful study of the allegations than this—that he was cheated not out of any property or thing of value, but disappointed of his anticipated pleasure in being in close association with Welsh. If he had any remedy, it seems that a civil remedy to rescind the contract might have been ample. A fraud had been doubtless perpetrated upon him, if the indictment be true, and a very reprehensible one. But whilst the contract stood, he was not cheated of his money.

He could get the full value of that which he expected of it when he paid it.

The payment of the money for board is too remote a consequence of the false pretenses. They were not made *directly* for the purpose of having money advanced because of the facts. The object, as disclosed by the indictment, was to induce Fisher to *become a guest.* This does not come within the inhibition of the statute. To get the custom or patronage of a guest, is not to get property, but to induce a condition of things, or relation of the parties, out of which a contract to pay money for value may arise.

It was held in *Reg. v. Gardner, 36 Eng. Law & Eq. Rep.*, as reported in Mr. *Wharton's Work on Am. Crim. Law, sec. 2122*, that where a person obtained food and lodging as a boarder, on the pretense that he was a naval officer, the obtaining of such food and lodging was too remotely the result of the false pretense.

We think the court erred in overruling the demurrer to the indictment, and also the motion in arrest.

Reverse, with instructions to arrest the judgment and sustain the demurrer to the indictment.

WRIGHT v. GRAHAM.

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1. TAXES: *When defendant tax purchaser reimbursed, etc.*

A defendant in equity for land who under a *bona fide* claim of right to the land has acquired a tax title to it, or has redeemed it from a forfeiture for taxes, is entitled, in the decree against him for the land, to be reimbursed the taxes he has paid, though he asserts no title by virtue of his tax purchase or redemption, but claims to have purchased only to protect his own title which proves defective.

2. ACKNOWLEDGMENT: *Of mortgage: What necessary.*

The acknowledgment of a mortgage must show that the mortgage was executed for the "consideration" expressed in it, or it will be void as to all persons except the parties to it, though they have actual knowledge of its existence.

3. SAME: *Effect of curing act of* 1883.

The act of 1883 to cure defective acknowledgments of deeds, etc., can not operate in this court in a case decided in the Circuit Court before its passage. The judgment of the Circuit Court must be tested by the law as it then existed.

APPEAL from *Lee* Circuit Court, in Chancery.
Hon. M. T. SANDERS, Judge.

John C. Palmer for appellant.

The doctrine of *Main v. Alexander* should be reconsidered by this court. The object of the law being to secure proof of the execution of the instrument, and the proof by subscribing witnesses going only to the execution of the instrument, the purposes of the law are entirely accomplished by giving effect to such an acknowledgment as appears to the mortgage.

Thweatt & Quarles also for appellant.

The acknowledgment was cured by act March 14, 1883. (*Acts 1883, p. 129.*) As to the expediency and constitutionality of such curing statutes see *16 Am. Dec., 516, 546, 387.* The deed in this case was not invalidated before the passage of the act, for both parties appealed, and the case is now pending.

Tappan & Horner for appellees.

Appellee was an infant, and not barred by limitation. *Gantt's Digest, secs. 4113, 4130; 30 Wis., 333.*

When an ancestor dies in possession of land, it is not necessary in ejectment to trace title any further. *Adams on Eject., 281; 21 Ark., 52; 31 Ib., 334.*

The acknowledgment to the mortgage was fatally defective, and the instrument not properly filed for record or a lien on the land. *35 Ark., 67, 365; 37 Ib., 91.*

The appellant has not a vendor's lien. She was not the vendor, nor had she Lanford's notes for the purchase money. *27 Ark., 229; Wash. Real Prop., vol. 2, p. 92; 25 Ark., 129.*

Appellee entitled to rents, etc., during the whole time she was tortiously kept out of possession, and not merely from the time of the institution of the suit. *16 Ark., 181; Gantt's Dig., sec. 2260; 2 Ind., 87; 15 Wall., 624; 10 Pa. St., 198.*

The defective acknowledgment not cured by act March 8, 1883, because the deed had been "invalidated" by decree before the passage of the act.

EAKIN, J. This is an action begun in ejectment by Robert Graham and her husband, Davie W. Graham, against the tenants of Mary J. Wright, to recover two contiguous half sections of land. She claims as sole heir of her father, Robert A. Lanford, alleging that he died seized of the land, on the sixth of April, 1861, holding the same under a deed from William D. Burnett and wife, which is exhibited. It appears to be an absolute conveyance for the consideration of $16,000, the receipt of which is acknowledged. It was executed on the twenty-fourth day of June, 1858, and duly acknowledged and recorded. Proper allegations were made with regard to possession of defendants, etc.

Mrs. Mary J. Wright (formerly Tarpley) was admitted to defend.

She pleaded at law the statute of limitation of seven years, also that of five years on judicial sales. She admitted that the plaintiff's father, Lanford, was in possession

on the sixth of April, 1861, but denied his title, and also the title and right to possession of plaintiff, Robert.

By way of equitable defense and cross complaint, she says that on the first of March, 1858, she and her then husband, Tarpley, were seized as owners of the land, and conveyed it to W. D. Burnett by a deed, which is exhibited. It appears to have been for the expressed consideration of $38,200, secured to be paid by five notes for the sum of $6,000 each, due respectively on the first days of March 1859, 1860, 1861, 1862 and 1863, and a sixth note for $8,200, due March 1, 1864, all of which, the deed recites, was secured by a mortgage to which reference is made, as executed by Burnett and wife.

The deed also included a number of slaves, the value of which doubtless entered into the aggregate of the consideration. The deed, in referring to a mortgage, does not show upon what property the mortgage was given by the purchasers. She proceeds however to allege that next day Burnett and wife executed to her and her then husband a mortgage of this land and some negroes to secure the debt, and exhibits the instrument. It was filed on the tenth of June, 1858, and recorded with the following acknowledgment:

"STATE OF ARKANSAS, *County of Phillips.*

"Be it known that I, William D. Burnett, and Nancy D. Burnett, his wife, personally well known to the undersigned justice of the peace, duly sworn and commissioned by the county aforesaid, who acknowledged they made and signed the foregoing deed of conveyance, for the purposes and uses therein contained and set forth; and they the same certified for record. And at the same time, I examined Nancy D. Burnett, wife of the aforesaid W. D. Burnett, separate and apart from her said husband, who says she signed the foregoing deed of her own free will,

without fear, compulsion or undue influence of her husband, W. D. Burnett, and that she desired the same certified. I therefore certify, etc." Signed by the justice.

She further alleges that on the twenty-fourth day of June, 1858, Lanford desiring to purchase said land from Burnett, and being willing to pay for the same the sum of $16,000 on credit, but finding the mortgage on record, was unwilling to make the contract without some assurance or relinquishment from Tarpley. Whereupon it was agreed by all the parties—Burnett, Lanford and Tarpley and wife—that Burnett and wife might execute the deed, and that Lanford should execute to Tarpley and wife six notes, as follows: One for $1,000, due January 1, 1859; one for $1,600, due January 1, 1860; and four for $2,666.66⅔ each, due respectively on the first days of March 1861–62–63–64. Also Lanford was to pay two notes to W. C. Myrtle for $1,066.66⅔ each, and one to Watkins & Gallagher for $600. By request of Lanford, it is alleged, Tarpley indorsed this agreement on the margin of the mortgage, to take effect upon the payment of the said sums of money.

By reference to the transcript of the mortgage this indorsement appears, together with an absolute release of all the slaves in the mortgage, in favor of one Jesse Locke and wife. It is alleged that Lanford received the deed set forth in the complaint with this understanding, and subject to the lien for the purchase money, and that no portion of the notes above mentioned were ever paid; and it is submitted that the plaintiff, as heir of Lanford, is not entitled to possession until payment.

She proceeds to state that afterwards Tarpley died, and she became his administratrix. She returned to the State after the war, and finding the lands had been sold for taxes of 1860–1, redeemed them from the tax purchasers, taking an assignment of the certificate. Afterwards neither Lan-

ford nor Burnett paid the taxes for 1865 and 1866, whereupon the land was sold for those taxes, and again redeemed by defendant. In the last case the purchase at the tax sale was made by one Ayres, who obtained the collector's deed, and then conveyed to defendant. On inspection of these exhibits it appears that a quarter section of the land in controversy, the northwest quarter of section 20, in township 1 north, range 3 east, is omitted. This portion was bought in by herself on sale for the taxes of 1867. She also claims that she holds a certificate of redemption for the north half of 20, for the year 1870, for which she paid; and also receipts for taxes paid at various other times.

At the March term 1868, of the Phillips County Circuit Court, she filed a bill to foreclose the mortgage for the purchase money against Burnett and one Kinkle, who she alleges was in possession under the heirs and representatives of Lanford's widow, and the plaintiff and her sister (since deceased) were members of his family. She alleges that they all knowing that the land would not sell for the amount for which it was bound, abandoned it without ever paying the taxes. The mortgage was foreclosed for the sum of $20,607.55, and sold by the commissioner to one Mrs. Mary F. Farrell, for the sum of $7,800, who, on the fourth of November, 1869, conveyed to Joseph M. Anthony, for $8,500 upon a credit, retaining a lien for the purchase money.

Afterwards, at the October term, 1875, of the United States District Court for the Eastern District of Arkansas, the Farrells obtained a decree against the lands for an unpaid balance of purchase money. At the ensuing sale defendant became the purchaser, and obtained a deed of conveyance.

She prays that if it be found that plaintiff has any interest in the land, it may be subjected to a lien for the $16,000

purchase money, with interest from the twenty-fourth day of June, 1858.

The cause, without objection, was transferred to equity, and plaintiff and her husband answered the cross-complaint. She denied that Lanford made the agreement with Tarpley and Burnett, as set forth, or any other agreement with regard to the land, but says that Lanford purchased of Burnett and paid him the full consideration of $16,000. Also denied that Lanford had then any knowledge or information of the mortgage, or any other lien held by defendant or her husband, or that they did in fact have any. Also denied that any indorsement was made upon said mortgage by the consent or procurement of Lanford. Also denied that Kinkle was her agent, or that she was herself a party to any foreclosure suit. She says that she was born on the sixth day of December, 1861, and was an infant in 1868. She denies that there had ever been any valid sale for taxes of any part of the land. She says that defendant, Mrs. Wright, and those under whom she claims, took possession in March 1868, and have since received the rents and profits. She says her father died when she was quite young, and she has grown up in ignorance of her rights.

The Chancellor found in favor of the plaintiff upon the claim for the land, and ordered a writ of possession; and found also that she was entitled to recover rents and profits from the beginning of the suit. He found, however, that the defendant had paid some taxes and money for redemption, for reimbursement of which she was entitled to a lien, if the amount exceeded the rents and profits. An account was ordered to be taken as to these matters.

Both parties appealed.

First: As regards the appeal of the plaintiff. It is based on the refusal of the court to decree rents and profits

during the whole time of defendant's occupancy. These might doubtless be recovered in ejectment without regard to the period of limitations, when the plaintiff is a minor. In this case, however, the Chancellor may well be supposed to have gone upon the ground that there was no clear proof of the time when defendant took possession. It was admitted at the beginning of the suit. Before that, it does not clearly appear when defendant assumed control. It was abandoned by the mother and step-father of plaintiff in 1868 or 1869, but it is not plain that defendant took actual possession then, or at any fixed period.

1. TAXES: When a defendant tax purchaser entitled to reimbursement.

The taxes and redemption moneys paid by Mrs. Wright, whatever they may be, and it is plain enough there were some, were paid under a *bona fide* claim of right to the land itself and inured to the benefit of the plaintiff. She has a tax deed, by mesne conveyances from the collector, to a great part of the land. She does not herself take the position that she had no interest in the land left to make it proper in her to acquire a tax title as any other stranger. From all that appears, such position, if conceded, would show a good adverse title and defeat the action of ejectment. She concedes on her part that she did not strengthen her own title, or mean to do so, but only meant to protect it, and simply claims reimbursement, in case the title be found in plaintiff. That is eminently just. There was no error against the plaintiff.

2. ACKNOWLEDGMENT. Of mortgage. What necessary in.

The acknowledgment of the mortgage was defective in that it did not state that it was executed by the mortgagor for the consideration therein set forth. The grammatical inaccuracies amount to nothing. It is urged that this defect was cured by an act of 1883, passed for the purpose of curing defective acknowledgments. But this cause was decided before the passage of that act, and we can not consider it. The question on appeal is, did the Chancellor

3. Effect of curing act of 1883.

err? That must be determined by the law as it then existed, or we would overrule a decision which was correctly made.

As long as this court feels constrained to adhere to its ruling in the case of *Main v. Alexander*, *9 Ark.*, *112*, the registration of a mortgage defectively acknowledged conveys no notice, and the mortgage itself is absolutely void as against all the world save parties, even with actual notice. The deed of plaintiff's ancestor from Burnett is absolute, with no lien reserved. He entered and died in possession, without any act of his, shown by proof, to create a lien upon the land. The indorsement or memorandum on the margin of the record is not shown to have been made by his direction, knowledge or consent; and, if it had been shown, there is no proof that he ever executed the supposed notes, or, if he did, that they remain unpaid.

The *prima facie* case of the plaintiff was well made. There was no bar to statute of limitations either of seven or five years. The equitable defense, save as to taxes, was wholly unsustained by proof, even if we should hold that all the facts set up would have given him a lien by estoppel or otherwise—a matter we need not decide.

Affirm and remand for further proceedings.

SADLER V. LEWERS.

REPLEVIN: *For property obtained by fraud: Innocent purchaser protected.*

Where one voluntarily parts with his property in exchange for stolen property, he can not, upon surrendering the stolen property to the true owner, recover his own from one who has acquired it for value and without notice of the fraud.

APPEAL from *Crawford* Circuit Court.
Hon. R. B. RUTHERFORD, Circuit Judge.

I. L. Fielder for appellant.

1. There was a total failure of consideration in the matter of the trade between —— Beavers and appellant. Therefore Beavers had no title to the mare in controversy, and hence could convey none to Locke, and for the same reason Locke could convey none to appellee.

2. Beavers could give nothing more than the bare possession to Locke, which possession was fraudulently obtained and illegal.

3. No one can convey to another a better title than he himself has.

4. The doctrine of "market overt" does not obtain in this country, and the doctrine of "caveat emptor" must apply.

The distinction of "innocent purchaser" is drawn between drafts, bills of exchange, coin, etc., as contradistinguished from other species of personal property, such as that involved in this controversy.

Second vol. Kent's Commentaries, p. 391 (marginal p. 325), and note on following page; also *Schouler Personal Property, pp. 22, 25, 637 and 638; Ark. Justice, p. 163.*

D. B. Locke for appellee.

There can be no question of stolen property in this case. Sadler voluntarily parted with his possession and ownership and clothed Beavers with every indicia of title, and would be estopped from setting up a title as against a *bona fide* purchase from Beavers.

A sale procured by fraud is not *ab initio* void, but voidable only. Upon the discovery of the fraud, the vendor may rescind the sale and recover back his property; but, in the mean time, third persons who acquire an interest in the

property will be protected. See *Benjamin on Sales, sec. 433, p. 394,* and authorities there cited. *1 Parsons on Contracts, 520; Story on Sales, sec. 200, p. 149; Walter, Actions and Defenses, vol. 5, p. 637; Ark. Justice, sec.* ——, and authorities there cited.

One of two innocent persons must suffer from wrongful act of a third, and when this is the case, he must suffer who has by his conduct enabled such third person to perpetrate a fraud upon the other. Sadler, by clothing Beavers with the *indicia* of ownership, enabled him to perpetrate the fraud upon Locke. Mr. Sadler has his remedy against Beavers, and if he deals with irresponsible persons he must suffer the consequences.

STATEMENT.

EAKIN, J. Sadler, in an action of replevin before a justice, recovered of Lewers a certain bay mare, and the latter appealed to the Circuit Court, retaining the property on bond.

The case was then submitted to the court on an agreed statement of facts, as follows:

"On the third day of March, 1882, one Beavers stole from some person in Crawford County, a mule, which he brought to plaintiff's house in Franklin County, and traded to plaintiff on the sixth day of March, 1882, for the mare now in controversy, the plaintiff paying ten dollars difference in the swap, and voluntarily parting with the possession and ownership of said mare, upon the representation made by said Beavers, that he (Beavers) owned said mule. Said Beavers returned with said mare to Crawford County, where he traded her for a valuable consideration to D. B. Locke, who afterwards traded her to the defendant, H. S. Lewers, who now has her in possession." It was further admitted that Locke and Lewers had bought

in good faith for value; that the stolen mule was afterwards delivered up by Sadler to the true owner, without compensation, and that the thief had absconded.

The court refused on plaintiff's motion to declare that the doctrine of *caveat emptor* applied to this case, and that there was a distinction between cases like this and cash, bills, etc., as regards innocent purchasers; but declared the law upon such cases as that stated, to be, that the owner of the mare could only recover her from the thief, or some purchaser with notice, or without valuable consideration. Judgment was rendered that defendant retain the property, and Sadler appeals.

OPINION.

REPLEVIN: For property obtained by fraud. Innocent purchaser protected.

There was no error in the declarations of law. One who voluntarily parts with property, although upon a fraudulent contract of sale, which he might rescind against the fraudulent purchaser, or one claiming under him without consideration or with notice, can not follow the property into the hands of an innocent purchaser for value. The doctrine of *caveat emptor* in such cases can not be invoked to protect one who voluntarily let his property go. The cases for its application are when the property is stolen, or comes by chance into the hands of the vendor who has no title. Then the true owner may recover. This mare was not stolen, nor did she come by chance to the hands of Beavers. She was voluntarily sold and delivered to Beavers by plaintiff, for a pretended consideration, which turned out to be worthless. He must bear the loss.

See numerous cases in *Story on Sales, sec. 200.*

Affirmed.

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CITY OF LITTLE ROCK v. BOARD OF IMPROVEMENTS, ETC.

TAXATION: *City local improvements: Act of March* 22, 1881 *constitutional.*

The act of March 22, 1881, for regulating the manner of assessing real property for local improvements in cities of the first class is constitutional, and if the city council refuse to levy a tax on the real property of an "improvement district" to complete an improvement therein, as reported by the board of improvements, it may be compelled to do so by mandamus.

APPEAL from *Pulaski* Circuit Court.
Hon. F. T. VAUGHAN, Circuit Judge.

W. L. Terry, City Attorney, for appellant.

1. Under sections five and fifteen of the act of March 22, 1881, entitled "An act to regulate the manner of assessing real property for local improvements in cities of the first class," the city council are left without any discretion, and are compelled to levy a tax for such amount of estimated cost or deficiency as may be certified to them by the board of improvement, and thereby the taxing power is made subservient to the contracting power lodged in the board. In other words, the practical and necessary legal effect of the act is to separate the taxing power and the contracting power, and make the former absolutely dependent upon the latter, leaving in the hands of the municipality only the shadow of the taxing power, and putting the substance of it in the hands of the board, and this amounts to the same thing as conferring the taxing power upon the board in the first instance. The power to tax necessarily implies discretion, and when that discretion is taken away, and the taxing power made a mere kite-tail to some other power to which it has been attached, he latter is the real power and the former but a shadow.

Under section 23, article 2, Constitution, the Legislature could not delegate any portion of the taxing power to this board. If they could not do so directly, can they do so indirectly?

Under the present Constitution the Legislature can not delegate any portion of the sovereign power of taxation to "taxing districts," except "school districts," which are provided for in section 3 of article 14. (See also sections 3 and 4, article 12.) Section 27 of article 10, relied on by the board, must be construed in connection with the sections last above referred to, and especially with that section embodied in the bill of rights. See also *Cooley on Taxation, pages 48, 49, 50 and 51, and Dillon on Municipal Corporations 3d ed., vol. 2, sec. 770, note 1, citing 4 Bush. (Ky.), 464.*

2. That under section 27, article 19, the tax for local improvements must be based upon the consent of a majority in value of the property holders owning property "adjoining the locality to be affected."

The city contends that under this provision of the Constitution it is not competent for the Legislature to pass a law by which a large body of territory may be thrown into a district, and persons who live a dozen blocks or more away from the locality to be affected shall be thrown into hotch-potch with a large number of others whose property will be immediately benefited by the improvement for which the tax is laid. Upon this point see case of *Arnold v. Cambridge, 106 Mass., 352.*

John M. Rose for appellee.

This act (Acts 1881, p. 161) was passed under the provisions of *section 27 article 19 Constitution 1874.* Assessments for local improvements have always been sustained even without constitutional authority. *Cooley on Taxation, 429.*

There is no constitutional provision vesting any power

of any kind in the city council, or recognizing such a body. The powers it has are derived from the act of 1875 organizing municipal corporations. The Legislature can alter or amend that charter or abolish it at pleasure. (*Dillon on Mun. Cor., 54*). Hence there is no separation of the contracting and taxing powers, or making the city council subject to the board, as contended for. The city and the board depend entirely upon the Legislature for their powers, and it could have created a board entirely independent of the council, one that could have made its own contracts and levied and collected a tax to pay them.

The contention of the city, that the taxing power could not be separated from the contracting power, was based on the idea that the city could not delegate her powers; that the city council, being the taxing power, must necessarily decide on what contracts should be made, because the contract had to be fulfilled by the levy of a tax. But the Legislature has not vested in the council any power to make these sewers, nor has the Constitution conferred any powers of a similar kind. The council is simply a creature of the Legislature, and its powers can be changed at the pleasure of that body. The Constitution expressly says that these improvements may be made under such regulations as may be prescribed by law. This act prescribes these regulations, and is not unconstitutional.

EAKIN, J. The appellees were organized as a board of improvements for the city of Little Rock, under an act of the General Assembly, approved twenty-second of March, 1881, for regulating the manner of assessing real property for local improvements of the first class.

By petition to the Circuit Court on the eighth of October, 1883, they represented that, under the provisions of the act, the city council had levied a tax on certain sewer

districts of the city, numbered 2, 3 and 4; upon which the board had proceeded to construct sewers, and had exhausted the levy, leaving a deficiency; the amount of which they had certified to the council, and had demanded a levy to cover, together with an amount sufficient to complete the sewers; indicating the rate of taxation which would be required for said districts, severally. This having been refused, the petitioners prayed a mandamus to compel it.

The city demurred; and also responded, setting up in the response that the said act was unconstitutional, in so far as it required the city to make an additional levy upon the real property in the districts for any amount which the board might report to be necessary to complete the improvements. That the council had already made a levy for an amount sufficient to pay the costs of the construction of sewers, according to the first estimates made by the board; and that the board had furnished no proper vouchers for the expenditure of the large amount of money which had come into their hands; but, being called upon, had refused to do so.

Further, that the board had mismanaged and misappropriated a large portion of the fund, and that the amount of the levy demanded was far in excess of what would be really necessary, upon a due and proper account of what had already come to their hands.

Further, that the power of the council to make such levies could only be exercised by the "consent of a majority in value of the property holders owning property adjoining the locality to be affected;" and that the petitions from such owners, in said districts, had only authorized a levy of the actual amount required to pay the costs of constructing sewers therein; from which it followed that the council could not make the additional levy for said deficiency, inasmuch as it had no means of testing the

accuracy of the statements sent in by the board regarding the deficiency; and that the council had, therefore, declined to comply with the demand until the board should produce, before a committee appointed by the council, proper evidences of the correctness of their report. They pray that the mandamus be denied, and the petition dismissed. To this response there was a demurrer.

Upon the pleadings, the court directed an alternative mandamus, ordering the council, upon the production before its committee of the vouchers and accounts of the board concerning said districts, to examine the same, and, if found correct, to proceed on the thirteenth of November, 1883, to make the levy required, or show cause on the sixteenth of November why it had not been done.

It seems that the vouchers and accounts were produced before a committee. On the fourteenth of November the city appeared and responded that the committee had not had time to make a full investigation, and requested time till the twenty-seventh of November. By approval of the court the time was granted, and the response of the council was filed on the twenty-eighth, to this effect:

That the council, through its committee, had found the vouchers and accounts of the board correct, as to the fact of the expenditure of the fund raised by taxes; but that it could not indorse the manner of the expenditure already made, or that proposed to be made of the supplemental fund, if the tax should be levied. Whereupon it had, by resolution, instructed its attorney to test the constitutionality of the law under which the board was organized. Thereupon it asked to renew the demurrer to the original petition for mandamus, which had been passed without action. The causes of the new demurrer being:

1. Want of sufficient facts for relief.
2. That the law was unconstitutional.

Upon the twelfth of December the cause was heard on both demurrers—that of the petitioners to the response of the city, and that of the city to the original petition.

The former was sustained and the latter overruled. The city rested and the mandamus was made peremptory to make the levy on the eighteenth of that month. The city appeals.

The record presents for our consideration no other question than the constitutionality of the law. If it be valid, no reason appears why the mandamus should not have gone. The material provisions of the law, as found in the pamphlet acts of 1881, p. 161, are as follows:

Section 1 generally confers on city councils of the first class the power to assess all real property within the city, or any district of it, for the purpose, amongst other things, of "constructing sewers, or making any improvements of a local nature."

The second and third sections provide that, upon petition of ten resident owners, the council shall lay off the city or any portions of it, into "improvement districts" for local improvements, to be designated by numbers; and make publication of the order. It is provided that if, within three months after the publication, a majority in value of the owners of real property within such district adjoining the locality to be affected shall present a petition for the contemplated local improvement, the cost to be assessed upon the real property within the district, the council shall appoint three residents of the district as a board of improvement, to act without compensation. Provisions are made for qualification of the members, filling the vacancies, etc.

By sections four and five it is made the duty of the board to form plans for the improvement designated in the petition, and procure estimates of the cost, employing nec-

essary engineers and agents, and report to the council; which is then to assess the cost on the real property of the district, according to its value as shown by the county assessment on file in the clerk's office, with the proviso that no single improvement shall cost more than 20 per cent. of the value of real property in the district. Provision is made for the collection of the assessment by installments, so that no more than one per cent. of the value per annum shall be collected; and the form for a proper ordinance is given. By section 6 the ordinance is required to be published, and twenty days are given any one aggrieved to commence proceedings to test its validity.

By section 7 the city clerk is required to procure a copy of so much of the county assessment as contains the property affected, and to extend against each parcel the assessment so made, and deliver it to the district collector with a warrant for collection; who, by section 8, is required to give notice by publication. Then follow other sections providing in detail the modes of enforcing payment of the levy, and the disposition of the fund upon the order of the board.

Then follows section 15, as follows:

"If the assessment first levied shall prove insufficient to complete the improvement, the board shall report the amount of the deficiency to the council, and the council shall, thereupon, make another assessment on the property assessed, for a sum sufficient to complete the improvement, which shall be collected in the same manner with the first assessment."

There are many other sections in the act, none of which however, it is conceived, affects the points made on this appeal. The act is a general one, applicable to all cities, as they may attain the dignity of first class.

It is urged by counsel for the city that, under sections 5

and 15 of the act, the council is left with no discretion in levying the tax, but is entirely subject in this regard to the control and discretion of the board of improvement—being thus made dependent upon the contracting power; or, in effect, that the act makes the board itself the taxing power, and that under section 23, article 2, the Legislature could not delegate this power to the board, either directly or indirectly. That this sovereign power can not be delegated to districts, except "school districts," which are specially provided for in the Constitution.

The twenty-third section of article two provides that "the General Assembly may delegate the taxing power with the necessary restriction, to the State's subordinate, political and municipal corporations, to the extent of providing for their existence, maintenance and well being." We understand the argument to be that, whilst the General Assembly might well enough have granted this taxing power to the cities themselves, through their constituted authorities, it could not grant it to a board in a city, representing only a portion of the territory and inhabitants; and that the provision authorizing taxes by school districts indicates an intention by the framers of the Constitution to exclude by implication all other local boards.

Upon the other hand the counsel for the board rely upon section 27 of article 19, which, save the schedule, is the closing section of the Constitution, and provides that nothing therein "shall be so construed as to prohibit the General Assembly from authorizing assessments on real property for local improvements in towns and cities, under such regulations as may be prescribed by law, to be based upon the consent of a majority in value of the property holders owning property adjoining the locality to be affected. But such assessments shall be *ad valorem* and uniform." They insist that all other provisions which precede this are to be

construed in connection with, and subject to, this; and that the intention of it is to repel the idea that any express or implied prohibitions as to the exercise of the taxing power should interpose with such regulations with regard to assessments for local improvements in towns and cities as the Legislature might deem expedient—subject only to the conditions that the assessments should be *ad valorem* and uniform, and based upon the assent of a majority, in value, of the owners of property adjoining the locality.

It is certainly true that the power of taxation is a sovereign power, which, as a general rule, must be exercised by the Legislature of the State; and, even in the absence of express constitutional prohibitions, can not be delegated. The principle is considered to underlie all constitutions, as one of those which are taken for granted in all free governments; and so pervade the constitutions that their expression is not deemed essential. But this does not prevent a regulation of the taxing powers by express provisions in those instruments. It is simply *prima facie*. Whenever a constitution speaks on this subject it governs. Besides, even to the general rule there is an exception equally implied by silence, which is thus expressed by Mr. Cooley in his work on Taxation, page 51: "One clearly defined exception to the general rule exists in the case of municipal corporations, in the levy and collection of local taxes. Immemorial custom, which tacitly or expressly has been incorporated in the State constitutions, has made them a part of the general machinery of State government; and, in their case, the State does little beyond prescribing rules of limitation, within which, for local purposes, the power to tax is left to them, with authority subordinate to that of the State to make rules for its regulation and execution."

This principle was the governing one in the case of *Washington v. State*, 8 English, p. 761.

We do not understand counsel for appellant to contest this, although its expression is necessary in this connection. We understand them to say that the taxing power of municipalities can be exercised alone through the city council, and that neither the Legislature nor the council can delegate it to another body in the city, even though that body be officially created, and the tax be for purposes of local improvement only, and not for city or State revenue; and further, that although the levy of the tax, or assessment as it is called, be in form imposed by the council, yet it is really done by the board of improvement. They are well entitled to assume the last point, since the petition for mandamus implies that the city council has absolutely no discretion, or option, in the matter whatever.

The question narrows then to this: Conceding, both on general principles and from the terms of the Constitution, that the Legislature may grant *municipalities*, by general laws, the power to assess taxes, *ad valorem*, within prescribed limits, and on certain conditions, for purposes of local improvement, must that power be exercised through the agency, and in the discretion of the city councils?

Looking simply to the character and objects of *local improvements* there is nothing in their nature to make it most proper to commit their determination to the discretion of a city council, further than to see that their execution does not interpose with the city police. The council, as a body, generally represents, principally, inhabitants who are not concerned in special local improvements such as sewerage, the influence of which does not extend very far. It might be very unjust to leave inhabitants of a particular quarter dependent upon the caprice of the inhabitants of all the city for sewers of vital importance, or liable

to have sewers constructed which they do not need. It may well be that powers of taxation authorized to be delegated for revenue or general police purposes, should be presumed to have been intended to be delegated to the city council; but that presumption would not necessarily attach to the original determination as to the necessity or propriety of local improvements. Such things would naturally be better left to the inhabitants of the locality, although, when determined upon, the execution of the works might be properly put under the control of the council, and the machinery of the city government used for enforcing the assessments. These things may all be well regulated by general laws, which in the main would be beneficial to the greatest number. It will be well to add, in response to another point made by appellant, that this might indeed be a hardship upon the local minorities, and it would be in any case impossible accurately to adjust the burden upon respective property holders, in proportion to the benefits to the individual property of each, and that the power, in practice, might be woefully abused.

The court is conscious of all that, but can not entertain it as a constitutional objection. All human systems of government must be imperfect in the precise adjustment of benefits and burdens. If that were essential to the validity of the laws, there could be no legislation. We can find no human depository of discretion that may not be abused, nor can we invent a system of counter checks that will dispense with discretion somewhere. The Constitution does not require an adjustment of taxes according to actual benefits. "*Ad valorem*" means a quotient part of the existing value of property, not an adjustment of burdens to each individual man, in view of his particular gains or damages. Legislatures must simply do what seems the best to them, practically, and which may not be

prohibited either by great fundamental principles assumed as foundations of the government, or by the Federal and State Constitutions. Unless we can say with reasonable assurance that one or the other of these has been violated, we can not pronounce an act unconstitutional.

The State, for their well being, may delegate the taxing power to her subordinate political and municipal *corporations* (*Const., art. 2, sec. 23*), restricting it so as to prevent abuse, and also as to amount. (*Ib., art. 12, secs. 3 and 4.*) To prevent misapprehension, it is expressly provided that nothing in the Constitution shall *prohibit* the General Assembly from authorizing assessments *in towns and cities* for purposes of the nature in question, under such regulations as may be prescribed by law. In no place does it seem to be intimated that this delegation must necessarily be to the "city councils." In this case the grant is to the cities, for the benefit of citizens and proper holders therein, and the delegated powers are to be executed by city agencies, and collections made under the control of the city authorities. It seems to us too nice and doubtful a construction of constitutional intent, to hold invalid a delegation of taxing power to be exercised through such an agency as an official "board of improvements." The law prescribes regulations according to the requirements of the Constitution, and within its limits. We find no error.

Affirm.

MOORE v. HORSLEY.

ACTION: *When it accrues on note.*

An action on a note payable on or before a particular day can not be brought until after that day.

APPEAL from *Benton* Circuit Court.
Hon. J. FRANK WILSON, Special Judge.

E. S. McDaniel for appellant.

The note was not due, and the suit was prematurely brought. *Pomeroy on Rem, etc., sec. 519; Gantt's Digest, sec. 562; Wait's Action and Def., vol. 1, p. 640; Story Prom. Notes, 4th ed., sec. 225; 17 Ark., 442.*

SMITH, J. The plaintiff sued July 1, 1882, and obtained judgment upon an instrument for the payment of a certain sum of money on or before the first day of July, 1882. The maker had the whole of that day to pay it, and could not be sued until the next day. *Zachery v. Brown, 17 Ark., 442.*

Reversed and remanded, with directions to abate the action as premature.

GIBSON, AD., v. DOWELL.

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71 221

1. DOWER: *In personalty governed by law of intestate's domicile.*

The succession to an intestate's personal property is governed by the law of his domicile, without regard to its actual situs at the time of his death. By a legal fiction it is deemed to be in the place of his domicile, and the rights of his widow, heirs and distributees are determined by the intestate laws of that domicile.

2. ADMINISTRATOR: *Ancillary: His duties.*

It is the duty of an ancillary administrator in this State to pay the debts of the deceased which are proved here; to settle his accounts in the court that appointed him, and to transmit the residuum to the administrator in chief for distribution among the persons entitled to it. The court here may, however, sometimes order him to pay it to the heirs or legatees.

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

John K. Gibson, pro se.

1. Appellee being a non resident, and this being an ancillary administration, she must be postponed until resident creditors are paid. *16 Ark., 257; 30 Ib., 230; 31 Ib., 539; 34 Ib., 517.*

2. She should apply to the domiciliary administration for her dower.

3. A widow must take down in personalty in accordance with the laws of the domicile of her deceased husband. After the payment of resident creditors, the ancillary jurisdiction will distribute the surplus personalty according to the laws of the domicile of the intestate. *34 Ark., 131; 2 Kent, pp. 429–39 and notes; 1 Mason, 381; 2 Jones' Eq., 51; 6 Ib., 190; 10 Rich. (S. C.) Eq., 12; 3 Bradf., N. Y., 233; 51 Ala., 55; 52 Ib., 124; 47 Conn., 592; 32 La. Ann., 385; 95 Ill., 485; 64 Ga., 208; Wilkins v. Ellett, U. S. S. C., April 1883.*

SMITH, J. Mrs. Dowell applied to the probate court of Lawrence County for her allowance or thirds in the personalty of her late husband, J. H. Dowell. In her petition she alleged that choses in action to the amount of $118,-209.03 had come to the hands of John K. Gibson, to whom administration had been granted by said probate court, and that she was by law entitled to one-third of the same. The administrator contested her claim upon the grounds that her husband was, at the time of his death, domiciled in the State of Missouri, where the principal administration of his estate was proceeding, and that his own administration was merely auxiliary to the administration in Missouri; that he had already paid out what he had thus

far collected of the assets of said estate upon the debts of said decedent and the expenses of administering his estate, and it would probably consume the remainder of said assets that could be collected to satisfy the creditors who had proved their demands here; and that the petitioner's remedy was against the domiciliary administration.

Mrs. Dowell recovered a decree, both in the probate court and on appeal in the Circuit Court, for one-third of the available assets which had come into the administrator's possession. On the trial in the last named court it was admitted that the petitioner had been legally married to the deceased, who was a merchant in St. Louis, and had died there; that she also resided in Missouri; that Newton Crane was administrator of the estate in Missouri, and that the laws of the two States with regard to widows' rights in the premises were not the same.

By our law the widow is entitled, in her own right and independently of debts, to one-third part of the personal estate whereof the husband died possessed. This includes cash on hand, bonds, bills, notes, book accounts and evidences of debt. *Gantt's Digest, sec. 2230.*

1. DOWER: In personalty.

But the succession to the personal property of an intestate is regulated by the law of his domicile, without regard to the actual *situs* of the property at the time of his death. It is considered that movables have no *situs*, but accompany the person of the owner; so that by a legal fiction they are always deemed to be in the place of his domicile. And the rights of the widow, of heirs and distributees, are determined by the intestate laws of the country where the deceased was domiciled. *Story Conflict of Laws, sec. 481, et seq.; Wharton on same, secs. 189, 193; Clark v. Holt, 16 Ark., 257; Shegogg v. Perkins, 34 Ib., 131; Wilkins v. Ellett, 9 Wall., 740; Same v. Same, U. S. S. C., April 16, 1883, 2 Sup. Court Rep., 641; Slaughter v. Garland, 40 Miss., 172.*

What the rights of Mrs. Dowell in the personalty may be under the laws of Missouri this record does not disclose, except that they are different from ours. Those laws are not proved, and we can not take judicial cognizance of them.

2. ANCILLARY ADMINISTRATOR: His duties.

The duties of the ancillary administrator are to pay the debts of the deceased which are proved here; to settle his accounts under the supervision of the court to which he owes his authority, and to transmit the residuum to the administrator in chief for distribution amongst the persons beneficially entitled. Sometimes, to avoid circuity, the court having jurisdiction over the ancillary administrator, may order him to pay the residuum directly to heirs or legatees. *Wharton Conflict of Laws, secs. 619 and 639; Mackey v. Cox, 1 How., 100.*

Reversed.

BOOZER V. ANDERSON ET AL.

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83 244

PROMISSORY NOTE: *Stipulation to pay attorney's fee to collect void.*

A stipulation in a promissory note to pay the attorney's fee for collecting, if collected by suit, is void.

APPEAL from *Jefferson* Circuit Court, in Chancery.
Hon. J. A. WILLIAMS, Circuit Judge.

McCain & Crawford for appellant.

A provision in a note for an attorney's fee in case of suit, does not destroy its negotiability. (*35 Ark., 147.*) Such a stipulation is valid, in the absence of fraud. *59 Penn., 204; 4 Watts, 126; 8 Wright, 32; 1 P. F. Smith, 7; 2 P. & H. R., 110; 34 Ill., 149; 8 Blackf., 140; 1 Ind., 331; 29 Ib., 158; 32 Ib., 321; 34 Ib., 334; 35 Ib., 104;*

38 Ib., 323; 32 Iowa, 184; 11 Bush., 180; 23 La. Ann., 767; etc., etc.

As to the right to decree attorney's fees in cases of this kind, see *Jones on Mortgages, secs. 359 and 1606.*

Martin, Taylor & Martin for appellees.

No lien was retained in the deed for the attorney's fee, but only for the note and interest.

Although negotiable, notes with a stipulation to pay attorney's fees like this, are void. *Daniel on Neg. Inst., sec. 62 a, p. 72-3, 3d ed.; 11 Bush., 182; 14 Ib., 214; 39 Mich., 138; 40 Ib., 517; 11 Neb., 95; 10 Ohio, 378; 11 Ib., 417; 63 Mo., 33; 84 Pa. St., 407.*

Such provisions are in the nature of a penalty, and equity should interfere to relieve.

SMITH, J. Boozer sold and conveyed to the ancestor of the appellees, a lot of land in the town of Pine Bluff, for the consideration of $1,500, of which $500 were paid, and for the remainder a note was made. This note contained a stipulation that, in the event suit became necessary to collect it, the maker would pay an attorney's fee of ten per cent. on the amount that should be recovered. The deed which was made recites the note and stipulation for an attorney's fee, and provides that, until the note is paid, a vendor's lien is reserved to secure the same. On a bill filed to enforce this lien, the court below entered a decree for the unpaid purchase money with interest, but refused to decree for the attorney's fee.

In *Overton v. Matthews, 35 Ark., 146*, and in *Trader v. Chidester, 41 Ib., 242*, this court held that the insertion of such a stipulation in a promissory note does not destroy the negotiable character of the instrument. About the validity of such stipulations there has been, and is a great diver-

sity of judicial opinion. They are of recent origin, and courts of equal authority and respectability have condemned and sustained them. To us it appears clear, even to demonstration, that they are agreements for a penalty. The obligor agrees to pay a certain sum of money if he shall fail to perform the contract contained in another clause of the same instrument. Now courts of equity abhor penalties and forfeitures. So far from lending their aid actively to enforce them, they are inclined to relieve against them, when it can be done consistently with their rules. Compensation and not forfeiture is their aim. Accordingly they consider that when a debtor pays the debt, with interest for its detention and costs of suit, he ought not to be mulcted in a further sum. Whenever the injury is susceptible of definite admeasurement, as it is in all cases where the breach consists in the non-payment of money, the parties will not be allowed to stipulate for a greater amount, whether in the form of a penalty or of liquidated damages. *2 Lead. Cas. in Eq. Pt. 2 [1095], et seq., 4 Am. ed.; notes to the case of Peachy v. Duke of Somerset; Bispham Pr. Eq., secs. 178–9; 2 Sto. Eq. Jur., sec. 1314.*

It is also difficult to perceive by what consideration such a contract is supported. The land in the case was sold for $1,500. There was a cash payment of $500 and a note for $1,000 bearing ten per cent. interest from date until paid. What consideration was there for the promise to pay the attorney's fee in case of foreclosure? This was certainly no part of the purchase money, and could not be charged on the land, as we are asked to do.

The following cases have held such stipulations to be void, although they do not all place it upon the grounds we have announced: *Bullock v. Taylor, 39 Mich., 139, per* COOLEY, J; *Meyer v. Hart, 40 Ib., 517; Witherspoon v. Musselman, 14 Bush., 214; Toole v. Stephen, 4 Leigh, 581; State,*

Use, etc., v. Taylor, 10 Ohio, 378; Shelton v. Gill, 11 Ib. 417; Martin v. Trustees, 13 Ib., 250; Dow v. Updyke, 11 Neb., 95; Merchants Nat. Bank v. Sevier, 14 Fed. Rep., 662 (*U. S. Cir. Court, East Dist. Ark., per* CALDWELL and McCRARY, JJ).

Affirmed.

CUNNINGHAM v. WILLIAMS.

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1. DEED: *Destruction or return of, effect on title.*

The destruction or return of a deed by the grantee to the grantor does not re-vest the title in the grantor. It remains in the grantee though by his direction the grantor reconvey to another.

2. FRAUDULENT CONVEYANCE: *Allegations and proof of.*

A judgment creditor assailing his debtor's conveyance made before the creation of his debt, as fraudulent, must prove that it was made with the intent of the debtor to put the property beyond the reach of debts he intended to contract and did not intend to pay, or had reasonable grounds to believe he would not be able to pay.

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

J. M. Cunningham, pro se.

The proof that Mary Williams furnished the means to pay for the property, and that she was indebted to Robert, and caused the title to be made to him, does not support the allegation in the answer, of a purchase with the means of Robert Williams. *Marshal v. Green, 24 Ark.; 1 Whittaker, N. Y. Prac., 491; Sanford, 665.*

Contends that the evidence fairly shows that James P. Williams was insolvent or in failing circumstances; that he furnished the means to buy the land, and that the con-

veyance was taken to his brother with the intent to hinder, delay and defraud creditors, and was void. Cites *Bump Fraud. Convey.*, *23*, *25*, *266*, *268*; *Gantt's Dig.*, *sec. 2954*; *11 Paige*, *589*; *9 Ves.*, *190*; *Amb.*, *596*; *1 Ark.*, *14*; *23 Ark.*, *494*; *3 John. Chy.*, *481*; *38 Ark.*, *419*.

The declarations of a vendor at the time of the transfer, and of a debtor who remains in possession, are competent evidence against the grantee. *Bump Fraud. Conv.*, *560*, *562*.

The entire consideration having been paid by James P., and the title taken to Robert, the latter is a trustee (*Perry on Trusts*, *126*), and the property is liable to execution for James P.'s debts. *Herman on Ex.*, *sec. 138*; *3 Paige*, *498*; *4 Paige*, *598*.

SMITH, J. In June, 1876, James P. Williams bought of one Hamby three acres of land, and took a conveyance to himself and his sister, Mary Williams. In November of the same year he bought of the same vendor nine acres adjacent, and the deed to the three acres never having been recorded, was surrendered and destroyed, and Hamby executed a deed for the twelve acres to Robert Williams, brother to James P. and Mary. The entire consideration was $231.25, of which $20 were paid in money and the remainder in goods. The evidence tended to show, and the court below found as a fact, that the store out of which the goods came belonged to Mary Williams. She was an elderly woman, doing business as a milliner at Pine Bluff, mainly upon capital furnished by Robert Williams, who resided in Kansas. The land in controversy was purchased with a view to establish a branch store, and the store house was built upon it. James P. Williams, who seems to have been without means of his own, was placed in charge of the business. His interest in the store does not satisfac-

torily appear, but it is probable that he was simply the managing agent. His sister, when she was informed that the deed had been taken to James P. and herself, disapproved of this arrangement, and directed him to have the land conveyed to Robert, to whom she was indebted.

In 1878 one Charley Self recovered judgment for a small amount against James P. Williams, upon which execution issued and was levied upon the land. And at the sale Mr. Cunningham purchased and received the sheriff's deed. He has filed this bill against the Williams', attacking the conveyance to Robert as fraudulent. It is alleged that James P. paid for the land, and that he was at the time in failing circumstances. It was not, however, either averred or shown that Self, under whose judgment the plaintiff claims, was a creditor at the date of the conveyance, nor that the debt was contracted in and about the management of said store. It must therefore be treated as the individual debt of James P. Williams, and incurred subsequently to the execution of the deed to Robert Williams.

The defendants, in their joint answer, set up that the land was paid for out of the money and means of Robert. The court decreed that the plaintiff by his purchase took an undivided half of the three acres originally conveyed to James P. and Mary, and that the rest of the land belonged to Robert. Both parties appealed.

Upon the decree of Robert Williams, it is only necessary to say that the proofs do not sustain the allegation that he supplied the money for either purchase. They tend to show that the land was purchased for Mary Williams, and paid for with her means. Although those means may have been derived from Robert in the first instance, and although she may have intended to transfer to him the land as security for or in partial satisfaction of her debt to him, yet this gave him no estate or interest in the

land until that intention was carried out. This has been done with regard to the last purchase of nine acres. But his deed from Hamby was wholly inoperative as to the three acres which had been previously conveyed to James P. and Mary. In this last tract Hamby had nothing to convey in November, 1876. The surrender and destruction of the first deed did not re-vest title in Hamby. *Strawn v. Norris, 21 Ark., 80; Neal v. Speigle, 33 Ib., 63; Taliaferro v. Rolten, 34 Ib., 503.*

The land in the hands of James P. Williams might have been affected with a resulting trust in favor of his sister Mary, who advanced the consideration. But Robert can get no benefit from this, as he stands in no relation of privity either to the title or to the trust.

Mr. Cunningham has no cause to complain of the action of the Circuit Court, either in divesting the title to the other half of the three acre tract out of Mary, and vesting it in her brother upon her prayer, or in quieting Robert's title to the nine acres. The burden was upon him to prove, not only that the land was the property of James P., but that he caused the conveyances to Mary and to Robert to be made with an intent to put the property out of the reach of debts which he intended thereafter to contract, and which he did not intend to pay, or had reasonable grounds to believe he would not be able to pay. *Bump on Fraudulent Conveyances, 3d ed., ch. 13; 1 Am. Lead. Cas., 5th ed., 37; note to case Sexton v. Wheaton; Mattingley v. Nye, 8 Wall., 370; Graham v. Railroad Co., 102 U. S., 148.*

Upon the first of these propositions the evidence mainly consists of the depositions of farmers living in the neighborhood, who swear to their impression that James P. Williams was transacting business on his own account. And upon the second, there is properly no evidence in the record.

Affirmed.

SEPARATE OPINION, BY

EAKIN, J. Concurring in the result of the opinion, and all the expressions of Mr. Justice SMITH delivering it, save upon one point, I prefer to base my assent to so much of the judgment of this court as denies to Robert Williams *the whole* of the land, and gives appellant, Cunningham, the half of three acres upon this ground: That it does not clearly appear that Robert Williams was ignorant of the former deed to James and his sister; that it does appear the deed was made to him without his knowledge as a security, by his sister acting in his behalf, and who knew all about the former unrecorded deed. In other words, he does not stand so clearly as a purchaser for value, without knowledge of an unrecorded deed, as to justify a reversal on his appeal, with regard to this small interest. Otherwise, I would not be inclined to hold that an unrecorded deed, returned or destroyed, left nothing in the grantor which he could convey to a third party. Technically, the legal title passes with the first deed, and is not re-vested by its surrender or destruction. Yet nevertheless, by force of the registration acts, the vendor may make full, complete and absolute title to a third party without notice, for a valuable consideration, who records his deed, and Robert would be entitled to this protection, but for the doubt which the case leaves as to his position. There is no substantial difference of opinion between myself and my associates. I merely desire to be more specific.

PATRICK v. BAXTER.

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EXEMPTION: *Homestead must be occupied at time of levy.*

Land or a town lot can not be exempt from execution as a homestead, unless it is occupied as a residence at the time of the levy of the execution; and a supersedeas issued upon a claim of homestead, where there is no such residence, should be quashed.

APPEAL from *Drew* Circuit Court.
Hon. J. M. BRADLEY, Circuit Judge.

N. & J. Erb for appellant.

1. Baxter never *occupied* the premises *as a homestead*, and the property was not exempt. *Const., sec. 5, art. 9; Thompson on Homesteads and Ex., sec. 245; Johnston v. Turner, 29 Ark., 280.*

2. The issue should have been tried by jury. *23 Ark., 101; 32 Barb., 291; 14 John., 434; 55 Barb., 390, 399; 1 Denio, 462; 31 Ark., 654.*

ENGLISH, C. J. On the twenty-eighth of September, 1878, William H. Patrick recovered a judgment for $200, before a justice of the peace of Drew County, against Robert M. Baxter, on a debt contracted in 1875.

An execution having been issued thereon, and returned *nulla bona*, Patrick filed a certified transcript of the judgment in the office of the clerk of the Circuit Court of Drew County, on the eleventh day of October, 1878, which was entered in the judgment docket.

On the third of November, 1881, an execution was issued upon the judgment, by the clerk, to the sheriff of Drew County, who, on the next day, levied it upon a lot in the town of Monticello, as the property of Baxter, and fixed the twenty-sixth of the same month as the day of sale.

At some time between the day of the levy and the eighteenth of November, 1881, Baxter filed a schedule in the office of the clerk, claiming the lot to be exempt from execution as a homestead.

(This schedule seems to have been used on the trial of this case, and the clerk was directed to copy it into the bill of exceptions, but failed to do so, because it was not found among the papers of the case, as he states.)

On the eighteenth of November, 1881, the clerk issued a supersedeas to the sheriff, based upon the schedule, commanding him not to sell the lot, etc.

At the February term 1882, of the Circuit Court of Drew County, Patrick, the plaintiff in the execution, filed a motion to quash the supersedeas.

In this motion it was stated that Baxter, in his schedule, had claimed to be the head of a family, and, as such, to hold the lot as a homestead; and it was alleged that he was not the head of a family at the time of filing the schedule, and that he did not occupy the lot at the time it was levied upon, nor at the time the schedule was filed.

At the August term 1882, both parties appeared, announced themselves ready for trial, the matter was submitted to a jury, and there was a verdict in favor of the plaintiff, which, on motion of defendant, the court set aside, and ordered a new trial.

At the March term, 1883, the motion to quash the supersedeas was submitted to the court, and, upon the evidence produced by the parties, the motion was overruled, and the supersedeas made perpetual. A new trial was refused the plaintiff, and he took a bill of exceptions and appealed.

The above facts are shown by record entries, and the bill of exceptions in the case.

Baxter was examined as a witness on his own behalf at the trial. He testified, in substance, that he purchased the

lot in question, after Patrick obtained the judgment, and at the time execution was levied upon the lot, he was building a house on it, with the view of making it a home for himself and his aged mother, whom he was supporting, his father being dead. He had put up the frame of the house, and it was partly roofed and partly floored, and no chimneys built at the time the levy was made. He was not then living on the lot, and no person had ever lived on it. He did not complete the house and move into it until two or three months after the execution was levied on the lot. After he moved into the house he had continued to make it his home until the trial, and had become a married man.

No declarations of law were asked of, or made by the court.

The homestead of any resident of this State, who is married or the head of a family, shall not be subject to the lien of any judgment or decree of any court, or sale under execution, or other process thereon, except, etc. *Constitution 1874, art. 9, sec. 3.*

The homestead outside of any city, town or village, owned and occupied as a residence, shall consist of not exceeding one hundred and sixty acres of land, with the improvements thereon, to be selected by the owner, etc. *Ib., sec. 4.*

The homestead in a city, town or village, owned and occupied as a residence, shall consist of not exceeding one acre of land, with the improvements thereon, to be selected by the owner, etc. *Ib., sec. 4.*

It may be that an unmarried man, who has an aged mother living with him in his house, dependent upon him, and whom he is supporting, is the head of a family within the meaning of the Constitution. *Thompson on Homesteads, sec. 60; Whalen v. Cadman, 11 Iowa, 226.*

EXEMPTION Homestead must be occupied at time of levy.

But appellee, Baxter, was not "occupying as a residence" the lot in question, when the execution was levied upon it; he had not impressed upon it the character of a homestead; it was not his home or dwelling place. (*See Williams v. Dorris et al., 31 Ark., 468; Johnston et al. v. Turner, ad., 29 Ib., 288.*) He did not complete his house and move on the lot until two or three months after the execution was levied, and a lien fixed upon it, and after the time fixed for sale. Fourteen days after the levy the supersedeas was issued, based upon a schedule filed by appellant, claiming the lot to be exempt from execution as his homestead.

The schedule could not truthfully have stated the requisite facts to show that the lot was exempt as a homestead, and the supersedeas was improperly issued, and should have been quashed by the court below.

Reversed and remanded, with instructions to the court below to quash the supersedeas.

PRICE ET AL. V. STATE OF ARKANSAS.

CRIMINAL LAW: *Bail not released by destruction of indictment.*

Where an indictment is lost or destroyed and a new indictment is found against the defendant for the same offense, his bail for his appearance to answer the first indictment will be liable for the penalty of the bond if he fails to appear and answer the second.

APPEAL from *Sebastian* Circuit Court.
Hon. R. B. RUTHERFORD, Circuit Judge.

Clendenning & Sandels for appellants.

The demurrer should have been sustained, first, because section 1743 Gantt's Digest prescribes the manner of

proceeding in such cases; and second, because the facts stated exclude the idea that the State ought to recover.

Where a party is *in court* to answer an indictment, he is subject to the orders of the court. (*10 Yerger, 542–8.*) When two indictments are pending for the same offense, the first shall be deemed to be suspended by the second, and *shall be quashed.* (*Sec. 1803 Gantt's Digest.*) Burning an indictment is no disposition of the prosecution. There were two indictments pending for the same offense, to the last of which Rains had never appeared, nor given bond to do so. The first was never quashed, and defendant was never ordered to stand upon his bond, or answer the second indictment. The sureties never *originally* undertook that Rains should be present to answer the second indictment, nor were they made liable by any order of court in that behalf.

C. B. Moore, Attorney General, for the State.

The condition of the bond was that Rains should "answer said charge, and at all times render himself amenable *to the orders and processes of said court,*" etc.

The finding of the second indictment suspended the first (*Gantt's Digest, sec. 1803*), but the first was in force until the second was found. The principal was bound to appear until acquitted or otherwise legally discharged. *22 Ark., 544; 28 Ib., 480; 34 Ib., 610*, and *18 Ala., 63.*

English, C. J. This was an action in the name of the State against Albert Price and George H. Carson on a forfeited bail bond.

The material facts alleged in the complaint, controverted by the answer, and specially found to be true on a trial before the court, are in substance as follows:

At the May term, 1881, of the Circuit Court of Sebas-

tian County, for the Greenwood District, William Rains was indicted for an assault with intent to kill and murder. Bail was fixed by the court at $1,000, and during the same term of the court he was arrested on capias, and the defendants in this suit entered into a bail bond for him before the sheriff, which was in the form following:

"William Rains being in custody charged with the offense of an assault with intent to kill and murder, and being admitted to bail in the sum of one thousand dollars, we, Albert Price and George H. Carson, of Sebastian County, Arkansas, hereby undertake that the above named William Rains shall appear in the Sebastian Circuit Court for the Greenwood District, from day to day and term to term, to answer said charge, and shall at all times render himself amenable to the order and process of said court in the prosecution of said charge, and if he fails to perform either of these conditions, we will pay to the State of Arkansas the sum of one thousand dollars.

"ALBERT PRICE,
"GEORGE H. CARSON."

That, upon the execution of said bail bond by defendants, Rains was released from custody. That at said May term, 1881, said case of State v. Rains was docketed and continued until the November term, 1881, and at said November term, 1881, said case was again continued until May term, 1882, with proper order of court requiring said Rains to stand upon said bail bond.

That on the nineteenth day of April, 1882, the court house in said district, together with the indictment, capias, bond and all other papers and records of said court in and pertaining to the case of State v. William Rains, were totally destroyed.

That at the May term, 1882, of said court, the grand jury returned another indictment against said William

Rains for the same identical offense for which he was first indicted, which on motion of the prosecuting attorney was docketed and called for trial by the court, and said Rains was called for trial on said charge in said second indictment, and failed to appear, and defendants, his bail, being also called, and failing to produce him, a forfeiture was entered on said bail bond.

It was upon this forfeiture that the complaint was filed, and upon the answer of defendants, the case tried by the court.

In addition to the above facts the court also found, from the evidence produced at the trial, that the first indictment had not been quashed by order of the court, nor had the case been remanded to the grand jury by order of court.

And, upon the facts found, the court declared the law to be "that no order quashing and remanding said first indictment to the grand jury was necessary before requiring the defendant to answer said second indictment, it being for the same offense; and that the finding of said second indictment by operation of law suspended the first indictment, and defendants having agreed in their bond that Rains would answer the charge, the finding of the second indictment does not alter or affect their liability."

The court gave judgment in favor of the State against defendants for $1,000, the penalty of the bail bond.

Defendants moved for a new trial on the ground that the "judgment was contrary to law, and not sustained by sufficient evidence." The motion was overruled, and bill of exceptions taken, and defendants appealed.

Before the answer was filed defendants entered a general demurrer to the complaint, which was overruled.

Bail not released by loss of indictment and finding of new one.

Whether the first indictment was in good or bad form does not appear, nor did that concern the bail. *Reeve et al. v. State, 34 Ark., 610.*

It is probable that the prosecuting attorney found it less troublesome to have the grand jury return a new indictment, upon the same charge, than to take the necessary steps to reinstate the one destroyed.

The destroyed indictment still had a legal existence, which, when the new indictment was found, was suspended, etc. (*Gantt's Digest, sec. 1803*), and it was proper to call Rains to answer the new indictment.

It does not appear that he was present at the May term 1882, as he should have been, to answer the charge in any form, and yet there had been no order of court discharging him, or exonerating his bail, and when called he made default.

The principal was bound to appear, and his bail had in legal effect undertaken that he should appear, from term to term, etc., until legally discharged. *Gentry v. State, 22 Ark., 544; Moore v. State, 28 Ib., 480; Reeves et al. v. State, 34 Ib., 610.*

In *State, use, etc, v. Glenn et al., MS.*, Mr. Justice SMITH, in delivering the opinion of this court, said: "The case of the *United States v. White, 5 Cranch, C. C. Rep., 369*, announces the safer rule that if the recognizance is conditioned to appear to answer to a certain indictment, and not to depart without leave of the court, it is not discharged by the quashing of that indictment, but remains in force until the defendant has leave from the court to depart; and if a new indictment be found, he and his bail are bound for his appearance to answer such new indictment."

On principle that rule applies in this case.

Affirmed.

LOVE v. MCALISTER.

1. AFFIDAVIT: *Clerk of another State can not take to be used here.*

A clerk of a court of another State is not authorized to take affidavits to be used in this State, and an appeal from a justice of the peace's judgment on such an affidavit will be dismissed.

2. AFFIDAVIT: *By whom to be taken.*

If a statute does not name the officer before whom an affidavit may be made in the State it may be taken by any officer in the State authorized to administer oaths.

3. APPEAL FROM JUSTICE OF THE PEACE: *Affidavit for: Jurisdiction of Circuit Court; cost.*

Where there is no affidavit for an appeal from a justice of the peace the Circuit Court acquires no jurisdiction of the case, and can render no judgment for costs on dismissing it.

APPEAL from *Pulaski* Circuit Court.
Hon. F. T. VAUGHAN, Circuit Judge.

Ratcliffe & Fletcher for appellant.

1. Before the adoption of the Code affidavits could be made before clerks. Although section 2539 Gantt's Digest omits *clerk*, there are no words of exclusion or prohibition in it, nor does it repeal any former law. It only intended to make the certificates of the officers named proof as stated. If any other officer should take it, proof of his authority might be produced *aliunde*, which is waved in this case. If an affidavit taken before a clerk was good at the time of the adoption of the Code, it is good now. *Rev. Stat., ch. 120, sec. 6; Gantt's Dig., secs. 25, 33.*

An affidavit taken in Missouri before an officer authorized by law to administer oaths, is good in Arkansas, unless expressly declared not to be. *See 38 Cal., 93; 4 Cow., 194; 9 Ib., 194; 7 Wend., 516; 9 Ib., 340; 1 Mill. (Const. S. C.), 137; 44 Ala., 319.*

2. Where an appeal is dismissed for want of a proper affidavit for appeal, the Circuit Court has no jurisdiction, and can not render any judgment for costs. *6 Ark., 182; 21 Ib., 264.*

W. F. Hill for appellee.

An affidavit for an appeal taken before the clerk of a court, outside of this State, is a nullity. *Gantt's Dig., sec. 2539, 2540.*

When a statute does not designate the officer before whom an affidavit may be made, it may be made before any officer having power to administer oaths. (*38 Cal., 93–9; 14 Ala., 423; 4 Wash., 601; 9 Cow., 194; 9 Wend., 340; 16 Barb., 319.*) But where a statute enumerates a class of officers before whom affidavits can be taken, all others are excluded. *7 Wend., 516; 16 Barb., 319; 76 N. C., 113.*

English, C. J. Jefferson McAllister sued P. C. Love before a justice of the peace of Pulaski County, on an open account for money had and received, and on a trial recovered judgment for $73.60.

Love prayed an appeal to the Circuit Court, which was granted upon the filing of an appeal affidavit made by him before W. A. Turner, county clerk of Webster County, in the State of Missouri, authenticated by his seal of office.

In the Circuit Court the plaintiff moved to dismiss the appeal because no such affidavit for appeal as required by law had been filed before the justice.

On the hearing of the motion it was admitted that W. A. Turner, before whom the appeal affidavit was made, was at the time clerk of Webster County, Missouri; that the proper seal of his office was attached, and that he as such clerk was authorized by the laws of Missouri to administer oaths and take affidavits.

The court sustained the motion to dismiss the appeal, and defendant, Love, took a bill of exceptions and appealed to this court.

I. An affidavit for an appeal from a judgment of a justice of the peace to the Circuit Court must be made by the party appealing, or some person for him. *Gantt's Digest, sec. 3821.*

1. Affidavit taken by clerk of another State.

An affidavit may be made out of this State before a commissioner appointed by the Governor of the State to take depositions, or before a judge of a court, mayor of a city, notary public or justice of the peace, whose certificate shall be proof of the time and manner of its being made. *Gantt's Digest, sec. 2539.*

An affidavit may be made in this State before a judge of a court, justice of the peace, notary public, an examiner or clerk of a court. *Ib., 2540.*

So it seems, by these sections of the statute, an affidavit may be made in this State before the clerk of a court, but not out of the State.

The officers before whom an affidavit may be made out of the State being mentioned in the statute, an affidavit made before an officer not named, is of no validity in this State. *People v. Tioga, C. P., 7 Wend., 516; Stanton v. Ellis, 16 Barb., 319; Benedict v. Hall, 76 N. C., 113.*

Had the statute provided that an affidavit might be made out of the State before any officer authorized by the laws of the State where made to administer oaths, the affidavit in question would be valid, but the statute does not so provide.

If a statute does not name the officer before whom an affidavit may be made, it may be made before any officer authorized by law to administer oaths. This is the rule as to domestic affidavits. *Dunn v. Ketchum, 38 Cal., 93;*

Wood v. Jefferson Co. Bank, 9 Cowan, 205; Christman v. Floyd, 9 Wend., 342.

II. On dismissing the appeal the court rendered the judgment against appellant for costs.

It has been several times decided by this court that where a Circuit Court dismisses a case or an appeal for want of jurisdiction, it can render no judgment for costs. *McKee v. Murphy, 1 Ark., 55; Neal v. Peay, 21 Ib., 93; Derton v. Boyd, 21 Ib., 265.*

The judgment for costs is reversed, and the judgment dismissing the appeal is affirmed.

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DYER ET AL. V. JACOWAY ET AL.

1. ADMINISTRATION: *Chancery jurisdiction, to correct errors and frauds.*

Chancery will not interfere for the correction of mere errors in the settlements of administrators in the probate court which could be corrected by appeal, nor of irregularities which, though illegal, were not of fraudulent intent, and have not resulted in substantial injustice; nor after a long period when explanations have become difficult, and evidences lost which in the nature of things might show matters which appear illegal on the record to have been really equitable. But it will interfere to correct fraud established either by direct proof, or by such circumstances as will fairly authorize an inference of intentional fraud.

2. SAME: *Same.*

In the correction in chancery of frauds in an administrator's settlements in the probate court, his accounts will be surcharged and falsified, or set aside altogether, and settlements required *de novo*, as the case may require.

3. PLEADING: *Multifariousness; how corrected.*

Multifariousness can not now, under the Code, be corrected by demurrer, but only by motion to strike out.

4. TRUST: *Trust funds may be followed, etc.*

If a trustee invests the trust fund, or its proceeds, in other property, the *cestui ques trust* may follow the fund into the new investment so long as he can identify the purchase as made with the trust property or its proceeds, although the trustee may have taken the title in his own name or the name of any other person.

5. TRUST: *Fraud: Administrator investing funds in improvements on wife's land: Relief.*

If an administrator invests funds of the estate in inprovements on his wife's land with her consent and connivance, equity will hold the property by receiver or injunction against alienation, for the security of creditors, distributees or sureties of the administrator, until final settlement of his account, and then apply it to their claims if he is in default.

APPEAL from *Yell* Circuit Court, in Chancery.
Hon. G. B. DENISON, Special Judge.

John Hallum for appellant.

Courts of chancery have jurisdiction and will exercise it to surcharge or falsify, re-state or set aside settlements of administrators for fraud. *33 Ark., 727; 34 Ib., 63 and 117.*

Dodge & Johnson for appellees.

1. The court had no jurisdiction. The administration was still pending in the probate court, and the parties had full and ample remedy there. (*Gantt's Dig., secs. 1183–4; Const., art. 7, sec. 34; 33 Ark., 592 and 728.*) Courts of chancery interfere only upon a clear showing of fraud. *34 Ark., 71.*

2. Review the thirty-one charges in the bill, and contend that they do not amount to fraud; that there were probably irregularities and mistakes which could have been corrected in the probate court, or by appeal, and cite *Gantt's Digest, secs. 91–2–3; 33 Ark., 582–3–4; 23 Ib., 94; 26 Ib., 377; 27 Ib., 596; 33 Ib., 728, 733; 34 Ib., 63; Ib., 127; 39 Ib., 117; 20 Ib., 526.*

3. As to the thirty-second charge, and seeking to subject Mrs. Jacoway's property, contend that:

First. As this suit was brought in the Danville District, and the property was in the Dardanelle District, the court had no jurisdiction. *Gantt's Dig., sec. 4532; Acts 1875, approved Dec. 15, 1875, secs. 3, 4, 5, 6 and 7; 39 Ark., 202,* and

Second. The bill is multifarious. *Sec. 4550 Gantt's Dig.; 1 Story Eq. Pl., sec. 271; Bliss on Code Pl., 289, 290, 292 et seq.; Newman Pl. and Pr., p. 265; 11 Ark., 726; 20 Ib., 22.*

EAKIN, J. Appellants, creditors of the estate of Samuel Dickens, deceased, on behalf of themselves and other creditors of said estate, filed this bill in 1878, against the administrator Jacoway, his sureties on his bond, and Mrs. Elizabeth D. Jacoway. The object of the bill was to set aside for fraud the settlements made by Jacoway in the probate court, to restate the accounts, to hold the sureties liable, and to subject to any decree to be rendered, certain real estate to which Mrs. Jacoway had legal title. A demurrer to the bill for want of equity was sustained, whereupon complainants rested. The bill was dismissed and they appealed.

The bill is long, containing thirty-one charges as to matters in the course of the administration alleged to be fraudulent.

It appears from the bill, which with regard to matters which should have been answered must be taken as true, that Dickens died intestate, on the second of March, 1867, and that Jacoway gave bond and was appointed his administrator. Claims to the aggregate amount of $23,597.62 were duly probated against his estate in favor of complainants and numerous other creditors, which to a great extent remained unpaid.

The administrator filed an inventory, and made several settlements of his accounts current, respectively, on the nineteenth of May, 1868; on the seventh day of July, 1869; on the fourteenth day of April, 1870, and the fifth day of July, 1871; all of which were approved and confirmed. Subsequently, on the fifteenth day of April, 1875, he filed a fifth settlement, in lieu of the four former ones, purporting to render an account and statement of all his administration down to that time, from the beginning, which was also duly approved and confirmed.

1. ADMINISTRATION: Chancery jurisdiction to correct errors and frauds.

The jurisdiction of courts of chancery to interfere with proceedings for the settlements of estates in the probate courts, rests upon the same grounds with their interference with the judgments and proceedings of any other courts whatever. It does not rest upon any jurisdiction of the original subject matter, but upon this broad principle that courts of equity will not allow the proceedings of any other courts to be made the means of perpetrating successful frauds, or will relieve against accidents or mistakes which other courts could neither prevent nor cure, but which, unrelieved, would cause irreparable wrong and injustice. And the interference goes no further than is reasonably demanded by the necessity. When the fraud is corrected, or the impediment to justice removed, the other courts, if there be anything further to do, will be left to proceed with the subject matter of their respective jurisdictions, especially if it be peculiarly intrusted to them by the Constitution.

Most usually the appeal is made to this power of equity courts in the settlement of estates, as to which probate courts have original exclusive jurisdiction. In this special connection, it has become the established doctrine that courts of equity should not interfere for the mere correction of errors which might be corrected on appeal, nor on

account of irregularities in settlements, which, although illegal, have been prompted by no fraudulent intent, and have resulted in no substantial injustice; nor after a long period, when explanations may have become difficult, and evidences have been lost, which, in the nature of things, might have shown things which appear illegal on the record to have been really equitable. Courts of probate are not, nor ever were, strictly speaking, common law courts. In England they were part of the system of ecclesiastical courts; and here within the range of the subject matters intrusted to them, they proceed upon equitable, as well as legal rules of right. Besides, the judges are not required to be learned in the technicalities of the law, it being far better that they should be men of sound, practical business qualifications, with a wholesome sense of right and wrong.

2. SAME: Those who wish to confine them to the strict letter of the law, have ample opportunity to do so, by paying attention to all proceedings in which they have an interest, and filing exceptions, and taking appeals from erroneous rulings. If they do not, the peace of the community and the security of property, especially the safety of sureties, demand that they be not allowed, at pleasure, to object to anything which may be merely illegal or irregular, and demand new settlements, when it may, from loss of witnesses or destruction of documents, or failure of memory, be impossible to make them. On the other hand it has been equally well settled that if fraud be shown in a settlement, either by actual and direct proof, or by such an array of circumstances as will fairly authorize a Chancellor to infer intentional fraud, relief will be readily granted; and as the case may require, the accounts will be surcharged and falsified, or set aside altogether, and settlements required *de novo*. *West and wife v. Waddell et al., 33 Ark., 575; Reinhardt v. Gartrell, Ib., 734; Mock et al. v.*

Pleasants, 34 Ark., 63; Shegogg v. Perkins et al., Ib., 117; Jackson v. McNabb et al., 39 Ark., 111; Price v. Peterson, 38 Ark., 496; Nathan v. Lehman et al., 39 Ark., 256; Trimble and wife v. James, 40 Ark., 393.

In this case, of the thirty-one specific charges of facts which are assumed to indicate fraud, some of them, taken alone, have not that effect. Of this nature may be noticed the claim for attorney's fees, without having been authorized to employ an attorney; the failure of the administrator to charge himself with interest on money which came into his hands; the claim of commissions above that prescribed by law; and improper claims of credits for securities which might have been made useful. These, for example, are things generally wrongful, but which belong to the class of errors, and might have been passed upon by the probate court without any imposition practiced upon it, or intent to deceive. Even double credits, which constitute part of the specifications, might be in single instances the result of simple mistakes.

But there are charges of a much graver nature, which, if proven on hearing, would clearly indicate a fraudulent intent in the settlement, and which should be answered and denied, or explained. Without recapitulating all, it will be sufficiently illustrative to say that there are charges of large credits claimed and allowed of money, property at appraised value, and interest thereon, paid to the widow, without any corresponding charge against the administrator of these items. There are charges of credits claimed and allowed of insolvent notes, which had been actually paid to the administrator. It is charged that the administrator failed to charge himself with interest on the price of property sold for the estate, when bonds for the purchase money were taken bearing interest. There are many charges of like nature. They may be all answered, and, so

far as we know, successfully denied or explained, but taken for true, as they stand on demurrer, they afford sufficient ground to surcharge and falsify the accounts; or, if the Chancellor should be of opinion that the fraud pervaded all the accounts, of setting them aside altogether, and ordering an account *de novo*.

These matters should have been reserved for the final hearing upon all the pleadings and evidence, when the Chancellor might, with all the facts disclosed, determine whether or not fraud had been intended, and if not whether the illegal and irregular proceedings had wrought any injury of such a nature as to invoke the doctrine of constructive fraud. The demurrers of the several defendants should have been overruled.

There was a separate demurrer by Mrs. Elizabeth Jacoway, the wife of the administrator, as to whom only the thirty-second charge applies. She had nothing to do with the administration of the estate of Dickens. It is alleged that her husband, about the twenty-eighth day of December, 1868, was in embarrassed circumstances, and purchased a block of ground in the town of Dardanelle; which, with the intent and purpose of defrauding his own creditors as well as those of the estate of Dickens, he had conveyed to his wife with her consent; and that, afterwards, in December, 1874, he converted the sum of $6,957 belonging to the estate of Dickens to building a house upon it, she knowing and assenting to such use of the money. It is part of the prayer, in addition to the prayer that the administrator be held to a new account and that his sureties be held liable with him for a true balance, that the said block, with the house, be sold, and the proceeds be applied to the payment of the decree. Her separate demurrer, which was also sustained, is based upon the ground that the bill was multifarious; that as to this land the

court had no jurisdiction; that it acquired none of her person for the main purposes of the suit; and that the bill as to her showed no grounds of relief.

Multifariousness is not, now, ground of demurrer, since the Code. If the objection made upon this point be good it should have been taken by motion to strike out so much of the bill as affected her. Technically, at least, the court erred in sustaining her demurrer, unless the law be that the facts stated show no equity against her at all.

In the case of *Wheat et al. v. Moss et al.*, *16 Ark.*, *255*, it was held that where an administrator bought property with the funds of an estate, the distributees might follow the fund and take the property, or might subject it to the repayment of the money. And the same reasoning would apply to creditors entitled to the fund. This upon the ground of constructive trusts. The bill however does not make this case, as the charge consists with the supposition that the administrator originally bought with his own money. It is alleged, indeed, that he did so with the purpose of defrauding his own then existing creditors, as well as the creditors of Dickens' estate. His own creditors are not complaining, and it is not shown by the bill that in 1868 he was so indebted to the estate of Dickens as to preclude him from laying out his own money as he might please. No charges of fraud as against the creditors of the estate, such as would make him liable to them, are made with regard to his conduct of the administration at that period. It is not alleged that any judgment creditors of his then existed. With regard to the lot itself, we are of opinion that the bill does not disclose facts sufficient to show the original purchase to have been fraudulent as to creditors of Dickens, or that they have any equity to attack Mrs. Jacoway's original title. Can they subject it to a burden for the funds of the estate, which the com-

plainants allege were invested in 1874 in building a brick dwelling house upon the lot, with the knowledge, consent and connivance of Mrs. Jacoway? This amounts to an allegation that the trust fund can be traced into the improvements.

Although a husband, by his labor, skill and services, which creditors have no right to compel him to exercise for their benefit, may improve his wife's property to any extent without rendering it liable to his debts, there are nevertheless respectable authorities which hold that if he puts upon it money or property to which his creditors *have* a right, the property so improved becomes burdened in their favor to that extent, most especially if it be done with the knowledge, assent and connivance of the wife. (See conflicting cases cited and discussed in Mr. Bishop's work on married women, vol. 2, sec. 467 *et seq.*) It will be seen, on the other hand, that there are quite as respectable authorities which hold that the wife can not thus be improved out of her land. It is not necessary in this case to settle this somewhat perplexing question, inasmuch as this is in no view a bill by the creditors of W. D. Jacoway to subject his wife's estate to a burden for his debts. No creditors of Jacoway are complainants. The bill is by the creditors of the estate of Dickens, against Jacoway as his administrator, to compel a due and faithful administration of the trust, in order that they may receive from his hands the *pro rata* amounts which may finally be awarded them by the probate court. The administration is still pending, from all that appears, and the accounts, if re-stated and corrected, must still, in the present aspect of the case, be certified to the probate court, as the basis of proceedings to complete and close the administration. The complainants are in no correct legal sense creditors of Jacoway, and *non constat* that they will ever be, for it

may be that when forced to a true settlement, if that should be ordered, Jacoway may be able and willing to conform to any proper order for distribution, or his securities may do it for him.

The relief really sought is in the nature of that administered on grounds *quia timet*, and is indeed as much for the benefit of Jacoway's sureties as it is for themselves. It is based upon an allegation of a wrongful conversion of the means of the estate, endangering the specific fund out of which the creditors of Dickens' estate must be satisfied, and beyond which, faithfully administered, they have no right to look. Nor have they any concern as to the fraudulent conduct of Jacoway towards his own creditors, nor as to the relative rights of Jacoway's creditors and his wife, if they themselves shall receive from Jacoway, upon order of the court, all they are entitled to receive out of the assets of Dickens' estate. It would only be for a deficiency of that payment that they would have a right to require a sale of the property, in any view of the case, be it much or little; for their rights against Mrs. Jacoway could reach no further. In short, the object of the bill is to follow the trust funds into the land, and to bring them specifically as a fund back under the control of the probate court, to be ready for distribution on final order. I mean the only *proper* object of the bill. There is, indeed, a prayer for a decree in favor of complainants, for the sum of money found due on accounting, and that the lot and house be sold to pay the decree; but such relief would not be in accordance with the principles and practice of courts of chancery in estates not fully and completely administered. It would be to assume jurisdiction.

That trust funds wrongfully converted may be followed into other property as long and as far as they can be identified, is a well settled principle of equity. It is thus

announced by Mr. *Perry*, in his work *on Trusts*, *vol. 2*, *sec. 836:* "If the trustee invests the trust fund or its proceeds in other property, the *cestui que trust* may follow the fund into the new investment, so long as he can identify the purchase as made with the trust property or its proceeds, although the trustee may have taken the title in his own name, or the name of any other person."

The protection extended to married women, because of their incapacity to act *sui juris*, does not give them immunity against such connivance at the misapplication of the trust funds of others, for their benefit, as is charged in the bill. The case is different from that where a woman sees her husband, although in debt, spending his money in improving her estate. She may well suppose he intends that as a gift, or advancement, without any resulting trust.

The power of those interested in trust funds, to call in the aid of chancery to compel the proper execution of the trust, and the preservation of the fund, has never been questioned.

It is germane to the proper relief sought, that the court of chancery should reach forth its hand, not only for the better protection of the creditors of Dickens' estate, but for the protection of the defendant sureties, and hold the trust fund, which, by the confession of the demurrer, has gone into the land, until justice may be completely effected. Under the prayer for general relief, although an immediate sale would not be necessary, and might be very unjust to Mrs. Jacoway, inasmuch as it may never be required, and the property might be sacrificed, yet the court may by any of its ordinary schemes hold it to avail the final determination. This might be done through a receiver, or perhaps more equitably and less oppressively by interlocutory injunction, or a mere *lis pendens* might of itself suffice to prevent alienation.

To this extent there is equity in the bill as against Mrs. Jacoway, although final relief affecting her may depend upon contingencies. She is properly before the court in this regard, and subject to its orders.

The suit was properly brought in the forum of the administration. It is competent to the court, having the parties before it, to do full justice, and to that end it may make orders affecting real estate lying out of the district. The two districts of Yell County are as distinct counties. This by special statute.

The defendants are all called upon to answer, or the complainants should have a proper decree upon the allegations confessed. What final decree may be proper, will depend upon the issues made, and proof upon them, and the relief may be moulded, under the general prayer, in such manner as to protect, adjust and enforce the equities of all parties.

It was error to sustain the demurrers. Reverse and remand for further proceedings.

PATTON v. ADKINS.

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CONTRACT: *Assumption of mortgage debt: Action.*

The acceptance of a deed subject to a specified mortgage does not imply a promise by the grantee to pay the mortgage debt; but if the deed contains a stipulation that the property is subject to a mortgage which the grantee agrees to pay, then a duty is imposed on him by the acceptance, and a promise is implied to perform it; on which, in case of failure, assumpsit will lie.

APPEAL from *Pulaski* Circuit Court.
Hon. F. T. VAUGHAN, Circuit Judge.

Blackwood & Williams for appellant.

1. Appellant not liable on the exception in the granting clause of the mortgage. There was no privity of contract. The exception is in the granting clause, not in the conditions. *See 33 Iowa, 49; 51 Ib., 637; 57 Ill., 198; 23 Ill., 320.*

No obligation to pay Adkins' debt was imposed by Patton's accepting a mortgage reciting another mortgage.

2. As to the verbal contract. If valid, the condition was broken, for Adkins sued, and the contract ceased to be binding. *Parsons on Contracts, p. 525 to 528; Bishop on Cont., sec. 428 et seq.; Wharton on Cont., sec. 523.*

3. Review *17 Mass., 400; Ib., 558 and 574,* and contend that while they may sustain the abstract principle that whenever defendant has money in hands *belonging to plaintiff,* which he has no *legal right* to retain, an action for money had and received will lie; that this case lacks those essential elements. In all cases there must be privity of contract, or before the law will imply one the parties must be connected directly with the transaction in a *contractual relation..* See *2 Wharton on Cont., secs. 728, 723; 37 Ark., 541.* The *money* must have been received, etc.

T. J. Oliphint for appellee.

1. The mortgage was accepted by Patton subject to the exception and *condition* that Adkins was to have $65 worth of it to pay his debt, and having gotten all the crop and a horse, and enough to pay both debts, he was liable for money had and received. *17 Mass., 574; 15 Cal., 344; 3 Wilson, 304, 307; 17 Pick., 159; 7 Cowan, 662.*

2. An agreement to forbear suit is a good consideration. (*1 Parsons, Cont., 440 to 444.*) Appellee did forbear until he became satisfied appellant would not pay him, as he promised. This was no breach of the condition.

SMITH, J. Adkins sued Patton before a justice of the peace, alleging as his cause of action that one Reasin owed him a debt of $65, which the defendant had afterwards assumed. The plaintiff recovered judgment there, and again in the Circuit Court on appeal.

The evidence showed that the plaintiff had sold Reasin a horse for $65, and had taken his note, secured by mortgage on the crop of cotton to be raised by the debtor during the year 1881, on the Al. Hogan farm, on Bayou Meto. This mortgage was executed in January, 1881. In March following, Reasin executed to defendant a mortgage upon a certain horse and his entire crop of corn and cotton to be raised by him, or under his control, during that year, except $65 worth of the cotton which had been previously mortgaged to Adkins. Reasin was living on the Al. Hogan place at the time of giving the second mortgage, but in point of fact made no crop there, having soon after moved off to another farm, where he did make a crop. Before the crop was gathered, Reasin left the country. Patton received the proceeds of the crop; but Adkins says that he verbally promised to pay his debt provided Adkins would not go to law about it. After waiting on him three weeks, and becoming convinced that Patton did not intend to pay, Adkins sued out an attachment against the crop, which had already been levied on to satisfy Patton's debt. But in this contest Adkins was defeated. He then brought this action, which was determined before a jury, to whom no directions of any sort were given.

CONTRACT: Implied by accepting deed of mortgaged property.

The acceptance of a deed subject to a specified mortgage, does not imply a promise on the part of the grantee to pay the mortgage debt. If the deed contains a stipulation that the property is subject to a mortgage which the grantee agrees to pay, then a duty is imposed on him by the acceptance, and the law implies a promise to perform

it, on which promise, in case of failure, assumpsit will lie. But here no express agreement is proved that the defendant would become personally liable, and no facts from which such an agreement can or ought to be implied. *Fiske v. Tolman, 124 Mass., 254, and cases there cited; S. C. 26 Amer. Rep., 659 and note; Hamill v. Gillispie, 48 N. Y., 556; Merriman v. Moore, 90 Pa. St., 78; Jones on Chattel Mortgages, sec. 489; Jones on Mortgages of Real Estate, sec. 761.*

Action.

The parol assumption of the debt, if not within the statute of frauds, was conditional; the condition being that Adkins should refrain from suit. And this condition was very soon afterwards violated by the institution of a suit without any demand on Patton to perform his promise.

Reversed, and a new trial ordered.

LITTLE ROCK AND FORT SMITH RAILWAY COMPANY v. HUNTER.

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1. RAILROADS: *Liability for goods deposited at depot.*

A railroad company is liable as a common carrier only when goods are delivered to, and accepted by it for immediate transportation in the usual course of business. If they are to await further orders from the shipper before carriage, it incurs, at the utmost, the liability of a warehouseman.

2. WAREHOUSEMAN: *Liability of.*

A warehouseman is not an insurer. He is bound only to ordinary and reasonable care of goods intrusted to him, and is not responsible for thefts not occasioned by his own negligence, nor for accidental fires.

3. RAILROADS. *Liability for goods at depot.*

When goods are left with a railroad company's agent at their depot to be kept until the owner should be prepared to proceed on his journey, and to be returned on request if he should not go, then the company becomes a mere gratuitous bailee, provided the agent can bind it at all by the reception of goods under such circumstances.

APPEAL from *Franklin* Circuit Court.
Hon. G. S. CUNNINGHAM, Circuit Judge.

J. M. Moore for appellant.

The agent was not authorized to receive goods for storage, but if he was, the railway is only liable as a warehouseman, and it was incumbent on plaintiff to show negligence. (*Pierce on R. R. Law, 428, 448; Hutchison on Carriers, sec. 701-3; 60 N. Y., 138.*) The lost articles were not baggage. *Thomps. on Carriers of Pas., 510-11; notes 1 and 2.*

L. L Wittich for appellee.

Appellant received the goods as a common carrier; they were so delivered, accepted and stored in its warehouse or depot (*21 Ind., 54*), and being lost through negligence, the company is liable. *See 52 Mo., 390; 2 Mo. App., 369; 63 Mo., 314; 29 Ind., 360; 37 Ib., 448; 47 Ib., 471.*

OPINION.

SMITH, J. The plaintiff in this action recovered judgment against the railroad company for the value of a box of household goods, alleged to have been left in its depot for safe keeping until the plaintiff should be ready to take the train. It was averred that the box was not re-delivered upon request, but was lost by the defendant's negligence. The action having originated before a justice of the peace, no formal answer was filed, but the defense seems to have been a general denial of the plaintiff's cause of action.

On the trial the plaintiff testified that on a certain day she came in from the country to Ozark, intending to take the defendant's train, on her way to Tennessee, provided she should receive a certain remittance of money she was expecting by mail; that she went to the depot and deposited her trunk and box on the platform; that about that

time the train came along, and the baggagemen were in the act of putting her effects aboard, when she interfered and told them that she was not going by that train, as she would not have time to go to the post office to see if her money had come; that she then spoke to the assistant agent at the depot, and inquired if her things could remain there until she was ready to go, and he assured her they would be perfectly safe. She then went to a boarding-house and never did go to Tennessee. Three days later she sent for and received her trunk, which appears to have been in the depot. About three weeks afterwards she inquired of the assistant agent whether any charges for storage on goods were made, and was informed the company never charged for storage.

The defendant's agents swore they had no knowledge of the box, and had never seen or heard of it until a short time before the commencement of the action; and that the company did not transact a warehouse business, but only received goods to ship as freight or baggage.

The following prayers of the defendant were refused:

1. "If the jury find from the evidence that the plaintiff deposited the box of goods with the agents of the company in the depot warerooms to remain there until such time as she should be ready to take the train, and become a passenger, with the view that it should be carried with her on the journey and to be returned to her in case she did not become a passenger without shipment to any point, then the company is not liable for the goods, either as baggage or freight, and can be liable only as special bailee."

2. "That unless it is proved that the defendant kept a warehouse for the general storage and forwarding of goods, and had corporate power and authority to do so, then the law is that the agents of the company could not bind

the company for the safe-keeping of goods which were not received either as freight or baggage."

3. "That the defendant is not liable for goods as special bailee without proof that the goods were lost through the negligence of the defendant. The fact that the goods were lost, without other evidence of negligence, is not sufficient to make the company liable as special bailee."

And the court gave the following directions of its own motion:

First. "The jury are instructed that the defendant corporation is a common carrier of goods, and is an insurer for the safe delivery of property intrusted to them for transportation."

Second. "The court instructs the jury that if they believe from the evidence that the box containing the goods sued for, was received into the exclusive possession of the agents of the defendant, who when they received said goods were acting in the usual course of their employment, and that the same were received for the purpose of being shipped, then they will find for the plaintiff the value of said goods."

1. RAILROADS: Liability for goods deposited at depot.

The court below evidently misconstrued the nature of the action and the purport of the evidence. Its charge is based upon the assumption that the goods were delivered to the defendant for transportation. Yet this was not alleged in the complaint, nor is there a syllable of testimony in the record to support this view. A railroad company is responsible as a common carrier only when goods are delivered to and accepted by it for immediate transportation in the usual course of business. If they are to await further orders from the shipper before carriage, it incurs, at the utmost, the liability of a warehouseman. *O'Neil v. N. Y. Cent. & H. R. R. Co., 60 N. Y., 138.*

2. WAREHOUSEMAN: Liability of.

Of course a warehouseman is not an insurer. He is only bound to ordinary and reasonable care of the commodity intrusted to him, and is not liable even for thefts, unless they have been occasioned by his own negligence, nor for accidental fires. *Story on Bailments, 8th ed., pp. 444, 449.*

3. RAILROADS: Liability for goods at depot.

If, again, the goods were left with the company's agents, to be left until she should be prepared to proceed on her journey, and to be restored to the depositor upon request, then the company became a gratuitous bailee, provided its agents could bind it at all by the reception of the goods under such circumstances. The first prayer of the defendant should have been granted.

Reversed for a new trial.

CARR ET AL. v. THE STATE.

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59 429

1. WITNESSES: *Wife of co-defendant in same indictment.*

When several defendants are jointly indicted and put on trial together for a crime alleged to have been jointly committed, the wife of one is not a competent witness for any of them; but if the trials are separate the wife of one not on trial is a competent witness for the others unless her testimony will tend directly to the acquittal of her husband.

APPEAL from *Howard* Circuit Court.
Hon. H. B. STUART, Circuit Judge.

Dan W. Jones, J. D. Conway, R. B. Williams, R. C. Newton, Met L. Jones for appellants.

The court erred in excluding the testimony of Laura Cooper. The wife of one *jointly* indicted with others, on a *separate* trial, is a competent witness for the co-defendants, except in cases of conspiracy, principal and accessory,

etc. Review *Collier v. State* and *Casey v. State*, and cite *1 Gr. Ev., top p. 389, par. 335; 2 Ashmead, 31; 1 Reddington, 62; 1 Bishop Cr. Pro., sec. 1019; 1 Mass., 15; 31 Me., 62, 64; 1 Met. (Ky.), 13; 14 Rich., 87; 2 Humph., 99; 6 Blatch., 76; 1 Doug. (Mich.), 48; 37 Mo., 343; 51 Mo., 27; 4 Snead, 426; 64 N. C., 54; 1 McCord (S. C.), 182;* etc.

C. B. Moore, Attorney General, for the State.

Relies on *Collier v. State, 20 Ark., 46*, and *Casey v. State, 37 Ark., 85.*

SMITH, J. Forty-two persons were jointly indicted for the murder of Thomas Wyatt. The defendants declining to sever, the State placed three of them upon trial together. Carr and Thompson were convicted of murder in the first degree, and, after sentence of death was pronounced upon them, appealed to this court.

WITNESS: Wife of co-defendant in same indictment

Evidence was given tending to connect the appellants with the commission of the offense. They tendered as a witness Laura Cooper, wife of Sidney Cooper, one of the accused, but not then upon his trial. It was stated that she was the only eye witness of the killing who was not under indictment; and it was proposed to prove by her the circumstances of the killing, and that no one of the defendants on trial was present or participated therein. The State's evidence conduced to show that her husband was not one of the mob by whom Wyatt was killed, but that he was at the time plowing in his field. The Circuit Court ruled that she was incompetent, her husband being a party to the indictment. An exception was saved to this ruling, and it was urged as a ground for a new trial, and has been assigned for error here.

In excluding Laura Cooper from the witness-stand, the court below did but follow *Casey v. State, 37 Ark., 67.*

In that case two men were jointly indicted as accessories to a murder. They severed, and on the trial of one, the wife of the other was excluded as a witness. And it was held the case fell within the principle of *Collier v. State, 20 Ark., 36.* There, upon the trial of the principal in a murder, the wife of an accessory was not permitted to testify.

When several persons are accused of a crime alleged to have been jointly committed, and are put on trial together, the wife of one of the defendants is not admissible as a witness for any of his associates. This, however, is not because her husband is a party to the record, but because the policy of the law prohibits persons standing in the relation of husband and wife from bearing witness for or against each other. Where the trial is joint she can not well give any testimony which would not affect her husband. It is the real identity of their interests, and not any fancied identity of their persons in law, that is the true ground of her disqualification. *Dominus Rex v. Frederick & Tracy, 2 Strange, 1095; R. v. Locker, 5 Espinasse, 107; R. v. Hood, 1 Moody Cr. Cas., 281; R. v. Smith, Ib., 289; 1 Gr. Ev., secs. 334-5; Comm. v. Easland, 1 Mass., 15; Comm. v. Robinson, 9 Gray, 560.*

"The mere fact that the husband is a party to the record does not of itself exclude the wife as a witness on behalf of the other parties, but the rule of exclusion is only to be applied to cases in which the interest of the husband is to be affected by the testimony of the wife." *Thompson v. Com., 1 Metcalf (Ky.), 13.*

Accordingly, when the trials are separate, the wife of a co-defendant not on trial is a competent witness unless her testimony will tend directly to the acquittal of her husband, as in conspiracy or other joint offenses where the interests of the defendants are inseparable. For the judg-

ment in the case of the prisoner at the bar will inure neither to the benefit nor to the prejudice of her husband; and the reason ceasing the law also ceases. *2 Russell on Crimes, 8th Am. ed., 981 et seq. and notes; Roscoe's Cr. Ev., 4th Am. ed., 149 et seq.; 1 Gr. Ev., sec. 335; Wharton's Cr. Ev., sec. 392; 1 Bishop, Cr. Pro., sec. 1019.*

And the point has been expressly adjudged in *State v. Worthing, 31 Me., 62; U. S. v. Adatte, 6 Blatchf., 76; State v. Anthony, 1 McCord, 182; Moffitt v. State, 2 Humph., 99; Thompson v. Comm., ante; Cornelius v. Comm., 3 Metc. (Ky.), 481; Comm. v. Manson, 2 Ashmead (Pa.), 31; State v. Burnside, 37 Mo., 343; State v. McCarron, 51 Ib., 27.*

Against this array of authority are opposed *People v. Colbern, 1 Wheeler's Cr. Cas., 479*, decided in 1823 by the recorder's court of the City of New York; *Pullen v. People, 1 Douglass (Mich.), 48* and a dictum in *State v. Smith, 2 Iredell Law, 405.*

In *Workman v. State, 4 Sneed, 425*, the Supreme Court of Tennessee held that, upon the trial of the principal felon, the wife of his co-defendant, indicted as an accessory, was a competent witness. But this is also a departure from principle. For the acquittal of the principal goes to show that no offense was committed by anybody, and thus tends to the acquittal of the accessory. We therefore hold that Collier's case was correctly decided; but that Casey's case was an unwarranted extension of the rule, not justified by principle, nor supported by authority.

The judgment of conviction is reversed, and a new trial is awarded to Carr and Thompson.

OVERSTREET v. GALLAHER.

1. SALE OF PERSONAL PROPERTY: *Fraudulent representations.*

Where a vendor of a mule sues for the purchase price and fails to recover on account of his false and fraudulent representations of its soundness, and the offer of the vendee in due time to return it, the mule becomes the property of the vendor.

2. SAME: *Same; no offer to return.*

A vendor of a mule can recover no part of the purchase price if he falsely and fraudulently represented it to be sound and it proved unsound and entirely worthless, though the vendee never offered to return it.

APPEAL from *Pulaski* Circuit Court.
Hon. F. T. VAUGHAN, Circuit Judge.

Ratcliffe & Fletcher for appellant.

Under the rule for the measure of damages, laid down in *25 Arkansas, 164*, if the mule was worth anything at all, the jury should have found for the plaintiff.

Review the testimony, and contend that the evidence fairly shows that the mule was worth *something*, and that the verdict should have been for plaintiff.

Clark & Williams for appellee.

Cite in support of the instructions of the court, and the justness of the verdict, *22 Arkansas, 454; 25 Ib., 164.* Where there is some evidence to support a verdict, this court will not reverse.

ENGLISH, C. J. This suit was commenced before a justice of the peace of Pulaski County, by William Overstreet against B. Gallaher, on a note for $100 given for a mule.

The defense was that plaintiff induced defendant to purchase the mule and execute the note by false and fraudu-

lent representations that it was sound, and that it turned out to be unsound and worthless. On a trial before the justice the verdict of the jury was for defendant; plaintiff appealed to the Circuit Court, where there was a trial anew by a jury, verdict and judgment in favor of defendant, new trial refused plaintiff, bill of exceptions and appeal by him.

There is no question of law presented on this appeal. No exception was taken to any ruling of the court during the trial, and appellant made no objection to the instructions given by the court to the jury.

No doubt appellant represented the mule to be sound when he sold it to appellee; and he testified on the trial that it was sound, and two witnesses examined on his behalf, who had seen the mule before the sale, testified that it appeared to be sound. On the contrary, appellee, and several witnesses sworn on his behalf, testified that the mule, on an attempt to work it, proved to be unsound and worthless. This was a question of fact for the jury, and they seem to have believed appellee and his witnesses.

1. SALE OF MULE: Fraudulent representations as to soundness.

Counsel for appellant submit that, if the mule was unsound, it was proved that appellee kept it, and worked it, and that it must have been of some value, and that appellant should have had a verdict for such value.

Appellee testified that shortly after discovering the mule to be unsound, he offered to return it to appellant, who refused to receive it. That afterwards he occasionally attempted to work it, but could not get enough work out of it to pay for half of its food.

If the mule is in fact of any value, it belongs to appellant, appellee having, on discovering it to be unsound, elected to rescind the contract of sale by offering to return the mule, and successfully resisting the recovery of the consideration. *Plant v. Condit, 22 Ark., 458.*

2. SAME: No offer to return.

Even if there had been no offer to rescind, if the mule was in fact utterly worthless, appellant was not entitled to a verdict for any part of the purchase price. *Ib.*

Affirmed.

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55 548

42 210
76 600

STANLEY v. BRACHT.

JURISDICTION OF JUSTICE OF THE PEACE: *Action for damages for sale of horses.*

Stanley deposited with Bracht a horse in pledge for $24 which Bracht had paid for him on the horse. He afterwards tendered Bracht the $24 and demanded the horse. Bracht refused the tender, and afterwards sold the horse, and Stanley sued him before a justice of the peace for $100 damages. The justice found the value of the horse to be $30, and deducting the $24, gave Stanley judgment for $6. Stanley ignored this judgment and sued in the Circuit Court, in trover, for $150 damages. Bracht pleaded the former judgment in bar. *Held,* that the first suit was in effect an action for breach of a contract of bailment, and not for damages to property; that the justice had jurisdiction and his judgment was good in bar of the last action.

APPEAL from *Sebastian* Circuit Court.
Hon. R. B. RUTHERFORD, Circuit Judge.

A. M. Stanley, pro se.

1. A justice of the peace has no jurisdiction of actions *ex delicto* for conversion of a chattel. *Const. Ark., art. 7, secs. 40, 11; 34 Ark., 188; 5 Ib., 27.*

2. Justice's courts, are courts of limited jurisdiction, and have none unless expressly conferred by the Constitution; their proceedings must affirmatively show such facts as bring the case within their jurisdiction. *6 Ark., 41; Ib., 182; Ib., 371; 16 Ib., 104; 4 Johns., 292; Freeman on*

Judgments, sec. 517; Ib., sec. 119, et seq.; Cooley on Torts, p. 417, note 3, etc.; 9 Ark., 41.

3. The facts of this case constitute an action in tort for the conversion of the horse—*and not an action in debt for the value thereof. Gantt's Dig., secs. 3726, 4562; 29 Ark., 365; Bigelow on Torts, p. 193; Pomeroy on Rem, sec. 573.*

ENGLISH, C. J. The material facts of this case may be stated chronologically.

Charles Bracht made and delivered to A. M. Stanley the following instrument:

"FORT SMITH, ARK., October 1, 1881.

"This will certify that as soon as Mr. A. M. Stanley will pay me the twenty-four (this being the amount due me) which I paid for him on said horse, I will return him his horse. He owes me $24, and as soon as he pays me the amount, the horse will be turned over to him. I am to keep the horse until the $24 is paid to me. The horse is in my possession.

"CHARLES BRACHT."

On the twenty-seventh of June, 1882, Stanley brought suit against Bracht before a justice of the peace of Sebastian County, for the value of the horse. The substance of the complaint filed before the justice is as follows:

"The plaintiff states that on the first day of October, 1881, the defendant signed a certain instrument, a copy of which is herewith filed. (The above is the instrument referred to.) That on the twenty-ninth day of May, 1882, the plaintiff tendered and offered to pay the defendant the sum of $24, and at the same time and place demanded the horse. That the said defendant refused to accept the tender and to deliver the plaintiff the horse. Plaintiff further says the defendant has sold said horse

without authority from or notice to plaintiff. Whereupon plaintiff was damaged in the sum of one hundred dollars, and he prays judgment for that amount and for costs."

The defendant being summoned appeared, and controverted the plaintiff's demand, and neither party requiring a jury the case was submitted to the justice, who, after hearing the evidence, on the eleventh day of July, 1882, rendered judgment finding the value of the horse sued for to be thirty dollars, and after deducting therefrom the $24 due by plaintiff to defendant, that he recover of the defendant the sum of $6, being the balance of the value of the horse, and for costs.

No appeal appears to have been taken from this judgment. On the eighteenth of September, 1882, Stanley brought suit in the Circuit Court of Sebastian County, Fort Smith District, against Bracht, for the value of the same horse. In this complaint he alleged, in substance, that on and before the first day of October, 1881, he was the owner and lawfully possessed of a certain black horse of the value of $50, which horse on the said day came to the possession of the defendant, and defendant contriving to injure the plaintiff, did afterwards wrongfully convert the said horse to his own use and benefit, to the damage of the plaintiff in the sum of $150, for which he prays judgment.

The defendant pleaded in bar, as a former recovery, the judgment obtained against him by the plaintiff, before the justice of the peace, alleging that the two suits were for the same cause of action, and that the judgment of the justice remained in full force. He exhibited with his plea a transcript of the judgment, etc., authenticated by the certificate of the justice. The defendant filed an additional plea, which it is not important now to notice.

The plea of former recovery was submitted to the court, and the court, after hearing the evidence, rendered judg-

ment sustaining this plea, and dismissing this suit at the cost of the plaintiff, who was refused a new trial, and he took a bill of exceptions and appealed.

It is submitted for appellant that the justice of the peace had no jurisdiction of the subject matter of the action brought before him, and that his judgment was therefore null and void, and no bar to a recovery in this suit, upon the same cause of action.

The Constitution provides that justices of the peace shall have "concurrent jurisdiction (with the Circuit Courts) in suits for the recovery of personal property, where the value of the property does not exceed the sum of three hundred dollars; and in all matters of damage to personal property where the amount in controversy does not exceed the sum of one hundred dollars." *Sec. 40, art. 7.*

Neither the suit before the justice nor this suit was for the recovery of the horse, nor was either suit strictly for damage to the horse. This suit is in the nature of the common law action of trover, which is in substance a remedy to recover the value of personal chattels wrongfully converted by another to his own use. The injury lies in the conversion and deprivation of the plaintiff's property, which is the gist of the action. It is an action for the recovery of damages to the extent of the value of the thing converted. *1 Chitty Plead., 146, Trover.*

The common law actions for the recovery of personal property are detinue and replevin; for the recovery of the value of such property when tortiously converted, trover and trespass, and for damage done to such property by injuring or destroying it, trespass.

By the Constitution of 1836 the jurisdiction of justices of the peace, in civil cases, was limited to matters of contract. *Sec. 15, art. 6; Reeve v. Clarke, 5 Ark., 29.*

By the Constitution of 1868 their jurisdiction in civil cases was limited to "actions of contract and replevin." *Art. 7, sec. 20.*

By the present Constitution it has been extended as above shown, to "all matters of damage to personal property," etc.

In *St. Louis, Iron Mountain and Southern Railway Company v. Heath, 41 Ark., 476*, Justice SMITH said: "By 'matters of damage to personal property,' we understand all injuries which one may sustain in respect to his ownership of personal property."

In this view of the meaning of the language of the Constitution, if the suit before the justice of the peace be treated as in the nature of the common law action of trover for the conversion of the horse, the justice had jurisdiction.

But we think the suit before the justice may more properly be regarded as in the nature of the common law action of assumpsit for breach of the contract of bailment, which was filed with the complaint, and made the foundation of the action. In this view of that suit there can be no doubt of the jurisdiction of the justice, for by section 40, article 7, of the Constitution, justices of the peace have exclusive jurisdiction in all matters of contract where the amount in controversy does not exceed the sum of $100, and concurrent jurisdiction in matters of contract where the sum in controversy does not exceed the sum of $300, etc.

In either view the judgment of the justice, pleaded as a former recovery, was a bar to this suit. *McGee v. Overby, 12 Ark., 164.*

Affirmed.

SANDERS, AD., v. ELLIS.

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59 149
59 366
42 215
74 347
74 578

1. TAX SALE: *Redemption: Who entitled to.*

Almost any right, either at law or in equity, perfect or inchoate, in possession or in action, or whether in the nature of a charge or incumbrance on land, amounts to such ownership as will entitle the party holding it to redeem from a sale for taxes.

2. SAME: *Purchase or redemption by wife in possession.*

A wife in possession with her children, of her husband's homestead (who has abandoned them and absconded) at the time it is sold for taxes, and receiving the rents and profits of it, can not acquire title to it as against him or his creditors by a purchase at a tax sale, nor by purchase of the tax certificate of another purchaser and taking the tax deed to herself. She will be held to be the agent or trustee of her husband. A stranger in the possession and use of premises can not acquire a title by such a purchase, and her obligations are no less nor her rights any greater than his.

APPEAL from *White* Circuit Court, in Chancery.
Hon. M. T. SANDERS, Circuit Judge.

J. W. House for appellant.

1. Mrs. Ellis was a trustee or agent of her husband, and was bound to protect the interest of her husband, for whom she held. *Perry on Trusts, secs. 245, 265, 285.*

2. By occupying the property and assuming control of same, after the departure of the husband, she became his trustee, and could not abuse that trust, nor make a profit out of it, or buy it. *Ib., secs. 194, 200, 209, 429–30–31.*

3. She had such an interest or right that the law imposed upon her the obligation of keeping the taxes paid. The homestead is not a personal right of the debtor, but extends to the family and is intended to protect the home, and she will be presumed to have bought for the benefit of the husband, and only held as trustee for him. *Thompson on Homesteads, etc., secs. 40–1–2–3–4, 95 and 97; Blackwell*

on Tax Titles, p. 399; Cooley on Taxation, 345; 32 Ark., 97; 31 Ib., 334; 25 Cal., 45.

4. All the circumstances of the case show that the pretended purchase was merely a *redemption* of the property from tax sale.

W. R. Coody for appellee.

1. Mrs. Ellis had no interest in the homestead, during her husband's life, that could affect the tax sale, had she bought it directly, much less, after the time for redemption had expired, and she purchased from a third party. *37 Ark., 302.*

2. A married woman may acquire property from *any person*, or in any way known to the law, and dispose of the same as a *femme sole*, and such property *is not subject to the debts of her husband. Art. 9, sec. 7, Const.; 2 Bishop on Married Women, secs. 91-2-3; 47 Ala., 456; Gantt's Dig., sec. 4193; Acts 1875 (adj. sess.), p. 172.*

STATEMENT.

ENGLISH, C. J. The complaint in this case was filed in the Circuit Court of White County, seventh of December, 1882, by T. N. Sanders as administrator with the will annexed of Richard Bestwick, deceased, against Thomas A. M. Ellis.

The complaint, in substance, alleged that in the year 1875, Bestwick and Ellis had entered into a partnership for the purpose of purchasing and selling groceries, etc., in the town of Searcy; stated in the terms of the contract between them the amount of capital put in by each, purchases made, debts contracted, etc.; that Ellis had charge of and conducted the firm business until March, 1877, when, having converted partnership funds to his own use, he absconded to Texas, leaving Bestwick to close the

partnership affairs, pay the debts of the firm, etc., and that Ellis was indebted to Bestwick, on a proper settlement of partnership accounts, in the sum of $1,500. That Bestwick had died testate in January, 1880, and plaintiff had become his administrator with the will annexed.

Upon an affidavit that defendant was a non-resident of the State, and the execution of a bond by plaintiff, an attachment was issued, and levied by the sheriff on the southeast quarter of block four in the town of Searcy, as the property of defendant.

Sarah J. Ellis interpleaded, claiming the property attached, and excepting to the attachment mainly upon the ground that the suit was at law, when it should have been in chancery. The court sustained the exceptions, but permitted plaintiff to amend the complaint, and transfer the suit to the equity side of the court.

The interplea of Mrs. Ellis was in substance as follows: That the lot attached was assessed for taxation in the name of defendant, Thomas A. M. Ellis, for the year 1876, and the taxes levied thereon for that year amounted to $18.75. That on the twenty-sixth day of April, 1877, the collector returned the lot delinquent, and afterwards advertised it for sale, and it was sold on the second Monday of June, 1877, and purchased by Thomas J. Rogers for $23.68, the amount of taxes penalty and costs charged thereon, and the clerk issued to him a certificate of purchase.

That afterwards, and after the expiration of the two years allowed by law for the redemption of said lot, to wit, on the eleventh day of July, 1879, said Thomas A. M. Ellis, nor any one for him, having redeemed said lot, the interpleader, Sarah J. Ellis, then being in possession thereof, was desirous of purchasing the same for a home for herself and family, but not having the means of her own, certain ladies of the town of Searcy interested them-

selves in her behalf, and raised sufficient means to purchase the same from said Thomas J. Rogers, he having kindly donated five dollars of the purchase price to said interpleader to assist her in making the purchase; and upon the payment of the sum of ——— dollars to the said Rogers for the purchase of said land, he, on the said eleventh day of July, 1879, assigned to her his said certificate of purchase. That on the twelfth day of July, 1879, she presented said certificate so transferred to her to the county clerk, who executed, acknowledged and delivered to her, in the usual form, a tax deed of said lot. Wherefore she alleges that she is the owner of said lot in her own right, and that the same is not subject to the debts or liabilities of the said Thomas A. M. Ellis, and she prays that plaintiff's attachment levied thereon be forever superseded as to said lot.

The plaintiff answered the interplea, and the court sustained a demurrer to the answer. He then filed an amended answer in substance as follows: He admits the regularity of the tax sale of the lot; that it was purchased by Rogers and that he transferred his certificate of purchase to the interpleader, and that the clerk executed a tax deed to her for the lot. But he denies that by virtue of said tax sale, transfer and deed, the title to said lot was divested out of defendant, Thomas A. M. Ellis, or that said interpleader thereby acquired any such right or title to said property as to entitle her to plead and set up the same against said defendant or the plaintiff as the attaching creditor in this suit. Because, he says, said interpleader was at the time and is now the wife of said Thomas A. M. Ellis; that said lot and improvements thereon constituted, at the time of said assessment, sale for taxes, assignment of said certificate of purchase, and the execution of said tax deed, the homestead of defendant Thomas A. M. Ellis and his fam-

ily, consisting of his wife, the interpleader, and their children. That said interpleader with her children, at the time of the sale, transfer of said certificate and the execution of said tax deed, and ever since then, until the first day of January, 1880, occupied said property as a homestead. That for the year 1880 she rented out said property and received the rents and profits thereof. That for the years 1881 and 1882, she with her children occupied said property as a homestead. That on or about the first of December, 1882, said interpleader with her family abandoned said property as a homestead, and removed with her husband, the defendant Thomas A. M. Ellis, to the State of Texas where they now reside.

Plaintiff alleges that said interpleader, before the time for the redemption of said property from tax sale had expired, applied to said Rogers for the purpose of making some arrangement, or having an understanding concerning the redemption of said lot. That it was then and there agreed and understood between them that she should redeem the property upon the payment of the amount allowed by law, to wit, the taxes, penalty, costs and interest, and that in lieu of the ordinary mode of redemption, by application to the clerk, payment to the county treasurer, etc., he, Rogers, would assign and transfer the certificate of purchase to her; and further agreed, at the time, at the request of the interpleader, or her agent, that he would assign said certificate at any time, upon payment of the amount agreed upon, though the time for the redemption of the property had expired; and said interpleader, in pursuance of this agreement and understanding, and being assured by said Rogers that he would take no advantage as to time, purposely deferred taking an assignment of said certificate until a few days after the expiration of the two years from the date of tax sale.

That said application to said Rogers was not for the purpose of purchasing said property, but for redemption, and the amount paid by said interpleader was simply the amount that said Rogers was entitled to under the law if said property had been redeemed in the ordinary mode, by application to the county clerk and treasurer.

Further answering, plaintiff alleges, in addition to the facts alleged in the bill, that said Thomas A. M. Ellis, some two or three months before the sale of said property for taxes, on account of financial trouble and embarrassment, and being largely indebted to plaintiff's testator for moneys fraudulently procured and appropriated to his own use, absconded, leaving his family, the said interpleader and her children, in the possession of said property. That although he had absconded, or departed in the manner and for the cause above stated, yet he had not abandoned his family, whom he expected at some time should and would again join him as soon as he had established a residence elsewhere. And so plaintiff alleges that said interpleader, fearing that if said lot were redeemed before the expiration of two years it would be subject to the payment of defendant's debts, fraudulently deferred taking an assignment of said certificate until the time before stated, for the fraudulent purpose of cheating, hindering and delaying the creditors of her said husband, and particularly plaintiff's testator, in the collection of his claim.

Plaintiff prays that said tax deed be canceled; that the assignment of said certificate of purchase be declared a redemption of said property from tax sale, and that said interplea be dismissed, and for other proper relief.

The interpleader demurred to the amended answer, the court sustained the demurrer, and, the plaintiff resting, entered a decree sustaining the interpleader's claim to the lot, and that her title thereto be quieted, so far as plaintiff

was concerned, and that the attachment, so far as it affected her title to the lot, be quashed, set aside and held for naught.

From this decree the plaintiff appealed.

OPINION.

1. TAX SALE: Redemption. Who entitled to.

Taking the allegations of the answer to the interplea to be true, a court of equity can not treat the transaction between Mrs. Ellis and Rogers otherwise than as a redemption by her of the land from the tax sale.

Almost any right, either at law or in equity, perfect or inchoate, in possession or in action, or whether in the nature of a charge or incumbrance on land, amounts to such an ownership as will entitle the party holding it to redeem. *Woodward v. Campbell, 39 Ark., 584.*

2. SAME: Purchase or redemption by wife of owner.

Mrs. Ellis had an inchoate right of dower in the lot, which might have been lost to her by the tax sale; she and her children were in possession of the lot and improvements thereon, as the homestead of her absent husband, when the tax sale occurred, and at the time Rogers transferred to her his certificate of purchase; she was enjoying the rents and profits of the property; and she may be regarded as the agent and trustee of her husband. Under all these circumstances, if not her duty, she certainly had a right to redeem the property from tax sale. And her relation to the property was such that she could not have acquired title to it by purchasing it at the tax sale, and did not acquire title as against her husband and his creditors, by purchasing or redeeming from Rogers. *Perry on Trusts, sec. 678, etc.; Frierson, ex., et al. v. Branch, ex., 30 Ark., 464; Jacks v. Dyer et al., 31 Ib., 344; Guynn et al. v. McCauly et al., 33 Ib., 111; Pleasants et al. v. Mock et al., MS.*

If Ellis had, on absconding, placed a mere stranger in charge of the lot and improvements, to occupy and have

the use of the property in his absence, and furnished him no money to pay the taxes, such stranger in the use of the premises could not acquire a valid title thereto by permitting them to be sold for taxes, and purchasing at the sale, or procuring another purchaser to transfer to him his certificate of purchase. *Cooley on Taxation, pp. 345–7.*

The obligation and duty of the wife left in the use of the premises could not be less than that of a stranger, nor could her right to acquire title to the property through a tax sale be greater.

The decree must be reversed, and the cause remanded to the court below, with instructions to overrule the demurrer to the amended answer to the interplea, etc.

PINCHBACK, ADX., v. GRAVES ET AL.

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1. PRACTICE: *Defense of infant, how made: Disabilities removed.*

A court should not permit an answer of an infant without guardian to be filed merely upon the statement in the answer that his disabilities have been removed by the probate court. The removal should be proved by the record of the probate court, and, if it is not, a decree against the infant upon such an answer will be reversed.

2. SAME: *Defense of an infant: Appointment and duty of guardian.*

The defense of an infant must be made by his regular guardian, if he has one; or, if he has none, by one specially appointed *after* service upon the infant. No attorney nor party in the suit should be appointed, and the defense of the guardian must be not merely formal, but real and earnest; he should put in issue and require proof of every material allegation to the infant's prejudice, whether it be true or not, and make no concessions on his own knowledge.

APPEAL from *Lincoln* Circuit Court.
Hon. W. P. GRACE, Special Judge.

L. A. Pindall for appellants, L. A. and X. J. Pindall.

It was error to render a decree against a minor without appointing a guardian *ad litem*, or sufficient proof that his disabilities had been removed. *Gantt's Dig., sec. 1190, 4493; 39 Ark., 62; Ib., 106.*

D. H. Rousseau and *U. M. & G. B. Rose* for appellants, argue upon the merits.

J. M. Cunningham for appellee, argues upon the merits.

EAKIN, J. This is a bill by the children of Peyton R. Graves, deceased, as heirs and distributees, seeking to follow assets of his estate into lands which have been purchased by their mother's second husband, and to subject the lands to their payment.

It is alleged and shown by the pleadings and proof that Peyton R. Graves, about the beginning of the civil war, died seized of some personalty, including two slave men, a wagon and some oxen. He had no land, but was cultivating land of his wife, with negroes, some of which were her own; and upon which land he left a growing crop. His widow became his administratrix; and it is sufficiently clear that some debts were probated against the estate, which have never been paid. In a short time she married Edward C. Hydrick, who took possession of all effects in her hands, and assumed the care and protection of her children. Of this second marriage a son was born also, E. C. Hydrick, junior; who, after the death of his father, was made a party to this suit, together with the administrator of his father's estate. The administration on the estate of Graves was never revived nor settled. It is plain that none is necessary now. The creditors have rested nearly twenty years upon their probated claims and would not now be heard if they were claiming, which they

are not. No effects remain which if collected could be otherwise disposed of than by distribution amongst the complainants. The rights of all parties may be finally settled in chancery.

It is not a case of distributees endeavoring to represent the estate, to get in or get possession of outstanding effects or property adversely held. It is more in the nature of a claim for waste and conversion against the administrator himself, in which the aid of chancery is necessary to reach a fund to which the distributees are entitled.

All the active parties in the transaction are dead, and the widow also. The contest is between the complainants and those claiming the land through Hydrick. The principal and the determining questions are: First. Did Hydrick lay out any money or expend effects of Graves' estate in such manner as to make him a trustee for Graves' children; and, if so, are a portion of the defendants, the Pindalls, who hold the greater part of the land under a purchaser at execution sale against Hydrick, bound by the trust? With regard to Hydrick's heir, the second question can not arise, but as against the Pindalls he had a right to contest the validity of the execution sale.

The Chancellor upon hearing, in a very clearly expressed written opinion, setting forth its grounds, held both points in the affirmative, and decreed in favor of complainants for the original value of the property of Graves' estate, which he found had been used by Hydrick in the purchase of the lands, but, under the peculiar circumstances, allowed nothing for interest. It was further held that the lien of complainants was superior to the claim of the Pindalls. In the decree, however, it was ordered that certain portions of the land which Hydrick had conveyed to his wife,

and of which complainants had possession, should be first subjected to the lien.

From this decree both parties appealed.

The interests of the defendants are not identical. The Pindalls, the administrator of Hydrick, and his heir, E. C. Hydrick, have a common interest in denying the trust, but the community goes no further. The heir has an interest antagonistic to the Pindalls, inasmuch as their purchase of the judgment against his father, and the sale under it, diminishes his inheritance, and he has a right to contest it. The administrator of Hydrick, senior, is only concerned to prevent a personal judgment or decree against the estate for the value of the property, for which he will not be personally liable. It can not concern him very materially whether a trust be declared against the land or not, although it does concern the heir very seriously.

It is evident from the decree that whilst the Pindalls may by its operation still be protected from loss, and have their claim to hold the lands against the heir made *res judicata;* and whilst the administrator or his sureties can not be injured, the heir loses all.

1. PRACTICE Defense of infant, how made.

He was but seventeen when he defended, and it is very important to consider whether he has had proper protection in the court, in the determination of the rights of the respective parties upon the merits. I am deeply impressed with the conviction that there has been, in the past, not only in this, but in other States, too great laxity in dealing with the interests of minors. This is common in the probate courts, and not sufficiently rare in courts of more extensive jurisdiction.

No guardian *ad litem* was appointed for this youth. He came in and simply adopted an answer which had been filed by an administrator *de bonis non*, denying nothing of

his own motion, evidently knowing nothing about the whole matter. He adds this:

Disabilities removed by probate court.

"The defendant further states that at the —— term of the probate court of Lincoln County he had his disabilities of non-age removed, and was then and there declared to be competent to transact his own business, as will more fully appear by a copy of the record of said court in that behalf made, and herewith filed."

This answer is signed only by the attorney, and verified by no one. It is put in upon the ordinary leave granted in all cases to new parties, adults or others. No copy of any such record appears in the transcript. None was ever filed below. No entry shows that the court was satisfied that the infant was competent to act *sui juris*, or that the court ever looked into the matter at all. The cause proceeded as against an adult, with the result above announced.

If there had not been that clause in the answer, no one would question the fact that a gross error had been committed in allowing the rights of a boy of seventeen years to be settled upon his own submission to a vicarious defense, made by one having no connection with him by blood, nor personal interest in the subject matter. Of what effect, in law, can be the admission or statement of one not competent to make it? It made no issue. And may, from all that appears, have been prompted by those who had an interest in dispensing with a proper guardian *ad litem*. I do not mean to say there is any special reason to suspect this. I take it that in fact there has been some proceeding in some other court, by which the court and attorneys were all satisfied that the boy had been rendered competent to act *sui juris*. But we can not make bad precedents from confidence in the court and attorneys. No such proceedings appear, whilst it does appear that he was a mere

boy, had no guardian, and lost his inheritance in the contest. For between the Graves' and the Pindalls he will have nothing left.

When the probate court of Lincoln County did the thing, whether or not it had jurisdiction, by residence of the boy, at the time, and what specially it did, are not shown. No inquiry upon these points appears to have been made.

2. Appointment of guardian *ad litem*, and his duty.

The business and juridical history of America is strewn with the wrecks of infants' fortunes. The courts and the relatives of infants are culpable in this, not the Legislature. The laws are wise and careful. The true spirit of them should be kept in view, and administered. Our statutes require not only service on an infant, but that his defense must be made by his guardian if he has one; or, if he has not, by one specially appointed. In making this appointment the court should take care that it be not done until after service on the infant, that he may be heard upon this point if he should desire it, and must take care, further, that no attorney nor party in the action be selected. No judgment should be rendered affecting the interests of an infant until after defense *by guardian*, and this defense should not be a mere perfunctory and formal one, but real and earnest. He should put in issue, and require proof of, every material allegation of a complaint prejudicial to the infant, whether it be true or not. He is not required to verify the answer, and can make no concessions on his own knowledge. He must put and keep the plaintiff at arm's length. *See Gantt's Digest, sections 4521, 4595, 4493, 4494, 4495, 4578.*

These are wise provisions, and they are so far imperative. I think too that a guardian *ad litem* fails in his full duty, and does not apprehend the true obligation which he voluntarily assumes, if he contents himself with simply putting in a general denial, as is commonly done, and then

leaves the infant to the mercy of the rude stream of the ensuing contest. His interests, after issue, require protection as well as before. Proof may be required in his behalf; witnesses against him may require cross-examination. Points on error must be duly saved. With regard to these matters the statutes are not mandatory, but the caution of the Legislature would fall far short of its design, and be nullified in its effect—would indeed be but empty pretense, if it be not further understood that the guardian *ad litem* should watch the interests of the infant throughout the litigation, and see to it that a vigorous and real defense throughout be made by attorney. It is a moral obligation of the imperfect sort, perhaps, which can not be enforced, but it is none the less in contemplation of law, which aims only to be as practical as possible.

Keeping this policy in view, we must consider the nature and effect of the statute relied upon in this case to support the proceedings. The general policy of the common law, and as we have seen, the statutes also, is to rigidly protect the minor against his own inexperience, immaturity of judgment, carelessness and improvidence. Legislatures have, in some cases, supposed that particular infants may be more trusted, and have relieved their incapacities. In other cases they have enabled courts to do so, upon proper showing, and this power was conferred by law, in 1869, upon probate as well as Circuit Courts. Of the policy of laws which put it in the power of the probate judges in their discretion, and without any prescribed safeguards, to beardless boys to make ducks and drakes of their patrimony, I have nothing to say. It belongs to the Legislature. But it is at least apparent that the operation of such statutes should not be extended beyond their plain expressions or obvious meaning, and that courts, before acting upon them in individual cases, should at

least be affirmatively advised in some proper way that the disabilities have been removed. I am very sure the honorable circuit judge in the present case was satisfied personally as to this, but that is not enough. He should have been *judicially* so, or else the precedent of affirming his action will lead to the most shocking abuses. The general rule with regard to incapacities of infants is against the presumption of their removal, and the rule that all things will be presumed to have been rightfully done by superior courts, does not apply on direct appeals, where the record shows affirmatively that an error has been committed. Appellate courts can not cast about for presumptions which contravene the ordinary presumptions of facts, in such cases, and affirm upon the ground that by some possibility, upon some imagined condition of things, the action might be right.

With regard to the law in question some difficult questions arise, not now necessary to determine, and upon which we indicate no opinion, reserving their consideration until a case may arise in which attorneys may specially argue the points. Principally this, whether probate courts, as reorganized under the Constitution of 1864, bave that power at all.

Whether they have or not, there is nothing in this transcript to show that it has been done, and the bare allegation of the infant in his answer that it had, must pass for nothing. The showing should have preceded the answer. If he could not answer, nothing he could say in answer should be at all regarded. The case simply stands as that of an infant defending for himself.

I think the decree should be reversed, and the cause remanded, with directions to strike the answer of the infant from the files, and to appoint for him a guardian *ad litem*, as in ordinary cases. If in fact he has been properly

capacitated to answer *sui juris*, he should make that apparent to the court by evidence, before leave should be granted him to answer so, and the evidence should appear in the record and proceedings. It is, in short, a condition or *status* in contravention of the common law, and the general purport of the statute law, and must appear affirmatively, and wholly independently of the infant's own acts or admissions. The court must know it before it can hear the answer of the minor.

Reverse and remand for proceedings consistent with this opinion, and the principles and practice of equity.

FULLER v. EVATT.

EXECUTION SALE: *Redemption: Taxes paid by purchaser not included.*

The owner of land sold under execution may redeem it without paying the taxes paid on it by the purchaser since his purchase. They are no part of "the lawful charges" required by the statute. The purchaser's remedy for them is by action at law.

APPEAL from *Scott* Circuit Court.
Hon. WILLIAM WALKER, Circuit Judge.

Duval & Cravens for appellant.

Taxes are not within the meaning or intent of the words "and all lawful charges," in *section 2697 Gantt's Digest.*

They refer entirely to such charges as were allowed to be made by the clerk, and which were on file or ascertainable in his office. *Rover on Jud. Sales, sec. 1162; Freeman on Ex., 323, 333; 6 Cush., 70; 13 Cal., 609; 2 Burr., 1052, etc.; 3 Met., 521; 9 Serg. & R., 109; 1 Bibb, 295.*

The clerk, under our revenue law, is not authorized to collect taxes assessed upon land.

Clendenning & Sandels for appellee.

The words "lawful charges," as used in *sec. 2697 Gantt's Digest*, can not mean clerk's fees, for he is allowed none, and if he was, the sum paid would go to the clerk, and *not be held for the use of the purchaser.* As *no fees are allowed the clerk*, a charge made by him would not be a *lawful charge.* There is no statute allowing the clerk a fee for marking the redemption on the books, nor is there any general provision under which he could demand a fee. *32 Ark., 45; 35 Ib., 438; 25 Ark., 235.*

Taxes are "lawful charges." The State has a lien on the land for them (*Gantt's Digest, 5153; Miller's Digest, 103*), which attaches in October. These taxes the purchaser was compelled to pay to avoid penalty, and should have been paid to the clerk for the use of the purchaser.

The right of redemption is purely statutory. (*Rover Jud. Sales, 906; 1 How., 311.*) Where a new right is given and the mode of enforcing it is also given, such prescribed remedy is exclusive. *Brooks v. Baxter, 29 Ark.; 13 Barb., 217.*

EXECUTION SALE: Redemption. Taxes not included.

SMITH, J. Upon a judgment recovered in Sebastian Circuit Court against Fuller, an execution was issued to Scott County and was levied upon land. Under this writ it was sold to one Finley on the twentieth of March, 1880. On the fourteenth of October, 1880, the judgment debtor applied to the clerk of the court out of which the writ had issued to redeem, and a redemption was permitted upon payment of the purchase money, with interest at fifteen per cent. per annum. However, on the twentieth of April, 1880, Finley had paid to the collector of Scott County the taxes for 1879, amounting to $2.50. After the expiration of twelve months from the sale, the sheriff conveyed the land to the purchaser, his deed reciting that the sale had

not been redeemed from. And the purchaser sold and conveyed to Evatt, who brought ejectment. A jury being waived, the court found the facts as above stated, and declared the law to be that the attempted redemption was ineffectual, and that the legal title had passed to and vested in the plaintiff.

Section 2697 of Gantt's Digest provides that the debtor may redeem, at any time within twelve months, by paying to the clerk of the court out of which the execution issued, the purchase money, with fifteen per cent. per annum, and all lawful charges.

The only question is, whether the expression "lawful charges" includes taxes paid by the purchaser after the sale under execution and before redemption.

While redemption is a statutory right, and to be pursued under the terms and upon the conditions prescribed by the statute which confers the right, yet it is not expressly required that the owner, to entitle himself to redeem, shall refund taxes subsequently advanced by the purchaser. Nor are we at liberty to infer that this meaning was in the mind of the Legislature. Courts can not incorporate new terms into the provisions of a statute. While it would have been eminently just to make the repayment of such taxes a condition of redemption, it is probable the Legislature would have distinctly said so if such had been their meaning, and would have provided some method of bringing such payments to the notice of the officer before whom the redemption is to be effected. "Charges" here mean the costs of the clerk connected with the act of redeeming. And the purchaser is remitted to his action at law against the party for whose use and benefit he may have paid the taxes.

Purchaser's remedy is by action at law.

Reversed, and remanded for a new trial.

FILES, AUDITOR, v. THE STATE, EX REL. GATEWOOD.

AUDITOR: *Issuing warrants and certificates.*

The Auditor can not issue warrants on claims against the State when there is no appropriation to pay them; but if the claim is one recognized by law, he should audit and settle it, and issue to the claimant a certificate of the amount, under his official seal, if demanded.

APPEAL from *Pulaski* Circuit Court.
Hon. F. T. VAUGHAN, Circuit Judge.

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

A certificate of indebtedness can only be given by the Auditor *when the Auditor audits and settles a claim.* (*Gantt's Dig., sec. 2779.*) He is *only* allowed and required to audit and settle such claims as are not "*expressly required by law to be audited and settled by some other officer.*" *Sec. 2774.*

Attorney's fees under the "over-due tax act" (*Acts 1881, p. 68*) are *audited and settled by the court*, and come within the exception of section 2774. See *section 9, Acts of 1881, page 68.*

There is no provision in the over-due tax act for the Auditor to issue certificates of indebtedness, but *section 10* directs him to draw a *warrant*, etc. He could not draw a warrant, because there was no appropriation. *Sec. 2786 Gantt's Dig.; Const., art. 5, sec. 29, and art. 16, sec. 12.*

John C. & C. W. England for appellees.

It was the duty of the Auditor to audit the claim and issue certificates of indebtedness. *Acts of 1881, p. 68, secs. 9 and 10; Gantt's Dig., sec. 2779.*

SMITH, J. This was a petition for the writ of mandamus to compel the Auditor of Public Accounts to audit the

claim of the relators for service rendered as attorneys in Prairie Circuit Court in enforcing the payment of over-due taxes under the act of March 12, 1881. The petition sets out the rendition of a final decree condemning the lands to be sold, the allowance of fees to the relators of one dollar per tract, the sale of the lands, and the purchase of a portion of the same by the State. And the prayer was that the Auditor be required to issue his warrant upon the Treasurer, or a certificate of indebtedness for the amount of such allowance. To this petition the Auditor demurred. His demurrer was overruled, and, declining to answer, the peremptory writ was awarded on the second day of December, 1882.

By the ninth section of the act of 1881 attorney's fees are to be taxed as a part of the costs, and charged upon the lands as liens, the amount of the fee to be determined by the court. But the tenth section provides that if the lands shall be stricken off to the State, it shall not be required to pay the amount decreed against the lands, but the costs of the proceeding so far as it relates to such lands shall be certified to the Auditor, who is directed to draw his warrant on the Treasurer for the amount thereof. But there was no appropriation to draw against. Hence the Auditor could not issue his warrant. *Constitution of 1874, art. 5, sec. 29, and art. 16, sec. 12; Gantt's Digest, sec. 2786.*

However, it is further provided that "in all cases where the law recognizes a claim for money against the State and no appropriation shall be made by law to pay the same, the Auditor shall audit and settle such claim and give the claimant a certificate of the amount thereof, under his official seal, if demanded, and report the same to the Governor, who shall lay the same before the General Assembly." *Gantt's Digest, sec. 2779.*

The present case falls within this provision. The issue

of the certificate of indebtedness was a plain ministerial duty, and, in the performance of the duty, the law had vested in the Auditor no discretionary powers. The demand had been definitely ascertained as prescribed by law, and a refusal to perform his duty in the premises warranted the interposition of the court by mandamus. *Danley v. Whiting, 14 Ark., 687; High on Extraordinary Legal Remedies, secs. 100, 107.*

Affirmed.

PAYNE V. PAYNE.

DIVORCE: *Adultery: Evidence of adulterer.*

Where the charge for divorce is adultery courts are reluctant to grant it upon the uncorroborated testimony of a *particeps criminis.*

APPEAL from *Nevada* Circuit Court, in Chancery.
Hon. C. E. MITCHELL, Circuit Judge.

Smoote & McRae for appellant.

The allegation of adultery is clearly sustained by the depositions, and the divorce should have been granted. *Gantt's Dig., sec. 2195, clause 3.*

ENGLISH, C. J. This was a bill for divorce, brought in the Nevada Circuit Court by George S. Payne against his wife Mary Ann Payne. The bill alleged as cause for divorce that the wife had committed adultery with one Benjamin F. Snodgrass.

The plaintiff proved by Snodgrass that he had had carnal intercourse with defendant, but his testimony was not only uncorroborated, but he admitted, on cross-examination, that he had stated to one Grayson that he believed that

plaintiff had used him as a tool or instrument for the purpose of getting a divorce.

The court below refused to grant a divorce on his testimony, and we shall decline to disturb the decree.

Where the charge is adultery, the courts are reluctant to grant a divorce on the uncorroborated testimony of a *particeps criminis. Abbott's Trial Evidence, p. 747; Banta v. Banta, 3 Edw., ch. 295; Turney v. Turney, 4 Ib., 566; 2 Greenleaf Ev. (Rev. Ed.), sec. 47 and note 2; Simmons v. Simmons, 13 Texas, 558.*

Affirmed.

(On a petition for reconsideration in this case, which was denied, the court ordered that the decree dismissing the bill be so modified that the bill be dismissed at the cost of appellant, without prejudice.)

JENNINGS v. McILROY.

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EXECUTION: *Mortgaged personalty not subject to.*

Mortgaged personal property is not subject to attachment or execution for a debt of the mortgagor, and a tender of the mortgage debt by an attaching creditor after the levy of his attachment on the property, will not cure the illegal levy.

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

B. R. Davidson for appellant.

An equity of redemption in personal property is subject to levy and sale under execution. *Herman Chattel Mortgages, pp. 389, 443, 445, 455, 452, 454, 456, 458, 459, 460; Herman on Executions, p. 150, sec. 118, note 4; Freeman on Executions, sec. 117 and note.*

By the act of the Legislature (*Acts of 1877, p. 82*), in the *absence* of stipulations to the contrary, the mortgagee took the legal title and possession. In the mortgage in question it was stipulated to the contrary, and Fisher held possession.

There are authorities that say that an equity of redemption in personal property is not subject to execution. These authorities also say that the mortgagor can not redeem at *law*. That the mortgagee's title becomes *absolute* after default, and can only be redeemed by bill in equity.

It has been uniformly held that when *possession* is retained by the mortgagor, he has an interest subject to execution or attachment. *Herman Chattel Mortgages, p. 455, sec. 192; Hull v. Carnley, 11 N. Y., p. 501, 505, and a host of authorities cited; Hull v. Carney, 17 N. Y., 202; Gonlet v. Asseler, 22 N. Y., 225; Manning v. Monaghan, 28 N. Y., 585; Herman Executions, p. 150; Freeman Executions, sec. 117, and cases cited; Hall v. Sampson, 35 N. Y., 274; Harbison v. Harrell, 19 Ala., 753; Merritt v. Niles, 25 Ill., 282; Saxton v. Williams, 15 Wis., 292.*

While personal property remains with the mortgagor his interest is subject to attachment. *Hanvill v. Gillespie, 48 N. Y., 556; Simmons v. Jenkins, 76 Ill., 479.*

But whether subject to execution or not it is to attachment. *14 Ohio St., 457; Gantt's Dig., secs. 392, 399, 414, 400; 4 Met. (Ky.), 285.*

An attaching creditor has an unquestioned right to redeem. *Carter v. Fenstemaker, 14 Ohio St., 463; Herman Chattel Mortgages, pp. 358, 363, 470; Gardner v. Emmerson, 40 Ill., 296; Lucking v. Wesson, 25 Mich., 443; Treatt v. Gilmore, 49 Me., 34; Landers v. George, 49 Ind., 309.*

May redeem as soon as his attachment becomes a lien. (*Jones Chattel Mortgages, p. 691.*) The levy a lien. *Freel-*

son v. Green, 19 Ark., 377; Patterson v. Hanland, 12 Ark., 164; Drake on Attachment, sec. 224.

The payment or tender of payment discharged the lien of Crane, Breed & Co. *Herman Chattel Mortgages, p. 462, sec. 194, p. 469, 404; Caruthers v. Humphreys, 12 Mich., 270; Hartley v. Tatham, 26 Howard, Pr., 158; Jackson v. Crafts, 18 Johnson, 110; Farmers & Co. v. Edwards, 26 Wendel, 541; Vanhousan v. Kanouse, 13 Mich., 303; Moynahan v. Moore, 9 Mich., 9.*

And the title was re-invested in the mortgagor. *Jones Chattel Mortgages, sec. 566; Greer v. Turner, 36 Ark., 18; Chearff v. Dodge, 33 Ark., 340; Wells et al. v. Rice et al., 34 Ark., 347.*

It is now well settled that after payment, or tender and refusal, a mortgagor may sue at *law* and recover possession. *Herman Chattel Mortgages, pp. 465, 468, 469; Fuller v. Parish, 3 Mich., 211.*

S. R. Cockrill for appellee.

At and before the attachment and condemnation and sale of the hearse, the mortgage was over-due, and Fisher, the mortgagor, had no interest subject to sale, or even to seizure under attachment. *Drake on Attachment, sec. 245, 538–9; Rover on Judicial Sales, 1st ed., secs. 981, 985; Hilliard on Mortgages, 1st ed., vol. 2, pp. 347, 353, 377, 426–7–8 9 (note c.), 432, 478; Herman on Executions, pp. 150–4; Freeman on Executions, sec. 116, 117, 191; Wait's Actions & Defenses, vol. 6, pp. 751–2; 18 Ark., 508; Turner v. Watkins, 31 Ark., 429.*

Equitable interests in chattels were not subject to sale on execution at common law, and if subject now, must be by statute. *Rover on Jud. & Ex. Sales, sec. 551; 31 Ark., 452, Dissenting Op. English, C. J.*

There is no such statute.

Appellant's remedy was by garnishment or bill in equity.

EAKIN, J. This is an action in replevin, brought by appellant to recover a certain hearse from the appellee. The plaintiff relied upon a purchase at a sale under an attachment from a justice of the peace, at his suit against one Fisher, the former owner. The defendant claimed to hold it as the assignee of a mortgage upon it, which had been given by Fisher to the original vendors of the hearse to secure certain notes for the purchase money. At the time the attachment was levied Fisher was in possession, and the last of the purchase notes was not due. It became due, however, before the day of sale, and McIlroy had got the control of the hearse. On the day of sale, and before it took place, default having been made in the payment of the note held by McIlroy, Jennings tendered him the money in full, which was refused. He still offers to pay it, and tenders it in court.

The cause, on issues properly made as to the respective rights of the parties, was submitted to the circuit judge upon the law and the facts. He found for defendant, and judgment was rendered for a return of the hearse or its value, fixed at $500. After proper motions, and a bill of exceptions, plaintiff appealed.

It certainly is a case appealing strongly to our sense of justice in plaintiff's favor. If he can not succeed, it must be upon technical grounds, which this court can not ignore nor override.

EXECUTION Mortgaged personalty not subject to.

There are other points in the case which would render this opinion too long to discuss. The correctness or error of the judgment below is sufficiently well determined by the solution of a single question. Has a mortgagor of personal property, whilst the mortgage debt remains unpaid, anything left subject to execution at law? or must the remedy of the creditor, against him, be by garnishment of the surplus proceeds of a sale, or by bill in chancery

to compel a sale and reach the fund? For nothing can be taken in attachment which is not liable to execution; and if the creditor took nothing by the attachment, he had no right to acquire property by tendering the debt. Nor would such tender cure a void levy.

In the outset we must say that the decisions in the different States upon this point are not susceptible of harmony, on any line of distinction which will run through all. They are at hopeless variance. In this condition of things we can not do better than resort to common law principles, which in this regard have not been altered by statute, and to such former opinions of this court as may indicate its tendency to one or the other line, leaving it to the Legislature to prescribe any law upon the subject which it may deem advisable.

At common law equitable interests in personalty were not liable to be taken in execution at law. As to this all agree. By a mortgage of personal property the title passes, and the mortgagor has only the equitable right to reclaim it on payment.

"Hence," says Mr. *Drake*, "personalty so situated is not subject to sale under execution, and therefore not attachable." (See work *on Attachments, 5th ed., p. 539.*) Also Mr. *Jones on Chattel Mortgages, sec. 555,* lays it down that "at common law a chattel pawned or mortgaged was not liable to attachment in an action against the pawner or mortgagor," which he says "was settled with great deliberation by the Kings Bench, and is supported by all the common law authorities," citing *Scott v. Scholey et al., 8 East., 467.*

It will be found upon reference to that case that all the *argumenta ab inconvenenti, pro* and *con,* for this or the contrary doctrine, are well discussed by Lord ELLENBOROUGH, who rests his decision upon the ground that the *silence*

with regard to chattel equities of the English statute which had made *lands and tenements*, or trusts on them, so liable, afforded a strong argument that the matter with regard to chattels was "meant to continue in the same plight in respect to executions, in which both freehold and leasehold trust interests equally stood prior to the passing of that statute." The case, by the way, was one of a chattel interest in land, which is not so strong as this which regards personalty. Our statute, which makes equitable interests in real estate liable to execution, is silent as to personal chattels. "It has, indeed," says Lord Ellenborough in that case, "been urged in argument as an inconvenience on the other side, if such equities of redemption in chattel interests shall be held not to be salable under an execution; that, by means of a mortgage of the largest leasehold property for the smallest sum imaginable, such property might be effectually protected and withdrawn from the legal claims of every creditor." This he answers by saying that "the inconvenience in the case put does not extend beyond the necessity which such a step would occasion, of resorting to a different remedy, to be applied in another court, upon a bill to be filed by a creditor." One of the considerations which seem to have determined the court was, that the language of the writ of execution and return imports that the goods and chattels to be taken "are properly of a *tangible* nature, capable of *manual seizure*, and of being detained in the sheriff's hands and custody; and such also as are capable, conveniently, of sale and *transfer* by the sheriff." It is very obvious that whilst a hearse, for instance, is of itself tangible enough, yet an equitable interest in it is not susceptible of manual seizure; and the sheriff would have no right to take the hearse itself and deliver it to a purchaser, if a mortgagee before or at the time of the sale had the legal right to its

possession. It would be fruitless to take it if the mortgagee, even after the sale, on default, would have the right to retake it. Its delivery in such case would be elusive.

Courts of chancery deal best with those rights which exist only in idea, and have the means of working out for those who have such equities the material results, by proceedings specially adapted to such cases. A sale under execution might be considered too trenchant a remedy in view of the rights of a mortgagee. In the absence of statutory provisions, courts of law do not recognize the duty of a purchaser of such an interest to redeem, and have not apt machinery to make him redeem or forfeit his purchase under execution sale. If the mortgagee is to be driven into equity to regain his right of possession, it might be well considered quite as equitable that the creditor should go there in the first instance. At least it has been thought that the embarrassments attending the sale of mere equities in chattels, upon execution, outweigh those of a resort to chancery.

Even in those States which have adopted the equitable idea of property in the mortgagor, and held equities of redemption in chattels subject to execution, the doctrine does not seem to have been carried further than to hold that, where the mortgagor himself has the right of possession *for a definite time*, as, for instance, till default, that the right of possession, to that extent, is the subject of levy and sale. Such doctrine would not help the plaintiff in this case. The note was due at the time of the issuance of the order of sale, though not when the attachment was levied. When the sale was made there was no right of possession left in Fisher to be transferred by it. A mere permissive possession which the mortgagee might terminate at his pleasure, could not be the subject of sale, under any line of authority. *Jones on Chattel Mortgages, sec. 556.*

Our own court, in one instance, if not more, has indicated

its adoption of the English line of authorities. (*Patterson v. Harland, 7 English, 158.*) The court in that case declared that one with whom personal property had been left as a security for an obligation, was not liable as a garnishee to have it taken by another creditor of the same debtor. That no recovery for the property or its value in that case could be had until the lien created by the pledge had been removed. This was but a dictum, it is true, but is irreconcilable with the idea that the property could have been taken by attachment. When the attachment in this case was levied the lien had not been removed, either by payment or tender, and whatever may be the case with regard to the sale, the validity of the original attachment must be determined by the conditions then existing.

We think it held nothing, and the sale under it gave no right of property. The judgment was right on the law and facts. This is sufficient to say in cases submitted to the court upon both. Declarations of law need not be considered in detail, where the result is obviously correct.

Affirmed.

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70 583

BERRY ET AL. V. MITCHELL.

1. LEGISLATURE: *No power to annul contracts.*

The Legislature has no power to deprive one of the benefit of a contract lawfully made by the commissioners for letting out public contracts.

2. CONTRACTS: *Public binding.*

In 1882 the board of public contractors let to Mitchell the public binding for the State for the years 1883 and 1884, specifying the size and price of the binding. In March, 1883, the Legislature provided for the printing and binding of a new Digest of the Laws of the State, to be printed on royal octavo paper, which is of larger size than any specified in Mitchell's contract, and for which no price was specified in his contract. *Held*, that the binding of a Digest was not in contemplation of the parties to the contract, was not embraced in it, and he was not entitled to it.

APPEAL from *Pulaski* Chancery Court.
Hon. D. W. CARROLL, Chancellor.
C. B. Moore, Attorney General, for appellant.
J. M. Moore, contra.

SMITH, J. In the year 1882, the board of commissioners to superintend the letting of public contracts for the State, awarded to Mitchell the contract for the public binding for the years 1883 and 1884. By an act approved March 13, 1883, and amended March 27, 1883, provision was made for publishing a revision of the statutes. When the work was ready for publication, the Digester was directed to invite proposals for printing and binding 8,000 copies of the same; and these proposals were to be compared by him, together with the Governor and Auditor, and they were to let the contract to the lowest responsible bidder. Bids were accordingly advertised for. Whereupon Mitchell succeeded in perpetually enjoining the members of this last mentioned board from entering into any contract for the binding of said Digest. He claims that their proposed action is an invasion of his contract rights.

1. LEGISLATURE: No power to annul a contract.

If Mitchell's contract covers this matter, the decree below is correct. For the Legislature could not constitutionally enact a law which would deprive him of the benefit of that contract. But upon examining his bid, which was accepted and which is by reference incorporated into his written contract, we find there are no specifications of prices to be charged for binding books in royal octavo form, which is the size prescribed for the Digest, both by the law in force when his bid was made, and by the subsequent act. All of his proposals relate to the binding of books printed on medium paper. Now the standards of size are fixed by section 10 of the act of November 28, 1874, to regulate the letting of such contracts. A page of

royal octavo is longer and wider than a page of medium. One contains 1800 ems, the other 1500. The difference may be seen by comparing a copy of Gantt's Digest with a volume of our Reports.

To enter into a contract for binding books of this size was evidently not in the contemplation either of the board or of Mitchell himself. The revision of the statutes is the only book that is required to be printed in this form. And at that time no law had been passed for the publication of a revision. It was uncertain when such a law would be passed.

Hence Mitchell could not be compelled to do this work. Nor would his sureties be liable for his non-performance. He and they might well say *non haec in foedera veni.* And unless both parties are bound neither is.

Besides, if he were to do the work, no man can tell what compensation he would be entitled to. One of the objects in making such contracts in advance is, to ascertain and fix definitely the prices to be paid. Here the most important term is left open for future adjustment. But that can not be properly called an agreement at all, where there is an absence of that mutual assent which is of the essence of all contracts.

Mitchell has not in his bill averred his readiness to bind the Digest for the same prices that are allowed him for less expensive work; but if he had, it would not affect the case. The question is, whether he already has a contract for this particular work.

The General Assembly doubtless considered that no provision for this species of work had been made in previous contracts, and directed the printing and binding of the Digest to be let by special contract.

The decree of the Chancellor is reversed, and a decree will be entered here dismissing the plaintiff's bill.

PLEDGER V. GARRISON.

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68 157

42 246
79 102

1. STATUTE OF FRAUDS: *Delivery of possession.*
Delivery of possession of land to the vendee under a parol contract of purchase takes the case out of the statute of frauds.

2. PRACTICE IN SUPREME COURT: *Finding of Chancellor on evidence.*
Where the Chancellor's finding of facts is sustained by a preponderance of testimony this court will affirm it.

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

Duval & Cravens for appellant.

There was no such contract of sale, payment of purchase money, part performance, and entry into possession as would take the case out of the statute of frauds. *8 Ark., 278; 20 Ib., 550; 19 Ib., 24; 3 Paige, 478; 2 Paige, 177; 10 Ib., 535; 1 Hoff., 470; 5 Wend., 643; 1 Ark., 391; 16 Ib., 466; 21 Ark., 533; Story Eq. Jur., sec. 760; 1 McMullen Eq., 317; 1 Rich. Eq., 131; 5 Mumf., 308; 4 Blackf., 94; 21 Ark., 277; 15 Ib., Cain v. Leslie; 26 Ib., 344; 34 Ib., 663; 39 Ib., 430.*

J. T. Harrison and *W. N. May* for appellee.

There was such a sale, payment of purchase money, entry of possession, part performance and making of valuable improvements, as entitled appellee to a decree of specific performance. *21 Ark., 110, 137, 277; 1 Ark., 391; 15 Ib., 322; 16 Ib., 340; 20 Ib., 615, 648; 30 Ib., 547; 32 Ib., 97; 34 Ib., 663; 3 Wash. Real Prop., p. 235; 2 Story Eq., *pp. 29 to 132, sections 752 to 772, etc.*

SMITH, J. This bill was exhibited by Garrison against his father-in-law, nominally to quiet his title to and pos-

session of a tract of land, but in reality to compel the specific execution of a contract of purchase. It alleged that the defendant had, ten years before, sold to the plaintiff forty acres of wild and uninclosed land, described in the bill by metes and bounds, for $600; that the terms of this contract were not manifested by any writing, but that the plaintiff had been put in possession under it and had held possession ever since, had paid for the land in full, and had made valuable improvements.

The defendant for his part denied the contract of sale and denied that he ever placed plaintiff in possession of the tract claimed.

The decree below was in favor of the plaintiff.

1. STATUTE OF FRAUDS: Delivery of possession.

This is evidently a case where the parties, being nearly connected, have dealt loosely with each other, each relying upon the good faith of the other. Subsequent dissensions having sprung up between them, their accounts of the same transactions are of the most contradictory nature. And thus their respective rights are involved in obscurity and uncertainty. If the facts were once known, it would not be difficult to apply the law. For no principle is more firmly established than that delivery of possession under a parol contract for the sale of land takes the case out of the statute of frauds.

Was there a contract between the parties? And has that contract been so far performed on the part of the plaintiff that it would be a fraud upon his rights to permit the defendant to repudiate it?

In the year 1868 the defendant had bought a plantation on the Arkansas river, containing near 300 acres. The price was $4,500; and of this sum he still owed $2,300. He was in doubt about his ability to meet the deferred payment, and he was anxious to have his children settled near him. For these two reasons he proposed that the plaintiff should go upon a part of the tract.

Now the plaintiff says that the defendant agreed to sell him forty acres of the unimproved land, lying west of a certain slough, at the same rate which he had paid for the entire place himself; that the land was not surveyed at the time, but the initial point from which the line was to be run was agreed upon, together with the courses and directions, and that the defendant pointed out the distances to which the lines would probably extend; that the plaintiff entered upon the land, built his house, cleared about twenty acres, and has paid the plaintiff in money and property about $700, besides the taxes.

There is no improbability in the plaintiff's story, and it accords with the undisputed facts of the case. The price was a round one, to begin with, and the plaintiff proves the payment of it by testimony other than his own, and even for the most part by the admissions of the defendant himself. There is no doubt that he took possession and has expended his time, labor and money in the improvement of the premises.

Now the defendant's version of the matter is in the highest degree improbable. He says the plaintiff was to have only ten acres west of the slough and as much on the east side as he could pay for; but the land so paid for was not to be conveyed to the plaintiff in the defendant's lifetime. The defendant was to leave him the same land by his will. Surely no sane man ever bought property, paid full value for it, and erected costly improvements, upon the chance that his vendor would devise him the self-same property.

Again, the testimony shows that the plaintiff had cleared, fenced and reduced to cultivation some twenty acres west of the slough; that the defendant knew it, as he lived upon the farm; and that the cost of preparing such land for the plow was $15 per acre. This is attempted to be explained

by saying that, for clearing all over and above ten acres, the plaintiff was to have the use of the land for one year free of rent. But this is too unreasonable in itself to be believed, and it is contradicted by the fact that the plaintiff has retained possession for several years since the land was put into cultivation, without any demand for rent.

In his answer the defendant denies that plaintiff has paid him more than $375. In his deposition, however, he admits the payment of $500; and if he had computed the value of the cotton which he admits he received, according to its proved market value, it would swell the amount to near $600. Nor does he allege or show that the plaintiff was indebted to him on any other account to which the payments might be referred, nor offer to refund the surplus which is in his hands, if his own theory be correct. But he wishes the plaintiff to accept his deed for two unconnected tracts, one west of the slough, containing ten acres, and the other east of the slough, containing fifteen acres, in full satisfaction of the payments that have been made.

There is nothing involved except a question of fact, and the preponderance of the testimony being in favor of the Chancellor, the decree is affirmed. 2. Finding of Chancellor on evidence.

St. Louis, Iron Mountain and Southern Railway Co. v. Peach Orchard and Gainesville Railroad Co.

Damages: *Between railroad companies: Construction of grade at intersection.*

A railway company in building its road crossed the line of a projected railway upon a grade twelve or fourteen feet above the grade of the other. No work had been done on the projected line at or near the point of intersection, nor had the right of way been acquired from the owner, nor proceedings been taken to condemn it. *Held*, no injury to the projected road for which damages could be recovered.

APPEAL from *Greene* Circuit Court.
Hon. B. H. CROWLEY, Special Judge.

Dodge & Johnson for appellant.

The gravamen of the complaint is that by reason of defendant's unlawfully building and constructing its road-bed above the grade of plaintiff's road, that the *road-bed and right of way of plaintiff* was obtructed, to its damage, etc. Plaintiff had only an imaginary *railroad* at the point of intersection, no actual work had ever been done, and none is alleged in the complaint. The *railroad* was only in contemplation. No demand was ever made for a crossing or passage-way through defendant's embankment, and no specific damages were alleged or proved. The act of defendant in building its road was lawful (*Art. 17, sec. 1, Const.; Gantt's Dig., sec. 4943, pars. 5 and 6.*) Defendant was *first* to *build* its road across the *projected* line of appellant's *projected* road, and it had the right to cross it. Hence, plaintiff sustained no damage, alleged none and proved none, and the verdict was not supported by evidence, and is such as to shock one's sense of justice and fair dealing. Juries can not presume that there were damages, and in cases of this kind they must be proved.

L. L. Mack and *J. E. Riddick* for appellee.

Where a railroad company is entitled by statute to compensation for other railroads crossing its right of way, the damage may include the value of the interest or title taken and costs of changes and new structures required by reason of the crossing. *Pierce on R. R., p. 218; 121 Mass., 124.* See also *33 Barbour, 420; 87 Ill., 317; 24 Am. Rep., 345 and note 551; 14 Am. Rep., 42.*

SMITH, J. In the summer of 1881 the appellant railway company, contemplating the building of a branch rail-

way from its main line at Knobel, in the county of Clay, to New Orleans, Louisiana, commenced and worked southward to Gainesville.

Its surveyed line passed through the southeast quarter of southwest quarter of section 14, lying in township 18 north, range 5 east of the fifth principal meridian, in Greene County. This quarter section was owned by one F. S. White, a citizen of Greene County, who refused to give or sell the appellant a right of way through his place. Thereupon, on the twenty-second of October, 1881, the appellant commenced proceedings in Greene County Circuit Court to condemn the right of way. Summons was issued and served on F. S. White, the owner of the land, on October 29, 1881. Immediately thereafter the appellant commenced work through the land, and on the fifteenth day of December, 1881, had completed and in full operation its railway over this land, and was running its trains some miles south of it. On the fourteenth of January, 1882, nearly three months after the institution of the proceedings to condemn this land, and one month after the completion of appellant's railway, the owner of the land—the defendant in the condemnation proceedings—executed and delivered to the Peach Orchard and Gainesville Railroad Company, appellee, a deed to a right of way one hundred feet wide through the above-mentioned land. The right of way ran at right angles to appellant's completed road, and intersected it in an open cornfield which had been cultivated for fifteen years. Shortly after receiving this deed to the right of way, the appellee, on the fourth of February, 1882, filed its suit in the Greene County Circuit Court against the appellant, claiming $10,000 damages for crossing its projected road or right of way upon said land. To the complaint in this action, at the following term of court, a demurrer was sus-

tained and appellee amended his complaint. A demurrer in short was interposed to the amended complaint and by the court overruled. Appellant then answered, and upon the answer trial was had, and a verdict for $1,000 awarded appellee. The St. Louis, Iron Mountain and Southern Railway Company, after a motion for a new trial had been overruled, saved all of its exceptions and brought this appeal.

The burden of the complaint was, that after the plaintiff's line had been located and its grade established, the defendant unlawfully and against plaintiff's remonstrance constructed its road-bed at the point of intersection, twelve feet above plaintiff's grade, whereby the plaintiff's right of way was obstructed.

No actual work is alleged to have been done by plaintiff at the place of crossing. There was then at that point only a projected road which the plaintiff contemplated building at some future time. Nor had the plaintiff at the date of the alleged trial acquired from the owner the right of way over the land. As a railroad corporation it had the power to invoke the exercise of the State's right of eminent domain for the condemnation of so much of the land as was required for its use. And it had caused a preliminary survey of its route to be made. But nothing more having been done to fix its right at that particular place, it is difficult to understand how the plaintiff has sustained any injury for which the law awards compensation.

It was shown that at the time of the trial the plaintiff's road was three miles distant from the contemplated crossing. The defendant had the same right as the plaintiff to build a railroad. And the law imposed upon it no obligation to conform its grade to that of a projected or unbuilt railroad. If, then, the defendant had only done what it was authorized to do, it has committed no wrongful act.

Though the cost of construction to the plaintiff may be enhanced by the difference in the grades, yet this is probably loss without injury.

On the subject of damages, the plaintiff's engineer gave the following testimony:

"The defendant's crossing is fourteen feet higher than plaintiff's grade, and was built in December, 1881, and its road crosses nearly at right angles. Defendant's embankment is solid, and no way is left for plaintiff to put its road through. In order to build so as to cross defendant's road on a level, it will require an embankment commencing about one mile at the north, and will extend about two thousand feet on the south, so as to get a grade to cross on a level; and, according to my estimate, it will cost, if the plaintiff builds the embankment and crosses on a level, about $16,059.61; this will be extra cost caused by defendant's embankment."

Thus the damages, if the defendant is liable at all, are wholly conjectural, dependent upon a contingency which may never occur. For, if the plaintiff should abandon its project, or if, building to the point of intersection, the defendant should make an opening in its embankment sufficient to permit the passage of plaintiff's trains through and under the existing road-bed, no damages will have been suffered. No demand for a crossing has ever been made upon the defendant.

Reversed.

Block v. Wilkerson & Co.

Notes and Bills: *Acceptance of draft: What sufficient.*

The following indorsement by the drawee on a draft when presented for acceptance, "Protest waived, payment guaranteed," *held*, a sufficient acceptance to bind the drawee. Any words showing the intention of the drawee to accept or honor a bill will be sufficient.

APPEAL from *Miller* Circuit Court.
Hon. C. E. MITCHELL, Circuit Judge.

O. D. Scott for appellant.

The indorsements were only a guarantee, not an acceptance, and to hold appellant liable as a guarantor, there must have been demand, protest and notice. *2 Green, 189; 4 Ark., 76; 7 Pet., 112; 2 Bailey, S. C., 1; 35 N. H., 295; 14 La. Ann., 305; 42 Barb., 646; 29 La. Ann., 538; 14 Ark., 230.*

Compton, Battle & Compton for appellees.

No particular form of words is necessary to constitute an acceptance; any words showing an intention to accept or honor are sufficient. *1 Daniel Neg. Inst., 2d ed., pp. 400, 406, sec. 496, 503; Strong on Bills, sec. 242, 247.*

Where an instrument is susceptible of *two conflicting probable* constructions, the court will adopt that construction which is most consistent with good faith, etc. *2 Wharton on Evidence, sec. 1249; Broom's Legal Maxims, *729.*

If Coleman had funds in appellant's hands, then he was under obligation to accept, and the law will not impute bad faith to him in his indorsement. If he had no funds of the drawer's, and was under no obligation to accept, then Coleman was liable without demand or notice. *2 Daniel, pp. 111, 113,* and appellant would be liable even as guarantor. *24 Ark., 511,* and authorities cited by appellant's counsel.

STATEMENT.

ENGLISH, C. J. This action was brought the seventh of March, 1882, before a justice of the peace of Miller County, by Charles Wilkerson and George R. Ruffin, partners, under the firm name of Wilkerson & Ruffin, against Charles Block.

The complaint alleged that on the eighteenth of August, 1881, D. R. Coleman gave plaintiffs, for value received, his draft on Charles Block, as follows:

"TEXARKANA, August 18, 1881.

"$300. On the first day of October, 1881, pay to the order of Wilkerson & Ruffin three hundred dollars, value received, and charge the same to account of

"D. R. COLEMAN.

"To Charles Block, Texarkana, Texas."

That on the eighteenth of August, 1881, said draft was presented to said Charles Block for acceptance, whereupon he wrote on said draft these words: "*Protest waived, payment guaranteed,*" and signed his name thereto.

That on the first day of October, 1881, said draft was duly presented to said Block for payment, and payment requested, whereupon he wrote on said draft, "*Protest waived, and payment guaranteed,*" and signed his name thereto, by reason of which he undertook and obligated himself to pay said sum of three hundred dollars to plaintiff. That defendant Block had been often requested to pay the same, but had refused, etc.

There was a judgment in favor of plaintiff before the justice, and Block appealed to the Circuit Court.

In the latter court, the bill of exceptions states, "defendant pleaded orally for his answer, alleging that his liability upon the bill of exchange sued on was secondary, and not that of principal; that he was only a guarantor of the payment, and that plaintiff had by reason of non-protest and want of notice released from payment the principal in said draft, D. R. Coleman, the drawee thereof."

The parties submitted the case to the court, the plaintiffs

read in evidence the bill of exchange sued on, above copied, and the indorsement:

"Protest waived.

"Payment guaranteed.

"C. BLOCK."

Which was all the evidence. The court found for plaintiffs, and rendered judgment against defendant for the amount of the bill. No declarations of law were made by the court. Defendant moved for a new trial on the ground that the decision of the court was contrary to law and the evidence.

The motion was overruled and defendant took a bill of exceptions and appealed.

OPINION.

Appellant was not sued as a guarantor, but as acceptor of the bill, and was so treated by the court below.

The bill was drawn upon him, and when presented for acceptance, he wrote upon it "protest waived, payment guaranteed," and signed his name, and when the bill was presented for payment he made a similar indorsement. This is not the usual form of a commercial acceptance, but form is not essential by the law merchant, nor under the statute. (*Gantt's Digest, secs. 549–52.*) Any words showing the intention of the drawee to accept or honor the bill are sufficient. (*1 Dan. Nego. Inst., 2d ed., sec. 497.*) If he write upon it "I will pay the bill," and sign his name, it will be treated as an acceptance. *Ib.*

In this case appellant, by writing on the bill "protest waived and payment guaranteed," must have meant that he would pay the bill. No other reasonable interpretation can be given to the words.

Affirmed.

ROSE v. WYNN.

DAMAGES: *Lessor and lessee: Failure to deliver possession.*

In an action by a lessee against his lessor for damages for refusal or failure to deliver possession of the demised premises, the general rule for the measure of damages is the difference between the rent reserved and the value of the premises for the term; and if this value be not greater than the rent reserved, the lessee can in general recover only nominal damages, though the lessor without just cause refused to give possession. But if other damages have resulted as the direct and necessary or natural consequence of the lessor's breach of contract, it seems that they, also, are recoverable.

APPEAL from *Mississippi* Circuit Court.
Hon. J. G. FRIERSON, Circuit Judge.

O. P. Lyles for appellant.

The instructions (especially the second) are too broad and misleading. Under them the jury might have found the amount he might have made at the hotel business, which is remote and speculative. *9 Ark., 894; 30 Ib., 50; 8 Am. Law Reg., 369 (N. S.); 71 Penn., 51; 5 Am. L. R. (N. S.), 748.*

STATEMENT.

ENGLISH, C. J. This action was commenced the sixth of April, 1882, in the Circuit Court of Mississippi County, by J. B. Wynn against Martha Rose, for breach of a covenant for possession in a lease.

The lease declared on was executed the sixth of September, 1881. By its terms defendant demised to plaintiff for one year from the first day of November, 1881, the Planter's House in Osceola, usually kept as a hotel, and its appurtenances, furniture, table and kitchen ware, agreeing to

deliver to him possession of the premises on the first of November.

The plaintiff agreed to pay $175 for the use of the premises during the term, of which sum he was to pay $100 in cash on the last day of October, 1881, and execute to defendant a note for $75, payable at the end of the lease.

He also agreed to permit her to occupy a room in the house then occupied by her, and to board her free of charge during the term of the lease. She covenanted to make some repairs.

The complaint, after setting out the terms of the lease, alleged that on the day of its commencement plaintiff tendered to defendant $100 in cash, which she refused to accept, and was ready and offered to perform the other conditions of the contract on his part, but that defendant failed and refused to perform or comply with any part of the contract on her part. Plaintiff alleged that by reason of the failure and refusal of defendant to comply with the stipulations of the contract on her part he had been damaged to the extent of $1,000, for which he prayed judgment. He alleged no special damages.

In her answer defendant stated that she did engage to rent the house to plaintiff, and greatly desired to execute the contract, but found it impossible to get possession of the hotel from Mrs. Rowena Carrigan who was in the possession, and wrongfully held over. That she at once brought suit against Mrs. Carrigan for possession, but failed to get possession in time to carry out the arrangement with plaintiff. She denied that plaintiff was damaged as charged, and added that there was no consideration for the agreement; that it was a *nudum pactum* and void, and that she was prevented from consummating the agreement without fault on her part.

The case was submitted to a jury at the November term, 1882.

On trial the plaintiff, after stating the terms of the lease, testified in substance that he gave his note to defendant for $75, as agreed, and on the day he was to take possession under the contract, tendered to her the balance of the rent money, and she informed him that she could not let him into possession, and she did not give him possession. That he sustained great damage—several hundred dollars—by not getting the house. That he was forced to make other arrangements; found it impossible to rent another house, and he and his wife boarded at Parnell's seventeen days at a dollar per day. They, boarded at Charles Gaylord's, in all, four and a half months, at $15 per month each, and he boarded her mother at said hotel at $15 per month, for four and a half months. Had to furnish fuel extra of board. In the mean time he built him a house. He had a considerable lot of wood purchased and hauled to operate the hotel with, and was forced to sell it at a loss because he could not get possession of the house. That on account of not getting possession of the hotel, he was compelled to scatter his family and change round some three or four times in the four and a half months spoken of. He had much trouble in building his house, on account of high water. It cost him $45 per month to board three of his family for the four and a half months. That he did keep house on $20 per month.

Parnell testified that he thought plaintiff had been damaged some, but did not know how much. It was a good deal cheaper to keep house than to board.

Gaylord testified that he charged plaintiff $15 per month for board, but did not charge him for board of his wife, she being sister-in-law to witness.

Plaintiff and wife staid at his house three months. He thought plaintiff was damaged some by not getting the

hotel. A man, in his opinion, could keep house cheaper by $20 or $25 per month.

Mrs. Carrigan testified that she was occupying the hotel at the time plaintiff was to have had possession of it, and refused te give it up to Mrs. Rose because she had no place to go to, and thereby defendant was prevented from carrying out her contract with plaintiff, which she would gladly have done. Defendant brought suit at once against witness, but she gave a counter bond, and held on to possession. She could not see how plaintiff was damaged, because she had lost money by keeping the hotel, and it was a lucky thing for plaintiff that he did not get it. (This was ruled out by the court.)

Mrs. Rose testified that she was anxious to have plaintiff get the house as per agreement, but Mrs. Carrigan refused to give possession, and so she was prevented from carrying out her contract. She could not see how plaintiff was damaged. She did get the note as stated by plaintiff, and when she found she could not carry out her agreement, she surrendered the note to Mr. Parnell, who was surety on the note for plaintiff. It was true that plaintiff offered her the $100, which she refused, because she found she was unable to comply with her written agreement.

The above being all the evidence, the court instructed the jury as follows:

"1. If the jury find from the evidence that plaintiff and defendant entered into a written agreement for the lease of the hotel building, that plaintiff performed his part and defendant failed to perform her part of the agreement, they will find for the plaintiff the amount of actual damages sustained by reason of such failure of defendant.

"2. In estimating damages, should the jury find for plaintiff, they will take into consideration the additional trouble, cost and expense of boarding, and the amount of

damages actually sustained by plaintiff in being deprived of the use of the house during the period of the lease."

Excepted to by defendant.

The jury returned a verdict in favor of plaintiff for $150 damages.

Defendant moved for a new trial, on the grounds that the verdict was contrary to evidence, that the court erred in its instructions to the jury, and that the damages were excessive. Motion overruled; bill of exceptions, and appeal by defendant.

OPINION.

Though appellant was unavoidably prevented from delivering possession of the demised premises, in compliance with the terms of the lease, yet appellee was entitled to a verdict for some damages for breach of the contract on her part.

If loss upon the wood provided by appellee for the purpose of operating the hotel could be treated as actual damages, resulting directly from breach of the contract by appellant, appellee did not state what such loss was.

It seems the family of appellee consisted of himself, wife and mother-in-law.

The difference between the cost of boarding them for four and a half months until appellee built his house, and the expense of living at the hotel, had possession been delivered, was conjectural, and too uncertain to be treated as the measure of damages in such an action.

DAMAGES: Lessor and lessee: Failure of lessor to give possession.

The books agree that in an action by a lessee against a lessor for damages for refusal or failure to deliver possession of the demised premises the general rule for the measure of damages is the difference between the rent reserved and the value of the premises for the term.

If the value of the premises for the term is no greater

than the rent which tenant has agreed to pay, then the latter is not substantially injured, and can in general recover only nominal damages, though the landlord without just cause refused to give possession. But if the value of the premises is greater than the rent to be paid, the lessee is entitled to the benefit of his contract, and this will ordinarily consist of the difference between the two amounts. *Adair v. Boyle, 20 Iowa, 242; Trull v. Granger, 4 Selden, (New York Court of Appeals), 115; 3 Sutherland on Damages, 150; Green v. Williams, 45 Ill., 206; Dean v. Roesler, 1 Hilton, 422.*

Special damages.

It seems, also, from the current of adjudications, that if other damages have resulted as the direct and necessary or natural consequence of the defendant's breach of the contract, these are also recoverable. For example, if plaintiff in good faith, and relying on the contract, has made preparation to take possession, and these have been rendered useless by the defendant's refusal to comply with his contract, the authorities hold that there may be a recovery for the loss thus sustained. *3 Sutherland on Damages, 151; Adair v. Boyle, sup.; Green v. Williams, sup.; Driggs v. Dwight, 17 Wend., 71; Newbough v. Walker, 8 Grattan, 16.*

Per contra, *see Hughes et al. v. Hood et. al., 50 Mo., 350.*

In this case appellee did not prove that the rental value of the demised premises was greater than the rent which he contracted to pay.

Nor did he prove any actual special damages within the above rule.

The instructions of the court did not properly advise the jury as to the measure of damages in the action. And the damages assessed were not warranted by the evidence.

Reversed, and remanded for a new trial.

EMERSON V. HEDRICK.

LABORER'S LIEN: *Cutting and raking grass.*

Hay is the production of the laborer who cuts and rakes the grass, and he has a lien on it for the price or value of his labor.

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

John C. & C. W. England for appellee.

Prairie hay is a natural production, and being such, the plaintiffs *produced* nothing by cutting it, but simply changed its form, or assisted in putting it in a marketable condition. Having produced nothing, they were not entitled to enforce a lien against the hay. *27 Ark., 564.*

George Sibley for appellant.

Appellee was a *laborer* within the meaning of the statute, and entitled to a lien on the *production* of his labor. Production is the fruit of labor, it is the result, effect, yield of labor. (See *Webster in verbum.*) See also as to "labor." Hay does not grow in bales on the land, but to *produce* hay, the grass requires labor, rakes, mowers, balers, etc., to cut, rake, cure and bale; hence *it is* the *production* of the laborer, etc. Relies also on *27 Ark., 566–7*, so far as applicable.

STATEMENT.

ENGLISH, C. J. This is a suit to enforce a laborer's lien upon about seventy-five tons of prairie hay. The suit was commenced before a justice of the peace of Prairie County, by William Hedrick, against Lee and Baugh. Hedrick filed an affidavit before the justice (which served as a complaint), in which he stated that defendants were justly in-

debted to him in the sum of $120, for cutting and raking hay for them, which they had hauled and stacked at places named, and that he had a laborer's lien thereon under the statute; and praying that it be attached, etc.

Process was issued, the hay seized, and A. Emerson, doing business under the style of A. Emerson & Co., interpleaded for the hay, alleging that he owned half of it, and held a mortgage upon the other half, executed by the defendant, and that plaintiff was not entitled to a laborer's lien upon any part thereof.

The defendant made no defense before the justice; there was a trial upon the interplea, the lien of the plaintiff was sustained and judgment for his debt, etc.

Emerson took an appeal to the Circuit Court for himself and the defendants.

In the Circuit Court he moved to quash the attachment on the ground that plaintiff had no lien on the hay, and the motion was overruled. He then demurred to plaintiff's complaint, and the demurrer was overruled. In the motion and demurrer defendants were joined with Emerson. They rested on the demurrer, and judgment was rendered in favor of plaintiff against defendants for his debt, etc., and the hay condemned for its satisfaction. The interpleader, Emerson, appealed to this court.

OPINION.

LABORER'S LIEN: Making hay.

The only point made here for appellant is, that the complaint did not show that appellee produced the hay, and therefore he had no lien upon it for his labor.

The argument is, that prairie hay is a natural product, and, being such, appellee produced nothing by cutting and raking it, but simply changed its form or assisted in putting it in a marketable condition.

The statute provides that laborers who perform work

and labor for any person under a written or verbal contract, if unpaid for the same, shall have an absolute lien on the production of their labor for such work and labor. *Gantt's Digest, sec. 4079, etc.*

The person having such lien is required to make a sworn statement of the amount due, the kind of service, for whom rendered, material furnished, etc., and the statement must contain "a list of land, property, crops, or other production of his labor charged," and upon this, process in the nature of an attachment issue. *Ib., secs. 4080–1–2, etc.*

The whole statute was construed in *Dano v. M. O. R. R. R. Co., 27 Ark., 564*, in which the word "production," etc., was defined. See also *Taylor, Bradford & Co. v. Hathaway, 29 Ib., 597.*

Hay is grass cut and dried for fodder—grass prepared for preservation. Make hay while the sun shines. *Webster.*

Wild prairie grass is not hay, but when cut or mowed and raked it becomes hay, the drying or curing occurring between the former and the latter process. Hay may therefore with propriety be said to be the "production" of the laborer who cuts and rakes it—in other words makes it. To hold otherwise would be a very narrow construction of the statute.

Affirmed.

St. Louis and San Francisco Railway v. Smith et al.

Railroad: *Damages for right of way; evidence.*

Upon an inquest of damages for a right of way, the price which the owner gave for the land may be put in evidence as tending to show its value, but it is not conclusive. The owner may show in explanation, the circumstances under which he bought, the condition of the property at the time, and his improvements put upon it since his purchase.

APPEAL from *Washington* Circuit Court.
Hon. W. F. PACE, Special Judge of the Circuit Court.

B. R. Davidson for appellant.

The price paid for land may be put in evidence to show its value. (*Mills on Em. Domain, sec. 168; Pierce on Railroads, p. 225; 100 Mass., 350; 58 Pa., 26; 7 Allen, 313; 68 Ill., 380.*) The right to prove the market value of the land before and after the building of the road is clear. *Pierce on R. R., p. 225; 13 Met., 316; 118 Mass., 546; 65 Me., 230; 2 Iowa, 288; 36 Ib., 323; 74 Pa. St., 262; 18 Ill., 257; 10 Ind., 560; 18 Minn., 184; 64 Mo., 149; 5 Ohio St., 568, etc.*

L. Gregg for appellee.

Contends that while it may be that the court erred in excluding testimony as to the price paid for the land, etc., etc., yet the judgment is right on the whole case, and the damages not excessive on the testimony adduced. The correct rule is that the damages must be estimated upon the *market value,* and not upon what a party paid, or what it might have brought at a specific sale, or under peculiar circumstances, etc.

SMITH, J. This was a proceeding under the statute by a railway company to have the damages assessed for appropriating the right of way through the defendant's farm. The tract contained 237 acres, and the road ran through the cultivated part of it for the distance of three-quarters of a mile. The land actually taken was less than ten acres. The jury gave a verdict for $430 damages, upon which judgment was entered.

On the trial the petitioning company introduced McDaniel, one of the defendants, and offered to prove by him that he had, shortly before the commencement of the

condemnation proceedings, purchased the whole farm of his co-defendant, Smith, for $1,200, and had afterwards resold and conveyed it to Smith for the same price. Also, that at Smith's request, the consideration expressed in the deed was $2,000.

Hunt, a witness for respondent, after testifying to the market value of the land, was asked on cross-examination: "Do you know what Smith paid for the tract just before the road took the right of way?"

Smith, one of the defendants, had sworn that the 120 acres pierced by the railroad was worth $1,800 before the right of way was taken. On cross-examination he was asked these questions: "Did you not have this tract of land in your hands, as a real estate agent, for two or three months just before the right of way was taken, offering it for $1,500, and unable to find a purchaser?" "Did you not in the conveyance by McDaniel to you have the consideration placed at $2,000, when in fact the sale was for $1,200, in order to enable you to sell for a greater price?"

But the court refused to require or even permit the witnesses to answer any of the foregoing questions. The exclusion of this testimony was excepted to at the time, and the objection was renewed in the motion for a new trial.

The price which the owner gave for his land may be put in evidence, because it tends to show its value. It is not of course conclusive, because the owner may show in explanation, the circumstances under which he bought, the condition of the property at the time, and the improvements he has made upon it since the purchase. *Ham v. City of Salem, 100 Mass., 350.*

Reversed, and remanded for a new trial.

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SILVER v. LUCK.

PRACTICE: *Judgment on constructive service, etc.: Issues must be disposed of.* No personal judgment can be rendered against a defendant upon constructive service, when he has not appeared to the action. Nor can judgment be rendered without disposing, in some way, of the issues raised by the defense.

ERROR to *Carroll* Circuit Court.
Hon. J. H. PATTERSON, Circuit Judge.

S. W. Peel and *Henderson & Caruth* for plaintiff in error.

Plaintiff was a non-resident, constructively served by publication, and no personal judgment could be rendered against him.

This court has jurisdiction to review the judgment and correct errors which appear upon the face of the record. *32 Ark., 154; 29 Ib., 37; 26 Ib., 536.*

Clark & Williams for defendant in error.

The record conclusively shows *the appearance of Silver,* and that he *was in court* when the damages were assessed. He took no exceptions to the action of the court, took no bill of exceptions, and can not now be heard to complain. *25 Ark., 164; Green's Pl. and Pr., secs. 1136, 448.*

Argue upon the merits, and that while the judgment should have been *nil dicit* instead of *by default,* yet the difference is purely formal.

SMITH, J. This was an action on an attachment bond against Thrower, Silver and Cameron. The bond was given in a case pending before the mayor of Eureka Springs, sitting as a justice of the peace, wherein Silver and others were plaintiffs and Mrs. Luck was defendant. Upon the dissolution of the attachment, Mrs. Luck brought

this action, alleging that the marshal in executing the writ had taken and damaged her furniture, had destroyed her business and compelled her to go to a boarding house and to employ an attorney.

Thrower and Cameron filed a plea of former recovery for the same cause of action and satisfaction of the judgment so recovered.

The record is in some confusion upon the point whether Silver joined in this plea or not. He had been proceeded against as a non-resident and had been brought in by publication of a warning order in a newspaper. But no attachment against him had been prayed for or granted. The record entry shows the filing of an answer by his co-defendants at March term, 1882. And the answer begins: "Come the said defendants, B. K. Thrower and J. H. Cameron, by their attorneys, Peel and Hodge, and for plea and answer to plaintiff's said complaint, say," etc. After Cameron's name, the words "and D. H. Silver" are interlined; but it does not appear when and by whom this interlineation was made. At September term, judgment by default was rendered against Silver, and a jury impanneled, who assessed the plaintiff's damages at $500.

The court evidently proceeded upon the idea that Silver had never appeared to the action. And if such was the case, no personal judgment could be rendered against him upon constructive service. *Gantt's Digest, sec. 4737; Williams v. Ewing, 31 Ark., 229; Goodwin v. Anderson, 17 Ib., 36; Cooper v. Reynolds, 10 Wall., 308; Pennoyer v. Neff, 95 U. S., 714; Coleman's Appeal, 75 Penn. St., 441; Drake on Attachment, 5th ed., secs. 5, 449.*

If, on the contrary, Silver did unite with his co-defendants in a joint answer, then no valid judgment could be given against him until the issue raised by that answer had been, in some way, disposed of. *Hicks v. Vann, 4 Ark.,*

526, Reed v. Bank of The State, 5 Ib., 193; Alexander v. Stewart, 23 Ib., 18.

The judgment was, therefore, in any view, erroneous, and must be reversed. Upon the remanding of the cause, Silver is to be regarded as in court, the same as if he had been personally served with process. He has voluntarily made himself a party to the action by prosecuting this writ of error.

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SOUTHWORTH v. THE STATE.

CRIMINAL LAW: *Twice in jeopardy.*

A conviction of petit larceny in a justice's court is a bar to a prosecution in the Circuit for grand larceny for the same offense.

APPEAL from *Pike* Circuit Court.
Hon. H. B. STUART, Circuit Judge.

P. C. Dooley for appellant.

That a person can not be put twice in jeopardy for the same offense is well settled. The difficulty in applying the principle is where there are degrees in the crime, and where an included offense is tried by a court having no jurisdiction of the highest grade. All offenses of larceny are degrees of the same offense. (*Code, sec. 260.*) Justices have jurisdiction in petit larceny.

Appellant, having once been tried and convicted and punished for larceny, can not again be put in jeopardy for any of the grades or degrees of that offense, and again punished for the *same* offense. *Bishop Cr. Law, sec. 1057; 55 Iowa, 530; 58 N. H., 257; 36 Ind., 280; 50 N. H., 150; 57 Barb., 46; 14 Ga., 8; 43 Vt., 324; Am. Law Review, Oct. 1883, p. 740-1; 2 Swan, 493.*

C. B. Moore, Attorney General, *contra*.

The case of *State v. Nicholls*, *38 Ark.*, *550*, is conclusive of this case, and especially that part founded on the case of *Commonwealth v. Curtis*, *11 Pickering*, *134*.

The former conviction may have been a bar to any conviction of *petit larceny*, but not of *grand larceny*, for the justice had no jurisdiction of that offense, and hence he was in no jeopardy for that offense.

Appellant should have pleaded former conviction of *petit larceny*, thus preventing the possibility of a conviction of the included lower grade, and then pleaded not guilty of grand larceny; and if it had turned out in evidence that the property was not over $10, he would have been acquitted altogether. By pleading as he did, he lost the benefit altogether of his former conviction.

English, C. J. On the twenty-ninth of September, 1882, P. H. Southworth was arrested by the sheriff, and taken before a justice of the peace of Pike County, on a charge of stealing a cow. The case was postponed until the second of October, when the witnesses were examined by the justice, who found that the value of the property stolen was less than ten dollars, and that therefore the accused was not guilty of grand larceny. Thereupon the prisoner, under advice of his counsel, pleaded guilty to the charge of petit larceny, and was sentenced by the justice to imprisonment in the county jail for twenty-four hours, and to pay a fine of $25.

Twelve days later he was indicted in the Circuit Court of Pike County for the same larceny, the indictment alleging the value of the cow to be $12.50. He pleaded in bar the former conviction; the court sustained a demurrer, interposed by the State to the plea; whereupon, the prisoner resting and relying on his plea in bar, entered the

plea of guilty to the charge, was sentenced to the penitentiary for one year, and appealed.

By section 8 of the Declaration of Rights, "no person, for the same offense, shall be twice put in jeopardy of life or liberty," etc.

The difference between grand and petit larceny, under the statute, rests entirely upon the value of the property stolen. Where the value of the property stolen exceeds $10, the punishment is imprisonment in the penitentiary for not less than one, nor more than five years. When the value of the property stolen does not exceed $10, the punishment is imprisonment in the county prison not more than one year, and fine of not less than ten, nor more than three hundred dollars. Act of March 22, 1882, *Acts of 1881, pp. 144-5.*

Under a charge of either of the grades of larceny, the liberty of the accused is in jeopardy. Not only so, but on conviction for petit larceny, as well as grand larceny, the accused is rendered infamous. *Gantt's Dig., sec, 2482; See also sec. 2, art. 3, Constitution.*

The Constitution shields and protects life and liberty, and reputation as well, from being twice put in jeopardy.

Remove or disregard this shield, and upon the oaths of witnesses before a justice of the peace, that the value of stolen property does not exceed $10, the accused may be deprived of his liberty, and upon the oaths of other witnesses in the Circuit Court, that the value of the property does exceed $10, the accused may be again deprived of his liberty for the same larceny. This would open a door to injustice, which it is safer to keep closed, except in clear cases of the exercise of jurisdiction by justices of the peace under circumstances of fraud and collusion.

We are unwilling to extend the decision in *State v. Nichols, 38 Ark., 550,* to cases of larceny. There the punish-

ment was a fine only, and the accused was in no danger of being deprived of his liberty, or rendered infamous by the judgment of the justice.

Men are not so apt to attempt to commit a fraud on jurisdiction in cases of larceny, as they are where they can substitute a mere fine for a misdemeanor for imprisonment in the penitentiary for a felony and its consequences.

Reversed and remanded to the court below with instructions to overrule the demurrer to the plea of former conviction, and for further proceedings, etc.

STATHAM v. THE STATE.

CRIMINAL PRACTICE: *On motion for continuance.*

Statham, indicted for selling liquor in violation of the three mile law, filed a motion for continuance for want of testimony of an absent witness, stating what the witness would testify. The State admitted that the witness would testify if present, as stated in the motion, and thereupon the motion was overruled. On the trial the court excluded the alleged testimony as incompetent. The testimony would have tended to prove that the witness, and not the defendant, sold the liquor. *Held*, error. The testimony was competent, but if incompetent the motion for continuance should have been refused on that ground, and not on the admission of the State.

APPEAL from *Franklin* Circuit Court.
Hon. G. S. CUNNINGHAM, Circuit Judge.

Ed. H. Mathes for appellant.

Gage's testimony was clearly admissible and it was error to exclude it. This is such a palpable error, and the verdict is such a departure from the law and evidence as to shock one's sense of justice. *30 Ark., 403; 33 Ib., 757.*

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

1. The indictment is good, substantially in the words of the one in *Witt v. The State, 39 Ark., 216.*

2. Though the court may have erred in excluding Gage's testimony, yet *the verdict was right on the whole case. State v. Lawson, 14 Ark., 114.*

English, C. J. The indictment in this case charged, in substance, that Frank Statham, on the twenty-eighth of November, 1882, in the county of Franklin, and within three miles of the church and school house situated in the town of Ozark, unlawfully did sell to one T. L. Bolinger one pint of spirituous and intoxicating liquors, when the county court of said county had made an order in compliance with the act of the twenty-first of March, 1881, prohibiting the sale, etc., of such liquors within three miles of said church and school house.

Defendant moved for a continuance on account of the absence of one Anderson Gage, a material witness for him. The State admitted that if Gage was present he would testify as stated in the motion, and thereupon the court overruled the motion for a continuance.

On the trial, after the State had closed, defendant offered to read in evidence from the motion for continuance his statement of what Anderson Gage would swear if present, under the admission made by the State to avoid a continuance. The court ruled that the testimony of Gage was incompetent, and excluded it from the jury, and defendant excepted.

The defendant was convicted, refused a new trial, took a bill of exceptions and appealed.

The only error complained of here, which has any plausibility in it, is the exclusion of the testimony of Gage.

If the testimony of Gage was incompetent, the motion

for a continuance should have been overruled on that ground, and not upon the admission made by the State.

The Attorney General does not insist that the testimony of Gage was wholly incompetent, but submits that, if admitted, the State would nevertheless have been entitled to a verdict upon the whole of the evidence, and therefore its exclusion was an error without prejudice.

The testimony of Gage would have tended to prove that he, and not appellant, made the alleged unlawful sale to Bolinger. What influence it might have had upon the jury, if admitted, we do not know. We can not undertake to say that they would have convicted appellant, if the excluded evidence had been admitted. It is deemed safer to award a new trial.

Reversed and remanded for a new trial.

Blackwell v. The State.

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Liquor: *Local option law: Evasion of.*

Defendant had a billiard saloon at Dardanelle where the local option law was in force. Coats, by the defendant's direction, delivered to defendant's son at his billiard saloon, money for a quart of whisky. Defendant sent to his dram shop outside of the local option limits, got the whisky there, and his son delivered it to Coats at the billiard saloon in Dardanelle. *Held*, that the sale was in Dardanelle and defendant was rightly convicted.

APPEAL from *Yell* Circuit Court.

Hon. G. S. Cunningham, Circuit Judge.

Gibson and *Allen* for appellant.

C. B. Moore, Attorney General, *contra.*

English, C. J. S. J. Blackwell was indicted for selling a pint of intoxicating liquor to J. B. Coats within three miles of a school house in Dardanelle, where the local option law of twenty-first of March, 1881, had been put into operation by an order of the county court of Yell County.

On the trial it was proved that defendant kept a billiard hall in Dardanelle, and was a partner in a saloon at Caulksville, six miles out.

J. B. Coats, witness for the State, testified, in substance, that defendant kept a billiard hall in Dardanelle, and he got some whisky from his house on last Friday (before the trial). That he paid the money and received the whisky at defendant's billiard hall. Witness saw defendant the Thursday before, and asked him for whisky, and he said he did not have any there. Witness offered him the money to get him some at Caulksville. Defendant said he could not take it, but to leave the money anywhere, and step in and get his son to write an order for it, and that he could leave the money with his son, or anywhere where he could get it. On Friday his little boy called witness and handed him the whisky. The defendant was in his billiard hall at the time.

Pendergrass, a witness for the defendant, testified that he went out to Caulksville, on Thursday, in company with defendant, and in defendant's buggy, with an order for the prosecuting witness, J. B. Coats, and his money, for the purchase of a quart of whisky, and with that order he took others and brought in the whisky and left it at defendant's house. He was not the agent or employé of the defendant, and he only did it for accommodation. The whisky was bought at Caulksville, at the saloon of the defendant and W. E. Cotton, a distance of six miles from Dardanelle school house. Witness left the whisky at defendant's billiard hall, in Dardanelle.

It was admitted that the money was deposited with the defendant's son, and the whisky received, within three miles of the school house named in the indictment, where an order of the county court previously made had put the local option law into operation.

The court charged the jury as follows:

"If the jury find from the evidence that the order and money for the whisky were left with the defendant's son, and the son was acting as agent for his father, the defendant, and that the whisky was delivered here by the son to J. B. Coats, they will find the defendant guilty as charged." To the giving of which instruction the defendant excepted.

The defendant moved two instructions, as follows:

"1. In order to warrant a conviction in this case, it must be proven to the minds of the jury beyond a reasonable doubt, that the defendant sold or gave away a quart of whisky to the prosecuting witness, J. B. Coats, within twelve months of the finding of the indictment, and within three miles of the school house in the town of Dardanelle.

"2. If the jury find from the evidence that the defendant refused to take the money when offered to him in Dardanelle by the prosecuting witness, Coats, for a quart of whisky, telling him that he could not take pay for it in Dardanelle, but if he would leave the money in town where he could get it, he would send or take it out to his store, where he could lawfully sell it to him; and if it appears from the evidence that the quart of whisky was bought and paid for at the store, where it was lawful to sell it, the delivery of the same in Dardanelle or elsewhere within three miles of the school house, etc., after its purchase, was not a sale within the meaning of the statute, and they must acquit the defendant."

The court gave the first and refused the second of these instructions.

The defendant was found guilty by the jury and fined $25, refused a new trial, took a bill of exceptions and appealed.

The evidence warranted the verdict, and upon the facts in evidence, there was no error in the charge of the court.

The case is similar to *Yowell v. The State, 41 Ark., 355*, and what was said there is applicable to this case.

Affirmed.

BULLOCK v. NEAL, AD.

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1. PRACTICE: *Change of judges during a trial.*
When the judge at a trial becomes sick and unable to proceed after the evidence is all in and the instructions have been given to the jury, the trial should proceed under a special judge, before the same jury, and without rehearing the testimony.

2. BILL OF EXCEPTIONS: *By whom to be signed.*
Where different judges preside during the progress of a trial, each should sign a bill of exceptions as to the proceedings before him.

3. BILL OF EXCEPTIONS: *Order of court to file.*
When a bill of exceptions is properly signed and filed it becomes a record *proprio vigore* without any order of court making it so.

ERROR to *Sebastian* Circuit Court.
Hon. J. A. YANTIS, Special Judge.

J. B. P. Bullock, pro se.

The jury, upon Judge Rogers' disability, were, by operation of law, discharged; in other words, it was a mistrial, and upon the election of the special judge, a new jury should have been impanneled, and heard the cause anew.

C. B. Moore for appellee.

The bill of exceptions is marked filed by the clerk, *but was not entered of record, nor in any way made part of the record*, and can not be considered by this court. *35 Ark., 386; 37 Ib., 370.*

Judge Rogers heard the evidence and instructed the jury, and he only was competent to sign the bill of exceptions. *37 Ark., 370.*

There being no bill of exceptions, no error can be presumed in the judgment. *Supra and 37 Ark., 37.*

EAKIN, J. The transcript returned with the writ of error, shows a case determined in the Circuit Court of Crawford County, on appeal from a justice of the peace, in which defendant in error recovered judgment in both courts. No errors affecting the merits of the controversy are disclosed. No sufficient bill of exceptions was taken. The questions made regard jurisdiction and practice.

1. PRACTICE Change of judges during trial.

The case was tried by a jury at the April term, 1882, of the Circuit Court, the Honorable John H. Rogers, regular judge, presiding. Instructions given orally by consent, were not excepted to, and by like consent the jury were allowed to disperse, after having heard the evidence and instructions.

The next day, the regular judge being sick and unable to continue in the discharge of his duties, a special judge was elected to preside, before whom the cause was argued by counsel and submitted to the jury. They found for the plaintiff, and judgment was rendered against Bullock and his sureties on the appeal bond; who two days afterwards moved for a new trial. This motion at a subsequent day was overruled, as was also a motion in arrest. Afterwards, during the term, the Honorable William Walker, who had been appointed as regular judge in place of Hon. John

H. Rogers, who had resigned, appeared and took his seat in place of the Honorable James A. Yantis, who had been acting as special judge. Judge Walker had been an attorney in the case for the defendant, Bullock, and was disqualified thereby from taking any action upon it.

Then follows, in the form of a record entry, what can be only considered as a memorandum of the clerk, to the effect that the Honorable James A. Yantis, having vacated the bench, but being in the court-room, did at the request of defendant in the action, sign a bill of exceptions, at the same time informing the defendant that he had no authority to sign it, and instructing the clerk not to enter it of record.

What purports to be a bill of exceptions is transcribed and certified by the clerk, which is signed by Judge Yantis, and marked filed. There is no formal prayer for an appeal, although it is recited in the supersedeas bond that an appeal had been taken. The want of an appeal is not important on writ of error.

It is submitted as matter for arrest, that the jury were not discharged upon the election of the special judge, and a new jury selected. The jury had heard the evidence and instructions, and had dispersed to await the argument of counsel. There is no reason why this should not be made, under the presiding control of the special judge. The instructions had not been excepted to, and if it had been important to determine precisely what the evidence had been, the special judge might, in several ways, sufficiently have advised himself of it, to have enabled him to regulate the discussion. Upon a difference amongst the attorneys as to testimony during an argument, it is not uncommon practice to recall a witness, not for re-examination, but to state what he had testified. After the evidence has been admitted, and the law settled, the presidency of

the judge is more for the purpose of preserving order in the discussion, and in the future conduct of the jury, than for anything else. It would be an unnecessary delay, expense and vexation to clients in such cases to impannel a new jury, and to recall witnesses. It is not demanded by the ordinary requirements of justice. The cause properly proceeded.

2. BILL OF EXCEPTIONS: By whom to be signed.

All matters of exception, occurring whilst the regular judge was presiding, should have been shown by a bill of exceptions, certified to be true under his signature. As to those matters, the special judge had no authority to sign a bill. If, however, the exceptions regarded any matter which occurred before the special judge, or was first brought to his notice, such as misconduct of the jury, newly discovered evidence, etc., he should have signed the bill himself, although he had vacated the bench. The object of the signature is to give verity to the statement of the occurrences complained of as erroneous. As it is the duty of the presiding judge to consider them, he can most properly certify them. In doing so he performs no judicial act, requiring him to have the present character and authority of a judge. He thereby orders nothing, and determines nothing, not already ruled. The certificate has reference to past transactions. The honorable special judge was mistaken in basing his opinion, as to his incompetency to sign the bill of exceptions, upon the ground that he had vacated the bench. He might sign it as to all matters occurring before himself. (*Watkins v. State, 37 Ark., 370.*) As to matters arising before the regular judge, he was the only competent person to certify them, except in certain contingencies, when bystanders might do so.

3. SAME: Order of court to file not necessary.

The bill was, however, signed by the special judge, and duly filed by the clerk. This made it good to the extent above indicated. It is usual to make an order of court,

constituting the bill when so filed a record, but if properly signed and filed, it becomes such *proprio vigore*, to the same extent that pleadings are, which require no such order. (*Gantt's Dig.*, *sec. 4697.*) In the present case the judge presiding when the bill was filed had been an attorney in the case, and to have made his order essential would have been to impose on him too delicate a responsibility in case of a doubtful bill. Besides it might be impossible to coerce such an order from a judge whose refusal to sign might be remedied by bystanders. The decision of this court in *Walker v. State, 35 Ark., 386*, goes no farther than to intimate that if a bill of exceptions be not file-marked, then an order of court making it a record might suffice. In that case there was neither.

The motion for the new trial was made before the special judge, which, with its alleged grounds, was a proceeding which he might certify; but this court can not consider the contents and recitals of the motion, unless the facts are set forth in the bill independently of the motion. All the alleged grounds, therefore, which refer to evidence, instructions, excess of verdict and the antagonism of the verdict to the evidence, must be overlooked, as we do not have the evidence before us. That should have been shown under the signature of Judge Rogers. *Cowall v. Altchul, 40 Ark., 172.*

The only ground of the motion properly verified is, that the cause was argued before the special judge, and the verdict received by him, when the jury should have been dismissed. In this there was no error.

Affirm.

FURSTENHEIM ET AL. V. ADAMS.

APPEAL: *When order against garnishee appealable.*

An order ascertaining the amount of a garnishee's indebtedness to a defendant in an attachment suit, and directing him to pay it into court, is after judgment against the defendant in the attachment, final and appealable to the Supreme Court, and if superseded no action can be maintained on it during the pendency of the appeal.

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

G. S. Cunningham for appellants.

The order was not final. (*Freeman on Judgments, secs. 12, 26, 27, 33 34, 36; Gantt's Dig., secs. 421–3; 29 Ark., 470; 4 Otto, 11; 2 Nash Pl. & Pr., 4th ed., sec. 32.*) But if it were final, still plaintiffs had the right to sue upon it. *Freeman on Judgments, 2d ed., sec. 432, etc.*

STATEMENT.

EAKIN, J. Appellants sued Adams in an action in the nature of debt, alleging that they had sued out an attachment against the firm of Stewart & Co., in which suit the defendant had been garnished; that, in answer, he had denied his indebtedness to Stewart & Co., or that he had any effects of theirs on hand; that in the suit the attachment had been sustained; that plaintiffs had recovered a judgment against Stewart & Co. for $293.40, with interest, debt and their costs, taxed at $9.55, and at the same term of the court obtained an order directing the defendant, Adams, to pay into court the sum of $324.50, in discharge of his indebtedness to Stewart & Co.; that they had afterwards demanded said sum of $293.40 of said Adams; or that he should pay the sum ordered into court, both of which he had refused.

Upon issues formed the cause was submitted to the court, which found that the order to pay in money had been made on defendant, in the attachment case of plaintiffs against Stewart & Co., substantially as stated. But finding further, that said garnishee at the time excepted to the order, and prayed an appeal to this court, which was granted, and upon it a supersedeas had been issued; and that afterwards the plaintiffs made the demand as alleged.

The court declared the law to be that the order so made was final, and that, as it had been superseded, no action could be brought upon it pending the appeal which was then undetermined. The suit was dismissed, and plaintiffs appealed.

OPINION.

APPEAL: When order against garnishee appealable

If it were true that the order made in the original case was not final, and the subject of appeal, the proper mode of correcting the error would have been to move here to have the appeal dismissed. It is within the jurisdiction of Circuit Courts to grant appeals, and, through the clerks, to take bonds and issue writs of supersedeas. It is not proper to disregard their judgments in such cases as nullities. If they act erroneously in granting premature appeals, and issuing writs of supersedeas through the clerks, they may be corrected in the appellate tribunal.

In the case of *Adams v. Penzel & Co., 40 Ark., 531*, decided by this court at the last term, an appeal of this nature, by the same garnishee, was entertained by this court, without any question. No motion was made to dismiss, and this particular point was not considered, yet there is no reason to doubt that the action of this court was correct. After judgment rendered in the attachment suit against Stewart & Co., and after it was adjudicated that Adams had effects

in his hands, and he was ordered to pay them over for the purposes of the judgment, it is difficult to imagine what further remained to be done. It is like where a garnishee is ordered to pay money into court *pendente lite*. Adams had only to pay or appeal.

The amount ordered to be paid in slightly exceeds the judgment recovered against Stewart & Co. That, if error, is one of the matters which the appeal of Adams will bring up for correction. It certainly gives plaintiffs in this cause no right to disregard the supersedeas. Doubtless some such explanation will appear in the appealed case as appeared in that of Penzel & Co., which was evidently one of a lot of cases against the same defendants, and involving the same subject matter with this.

Affirmed.

McTighe, Ad. of Wallace, v. Herman.

1. Evidence: *Of witness in another suit: When admissible.*

The deposition of a witness in one suit is admissible as evidence in another suit between the same parties and regarding the same issues, when the witness has left the State.

2. Statute of Frauds: *Parol promise to pay another's debt.*

A parol promise to pay for goods previously sold to another is void; but if the promissor authorizes the goods to be charged to him at the time, or afterwards when informed of the charge ratifies it, he will be bound as for his own debt and not the debt of another.

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

R. C. Newton for appellant.

1. The men boarded by Herman were the hands of Stapp and not of Wallace, and any verbal promise made

by Wallace to pay their board, not being in writing, fell clearly within the statute of frauds and could not be enforced. *Gantt's Dig., sec. 2951; Kurtz v. Adams, 7 Eng., 174.*

2. The alleged deposition of Kerrigan was a mere memorandum agreed to be used in a different suit, and agreed *only* for that purpose.

W. L. Terry for appellee.

1. The credit was given to Wallace and not to Stapp; the board was charged to Wallace, and when therefore Wallace, with a knowledge of what had been done, verbally promised to pay, it was a promise to pay his own debt. Here there was no original debt of Stapp to which Wallace's promise could be collateral, and when he ratified Stapp's act, in having the board charged to him, it became a promise to answer for his own debt. *Story on Agency, sec. 244 and note 3; Throop on Validity of Verbal Agreements, secs. 147-8-9 and 158,* and *Darnell v. Tratt, 2 Carr & Payne, 82.*

2. Kerrigan's testimony was taken upon an issue between the same parties, upon the same subject matter of controvery, and he was absent from the State. It was clearly admissible. *Coke v. Fountain, 1 Vern., 413; Nevill v. Johnson, 2 Vern., 447; 10 Ill., 301; 2 John. Chy., 475.*

3. Substantial justice having been done, this court will not reverse. *34 Ark., 105; 23 Ib., 120; 15 Ib., 451.*

EAKIN, J. Wallace sued Herman before a justice of the peace for $35, the price of a tent. Herman had been engaged in boarding operatives upon the line of the railroad between Little Rock and Pine Bluff. He brought in a set-off against plaintiff for the board of hands, amount-

ing, after giving credit for the tent, to something over a hundred dollars. After a recovery by the plaintiff before the justice, Herman appealed to the Circuit Court, and there recovered judgment, on his set-off, against plaintiff for a balance of $103.09, found by verdict of a jury. After motion for a new trial, and exceptions saved by bill, plaintiff appealed to this court. Dying, pending the appeal, the suit is revived in name of his administrator.

The litigation is concerning the plaintiff's liability for the board of the hands claimed in the set-off. There is no contest concerning the tent, nor the amount of the board bill. The question arises under the statute of frauds. The circumstances are that Wallace being a contractor on the road, sublet to one Stapp, the construction of certain "bents," which seem to be spans of trestle work. Stapp had hands working under his directions and control, which were employed by him, although their wages were sometimes paid by Wallace, and charged to Stapp out of his pay under the contract. Stapp had kept a cook for the hands but the cook became sick, and he engaged board for them with defendant Herman. The proof tends to show that Herman was unwilling to trust Stapp for payment, and that Stapp, to induce him to do so, told him that Wallace would be responsible for the payment. It tends further to show that Wallace, afterwards, upon being solicited by Herman to pay the board, verbally promised to do so, at least as to some of the hands; the proof as to the promise to pay for all being conflicting. There is no direct proof that Wallace knew, when the contract for board was made by Stapp, that he had assumed to act as Wallace's agent, and to direct the credit to be given to Wallace, nor that he had been informed of that when he afterwards made the verbal promises to pay the bill, or that he had ever authorized Stapp to direct the

credit to be given to him, or that it was his duty to procure boarding for Stapp's hands. All these matters were such as a jury might, or might not, infer from other facts and circumstances in evidence.

We therefore pass without further comment the usual grounds of a motion for a new trial, often inserted *pro forma*, or from superabundant caution, that the verdict was contrary to or unsupported by evidence.

1. EVIDENCE Of witness in another suit: When admissible

It is made a ground of the motion that the court improperly admitted testimony on the part of defendant. This alludes to a certain deposition of one John Kerrigan, which had been taken in another suit between Herman and Wallace concerning this same board bill. It seems that Herman had first sued before another justice, and Wallace had not interposed the set-off of the tent. That was allowed by Herman in his account. Wallace, in place of accepting the credit or setting up the cross matter regarding the tent, brought this suit for it, and Herman interposed as a set-off the same account sued on elsewhere. The first suit seems to have been abandoned, but that is of no consequence, as no point was made on its pendency. The deposition was taken in a suit between the same parties, regarding the same issues; and, as Kerrigan had left the State, was admissible. *Greenl. on Ev., vol. 1, sec. 164; 45 Mo. Rep., p. 267; 69 Ib., p. 365.*

1. STATUTE OF FRAUDS: Promise to pay debt of another.

The instructions are not all contained in the bill of exceptions, whether from oversight or design we do not know. It seems there was a third instruction asked by plaintiff, and refused, which is not copied. So far as we can judge of the instructions, as shown, they were correct and consistent. They set forth the statute of frauds correctly as applied to promises to pay the debt of another, and in the absence of a written agreement, or memorandum, advise the jury that the liability of plaintiff to pay

the board bill depended upon whether the credit was originally given to him, either by his authority at the time, or without his authority, if he were afterwards informed that it had been so given and ratified it, but would not be liable upon a verbal promise to pay a debt of Stapp for the board of hands. The motion for a new trial was properly overruled.

Affirm.

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42 289
88 612

BREWER ET AL. V. KEELER ET AL.

1. ADVERSE POSSESSION: *Tenants in common.*

The possession of a part of tenants in common is the possession of all, and is not adverse to those not in actual possession until their rights are denied by some open, notorious and public act of those in possession amounting in law to an ouster.

2. STATUTE OF LIMITATIONS: *Tenants in common.*

The filing of a bill for partition of the whole property between tenants in common in actual possession, ignoring the rights of a co-tenant not in possession, is such an open, public and notorious denial of his rights as amounts in law to an ouster, and sets in motion the statute of limitations against him.

3. SAME: *Staleness of claim.*

Though there be no positive statute bar to a claim, it may yet be so stale that a court of equity will give it no support. [For the facts constituting the staleness in this case see the opinion.—REP.]

4. LANDLORD AND TENANT: *Tenant buying outstanding title.*

A tenant can not be relieved in any court from the payment of rent and restoration of the premises to his landlord, by buying up the outstanding title from another during his tenancy.

5. FRAUD: *May be waived.*

Every case involving questions of fraud or good conscience must, to some extent, depend upon its own peculiar circumstances; and parties may, after a long time, be held to have waived the fraud after rights of others have been acquired, even with notice of it.

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

N. T. White and McCain & Crawford for appellants.

1. When one purchases land at execution sale under an agreement with the debtor to hold the title until the money is repaid, a trust arises. *19 Ark., 39; 20 Ib., 272; 31 Ib., 272.*

2. If a trust, and the execution defendant remains in possession, third parties are affected with notice. *33 Ark., 465.*

3. Mere silence, when there is no obligation to speak, or acquiescence which induces no one to act, is not an estoppel. *33 Ark., 465.*

4. One who purchases at judicial sale an undivided interest in land of which he is already in possession, and who afterward makes partition and takes exclusive possession of that assigned to him, holds under the partition and not under the judicial sale, and the limitation is seven not five years. As to limitation between co-tenants see *20 Ark., 375, 557; 31 Ib., 272.*

Bell & Elliott for appellee, submit:

1. There was no trust in Walter P., as he distinctly says he bought for himself, with the intention of giving it back to *Bob*, if he needed and paid for it, but that he never paid for it.

2. If there was a trust *Bob* is estopped to deny Keeler's title, having notice and stood by and permitted him to pay for it and make improvements for seven years without protest, and when the division was made carried the chain, etc., and admitted all the time that *Walt* had *dumfoozled* him out of his lands, etc. Beside the statute of five years bars him from disturbing a *judicial* sale.

3. Mattie Phelps' claim is *stale.*

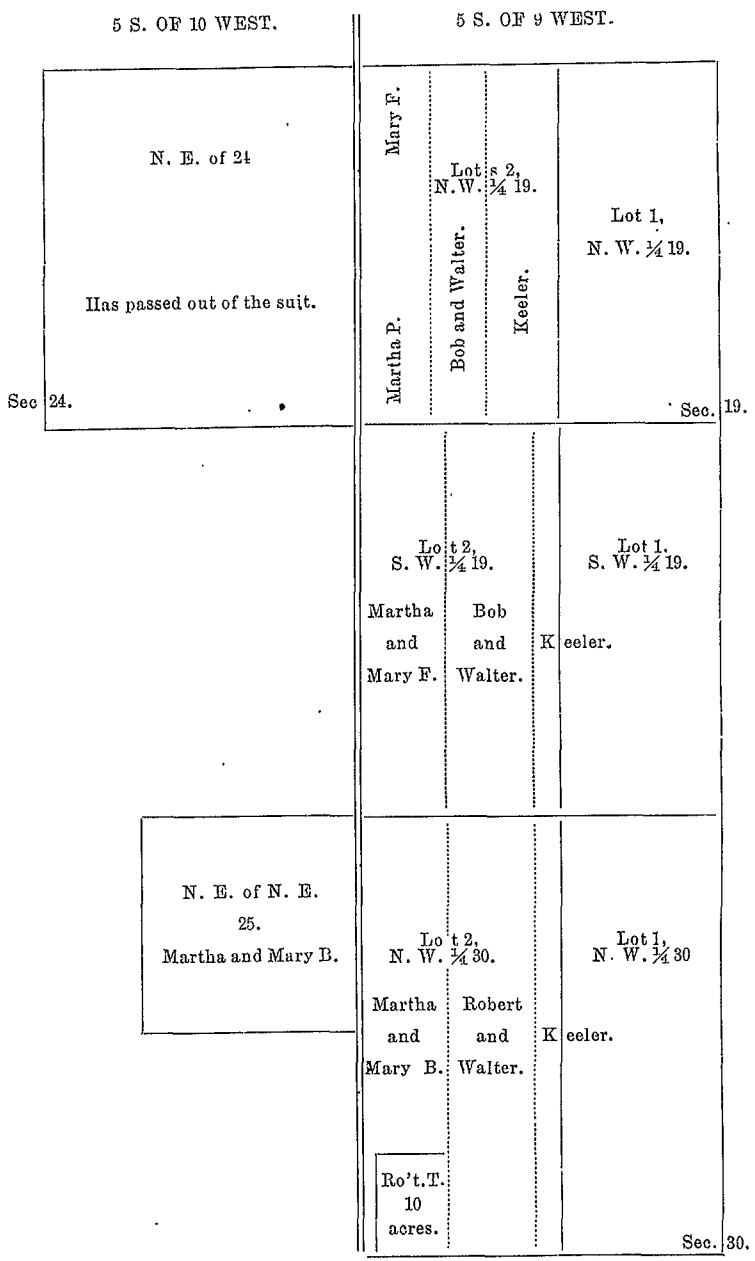
EAKIN, J. This is a bill for partition and to quiet titles and enjoin the collection of rents with cross bills by different defendants setting up conflicting interests. The controversy regards lands which have been or now are held by members of the family and blood of Henry C. Bradford, long since deceased, although for the most part the rights of the parties are not rested upon any claim from heirs by descent. The titles have become complicated in a long course of years by trusts and conveyances, and intermarriages, and sales of undivided parts under mortgage and upon execution. The parties, as is usual in families, have dealt somewhat loosely with their several interests under a common occupation, and until a comparatively recent period, there has been no effort for partition.

This suit is brought by Brewer, who married one of the grand-daughters of Henry C. Bradford, and claims under a conveyance of an undivided interest from another of the grand-daughters.

The defendants are different surviving members of the family with others claiming under them by purchase or by marital right. Throughout it is a family controversy.

The lands will be better understood by this plat, made from the Government surveys, and from notes of a partition made several years ago under directions of the Chancery Court in another suit. Some of the lands have dropped out of the litigation.

The present contest is really concerning the northwest quarter of section thirty; lot two in the southwest quarter of nineteen, and the northeast of the northeast of twenty-five.


5 S. OF 10 WEST.
5 S. OF 9 WEST.
N. E. of 24
Has passed out of the suit.
Sec 24.
Mary F.
Martha P.
Lots 2, N. W. ¼ 19.
Bob and Walter.
Keeler.
Lot 1, N. W. ¼ 19.
Sec. 19.
Lot 2, S. W. ¼ 19.
Martha and Mary F.
Bob and Walter.
Keeler.
Lot 1. S. W. ¼ 19.
N. E. of N. E. 25. Martha and Mary B.
Lot 2, N. W. ¼ 30.
Martha and Mary B.
Robert and Walter.
Keeler.
Lot 1, N. W. ¼ 30
Ro't.T. 10 acres.
Sec. 30.

It is on all sides conceded that the northwest quarter of section 30, and lot 2, in the southwest quarter of 19, were, in 1849, the joint property of three of the children of Henry C. Bradford, to wit, William H., Robert T. and Mary F. Bradford, having undivided interests of one-third each. Upon the twentieth of March, of that year, William H. Bradford conveyed to his brother, Robert T., an undivided fourth interest in the southwest quarter of section 19, and the northwest quarter of section 30. With regard to lot 1, in the southwest quarter of section 19, this deed could take no effect, as it does not appear to have been owned by any of the parties. With regard to the other three lots in these fractional quarter sections it added a fourth interest to the third, which Robert T. already owned, giving him seven-twelfths, and leaving in William H. an interest of one-twelfth.

In the same year, on the twelfth of September, Mary F., who had intermarried with Taylor, and was then a widow, conveyed an undivided fourth interest in the same lands to her daughter, then an infant, Martha S. Taylor, known in the suit as Mattie Phelps. This would still leave in Mary F. an undivided one-twelfth. These conveyances are not attacked, and their result in 1849 was to leave the interests in the said portions of lands respectively as follows: Wm. H. Bradford, one twelfth; Mary F. Taylor, one-twelfth; Martha S. Taylor, three-twelfths; Robert T. Bradford, seven-twelfths.

Whilst this result must be accepted, I make no doubt that both William H. and Mary F. intended to convey all their interest. It was originally a fourth, but one of the owners, a sister, Sophia, had died, and they perhaps overlooked the increase of their individual proportions and conveyed according to their original conception of their interests. With regard to the northeast quarter of the

northeast quarter of section 25, the showing of title and ownership is not clear, save to this extent, that there is no legal title to it nor equitable right to it, shown originally in Brewer, the complainant. It also appears to have been considered a part of the joint property of the same three owners, William H., Mary F. and Robert T. Bradford, and has been treated in the dealings concerning the lands as part of the tract in which Robert T. had the seven-twelfths interest. The title can not be traced from the abstract used as evidence.

With regard to other portions of the land appearing in the plat, it is sufficient to say that they have been winnowed out of the litigation, and are no longer in controversy.

Previous to the sixth of April, 1868, a judgment was recovered by Carroll and Thompson against Robert T. Bradford, which had been levied upon his interest in said lands, and they were upon that day sold by the sheriff under execution. They were bought by his brother, I. Walt Bradford, who previously had no interest in them.

It is one of the questions in this case—indeed the most important one—whether or not I. Walt bought for his own use or whether he was clothed with a trust for the use of Robert T. Afterwards I. Walt mortgaged all the lands, or the interest he claimed under the purchase, to John Chaffe & Bro., of New Orleans. He became insolvent, and the lands were sold by a commissioner, under a decree of foreclosure, and conveyed to defendant, Keeler, by the commissioner, on the eighteenth day of May, 1873. The interest in the deed is described as two-fifths. At the time of the purchase and conveyance Keeler and Robert T. were jointly occupying and living together at the old Bradford homestead. Keeler, it is well to mention, had married the widow of William H. Bradford, who had died,

leaving two sons, the defendants, Robert and Walter Bradford. The widow herself has since died. Robert T. had not been made a party to the foreclosure suit, but knew of the mortgage before the foreclosure, and made no opposition to the sale.

After Keeler purchased, Robert T. removed to another part of the lands. The evidence shows that he considered himself as having been overreached in the transaction with I. Walt, but he set up no claim to the remaining title, and was disposed to accept the consequence as irremediable.

Afterwards there was a proceeding in chancery for a partition of the lands, in a case which appears in the partial record of it brought here, under the style of *George G. Keeler v. John F. Bradford.*

The suit was begun on the twenty-fifth day of November, 1873. After adjudication of the interests of parties, commissioners with directions were appointed on the twenty-fifth of February, 1874. In this case a partition by metes and bounds was made by the commissioners, and reported and confirmed on the twenty-eighth day of October, 1874.

The lands now in controversy, with some others, were divided into three portions and assigned, two-fifths to Keeler, two-fifths to Mary F. Bradford and Martha T. Bradford, the latter of whom was the mother of Mary F., and who claimed an interest, and one-fifth to Robert and Walter, the children of W. H., who were represented by a guardian. The several portions appear by the dotted lines in the plat.

It is not disclosed who the parties were to this partition. The decree is not formally pleaded by any of the parties to this suit, as an estoppel or *res judicata*, as to rights. It is mentioned in the pleadings as affecting possession, and seems to have been read in evidence, for that and other

purposes. It was so used from the original record below, and is brought here by *certiorari*, that is the decree, as part of the evidence. There is nothing to show that Robert T. or Martha S., the daugther of Mary F., to whom the mother had made a conveyance in 1849, were parties. Mary F., herself, was probably a party since her husband's name, John F. Bradford, is first in the style of defendants. She had married John F., after the conveyance to her daughter, Martha S., and after the death of her first husband, Taylor. If Keeler represented all the interests that had been in Robert T., then one might fairly infer that all the parties who were originally joint owners were before the court.

Robert T., as remarked, does not appear to have been a party. Evidently all the others, and he himself, believed that he had no remaining interests. He did not apply to be made a party, and so far from protesting against that proceeding amongst his relations, he engaged in it actively, carrying the chain in surveying the tracts to be allotted. Whilst doing so, he remarked that he had been swindled out of his share, and seemed hurt and slightly aggrieved, but expressed the election to let it all go. Afterwards, his sister, Mary F., carrying out the wishes of his mother-in-law, then dead, conveyed to him out of the portion allotted jointly to her mother and herself, and which her mother had conveyed all to herself, a ten acre tract for his own, which Robert F., accepted and took into possession. This is shown on the extreme southern border of the plat. This conveyance was prompted solely, it seems, by sympathy with him in poverty, and to preserve him a home on the paternal acres.

We return now to Mary's daughter, Martha F. Taylor, to whom her mother, on the twelfth of September, 1849, had conveyed a fourth of the land as a gift. There is

nothing to show that she was made a party to, or was represented in any of the subsequent suits, nor is there anything to show that she ever claimed anything under the deed, or attached any consequence to it, for a period of thirty years.

She was born in 1843, and by the laws then in force, became of age in 1864. She was several times married. First in 1860, to one Fisher, who died in the fall of 1864 or early in 1865. She then married a man named Reynolds, but when is not revealed. She lived awhile around Pine Bluff, and then removed to Little Rock, and afterwards was for awhile lost from sight. She was next heard of in New York. About the spring of 1878, she reappeared upon the old scene and was for a time the guest of Keeler.

She stated that she had been married to a man named Phelps. When her marriage relation with Reynolds ceased, by death or divorce, is not known.

In this condition of family affairs, after the death of Mary F., and while her last husband, John F. Bradford, was holding her share as tenant by courtesy, the complainant, T. C. Brewer, who had married the daughter of Robert T., rented in connection with another party, a portion of the lands for the year 1880. This was by written agreement between T. C. and W. C. Brewer, of one part, and John F. Bradford of another, containing express stipulations for payment of rent and redelivery at the end of the term.

The lessees entered into possession, and being thus in, the complainant, T. C. Brewer, and his father-in-law, R. T. Bradford, procured from Mattie S. Phelps, a conveyance of all her right, title and interest in the lands in controversy, specially describing northwest quarter of section 30; southwest quarter of section 19, and northeast

quarter of the northeast quarter of section 25 with others.

This deed bears date the nineteenth of May, 1880, and was acknowledged in New York, before a notary, on the fourteenth of June.

Thereupon T. C. Brewer, on the twenty-fifth of September, 1880, filed this bill against Keeler, Robert T. Bradford, the sons of William H. Bradford, deceased, whose widow Keeler had married, and the husband and the children of Mary F., deceased, together with others, strangers to the family, who had, by tax sales and otherwise, obtained interests in the lands. Of these last it is enough to say, in passing, that their interests were all established, and the correctness of so much of the decree is conceded.

Brewer claimed half the lands, stating that defendants occupied with him as tenants in common. He admits the contract of lease, but says it was made to him by fraud of John F. Bradford, in representing himself as the owner entitled to make it, and sets up his own purchase of a half interest since the lease. He prays partition, injunction of rents and a receiver.

Keeler denied any interest in complainant; sets up his own interest as all of that which belonged to Robert T. before the sale by the commissioner; pleaded the statutes of limitations of five and seven years and makes his answer a cross bill against his co-defendants for partition.

Robert and Walter T. Bradford, sons of William H., claim under their father some fragments of interest in the disputed tracts, or which they set up without any reference to the former partition, and pray to be allowed them on a new partition. Their claims do not materially clash with Keeler's.

John F. Bradford claims under his wife, without any reference to her deed in 1849, whilst Mrs. Taylor, to her daughter, Martha S.

He rests upon the partition of 1874, without pleading it specially. As to the rents under the lease made by him to Brewer, he consents to a receiver.

Robert T. Bradford relies upon his interests, original and acquired, as set forth in the beginning of this opinion, and contends that his brother, I. Walt, bought in trust for him, that he had repaid his brother, and that Chaffe & Bros. had notice by his possession, as did Keeler when he purchased on foreclosure. He says that Keeler was in when he bought; did not take possession by virtue of the purchase, and that he has received rents and profits ample for reimbursement. He relies also on the deed of Mattie S. to himself and Brewer of the nineteenth of May.

In a reply to Keeler's cross bill, Brewer denies that the purchase of Robert T.'s interest was such as to remove the trust which had attached, as he contends, in the hands of I. Walt. He shows that Mary F. died intestate in 1877, leaving two daughters, Mattie S. and Mrs. Newson.

Upon hearing the Chancellor found:

First—That the cross bill of John F. Bradford, G. G. Keeler and the sons of Wm. H. Bradford showed no cause why the former decree of partition should be set aside, and dismissed them accordingly.

Second—That there was no equity in complainant's bill, which was also dismissed.

Third—The same finding and decree as to the cross bill of Robert T. Bradford.

In short, none of the litigants took anything in the suit. The costs were adjudged against the complainants, and Brewer was ordered to restore to John F. Bradford the lands in the lease.

This appeal is taken alone by complainant, Brewer, and the defendant, Robert T. Bradford, who rely upon some points in common, and whose interests do not materially

conflict. Only questions touching them will be considered.

The first point decided as above set forth is not of that nature. Did Brewer show any equity? He claims solely by deed of Martha S. Phelps of the nineteenth of May, 1880. That could convey no interest inherited from the mother, Mary F., in opposition to the partition to which her mother was a party, nor any in accordance with it as to her mother's share, which she could now assert, since John F. Bradford, her mother's second husband, had issue born alive, Mrs. Newson. If the deed conveyed anything to Brewer and Robert T., it could come only through the interest vested in Martha S. by her mother's deed of 1849, whatever that might be.

1. ADVERSE POSSESSION: Tenants in common

Taking that old deed as good to transfer the title as a gift when executed, we can not see that either Martha S. or her vendees, at the beginning of the suit, were barred, strictly at law, by the statute of limitation. Her infancy had long ripened, it is true, into mature womanhood; but the possession of her uncles and her mother of the undivided lands, was her possession. It remained so until they made application for a partition of the whole property amongst themselves, ignoring her rights, and in opposition to them. This was an open, notorious and public denial of them, which amounted in law to such ouster as would set the statute running. The ouster of a tenant in common need not be by violent or intimidating expulsion or repulsion. It must only be notorious and decisive of intention. See cases in *Angell on Limitation*, section 429.

2. STATUTE OF LIMITATIONS. Tenants in common: Ouster by filing bills, etc.

We do not know what were the allegations of the complaint in the old suit as to the rights of Martha S. But when the commissioners were appointed in February, 1874, to make division, with directions to partition the whole amongst the parties before the court without any saving as

to her, or recognition of her claim, it is clear that an open, notorious and public claim to exclude her, was thereby made by all the parties. This was more than seven years before the commencement of the suit.

Next arises the question, was she then under any disability, was she a married woman then? If then discovert no subsequent marriage could stop the statute. If then covert her right to sue would survive that coverture three years.

Her first husband, Fisher, was dead. Her second husband, Reynolds, had died also some time before 1878, for then she appears as the wife of Phelps. Taking that as true, it can not be known from the evidence when she married Reynolds, or when the marital relation between them ended. The proof tends to show that she married Reynolds before the adverse claim of her co-tenants was set up in the partition. Starting with that fact, the presumption would be, that her status of coverture continued until either its termination be shown, or the presumption of continuance be met and overcome by a counter presumption arising from time and the course of nature. The first presumption would carry her disability to a period within three years before the commencement of this suit.

2. SAME: Staleness of claim.

Yet, although there appears no positive statute bar, the claim is not only suspicious, but stale to an extraordinary degree. It was a mere gift at first, made to her when a child of six or seven years. She grew to womanhood, was several times married, and again discovert, and was nearly forty before she seems to have asserted any claim to the property, whatever, or to the rents or profits, or any participation in the possession. Meanwhile all but one of her co-tenants had passed away, and others had succeeded to and enjoyed their rights, and dealt with the property as

their own. Women are not apt to be so careless of their income, nor would three successive husbands be so careless of their marital rights if they had ever supposed they had any. A war had intervened in which many muniments of title had been lost or destroyed, and all the persons were dead who would have been apt to know of any retrocession of her claims to her mother, after she became competent to act. There is nothing in the case to appeal to the feelings of humanity or sympathy, in support of her title so asserted at so late a period. There would be a sense of injustice in now allowing it if asserted in good faith by herself. The repugnance to do so is increased by the object for which it is now revived and invoked. To enable a tenant to defeat the title of his landlord, and attach to his landlord the stigma of fraud in making the lease.

I have never, in all my experience or reading, met with a case which more forcibly illustrates the wisdom of the doctrine of staleness, or a more fitting one for its application.

There is another consideration, also, which must not be overlooked. The immediate object of the bill is to enjoin the collection of rents, and to avoid the express written obligation of the tenant to return the premises. The rule is settled with some plain exceptions, not including this case, that a tenant can not be heard in any court, who asks absolution from his duties as tenant, from having got in the outstanding title to the land from another. It is a breach of the fealty which the relation implies. We do not mean to lend any encouragement to the idea that Brewer may pay the rent, and return the possession, and then assert rights of this nature acquired during the tenancy. Whatever may be the general rule on this point, he has not offered to do so, but has, even in the most favorable view, brought this suit prematurely. We do not rest our opinion, however, on this point alone. The objection

goes deeper. The claim is too stale for notice in a court of equity. The complaint was properly dismissed with all the costs of the suit.

6. FRAUD: May be waived by acts, etc.

As to so much of R. T. Bradford's cross-bill as rests upon this same deed of Martha S. Phelps, the same remarks apply. The portion of it which seeks to charge Keeler with a trust, demands graver attention, and may not be so easily decided upon the facts. He was poor and embarrassed. There is some reason to believe he left the management of his land matters to his brother, who was a man of substance and trusted by the family. He asked his brother to buy the land and hold it for him. His brother did so for a small amount, and Robert sent him a mule which he accepted, and which probably covered the amount his brother paid. I. Walt denies this to the extent alleged, but admits enough to raise a strong suspicion that he at least allowed Robert T. to remain under the impression that he was holding the land for him. Robert T. was in possession when the mortgage was executed to Chaffe & Bro., and remained so until after foreclosure. The proof of a trust would, I think, preponderate if this were all.

But after he was informed of the mortgage, about seven years before this suit, and up to the date of his cross bill, he never repudiated the transaction, nor claimed the property, or any part of it, as his own. He murmured at the loss, but treated it as lost. When Keeler purchased from the commissioners Robert T. acquiesced and ceased to reside upon it. He made no protest. He actually assisted in the subsequent partition, which allotted the share to Keeler, which Keeler claimed under the purchase. He afterwards accepted from his mother and sister a portion of the old home tract which had been allotted to them, and which they gave and he accepted upon the grounds that

he had lost all his interest otherwise, and that it was necessary to preserve for him a home with his kindred, amidst old scenes and associations. This was evidently the spirit and meaning of the transaction, and it was creditable to human nature.

He could not "*ex equo et bono*" enjoy this tribute of maternal and sisterly love, and reclaim from another brother, or his vendee, the same property, the loss of which had prompted the gift. We do not say he would be bound to refrain from this if palpable fraud had been practiced by his brother, for the facts do not make a case of election. Yet it is a fact which the Chancellor might well take into consideration, together with the conflicting evidence as to the original fraud, and his long and repeated acts of acquiescence.

Every case involving questions of fraud or good conscience must, to some extent, depend upon its peculiar circumstances, and parties may, after a long time, be held to have waived it after rights of others have been acquired even with notice.

We think the Chancellor acted within the limits of a sound legal discretion in refusing to entertain this cross bill. Undoubtedly the Bradford family have dealt loosely with each other, and there are fragments of interest which might in apt time have been picked up, saved and adjusted.

But to go back now through and past the period of the civil war, and re-state their several interests and to endeavor to adjust them with rigid accuracy, might lead to greater injustice than any which may have been unwittingly done by the old partition.

It has something of the nature of and is governed by similar considerations applied to family settlements.

It had better stand.

Affirmed.

HERSHY V. LATHAM.

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1. STATUTE OF LIMITATIONS: *Judicial sales.*

The statute of limitations of five years as to judicial sales (sec. 4116 Gantt's Digest) has no application to sales under execution. They are not judicial sales.

2. SAME: *Married women: Saving clause not repealed by act of* 1873.

The act of April 28, 1873, which authorizes married women to sue alone and in their own names, does not repeal by implication the saving clause in their favor in the statute of limitations.

3. EXECUTION: *Land purchased by husband and conveyed to wife.*

Land purchased by a husband and conveyed to his wife in fraud of his creditors may be sold under execution at law against him, without first uncovering it by bill in equity.

APPEAL from *Crawford* Circuit Court.
Hon. R. B. RUTHERFORD, Circuit Judge.

U. M. & G. B. Rose for appellant.

Appellant was subrogated to all the rights of the judgment creditors under whose execution he bought. (*Bump Fr. Conv., 3d ed., p. 506; 7 Blackf., 66 S. C., 39 Am. Dec., 454; 13 Wis., 324; 1 Freeman Chy., 703.*) The fourth plea was a good defense at law as well as equity. (*26 Ark., 41.*) The defense may not be accurately pleaded, but it states a substantial defense, and appellee should have moved to have the answer made more specific. *32 Ark., 131.*

Contend that under our present Constitution and statutes, removing the disabilities of married women, that the statute of limitations runs against appellee. *Cessante ratione, cessat lex, and cite 51 Me., 305; 50 Cal., 303; 93 U. S., 674; 82 Ill., 385; 83 Ib., 172; 52 Barb., 146; 3 Ohio St., 80.*

Collins & Balch for appellee.

1. Our Constitution, section 7, article 9, and statutes relative to suits by and against a *femme covert*, have not so far removed the disabilities of a married woman as to abrogate that clause in our statute of limitations (*sec. 4113 et seq., Gantt's Digest*) relieving her of the necessity of bringing suits until discoverture. *Potter's Dwarris, p. 185, et seq.; 1 N. H., 55; 6 How., P. R., 229; 2 Dale, 316; 1 Blatch., 259; Pet. C. C. R., 188; 24 Ark., 487; 1 Kent's Com., 434; Wood on Lim., sec. 240; 72 N. C., 551; 39 Ark., 360.*

2. The fourth plea is bad. It does not allege that the insolvency was continuous. *32 Ark., 468; 10 Ib., 225; 10 S. & M., 556; 11 Ark., 418; Gantt's Digest, 2958.*

Even if the deed of Latham to his wife was fraudulent, he had in *law* no interest thereafter. It became her property against all the world except creditors at the date of the conveyance. If appellant took anything by his purchase it was only an equitable interest, and not such title as he could assert in a court of law in resisting a legal title. *48 Miss., 232; 54 Miss., 80; 56 Ib., 151; 36 Ark., 228.*

3. A sale under execution is not a judicial sale. *Rover on Jud. Sales, secs. 4, 5, 6, 7 and 12, note 6 to sec. 12, and secs. 15, 17, 18, 19 and 22.*

SMITH, J. Mrs. Latham brought ejectment against Hershy for the recovery of an undivided five-sixths of certain lots in Fort Smith. She claimed under conveyance executed in June, 1867, from five of the six heirs of John Rogers, to whom the property originally belonged.

The complaint shows that she was then and still is the wife of J. B. Latham.

The first paragraph of the answer set up title in the defendant through a marshal's deed made in pursuance of a sale under execution against John B. Latham. This deed bore date May 17, 1869, but the judgment on which it was based was rendered May 17, 1867. The second and third paragraphs pleaded the statutes of limitation of five and seven years.

The fourth paragraph attacked the plaintiff's deed as fraudulent against creditors, alleging that her husband furnished the whole of the money to buy the land, and that he was insolvent at the time.

A demurrer was sustained to the last three paragraphs of the answer, and the defendant withdrew the first paragraph, and after final judgment against him removed the case here by appeal.

1. STATUTE OF LIMITATIONS: Judicial sales.

The demurrer was properly sustained to the plea setting up five years as a limitation. Section 4116 of Gantt's Digest applies only to purchasers at judicial sales. Now a sale under execution is not a judicial sale. For, although it is supported by a judgment, yet that judgment is only for a designated sum of money, and does not direct the sale of any specific property, nor is it required to be reported to or confirmed by any court. *Griffith v. Fowler, 18 Vt., 394; Minnesota Co. v. St. Paul Co., 2 Wall., 640; Smith v. Arnold, 5 Mason, 420.*

2. SAME: Married woman: Saving clause not repealed by act of 1873.

The limitation in ejectment is seven years. But the plaintiff was a married woman. It is contended that the act of April 28, 1873, "for the protection of married women," which empowers them to sue alone and in their own names, on account of their separate property, repeals by implication the saving clause in their favor in the statute of limitations. Such has been decided to be the effect of similar legislation in other States. *Brown v. Cousins, 51 Me., 305; Cameron v. Smith, 50 Cal., 303; Castner v.*

Walrod, 83 Ill., 172; Kibbe v. Ditto, 93 U. S., 674; Ball v. Bullard, 52 Barb., 146.

On the other hand, the Supreme Court of North Carolina, in *State v. Troutman, 72 N. C., 551,* refused to adopt this view, holding that the right to sue alone was as mere privilege, and the failure to exercise it could not operate to the prejudice of the *femme covert.*

The wording of our statute limiting the time for the bringing of the action for the recovery of real property is peculiar. It gives the married woman three years after discoverture; that is, after the release from the bonds of matrimony by the death of the husband, or by divorce. If the language had been "three years after the removal of her disability," we might very well hold that her disability could be removed by an act of the Legislature as well as by the husband's death. But to declare that it was the intention of the Legislature or the necessary consequence of the married woman's act to shorten the period for bringing such actions, is to assume that the only consideration which operated upon the law-making power in making an exception in her favor, was her disability to sue at common law without joining her husband.

Doubtless this was the principal reason. But we are not sure it was the sole reason.

There was no error in adjudging the third plea bad.

3. EXECUTION: Land fraudulently conveyed, subject to.

The fourth plea presents an interesting question. When a debtor in failing circumstances has bought property and has fraudulently taken the title in the name of his wife, has he such an interest as can be reached by the levy of an execution? Or is the creditor forced to go into equity to uncover the property? At common law the husband's interest could not be sold under execution, because he never owned the legal title.

If the conveyance to the wife were treated as void, the

title would remain in the grantor; and this would be of no benefit to the creditor. *Freeman on Executions, section 136.*

But the sixth clause of *section 2630 Gantt's Digest*, subjects to execution all real estate whereof the defendant, or any person for his use, was seized in law or equity on the day of the rendition of the judgment or at any time thereafter.

Under the circumstances stated in the plea, is the wife seized for the use of the husband? A person who has paid the consideration money has an estate in the land by way of resulting trust, and the grantee in the conveyance, who has paid nothing, holds the formal legal title, but has no actual interest. Here the creditor of him who furnished the purchase money can take the land in execution through the resulting trust, although, if it was a device to defeat creditors, no court would aid the *cestui que trust* for his own sake.

But a conveyance to the wife is presumed to have been a provision for her, in which case no trust results. Yet this presumption may be repelled by proof; and it is effectually rebutted by proof or admission of actual fraud in the intent of making such a settlement upon the wife.

It follows that the husband's resulting interest may be sold on execution, and the fee in the lands transferred to the purchaser by virtue of our statute. (*Rankin v. Harper, 23 Mo., 579; Eddy v. Baldwin, Ib., 588; Dunnica v. Coy, 24 Ib., 167; Smitheal v. Gray, 1 Humph., 491; Thomas v. Walker, 6 Ib., 93; Kimmel v. McRight, 2 Pa. St., 38; Tevis v. Doe, 3 Ind., 129; Pennington v. Clifton, 11 Ib., 162; Clark v. Chamberlain, 13 Allen, 257.*) Such also was the law of New York until the statute of *29 Car. 2, ch. 3, sec. 10, was repealed. Foote v. Calvin, 3 John, 216; Jackson v.*

Bateman, 2 Wend., 570; Jackson v. Walker, 4 Ib., 462; Guthrie v. Gardiner, 19 Ib., 414; Wait v. Day, 4 Denio, 439; Brewster v. Power, 10 Paige, 562; Garfield v. Hatmaker, 15 N. Y., 475.

Reversed and remanded, with directions to overrule the demurrer to the fourth plea.

TITSWORTH v. SPITZER ET AL.

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1. PRACTICE: *Trial before court: Incompetent evidence: Presumption.*
When, in a trial before the court, incompetent evidence is given by one party against the objections of the other, and the court reserves its ruling upon the objections until the final ruling upon the whole case, it must be presumed that the court, in making up its final judgment, excluded the incompetent testimony from its consideration.

2. MORTGAGEE: *Action against purchaser of mortgaged property.*
A mortgagee may, by proper action, subject the proceeds of the sale of the mortgaged property sold by one who has purchased it from the mortgagor and sold it, to the payment of his mortgage debt.

APPEAL from *Logan* Circuit Court.
Hon. R. B. RUTHERFORD, Circuit Judge.

C. A. Lewers and Collins & Balch for appellant.

The *onus probandi* was upon the plaintiff (*22 Ark., 396*), and he must make out his case by competent testimony, (*4 Ark., 94*). He must establish his right of possession as well as wrongful detention of the identical property sued for. (*17 Ark., 549; 3 Eng., 519.*) Where there is no evidence to support the finding, this court will grant a new trial. *5 Ark., 640; 14 Ib., 202.*

A failure to clearly identify the property is fatal to plaintiff's case. Where a party has introduced no legal testimony tending to sustain a material issue, but has

introduced a mass of illegal testimony, it is a strong reason why a verdict in his favor should be set aside. *6 Ark., 86.*

U. M. & G. B. Rose for appellee.

The only question in this case is one of fact, and there being some evidence to support the finding, it will not be disturbed. *27 Ark., 592; 38 Ib., 139.*

English, C. J. On the sixteenth of December, 1881, Ignatius Spitzer and Isadore Sugarman brought replevin against E. N. Titsworth, before a justice of the peace of Logan County, for three bales of cotton described as marked "J. K. with drop block [E]," of which the plaintiffs claimed to be the owners and entitled to immediate possession, and which they alleged defendant wrongfully detained from them.

The cotton was seized under the writ, bonded by defendant, and he denied the title of plaintiffs, and alleged property in himself.

The plaintiffs obtained judgment before the justice, defendant appealed to the Circuit Court, where the case was submitted to the court sitting as a jury, and plaintiff again recovered judgment for the cotton, etc. Defendant was refused a new trial, and took a bill of exceptions and appealed.

I. From the evidence set out in the bill of exceptions, it does not appear that Isadore Sugarman had any title to or interest in the cotton sued for; and why she (if female) was joined as plaintiff, and why her name was not stricken from the complaint at the trial, when her want of title was shown, does not appear. No question seems to have been made in the court below, and none submitted here, as to her joinder as plaintiff.

II. No declaration of law was made by the court at the

trial. The motion for a new trial was upon the ground that the finding of the court was contrary to law and evidence.

Ignatius Spitzer was the only witness examined at the trial on behalf of the plaintiffs. He testified that he was merchandising at Paris in the year 1881, sold supplies to John Kornfield, and took from him a mortgage with the consent of defendant on fifteen acres of cotton and ten acres of corn, to be planted and grown by him on defendant's farm, in Roseville township, Logan County, and which mortgage the witness produced and read in evidence.

The mortgage was executed to Spitzer by John Kornfield, fifth of May, 1881, to secure an existing indebtedness to him of $60, and future supplies, the debt to be paid first of October, 1881, and on default Spitzer to take possession of and sell the crops mortgaged.

Spitzer further testified that at the commencement of the suit Kornfield owed him an unpaid balance of $87.50, for supplies, etc.

That in the winter of 1881 he went down to defendant's farm to see about John Kornfield's crops, having been previously informed that he had gathered his crops, and left the country. Witness saw defendant, and told him he wanted John Kornfield's cotton, to which he replied that he had bought and shipped all Kornfield's cotton on the boat, and this was all he said on the subject. Witness went to defendant's residence, and saw a lot of baled cotton, some 25 bales, in his yard or inclosure. Also saw three bales marked J. K. [E.], to one side from the other cotton. He returned to Paris and sued out a writ of replevin for the three bales. Did not examine the other bales of cotton to see how they were marked. Did not know who raised the cotton replevied. Kornfield had left the country when he went down to see about the cotton. Did not

know whether or not there were other persons on defendant's farm whose initials were "J. K." Defendant's farm was large, and had many tenants on it. Did not know whether the cotton replevied was raised by John Kornfield or not. Did not know of his own knowledge that said cotton was raised on defendant's farm. "But he was informed by some of the tenants on the farm, the day he went down to see about the cotton, that John Kornfield's cotton was up at defendant's house. He made inquiries of a Dutchman, some negroes and other parties who were tenants on said farm, and was informed by them that there was no other persons on said farm with the initials J. K., or initials of John Kornfield."

To the giving of this testimony defendant objected, and insisted that its competency should be passed on by the court, though sitting as a jury; but the question was reserved to be disposed of by the court in ruling upon the whole case.

Witness further testified that the cotton was worth $150.

Defendant proved by the officer who seized the three bales of cotton under the writ of replevin, that he found them in defendant's yard, marked as above shown. There were quite a number of other bales of cotton in the yard, but witness did not notice how they were marked. Defendant was not at home at this time.

The above is the substance of all the evidence introduced at the trial.

Plaintiffs allege that they were the owners of the cotton sued for, which being denied by defendant, the burden of proof was on the plaintiffs. They could not recover without showing title in themselves. *Robinson v. Calloway, 4 Ark., 94; Patterson v. Fowler, 22 Ib., 397.*

As above shown there was no evidence of any title in plaintiff, Sugarman.

Plaintiff Spitzer set up no title to the cotton except under the mortgage issued by Kornfield to him.

1. Incompetent evidence in trial before court: Presumption.

It must be presumed that the trial court, in making up its final judgment upon the whole case, disregarded and discarded from consideration the hearsay and incompetent evidence introduced by the plaintiffs against the objections of defendant.

There was no competent evidence of title in Spitzer, in other words that the cotton was covered by the mortgage, except the single fact that the bales were marked with the initials of the mortgagor. There was no competent proof that Kornfield produced the cotton, or that it was any part of the fifteen acres of cotton described in the mortgage.

There was no evidence that it was the custom of tenants on the defendant's plantations to mark cotton produced by them with their initials, or that such was a general custom, nor has the court any judicial knowledge of such custom.

Counsel for appellees submit that there was not a total want of evidence to sustain the verdict, that the fact that the cotton was marked J. K., the initials of the mortgagor, was some evidence.

Conceding this fact to be some slight evidence of title in Spitzer, yet there was in evidence the countervailing fact that the cotton was in possession of defendant, which was *prima facie* evidence of title in him. *Hutchinson v. Philps, 11 Ark., 271.*

Mortgagee may follow proceeds of mortgaged property.

Defendant stated to Spitzer that he had bought and shipped all of Kornfield's cotton on a boat. If this was true, Spitzer might in a proper suit subject the proceeds of the cotton in his hands to the payment of the mortgage debt, but he could not, in an action of replevin, recover of defendant other cotton not proven to have been produced by Kornfield or covered by the mortgage.

Reversed, and remanded for a new trial.

FLYNN ET AL. V. THE STATE.

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1. PRACTICE: *Summons on bail bond: Demurrer to.*

A summons on a forfeited bail bond is not a pleading, and not subject to demurrer for variance between it and the bond. If so fatally defective as not to be amendable, it may be quashed on motion, like any other bad writ.

2. EVIDENCE: *Bail bond: Indorsement of forfeiture by justice of the peace.*

The indorsement of forfeiture on a bail bond, by a justice of the peace, is not conclusive upon the bail that the forfeiture was properly taken.

3. BAIL BOND: *Defense to forfeiture of, before justice of the peace.*

Where a defendant appears before a justice of the peace for examination for a felony at the time fixed by his temporary bail bond, and the justice from press of other business postpones the examination to an unfixed day, and tells the defendant that he will have him notified of the day when fixed, he can not afterwards appoint a day and forfeit the bond without giving the defendant the promised notice.

4. CIRCUIT COURT: *Jurisdiction on bail bond.*

The Circuit Court has jurisdiction to render judgment on a forfeited bail bond for $100 taken by a committing court.

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

W. N. Morphy for appellants.

The answer of defendants was a sufficient defense to the case. *Acts of 1875, pp. 8 and 9, sec. 3734 Gantt's Dig.*

The Circuit Court had no jurisdiction. The sum in controversy could in no event exceed $100, and justices have exclusive jurisdiction wherein the amount does not exceed $100. *Sec. 40, art. 7, Const.*

C. B. Moore, Attorney General, for the State.

The proceedings were strictly in accordance with the statute. *Sec. 1704, 1743 Gantt's Digest.*

Section 40, article 7, Constitution, has no reference to proceedings such as this.

ENGLISH, C. J. This was a *scire facias* (Code form) in the Circuit Court of Garland County, on a forfeited bail bond, executed by Frank Flynn and J. F. Conder for the appearance of James Baird, charged with a felony, before a justice of the peace, for examination, and returned to the clerk of said Circuit Court as forfeited.

The defendants filed a motion to quash the summons; also, a demurrer to the summons for variance between it and the bail bond, etc., and also an answer. The court overruled the motion to quash, and the demurrer to the summons; the State demurred to the answer of defendants; the court sustained the demurrer, and, they resting, judgment was rendered against them for $100, the penalty of the bail bond.

They made a motion in arrest of judgment, which the court overruled, and they appealed.

I. The summons is substantially in the form prescribed by the statute, and it has not been insisted here that it is not in good form. See *Gantt's Dig., sec. 1743.*

The motion to quash was properly overruled.

1. PRACTICE Summons on bail bond: Demurrer to.

II. The demurrer to the summons for variance between it and the bail bond was also properly overruled, the common law *scire facias* or a forfeited bail bond served the double purpose of a declaration and a writ. (*Gray v. The State, 5 Ark., 265.*) And a substantial variance between the recitals of the *scire facias* and the forfeited bail bond or recognizance might be taken advantage of by demurrer. (*The State v. Williams, 17 Ark., 371.*) But in the Code action on a bail bond no pleading is required on the part of the State; but the clerk is required to issue a summons to the bail, requiring them to appear, etc., and show cause

why judgment should not be rendered against them for the sum specified in the bail bond, on account of the forfeiture thereof, etc. *Gantt's Dig., sec. 1743.*

If the summons, regarding it as such, is so fatally defective as not to be amendable, it may be quashed, on motion, like any other bad writ.

3. BAIL BOND. Defense to forfeiture.

III. The bail bond recites that James Baird, being in custody, charged with the offense of obtaining money under false pretense, and being permitted to give bail in the sum of $100, whereupon Frank Flynn and J. F. Conder thereby undertook that he should appear before Charles F. Vatterlin, justice of the peace for Hot Springs township, Garland County, on the fourteenth of September, 1882, to answer said charge, and should at all times render himself amenable to the orders and process of said court, etc.

The substance of the answer of the bail is as follows:

"That the forfeiture upon the bond was improperly taken, illegally exists, and ought to be set aside and held for naught, for the following reasons: That the case of the State against James Baird, on a misdemeanor, was begun before Charles F. Vatterlin, a justice of the peace, on the fifteenth day of September, 1882; that before the same came to trial, the defendant took a change of venue from said justice to John F. Allen, another justice of the peace of the same county; that defendant was notified to be present on the twentieth of said month for trial; that he appeared, and was ready for trial on that day, but the justice being engaged in other court business, which consumed the whole day, the trial of this cause was by order of said justice of the peace continued to some future day, when circumstances would admit of his hearing the cause, with the announcement from him that he would have the defendant notified by the constable of the time of hearing;

that defendant was at that time a resident of Hot Springs, and never absent from said city; that while he was such resident, and without any effort on the part of said justice to notify him, said cause was called, and forfeiture taken upon said bond six days after the former trial day, because of defendant not being present at said time. That defendant, Baird, was at all times ready and willing for a trial, and attended at such court on two separate days for trial, but was wholly unadvised that any action would be taken at the time forfeiture was had. That said Justice Allen did not fix any time for the hearing of said cause, but tried the same without any such time being fixed. That these defendants immediately on hearing of the action of said justice, and within two days after the date of forfeiture, desired to examine the papers for a hearing of a motion to set aside said forfeiture, but such justice had on the very day of forfeiture filed and delivered said bond, with all papers in the case, to the clerk of this court, and had summons issued thereon, whereby these defendants were prevented from having their motion considered.

"Wherefore," they say, "plaintiff ought not to have judgment, and that said forfeiture should be set aside," etc.

The bail bond is indorsed: "Filed September 15, 1882. Chas. F. Vatterlin, J. P."

"Filed this twenty-second day of September, 1882. John F. Allen."

"Forfeiture taken on the within bond this twenty-sixth day of September, 1882. John F. Allen."

The bond appears to have been filed in the clerk's office on the day of its forfeiture, and summons issued to the bail same day.

The bond shows upon its face that Baird was in custody on a charge of obtaining money under false pretense, which is a felony, and the allegation of the answer that he was charged with a misdemeanor must be disregarded.

Do the facts alleged in the answer, and admitted to be true by the demurrer, constitute a defense for the bail?

1. EVIDENCE: Indorsement of forfeiture on bail bond not conclusive.

When the accused gives bail for his appearance before a justice, during the examination, and fails to appear at the time specified, or at the time extended, the magistrate is required to indorse on the bail bond the word "forfeited," with his signature thereto, and return the bond to the clerk of the Circuit Court, etc., who is required to issue a summons thereon, etc., "and such indorsement shall be sufficient evidence of the forfeiture of the bond." *Gantt's Digest, sec. 1704.*

But such indorsement can not be treated as conclusive upon the bail, that the forfeiture was properly taken.

2. SAME: Defense to forfeiture: Surprise.

If, as alleged in the answer, Baird was present on the day fixed by Justice Allen for the hearing of the charge against him, and the case was not taken up on that day because the justice was otherwise engaged, but continued to some future unfixed day, when it might be convenient for the justice to hear the case, and Baird was informed by the justice that he would have him notified by the constable of the time of hearing; and on a subsequent day the justice took up the case, without notice to Baird, and entered a forfeiture of the bond, and immediately returned the bond to the clerk, the forfeiture was an unfair one and ought not to stand, and the court should have overruled the demurrer to the answer.

3. Jurisdiction of Circuit Court on bail bond. Justices may take temporary bail.

IV. The motion in arrest of judgment was upon the ground that the bail bond, being for only $100, was not within the jurisdiction of the Circuit Court.

In felonies, except capital offenses, murder or manslaughter, the examining justice may admit the accused to bail for his appearance at the Circuit Court, which has ex-

clusive jurisdiction in the trial of all felonies. (*Gantt's Digest, 1709, 1711.*) And there can be no good reason why in protracted examinations, continued from day to day, or time to time, the justice may not, in other than the excepted felonies, admit the accused to temporary bail. But the bail bond in such cases, if forfeited, must be returned to the clerk of the Circuit Court for action on the forfeiture. *Ib., sec. 1704.*

And this is in harmony with *section 1742 Ib.*, which provides that "the action on the bail bond shall be in the court in which the defendant was, or would have been required to appear for trial.

The Circuit Court having exclusive original jurisdiction for the trial of all felonies, where a bail bond, however small, is taken and forfeited as incidents in the prosecution, there is no valid constitutional objection to making the jurisdiction of the bond attach as an incident to the jurisdiction of the offense.

The examination before the justice of the peace is but a preliminary part of the whole prosecution for a felony, and the taking and forfeiture of a temporary bail bond are but incidents in the prosecution, and the jurisdiction of such bond may well be made to attach to the Circuit Court as incidental to its main jurisdiction of the crime, regardless of the amount of the bond.

For the error in sustaining the demurrer to the answer of appellants, the judgment is reversed, and the cause remanded to the court below with instructions to overrule the demurrer, and for further proceedings.

CITIZENS' STREET RAILWAY v. STEEN.

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1. NEGLIGENCE: *Contributory—counter negligence.*

Although one injured by a collision from a street railroad car may have been guilty of negligence, yet if the driver could, by reasonable diligence, have discovered the negligence in time to have avoided the collision by using ordinary care, and failed to do so, the company would be responsible for the injury.

2. SAME: WHAT IS: *Ordinary care, what is.*

The ordinary care required of a street railroad company to avoid a collision, is such watchfulness and precaution as are fairly proportioned to the danger to be avoided, judged by the standard of common prudence and experience; or such care as a reasonably prudent man, under the peculiar circumstances of the case, would exercise. Negligence is the failure to use such care and prudence.

3. STREET RAILROADS: *Rate of speed.*

A street railroad company may run its cars at any rate of speed convenient to it and not dangerous to passengers and the public along the track; and other parties have the right to drive along the street and cross and recross the track, using proper care and prudence to keep out of the way of the cars.

4. DAMAGES: *Compensatory—vindictive.*

The measure of damages for an injury from a collision of a street railroad car with a carriage is a fair pecuniary compensation for the injuries sustained by the occupant and his property; but if the injury be also willful, or wanton, or attended by such gross negligence as manifests a careless disregard of the consequences to the plaintiff, the jury may add such sum as they think proper under the circumstances, as vindictive or exemplary damages, or as punishment for the wrongful conduct of the driver.

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

John McClure for appellant.

T. J. Oliphint for appellee.

The first and second instructions for appellee are cer-

tainly law. *37 Ark., 569; Field on Dam., sec. 168; Cooley on Torts, pp. 674–5; 3 Ohio, 172; 6 Ib., 105; 8 Ib., 570.*

Appellant's instructions properly refused. The first and third are abstract, and the others do not properly declare the law applicable to this case. See authorities *supra.* The modification of number two was more favorable to appellant than appellee.

EAKIN, J. This is an action by appellee against a street railway company in Little Rock, to recover damages for an injury to her person and property, occasioned by a collision between a car of the company and a horse and buggy with which she was driving, upon a street along which the line of railway ran.

The buggy was partially upset against a sand bank, and to some extent injured; the horse was lamed, and the plaintiff herself bruised and hurt.

The jury found for the plaintiff, fixing her damages at $150. A motion for a new trial was denied, exceptions taken, and an appeal.

The material facts proven for plaintiff are as follows: She was driving down the street with her little son in the buggy. The boy stood up, cried to his mother that the street car was coming, and struck the horse with a whip to increase his speed. He repeated the blow, and the horse went still faster, but not so fast as the coming car. There was a sand pile on the street, with a narrow carriage way between it and the track. When about midway of this, where the buggy could not turn to either side, the collision occurred, with the results above mentioned. The top of the buggy was up, and she did not see the car when her son spoke. She says the car was going at an unusual rate of speed, and the driver did not stop when the accident occurred. The sand pile on the street was so placed

that all vehicles on that side were compelled to pass between it and the railway, with only four or five feet of room. There was some proof of actual pecuniary damage to the horse and buggy, including harness, but considerably short of the verdict. She says the buggy was struck by the front part of the car very forcibly. In this she is sustained by the testimony of a spectator, who says further that the driver of the car was coming at *an extraordinary rate of speed*, and that the driver did not stop, nor attempt to stop it. He thought the brake was broken and that the car would run over the mule on the down grade. The buggy was thirty or forty feet in advance of the car when he first saw it.

For defendant, the car driver testified that plaintiff was driving on the track, and he told her to get off, she whipped up, and he understood her to say "come ahead," and she drove off the track. He attempted to pass her but the sand pile crowded her on towards the track, and she ran into the car at the rear end.

The front part of the car had passed the buggy without touching. On this last point he is corroborated by a passenger. He says further, that after the accident the car stopped about two minutes. The car could have been stopped in ten feet. Plaintiff in rebuttal denies that she told the driver to come ahead, or saw him before the collision.

The court on motion of the plaintiff, and against the objections of defendant, instructed the jury:

(*Approved*) 1. NEGLIGENCE: Contributory: Counter negligence.

1. That although they might find the plaintiff to have been to some extent negligent, yet if the defendant did, or by reasonable diligence might have discovered the negligence in time, by using ordinary care, to have prevented the injury and failed to use such care, it would be responsible.

2. That the company was responsible for the damages to the property or person of plaintiff, by the wrongful act of its servant in running the car against the buggy, if they should find that he did so, unless they should further find that the plaintiff had been guilty of contributory negligence.

In the first instruction asked by the defendant, amongst other things not objectionable, the court was asked to charge that if the plaintiff knew that the street was occupied by the railway track it was her duty, from time to time, to look behind to ascertain if a car was approaching from the rear, and the failure to do so was contributory negligence, which would preclude her recovery.

In the second instruction asked by defendant it was asserted that the duty of carefulness rested both on plaintiff and defendant, and that if both were negligent and "their conduct was the legitimate result of such negligence," she can not recover.

The third of defendant's proposed instructions asserted the duty of all persons driving along a street, having upon it a line of street railroad, to keep out of the way of the cars, and if the jury should find that plaintiff negligently or carelessly drove so near to the track of the defendant's line of railroad as to be in danger of collision with its cars, and did not exercise due care in watching the approach of the car, this constitutes contributory negligence on the part of the plaintiff, and before the plaintiff can recover, it must be established by a preponderance of testimony that the negligence of the company was the result of a disregard of consequences, or of duty, on the part of the defendant, showing an intent to do an injury."

He asked in his fourth instruction that the court declare "the reasonable speed of a street car to be the average rate of carriages used to convey passengers by horse power."

"5. If the injury sustained was the product of mutual or concurring negligence, no action would lie."

"6. If the plaintiff contributed to the accident, then she must establish by preponderating evidence that the injury was inflicted by defendant willfully and wantonly."

"7. That only actual damages, to be shown by positive proof, could be recovered. The plaintiff would not be entitled to exemplary damages unless the injury was the result of wanton, willful and intentional wrong."

All these were refused as asked, but the court modified the second to read as follows:

"The mere fact that the defendant was negligent, will not entitle the plaintiff to recover, if the plaintiff was also negligent, and that the duty of being careful rests both on the company and the plaintiff; and if the jury find from the evidence that the plaintiff and defendant were both negligent, and that the negligence of the plaintiff was the proximate cause of the injury, she can not recover, and they will find for defendant." *(Approved)*

The defendant excepted to this modification.

The court further, upon its own motion, charged the jury that no action could be maintained where there had been mutual negligence, and the negligence of each was the proximate cause of the injury.

It explained to them the meaning of proximate cause to be "negligence directly contributory to produce or bring about the injury."

Further, that though some negligence might be shown on the part of plaintiff, yet if the defendant, knowing of that negligence, might, by the exercise of ordinary care and prudence, at the time of the injury, have avoided the same, an action would lie for the plaintiff. *(Approved)* Counter negligence Ordinary diligence.

The court proceeded to define ordinary care to be, the use of such watchfulness and precaution as are fairly proportioned to the danger to be avoided, judged by the *(Approved)* 2. What is ordinary care: Negligence: What is.

standard of common prudence and experience. "Or," the judge continues, "such care as a reasonably prudent man, under the peculiar circumstances of the case, would exercise." Upon the other hand, negligence was the failure to exercise such care and prudence. The jury were told that it was their peculiar province to settle this question of diligence or negligence in view of all the circumstances surrounding the case, the specific degree of care to be measured by the nature and character of the business, the appliances, and the dangers ordinarily incident thereto. The rule requires, not the utmost possible caution and prudence, but just such degree of it as might reasonably be expected of persons of ordinarily prudent business habits, to avoid danger under the circumstances of each case. They were told that if the plaintiff, by her own negligence, contributed to the injury, the company would not be liable unless the injury was willful, or unless it resulted from the want of ordinary care on its part, to avert it after the negligence of plaintiff had been discovered. They were advised that the company had the right to run its cars at any rate of speed that was convenient to it, and not dangerous to passengers and the public along the track; and other parties had the right to drive along the street and cross and recross the track, using proper care and prudence to keep out of the way of the cars. Other directions to like effect were embodied in the instructions, amplifying and elucidating, without varying what is above set forth.

(*Approved*) 3. Street railroad: Rate of speed.

(*Approved*) 4 DAMAGES: Compensatory: Exemplary.

On the point of damages they were told that they might find as a measure, "a fair pecuniary compensation for such injuries as you may find she sustained, to herself and her property; and, in addition to that, if you find the injury was willful, or attended with such gross negligence as manifests a careless disregard of the consequences to

plaintiff, then you may add such sum as you think proper under the circumstances, by way of vindictive or exemplary damages, or as a punishment for the wrongful conduct of the employé of the defendant."

The motion for a new trial questions the sufficiency of the evidence to support a verdict, and the correctness of the rulings of the court in giving, refusing and modifying instructions.

Upon the evidence we have no hesitancy in saying that it may well support a finding that the injury was unnecessary, easily avoidable by ordinary prudence, and the result of conduct wanton and reckless, if not mischievous and willful. To dash past a buggy in that situation at an unusual rate of speed, the buggy hemmed in a narrow way between a sand bank and the track, containing a woman and child, pressing and eager to get out of the immediate danger, was simply shocking. The jury was entitled to weigh the evidence, and to take this view of it. Street railways are a public convenience. They are to be encouraged and protected in the proper and judicious exercise of their franchises; but they are not entitled to a monopoly of the street, not even to the exclusive use of that part covered by their tracks. They must exercise their rights in fair accordance and harmony with the rights of all citizens and strangers to use the streets for legitimate purposes, with wagons, carriages, buggies, horses, or on foot. Cities, and especially the shopping streets, are necessarily crowded with men, women and children, whose convenience, or necessities, require the use of wheeled vehicles. Amongst the crowds some will, of course, be heedless. There is something revolting in the idea that mere negligence of persons, who must, perforce, be left to take care of themselves or be kept prisoners in houses will excuse a street railway company in smashing their

vehicles and endangering their lives, when the driver might fairly avoid it. It is too great a privilege to intrust to employés.

It is enough if persons guilty of negligence are precluded from recovering for injuries brought on by their negligence, and which others, aware of the negligence, might not fairly have avoided.

We have rarely met a case in which the instructions, taken all together, gave a more careful, correct and lucid exposition of the law, in a manner adapted to the comprehension of average jurors. The instructions given cover all the points, and are in accordance with the best authorities, if not, indeed, with all. The principles are directly asserted, or plainly assumed in *St. L., I. M. and S. Ry. Co. v. Hecht, 38 Ark., 369; L. R. and Ft. S. Ry. v. Finley, 37 Ark., 563; St. L., I. M. and S. Ry. v. Freeman, 36 Ark., 41; Evans & Shinn v. Rudy, 34 Ark., 383.* See also, as germane to the principle upon which the damages were measured, *Barlow v. Lowder, 35 Ark., 494; Clark et al. v. Bales, 15 Ark., 452.*

The rule, as laid down in the text book, regarding contributory negligence, and concerning which there is really no conflict, is this, that "the negligence of one party is no reason in itself why he should be punished by the negligent misconduct of another." "In other words, negligent as I may be, if, by due prudence, he could avoid hurting me, he is liable for the hurt his negligence inflicts." "Though I may be a trespasser on his property," says Mr. Wharton, "this does not excuse him in recklessly exploding gunpowder under my feet, or in firing a battery at my head." *Law of Negligence, secs. 335 and 344.*

DAMAGES: Compensatory: Vindictive.

And with regard to exemplary damages, resulting from negligent misconduct, the principle collected from numerous authorities, is thus laid down by Mr. Thompson, in his

work on Negligence, volume 2, page 1264: "If it was wantonly or willfully inflicted, or with such gross want of care and regard for the rights of others as to *justify the presumption of willfulness or wantonness*, the court will instruct the jury that they are at liberty to find for the plaintiff, in addition to a reasonable compensation for the injury actually sustained, such a sum in damages as the circumstances justify," and this applies to corporations also. For the negligent *misconduct* of employés see *Ib., p. 1265.*

Whilst street railway companies must, as we have said, be recognized as useful, and protected in all proper exercise of their rights and discharge of their duties in the public service, and whilst they must be absolved from such damages as occur from accidents occasioned by the negligence of others, which the employés of the company could not, in the exercise of due care, have averted; yet they must be held to such a reasonable regard to the lives and property of citizens, however negligent, as would be prompted by a sense of justice and humanity. They are not authorized to resent and punish carelessness, which gives their employés trouble and inconvenience. Their interests are not paramount to those of citizens who walk, or ride horses, or use other vehicles. There must be *mutual* care and *mutual* courtesies in the use of the streets. All cities are crowded with women and children, who necessarily go unprotected to school, to market, or on errands, or shopping, or visiting. Most of them are naturally heedless. The streets are for them also, and they are not to be unnecessarily jostled, frightened, lamed or treated with indignity, because they get upon the railway tracks, to say nothing of danger of life and limb.

I say unnecessarily, for, if unfortunately their carelessness should result in injury, which the employés of the

company could not reasonably foresee or avert, there can be no remedy.

The new trial was properly refused.

Affirmed.

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WORTHEN ET AL. v. RATCLIFFE ET AL.

1. TAX TITLE: *Confirmation of donation title. Effect of decree.*

Every question with respect to the assessment of land for taxes, the non-payment of taxes, or the regularity of the proceedings of the collector, is settled by a decree of confirmation of a donation title, if the court rendering the decree had jurisdiction of the petition, and the decree was not obtained by fraudulent misrepresentations or concealment of facts.

2. SAME: *Same.*

The petitioner for the confirmation of a tax title need not be in possession of the land, nor is it necessary that the land be unoccupied. The proceeding is *in rem*, and the decree is conclusive as well against the absent claimant as any who may intervene and contest the petitioner's right.

3. DONATION TITLE: *Infant donee.*

An infant donee of land forfeited for taxes is exempt from the duty of making the improvements required by the statute, but is not exempt from the duty to pay to the owner double the value of the improvements on the land at the time of the donation.

4. SAME: *The improvements, who is the owner of.*

The owner of the improvements on donated land is the person who made them, whether the owner of the land before forfeiture, or he or any other person since the forfeiture.

5. SAME: *Payment for improvements, condition subsequent.*

The condition of forfeiture of donated land, upon failure to pay to the owner of the improvements double their value in three months from the date of the deed, is a condition subsequent. The estate vests in the donee with the delivery of the deed, but subject to defeasance by non-performance of the condition; and may be defeated by the owner of the improvement donating the land as provided by the statute.

6. FRAUD: *By infant.*

Infancy furnishes no excuse for fraud, and is no protection from relief sought against it, whether committed by himself or by another for his benefit.

7. CHANCERY PRACTICE: *Relief against conditions subsequent.*

A court of equity will not lend its aid to destroy an estate for the breach of a condition subsequent, but will relieve against the consequences whenever the case admits of compensation in damages, as where the condition is to pay money.

8. DONATION LAND: *Improvement on, right in; repeal of the act.*

The owner of an improvement on donated land previous to the repeal of the act of 1851, had a vested right to be paid double their value, which was not cut off by the repeal of that act.

APPEAL from *Pulaski* Chancery Court.
Hon. DAVID M. CARROLL, Chancellor.

Clark & Williams and C. B. Moore for appellant.

An Auditor's deed is *prima facie* evidence of regularity, and imports title good on its face. *17 Ark., 546; 7 Ib., 424; 15 Ark., 331; Ib., 365.*

An abandoned improvement grown up, gives no right, being no improvement. (*24 Ark., 33.*) The act of eleventh of January, 1851 (*Gantt's Dig., sec. 3905*), was passed after this land was forfeited and at a time when it was subject to donation. Hanger made no improvement until 1857, and then the land was forfeited to the State; not owning the land he could own no improvement. The law upon which the Chancellor relied, was repealed by acts of 1879, p. 72, and with its repeal went every right appellees had. The remedy was special and statutory and must be strictly pursued. (*29 Ark., 174; 15 Ohio St., 114; 13 Barb., 209; 3 Comstock, 9; Sedgwick Stat. and Const. Law, 94; 28 Penn. Stat., 9; 35 Ib., 263; 44 Ib., 332; 1 Hill, S. C., 55.*) Hence, if the statute were repealed before any rights were perfected under it, the inchoate right is gone, etc.

Mills' attempt to convey was a nullity. *Gantt's Digest, sec. 3896.*

The provision of sec. 3893, that the owner should be paid double value, etc., created a mere debt which was barred in three years. *Section 3905* gave a remedy for this debt, by declaring a forfeiture, etc., upon failure to pay, as a *condition subsequent.* It did not declare the deed *void*, but on the contrary recognizes its validity. No affidavit of improvement or failure to pay was ever made, nor offer to *pay all arrearages of taxes and penalties.*

The decree of confirmation was valid, and cured all irregularities, if there were any, and was a complete *bar* against *any* and *all persons.* (*Gantt's Dig., sec. 791.*) It was a suit *in rem* against the world. The regularity of this donation deed, its legality, etc., were the very matters in issue, and the parties are concluded. *35 Ark., 337; 18 Wall., 467; 11 Ark., 157; 13 Ib., 33; 20 Ib., 12.*

There was no *fraud* in obtaining the decree of confirmation. No fraud or *deception practiced upon the unsuccessful party*, by which he was *prevented from fully exhibiting* his case, etc. *98 U. S., 61; 20 Conn., 544; 21 Iowa, 58; 12 N. Y., Dobbins v. Pearce.*

The confirmation statute applies to all tax sales of land, whether *adversely held* or not. Adverse possession is no defense. *20 Ark., 114; 22 Ib., 559; 24 Ib., 519; 18 Ib., 441; Hempst. C. C., 649; 21 Ib., 369; 5 Ark., 424; 22 Ib., 118.*

It makes no difference in whose name the forfeiture is taken, whether resident or non-resident. *Rev. Stat., ch. 128, sec. 10; 19 Ark., 602; 20 Ark., 277.*

Future payment of taxes, and future payment for improvements, are conditions subsequent, which no one but the grantor can enforce. In grants by the sovereign, the entry for breach can not be had except by statute or some

like expression of sovereign will. This will was pointed out as to payment for improvement of another. But with the repeal of that act went all remedy. (*4 Kent's Com., marg. pp. 122–3; Lewis v. Ridge, Cro. Eliz., 863.*) Conditions subsequent are not favored in law, and are construed strictly (*Kent's Com., sec. 4, marg. pp. 129–130*); and courts of equity will often relieve against, and rarely enforce, these forfeitures. (*Story's Eq., secs. 1312 to 1317.*) Even if the condition *was broken* after the ninety days, Worthen had an *estate* descendable and devisable, which no one could take advantage of but the grantor. *4 Kent's Com., 122; 21 Wall, 44.*

If appellees ever had any right to enter for breach of condition, or to put the machinery in motion by buying the land and with it the right of entry, they are barred by limitation. They are not free from negligence. No matter how gross a fraud may be, if there is no jurisdiction or power to remedy it, the court can not do so. The right and remedy were created by statute, and that being repealed there is none whatever. *4 Sawyer, 42.*

It was too late to file a bill of review. (*Gould's Dig., ch. 28, sec. 28.*) As to when a bill of review, or an original bill in the nature of one, will lie, see *Story Eq. Pl., sec. 404; 39 Ark., 107; Ib., 270.*

W. C. Ratcliffe for Ratcliffe and wife.

Mills donated the land and within eighteen months placed the required improvements thereon. This vested title in him. (*Gould's Dig., sec. 4, ch. 101; Gantt's Dig., sec. 3894.*) To make or *cause* to be made the required improvements was the only condition necessary to vest title. No justice's certificate necessary to obtain title. This was matter of proof. (*Gould's Dig., sec. 5, ch. 101; Gantt's Dig., sec. 3895.*) The marking "reverted" by the Auditor had no

effect. Worthen had notice and was put on inquiry. His deed was a nullity. *Ib.*

Again, Mills sold *after* his improvements were made. This he had a right to do. *Gould's Digest, sec. 6, chap. 101; Gantt's Digest, sec. 3896.*

He could only forfeit by selling *before* improvements were made. Appellants' assertion in their brief, that no conveyance could be made unless a copy of the certificate of the justice accompanied the deed, is positively negatived by the above section. The appellees hold under conveyance from Mills, and have a title under said forfeiture superior to Worthen.

There were improvements on the premises at the time Worthen donated—the owner of said improvements being on said land and in adverse possession at the time. He did not within three months pay to the owner double the value thereof, and did not file his receipt therefor with the Auditor within thirty days, or at any other time. He was required to do both, or else "forfeit all right to the land." He forfeited all right. *Gould's Digest, chap. 101, sec. 19; Gantt's Digest, sec. 3905.*

See also *Simpson v. Robinson, 37 Ark., p. 232,* and the able comments on the law of January 11, 1851, commencing at page 138.

There is no exception in favor of a minor. *Lacefield v. Stell, 21 Ark., p. 437.*

It makes no difference whether the improvements were made before or after forfeiture. *31 Ark., 528.*

The deed was void at the time it was presented for confirmation, and the confirmation could not make it valid. Certain important facts in this *ex parte* proceeding were kept from the court, and the decree was obtained by legal fraud. *22 Ark., 121.*

There was no service, there was actual, adverse and con-

tinuous possession. Those in adverse possession should have had notice. Ejectment the only remedy. The confirmation proceedings were fraudulent and void. *1 Ark., 472; 18 Ib., 441; 20 Ib., 114; Ib., 277; 22 Ib., 556.*

The proceeding to confirm is in the nature of a bill of peace, or to quiet title, and petitioner must be in actual or constructive possession. This is not modified by statute. (*Gould's Dig., ch. 170, sec. 1; Gantt's Dig., sec. 786.*) There being no process and service the decree is void. *Gantt's Dig., sec. 4738; Act Feb. 7, 1859.*

The decree evidently fraudulent and void, and the court that rendered it had power to so declare. The owners had no notice of this cloud until the ejectment suit, when they immediately took steps to remove it. (*33 Ark., 162; Freeman on Judg., secs. 99, 100, 491, 495.*) The court had power and discretion to correct, and this court will not interfere. *Ib.*, and *98 U. S., 61.*

The improvements were substantial and valuable. *37 Ark., 132.*

The repeal of *section 19, chapter 101, Gould's Digest* (*Gantt's sec. 3905*), by act of 1879, did not revive Worthen's dead rights if he ever had any. He had forfeited all his interests, and owners were not required to do anything to perfect the forfeiture.

B. C. Brown for appellee, Hanger.

1. A proper assessment is absolutely necessary to the validity of a tax sale. *21 Ark., 581; 23 Ib., 374; 22 Ib., 559; 30 Ib., 610; 31 Ib., 341; 32 Ib., 145, 139, 148-9.*

There having been no valid assessment made nor tax levied, there could be no forfeiture to the State. If these facts had been brought to the attention of the court, no decree of confirmation would have been entered. Evidently all the petitioner did was to produce his Auditor's deed which was by statute *prima facie* evidence. The pro-

duction of this *prima facie* evidence and the concealment of the real facts constituted a fraud. The deed was void and no confirmation can make good that which of itself is void.

Section 6, chapter 170, Gantt's Digest, attempts to cure informality or *illegality* in the proceedings. The Legislature can not authorize a court to confirm a sale, which, because of manifest illegality, was itself absolutely void. (*32 Ark., 131.*) It was never the intention of the Legislature, nor had it the power to confiscate the property of a citizen without assessment or levy of a tax, and the production of mere *prima facie* evidence and the consequent concealment of the fact that no assessment or levy had ever been properly made, was such a fraudulent concealment as is contemplated in *22 Ark., 121.* (See *Blackwell on Tax Titles, sec. 106, and p. 154; Cooley on Tax., p. 259 and note 2.*) Such illegality can not be cured in an *ex parte* proceeding.

While fraud may not be committed by a baby, it may be and *was for* a baby. *1 Fonbl. Eq., 71, 152; Sug., 522; 1 Wash. Rep., 299; Marbury v. Bank, 11 Wheat; 17 Ark., 641.*

2. Worthen failed to pay the owner of the improvement the value thereof, or file with the Auditor the receipt within the time prescribed. *Acts 1881, p. 142.*

To avoid the effect of this appellants in their brief say that this act was repealed in 1879, and that on such repeal, all penalties annexed to the title fell to the ground. There are cases where penalties have not taken effect, in which the repeal of the law puts an end to any attempt to enforce the penalty. But who ever heard that the repeal of the law after the penalty had taken effect restored a title which had been forfeited? Treating this as a penalty and not as a condition annexed to the title—treating it even as a condition subsequent—it had taken effect more than two

years before the attempted confirmation. If George Worthen failed within the three months provided by law, the act still being in full force and effect, to file in the Auditor's office the receipt of the owner for the value of the improvements upon the land which the State had attempted to give him, he thereby then and there forfeited all title, and the attempt to confirm the title thereby forfeited was a manifest and palpable fraud.

It is true that the owners of the land did not avail themselves of the right to purchase from the State given by the statute of 1840; but this could in no wise aid Worthen. His title was forfeited by his own neglect, and it required no act upon the part of the owners to make that forfeiture complete.

3. This court has never held that a party in constructive possession may, by *ex parte* proceeding, procure confirmation against one actually in adverse possession. In such a case a court of chancery would have no jurisdiction; the remedy is by ejectment.

Appellants are estopped. (*Bigelow on Estoppel, p. 357.*) Appellees and grantors have been in actual possession nearly twenty-one years, and during all that time Worthen laid by and saw them, or might have seen them making improvements and exercising acts of ownership, and made no attempt to recover.

SMITH, J. Mrs. Worthen brought ejectment in the Pulaski Circuit Court against Ratcliffe and wife and Fred. Hanger, for forty acres of land. Her title is derived by inheritance from her son George, who in his lifetime held a donation deed from the State, executed in the year 1858, and based upon a forfeiture for the non-payment of taxes for the year 1840. This deed had been confirmed in 1861, by decree of the Pulaski Chancery Court.

The defendants exhibited a chain of title connecting themselves with the original patentee of the United States, attacked the forfeiture for taxes as erroneous, and set up sundry equitable defenses. On their motion the cause was transferred to the Chancery Court, where it was consolidated with a suit there pending involving the same subject matter, in which Ratcliffe and wife were plaintiffs and Mrs. Worthen and the brothers and sister of George Worthen, deceased, were defendants. This last mentioned suit was in the nature of a bill of review to vacate the decree of confirmation of the tax title and to restrain the prosecution of the action of ejectment until the matters in the bill could be heard and determined.

This bill alleged that the plaintiffs' grantors were in actual adverse possession of the land at the date of said donation and of the decree of confirmation; that this fact was known to the father of the donee, who procured the donation for said infant, and the confirmation of his title; that, notwithstanding, they were not made parties to that proceeding, no process was served upon them, nor did they appear, but the application was entirely *ex parte*, only the statutory notice for publication in a newspaper having been given. Further, that there were improvements on the land at the time it was donated, belonging to those under whom the plaintiffs claimed, and that double the value of those improvements never having been paid or tendered to the owner within three months, according to the condition annexed to the donation, the deed itself became void and the estate never vested. And that the concealment of the adverse occupation, of the existence of improvements, and of the failure to pay for the same, was such a fraud upon the jurisdiction of the court, as well as upon the rights of the parties adversely interested, as to render the decree of confirmation a nullity.

The answer to the bill put in issue the cultivation of the soil, the ownership of the improvements and the possession of the plaintiffs' grantor at the date of the donation. There was no pretense that the donee had ever paid any one for the improvements.

The Chancellor canceled the donation deed for failure to pay for improvements, and set aside the confirmation for fraud.

The cause was heard upon documentary evidence, the deposition of Peter Hanger and the following agreed statement of facts:

"It is agreed that the following statement in connection with the pleadings and other proofs shall be taken as the testimony in the above entitled cause, as though fully pleaded and proven.

"That the said George Worthen was born on the seventeenth day of October, 1858, and that the said Louise B. Worthen, R. W. Worthen and W. B. Worthen and Lizzie Agee are his only heirs, he having died November 4, 1879, intestate and unmarried; that the said Maggie M. Ratcliffe and Frederick Hanger have a regular chain of conveyances from the United States to the said land, to wit, the southeast quarter of the northwest quarter of section thirty, township one north, range eleven west, in Pulaski County, Arkansas; the United States having conveyed her title to one James B. Keats, May 16, 1836, who conveyed, April 4, 1837, to Seaborn Hill, who died about the year 1844, leaving an heir, who afterwards intermarried with F. H. Moody, and conveyed the said land April 27, 1857, to Peter Hanger, and so on down to the said Maggie M. and Frederick; that the said James B. Keats was, in 1840, a resident of Pulaski County, Arkansas, and the said Seaborn Hill was, at the time he purchased said land, a non-resident of Pulaski County, and so re-

mained until his death, in 1844; that the said land had been occupied and partially improved prior to the year 1857, but same had been abandoned and unoccupied until April, 1857, when same was in actual possession of the grantors of said Maggie M. and Frederick, and has been actually occupied by their grantors and themselves ever since; that neither George Worthen nor his heirs herein named were ever in actual possession of said land or any part thereof; that the said land was returned into the Auditor's office as forfeited to the State of Arkansas, for the alleged non-payment of taxes for the year 1840, and was offered for sale by the Auditor in 1840; that the same was reported unsold, and returned into his office as land subject to donation; that the same was 'donated' by Caleb W. Mills, November 29, 1855, and the same relinquished by him to the State, he failing to make improvements, and re-donated by said Caleb W. Mills, May 6, 1857, and afterwards there was entered opposite said latter donation on the Auditor's books the words 'adult; reverted.'

"A donation deed was then executed to George Worthen under the same alleged forfeiture of 1840, said deed bearing date November 29, 1858; that the improvements placed on the said land from May 6, 1857, to November 6, 1858 (the time of last donation by Caleb W. Mills), to the time at which the eighteen months in which he had to make improvements thereon, were made by F. H. Moody and Peter Hanger, who at that time held said land by conveyance from original owners as purchasers from the United States Government; that the said Caleb W. Mills did not make any improvements thereon during the said time in his own proper person, nor did he hire any work done thereon, nor did he expend or lay out any money for said improvements; that the said Caleb W. Mills, on January 15, 1858, quit-claimed his interest in the said land by

deed to F. H. Moody above-named as one of the grantors of the said Maggie M. and Frederick; that the improvements on the said land at this time, to wit, on the twenty-ninth of September, 1882, are worth the sum of $5,000, and were placed thereon by Maggie M. and Frederick, or their grantors, before suit was instituted by said Louisa B. Worthen in Pulaski Circuit Court.

"The records in the office of the county clerk of Pulaski County show that the southeast quarter of southwest quarter of section thirty (30), township one (1) north, range eleven (11) west, appears on the non-resident list of lands not given in for taxes, and therefore taxed in the original owners' names for 1840, filed in the clerk's office September 15, 1840, taxed in the name of James B. Keats, and does not appear on the assessment list for the county of Pulaski, filed March 25, 1840 (and only appears as assessed for 1840 as above.)"

The deposition of Peter Hanger is in the following words:

"I am acquainted with the tract of land in controversy herein, to wit, the southeast quarter of northwest quarter of section thirty, township one north, range eleven west, and I know the boundary thereof. It is known as part of the Seaborn Hill land, and was owned on April 28, 1857, by Mrs. Moody, the only child and heir of Seaborn Hill. At that date I purchased same from F. H. Moody and wife. At the time I purchased there was an old orchard on the spot and adjoining where the dwelling house now stands, or near it. Also there was across the bayou on the same tract, a small clearing of six or seven acres, which had grown up in cottonwood trees. I immediately made a pole fence around this out of the small cottonwood, inclosing the whole six or seven acres, and, I think, raised a crop thereon during the year. I commenced improving

the place at this time, and worked on same continuously after this. A small house was on the ridge near where the dwelling house now stands and was occupied by one Harris, who is now dead, and also another house was built some time, either fall or winter, 1857, and was in the spring of 1858 occupied by William H. Brown, who is also dead. In December, 1857, I sold one-half of this tract of land to F. H. Moody, and we commenced work at this time in partnership. A mill was purchased in March, 1858, in St. Louis, and was set up under the superintendency of W. H. Brown, on the forty acres adjoining, about thirty yards below the line of this tract. It may be not so far. We cultivated during the year 1858 the six or seven acres heretofore inclosed, and commenced clearing at other points on the same tract. In the fall of 1858 we had considerably more land ready for cultivation.

"I get the exact dates from deeds of record in my possession. Up to November 1, 1858, there were two houses on said forty acres and some ten acres or more in cultivation, and other lands deadened—say some three hundred ($300) to five hundred ($500) dollars' worth of improvements. I went into possession of said lands in the spring of 1857 and remained until sold in the year 1868. I never had any notice of any proceedings to confirm tax title, or of any claim of any other person for the said lands. My possession during said time was quiet and undisturbed."

The objection to the forfeiture for taxes was that the land was assessed for the year 1840 in the name of James B. Keats, a resident of the county, instead of Seaborn Hill, the actual owner, who was a non-resident, and that, notwithstanding its taxation in the name of a resident, it was put upon the non-resident list and proceeded against accordingly. The revenue law then in force made considerable difference between the lands of residents and

non-residents of a county, especially in the mode of enforcing the payment of taxes by compulsory sales. But it was expressly provided that "no sale of any land for the payment of taxes shall be considered invalid on account of its having been charged in the tax book in any other name than that of the rightful owner, if such lands be in other respects sufficiently described in the tax book, and the taxes for which the same is sold be due and unpaid at the time of such sale." *Rev. Stat., ch. 128, sec. 99.*

In *Merrick & Fenno v. Hutt, 15 Ark., 331,* this same assessment of Pulaski County for 1840, was involved. There the land had been assessed twice; once on the resident list, to the true owner, and again in the name of a non-resident, who had no interest in it. The taxes were not paid by any one, and the land was proceeded against as the property of a non-resident, and was forfeited as such.

This court said: "The name of the owner is comparatively unimportant. The description of the land in such manner as that it may be identified, and the non-payment of the tax, are the two considerations of the most importance in a tax sale. The particular land taxed stands liable for it, no matter who may be the owner or into whosesoever hands the lands may pass;" and the forfeiture was upheld.

The same point was adjudged in *Kinsworthy v. Mitchell, 21 Ark., 145,* followed by *Garabaldi v. Jenkins, 27 Ark., 453.* And in *Gossett v. Kent, 19 Ark., 602,* it was decided that when the assessor returns his list, and the process of assessment is completed by the action of the county court, the condition of the land as being the property of residents or non-residents becomes fixed for the purpose of taxation for that year.

In the present case the land, having been entered in 1836, was subject to taxation. It was assessed for taxation

and it is immaterial in whose name the assessment was, or whether it was placed on the resident or non-resident list, provided the proceeding was consistent, and the subsequent sale followed the assessment. The taxes remained unpaid, and it was properly forfeited.

This conclusion is reached independently of the decree of confirmation.

1. Confirmation of donation title: Effect of.

But, in truth, every question with respect to the assessment of the land in controversy, or the non-payment of taxes, or the regularity of the proceedings of the sheriff and collector, is concluded by that decree; provided the court which rendered it had jurisdiction of the petition, and provided the decree was not obtained by a fraudulent misrepresentation or concealment of facts. *Thomas v. Lawson, 21 How., 331; Buckingham v. Hallett, 24 Ark., 521.*

2. Same: Possession at time of the petition for confirmation.

It is contended that no effect should be given to this confirmation, because the land was at the time adversely held. It is perhaps unfortunate that this relief has not been confined to purchasers who were in the actual or constructive possession of the lands purchased. The statute does but apply an old chancery remedy to a case special in its form. It is, in substance, a bill of peace. (*Overman v. Parker, 18 How., 137.*) And in other respects the proceeding is governed by ordinary rules of chancery practice. *Payne v. Danely, 18 Ark., 441.*

This view derives support, too, from the language of the statute. Its scope and design appear to be to protect purchasers at sheriffs', Auditor's and judicial sales, from eviction, or from any responsibility as possessors. *Gantt's Dig., sec. 786.*

But the statute does not, in so many words, say that the petitioner for confirmation must be in possession, or else the land be unoccupied, in which case the legal title might be considered as drawing the constructive pos-

sessions to its holder. Nor has this construction been heretofore adopted. The petition has been assimilated to a proceeding *in rem*, where the jurisdiction of the court over the controversy is founded on the presence of the property, and the decree becomes conclusive as well against the absent claimant, as against any who may intervene and contest the petitioner's rights. And the adjudication has been without any reference to or effect upon the possession. *Block v. Percifield, 1 Ark., 472; Evans v. Percifield, 5 Ib., 424; Bonnell v. Roane, 20 Ib., 114; Moses v. Hawkins, 22 Ib., 550; Scott v. Watkins, 22 Ib., 556.*

It was also contended that the donation deed to George Worthen became void because the donee did not comply with the conditions annexed to his estate.

This point also is not open to contestation if effect is to be given to the decree of confirmation, because it is a matter that might then have been litigated.

It is therefore necessary to consider whether any fraud was committed in procuring that decree. One of the conditions upon which the grant was made is set out in the act of January 11, 1851.

Section 1. Be it enacted by the General Assembly of the State of Arkansas: That as the present laws provide that if any individual should obtain a donation to a tract of improved land, he or she shall pay to the person or persons owning such improvement double the value thereof, but as no time is now fixed by law within which such payment for said improvement shall be made, it shall be the duty of each and every person who has obtained a donation to a tract of improved land, within three months after the passage of this act, or within three months from the date of the deed, to pay to the owner of such improvement double the value thereof, and take from such person his or her receipt for the amount of money so paid, which

receipt shall within thirty days thereafter be filed with the Auditor; and should any such improvements not be paid for by the donee within the time prescribed, such donee shall forfeit all right to the land which had been donated, and the owner of such improvement, upon filing with the Auditor his affidavit, stating that he owned an improvement on the land at the time it was donated, and that the donee has not paid or tendered to him double the value of such improvements, if the time for making such payments and for filing the receipt as evidence thereof shall have elapsed, shall be allowed to purchase said land including his improvement, by paying all arrearages of taxes which may be charged thereon, in the same manner as if the land had never been donated, and the Auditor shall execute to such purchaser a deed for the land so purchased, etc.

3. Infant donee must pay for improvements.

The two previous donations of this land to Caleb W. Mills had been canceled by the Auditor for failure to make the improvements which the law required of an adult. Worthen, as an infant, was exempt from the duty to improve; but not from the duty to pay the owner double the value of his improvements. *Lacefield v. Stell, 21 Ark., 437.*

4. IMPROVEMENTS: Who is the owner of.

And the owner of the improvement, within the purview of the statute, is he who has made it. If made before the forfeiture, the former owner of the land owns also the improvements. But improvements made subsequently to the forfeiture, whether by the former proprietor or by a stranger who had no interest in the soil, are also protected. (*Surginer v. Paddock, 31 Ark., 528; Simpson v. Robinson, 37 Ib., 132.*) Peter Hanger was the owner of the improvement in this case, and Worthen never paid or offered to pay him for it. The State might have re donated the land to Hanger upon the filing of the prescribed affidavit of non-payment.

But Hanger and those claiming under him have been

ignorant of Worthen's claim. This is evident from their conduct in not applying for a re-donation and in erecting expensive improvements; and the act of January 11, 1851, was repealed by the act of March 14, 1879.

What, then, is the effect of Worthen's non-compliance with the condition annexed by law to his grant and referred to in his deed?

5. Payment for improvements: Condition subsequent

If the payment of double the value of the improvements within three months was a condition precedent, then the estate never vested in him, and not even a court of chancery can relieve from the consequences of non-performance. But if the act required to be done is not to precede the vesting of the estate, but may as well be done afterwards, the law permits the estate to endure after breach of the condition, however absolute the words of forfeiture may be, until the grantor, his heirs or successors, enters and avoids the estate.

Now, Worthen's deed contained words of present grant, and he was given three months within which to pay for the improvements. This is a condition subsequent. The deed imports an immediate transfer of the title and vests the fee simple of the estate in the grantee, subject to be defeated by a neglect or refusal to perform the conditions. *2 Black. Com., *153, et seq.; 4 Kent's Com., *122, et seq.; 2 Washb. Real Prop., chapter on Estates upon Condition; notes to Dumpors case, 1 Smith's Lead. Cases, 5th Am. ed., 97, et seq.*

A reference to a few adjudged cases will make this plain. There is *Sneed v. Ward, 5 Dana, 187*, where a grant of land made by royal authority in 1872, reserved an annual quit rent in fee and required certain improvements to be made within three years, and declared that for a failure to make the improvements and pay the rent, the estate should *ipso facto* cease and determine. These were held to be

conditions subsequent, and the patent vested the title immediately.

In *Schulenberg v. Harrisman*, *21 Wall.*, *44*, Congress had granted public lands to the State of Wisconsin to aid in the construction of railroads in that State.

The language of the act was "that there be and is hereby granted to the State of Wisconsin" the lands specified.

The lands were to be subject to the disposal of the State Legislature, and it was provided in what manner sales should be made. And it was enacted that if the road be not completed within ten years no further sales should be made and the lands unsold shall revert to the United States. The State accepted the grant upon these terms, but the road was not constructed within the period prescribed, and it was held that the act passed the title, which remained unimpaired in the grantee, notwithstanding the non-performance of the subsequent condition, no action having been taken either by legislation or judicial proceedings to enforce a forfeiture. In *Underhill v. Saratoga R. Co.*, *20 Barb.*, *455*, the grant was upon condition that the grantee should build and maintain a water-tight embankment over a certain brook crossing the land conveyed, and that said embankment, with the flood-gates and sluiceways therein, might be used for hydraulic purposes by the grantor, their heirs and assigns. The railroad company, immediately after the execution of the deed, entered into the possession of the land, but never constructed the dam. In an action by the assignee of the grantors to recover possession of the lands, the condition was held to be a subsequent one. See also *Ruch v. Rock Island*, *97 U. S.*, *693*.

6. Confirmation obtained by fraud.

The papers in the confirmation proceeding have been lost, and it is impossible to say what allegations the petition contained. But it must either have alleged that there were no improvements on the lands, or that double the value of

them had been paid to the owner, or, as is more probable, have said nothing on the subject of improvements. For it is not to be supposed that any court would have confirmed Worthen's title with a knowledge that the condition upon which it was held had never been performed. Now, whatever course was pursued by or for the petitioner in this respect, the confirmation could not have been obtained without the suggestion of a falsehood or the suppression of the truth, and it is no answer to say that Worthen was then an infant.

Infancy no excuse for fraud.

Infancy furnishes no excuse for fraud, and is no protection from relief sought against it, whether committed by the infant himself, or by others for his benefit.

7 CHANCERY PRACTICE: Relief against conditions subsequent

However, a court of equity will never lend its aid to destroy an estate for the breach of a condition subsequent, but will relieve against the consequences wherever the case admits of a certain compensation in damages, as where the condition is to pay money. It regards conditions as mere remedies to enforce the fulfillment of obligations and will not allow them to be perverted from their purpose either on one side or the other. Thus, where a testator devised an estate to his two sons, they paying to each of his two daughters a certain sum within one year after his decease, and the money was not paid within the time prescribed; on ejectment brought by one of the daughters for her undivided one-fourth share of the land, as one of the four heirs of her father, it was held she was entitled to recover; because to entitle themselves to the estate the sons must have performed the condition strictly. But afterwards the sons tendered the money and applied to a court of equity for relief against the legal effect of the condition broken, and they were allowed to regain their title to the estate, which had been forfeited at law by non-performance of the condition, upon payment of the money and inter-

est. *Wheeler v. Walker*, *2 Conn.*, *196; Walker v. Wheeler*, *Ib.*, *299.*

Vested right in improvements not divested by repeal of the law.

The repeal of the act of 1851 does not cut off Hanger's vested rights to be paid double the value of his improvements.

And Mrs. Ratcliffe and Fred Hanger holding under conveyances from him, which carried not alone the land, but the improvements upon it, must be deemed to have succeeded to his rights in the premises.

Nor is the lapse of time any just impediment to the working out of the respective rights and equities of these parties. Laying the decree of confirmation out of the case, it would be a sufficient answer to the action of ejectment to say that Worthen had not performed the condition attached to his estate within the time limited by law.

If now a court of equity relieves his heirs from a forfeiture by dispensing with the literal performance of the condition, it will do so only upon the condition of doing justice.

The decree below is affirmed so far as it vacates the decree of confirmation; but in so far as it cancels the donation deed it is reversed, and a decree will be entered here, enjoining the heirs of Worthen from prosecuting any action against the assignees of Peter Hanger, until they shall pay into this court for the benefit of Mrs. Ratcliffe and Fred Hanger, double the value of the improvements, say $800 with six per cent. interest from the twenty-eighth day of February, 1859, until paid.

And upon such payment the cause will be remanded to the Pulaski Circuit Court, there to proceed as an action of ejectment, with leave to the defendants to set up the improvements made since the twenty-eighth day of February, 1859, under the betterment act of March 8, 1883, if they

shall be so advised. The appellants must pay all costs below, but will recover their costs in this court.

EAKIN, J. (Dissenting.) I concur with my associates in thinking that the proceedings in the confirmation suit are not binding upon the appellees. I am unable to agree with them, however, upon the grounds of this conclusion.

I can see no fraud in the proceeding for confirmation; none is charged to have been actively perpetrated by any device or means to deceive the court or any one interested. The complainant, in the confirmation suit, simply pursued what he supposed to be a statutory remedy applicable to his case. It was not his duty to advise the court that there were improvements on the land that he had not paid double value for. It was only his duty to refrain from any improper artifice to divert attention from the fact. The matter of unpaid improvements, if avoidable at all as a defense, and if the suit were a proper suit, was matter in defense. No personal notice of the suit to occupants of the land, nor to owners of the improvements was required. The statute may be an improvident one, but I perceive no fraud in the matter. It is simply an attempt of one to avail himself of what he supposed to be a statutory right.

But I very seriously doubt whether the statute for the confirmation of tax titles, or the extraordinary proceedings *in rem* for the purpose, have any application to donations. If not, they bind no one not served with notice.

There were no provisions for donating lands when the confirmation act was passed on the third of November, 1836. It is confined to sales made by sheriffs and Auditors, or under orders of courts of record. (*Rev. Statutes, ch. 149, sec. 1.*) Donations are not sales.

It is thus I come into concurrence with the court in holding that the appellants can derive no aid from the decree confirming their title. They must stand upon the original deed of donation. But this, as the court holds, and I think properly, conferred title *in presenti.* The failure to pay double value for the improvements was a condition subsequent, upon which title was to revert to the State, not a conditional limitation of the estate granted upon which the title was to go over to the owner of the improvements. He could only get title from the State by showing that he had not been paid, and obtaining an independent deed. Hanger's title was wholly lost by forfeiture to the State, and vested in the State entirely. The State, as a matter of pure grace, imposed on the donee a trust to pay the owner double the value of his improvements at one time, from 1851 to 1879; it also gave said owner the right, on failure of the donee, to apply to the State and obtain a new donation; not to be restored to his old title, for that was gone. This right is now taken away, as all matters of grace may be, and the State alone could enforce the forfeiture; she has not done so, and the title remains in the donee. But I think the trust remains with it, still adhering. I do not think it was the intention of the Legislature to absolve the donee from that duty, and thus enable him to take advantage of his own wrong.

I think one who takes land with these conditions, assumes such a trust as a charge upon the land itself. There is certainly quite as much reason to suppose that, as that a purchaser assumes a trust to pay purchase money.

In this view I do not concur in the special directions for a decree now made. The Chancellor, treating the confirmation of the donation as a nullity, should have nevertheless ratified the title of the donee, but should have decreed and enforced a lien upon it for double value of improvements

existing at the time of donation. If not paid he should have ordered a sale for payment, and thus have closed the matter by leaving a title in some one which would enable the owner of the land to take and enjoy it. Hanger and his successors have no title at all, and have not had since the original forfeiture for taxes, if that forfeiture were legal.

If the right of the appellants to prosecute their ejectment depends upon the payment now of the double value of improvements, they may not find it convenient or possible to do so, and the case will close with a forfeiture in effect not in favor of the State, but in favor of Hanger or those succeeding to his title. This would be either to convert the condition of forfeiture into a limitation over, for which the statute affords no warrant, or it would present the anomalous case of one having no shadow of title, left in the undisturbed enjoyment of property against all the world. I think a court of chancery can do better than that, and close everything by the declaration and enforcement of a trust, thus leaving all loose ends neatly tied.

I think, too, this court ought not to find the value of the improvements upon the evidence in the transcript. There is not enough to act on. Peter Hanger, speaking of his own property, and from memory, after a long time, says they were worth from three to five hundred dollars. That is all. I think this evidence too vague. The court *splits the difference*, and fixes the value at $400. That is, a man makes a wide and quite slashing margin of possible value, and it is taken as just half true. We can not say that the witness, if called to be more definite, would have said the improvements were worth about $400. Indeed, there was no finding at all as to value below. The value did not come into litigation. The cause was decided upon points

independent of value. This was all erroneous, but not irreparable. The case should be remanded, with directions to the Chancellor to do now what he before considered immaterial to be done; that is, find the value of the improvements. We are not compelled here to guess at the value, and I respectfully submit we can not do that equitably. The rule that we will remand a case for new proofs is quite proper with regard to proofs or issues made determining rights, and upon which there have been findings, but has no proper application to such proofs as are necessary to equitable adjustment on principles here first directed to be applied. In other words, the rule does not prevent the remanding of this case for all proper references to a Master below, or for the determination of values by the Chancellor, if he should conclude a Master not to be necessary.

I think the decree should be reversed and the cause remanded, with directions to the Chancellor to ascertain the value of the improvements at the time of the donation, either by reference or by himself taking the account, with such aids as he may use in accordance with equity practice, and to declare and enforce by the usual methods a lien for double that value, with interest.

I have not alluded to claims under the recent betterment act, as that was not in force pending the litigation. If the appellees have rights under that, I see no objection to allowing them to be brought in by supplemental bill after remand of the cause, so that the whole controversy may be determined in chancery.

SMITH, ADX., v. FELTZ.

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EVIDENCE: *Ex parte affidavit.*

A statement or declaration, though made under the sanction of an oath and reduced to writing, is not allowable as evidence on the trial of an issue raised by the pleadings, unless an opportunity has been afforded the adverse party to cross-examine the witness.

APPEAL from *Arkansas* Circuit Court.
HON. R. W. CROCKETT, Special Judge.

Gibson & Holt for appellant.

The writ of *scire facias* is a provisional remedy, and the affidavit of Floyd Smith should have been admitted. *Sec. 2536 Gantt's Dig.*

The discharge in bankruptcy was no answer to the *scire facias*, as the debt was a fiduciary one. *Sec. 23, Bank. Act of 1867; In re Jas. W. Seymour, Int. Rev. Rec., 60; S. C., 1 B. C. R., 25.*

L. A. Pindall for appellee.

Smith's affidavit was properly excluded, and there was no evidence whatever that it was a fiduciary debt. If it was originally, the settlement and note novated his liability as guardian.

J. W. Feltz, pro se.

Makes same points as his counsel, and argues that he was discharged from all liability, by his bankruptcy.

SMITH, J. There are two cases between the same parties and involving substantially the same issues. One is a *scire facias* to revive a judgment rendered November 4, 1867, by the Circuit Court of Arkansas County against Feltz in favor of John Floyd Smith, appellant's intestate,

for the sum of $4,518.91 and costs. The other is a motion to quash and recall two executions issued on the same judgment.

One of the causes shown against the revivor of said judgment, and for staying final process for the satisfaction thereof, is, that the judgment debtor was, on the first day of March, 1870, discharged from all of his debts by the consideration and judgment of the District Court of the United States for the Eastern District of Arkansas, sitting as a court of bankruptcy.

For the judgment creditors it was contended that the debt was created while the debtor was acting in a fiduciary character, and therefore not discharged by the proceedings in bankruptcy.

This issue of fact was determined adversely to the creditor, and judgment given accordingly.

The evidence showed that Feltz was, in the year 1860, appointed guardian for John Floyd Smith, then a minor; that upon the final settlement of his accounts in the probate court, he was found to be indebted to his ward in the sum of $31,279.34, which he was directed on the fourteenth of October, 1863, to pay over, the ward being now of full age, and that the guardian did, in 1865, file in said court his ward's receipt for the above mentioned sum.

The judgment of November 4, 1867, was founded upon a promissory note, made by Feltz to John Floyd Smith, on the twenty-fourth of November, 1863. But it does not appear what was the consideration of said note, and while it is quite possible that it was made in the settlement of the balance due by the guardian, yet it can not be presumed in the absence of competent evidence on that point.

Floyd Smith died after the commencement of these proceedings, but before trial.

While they were pending he made an affidavit before a

notary public that the note upon which judgment was rendered was given in settlement of the amount due him by his guardian.

Ex parte affidavit not admissible as evidence.

This affidavit was offered in evidence, but excluded by the court. A statement or declaration, though made under the sanction of an oath, and reduced to writing, is not allowable as evidence on the trial of an issue raised by the pleading, unless an opportunity has been afforded the adverse party to cross-examine the witness.

Affirmed.

JONES ET AL. V. FREED ET AL.

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1. DEED: *Married woman's—words of conveyance.*

In order to pass her estate in land apt words of conveyance must be used by a married woman. She must join her husband not only in the formal execution of the deed, but in the operative words of grant. A relinquishment of dower will not carry the fee.

2. SAME: *Of husband to wife's land.*

A husband's deed in fee to his wife's land, not her separate estate, will pass to his grantee the estate in the land during the joint lives of the husband and wife, and during his own life if he survives the wife and there has been issue born alive of the marriage.

3. STATUTE OF LIMITATIONS: *Against vendee of married woman.*

The statute of limitations will not run against a married woman, nor against her vendee except from the date of his deed.

4. SAME: *Reversionary interest.*

The statute of limitations will not run against the owner of a reversionary estate until the particular estate be determined; and so where a husband conveys in fee land of the wife in which he has curtesy, the statute will not run against the vendee of the wife until the husband's death.

5. TENANT FOR LIFE: REVERSIONER: *Rights of tenant.*

Where a reversioner obtains possession of the land before the particular estate has determined he will be required to restore the possession and rents received by him to the owner of the particular estate; and, if necessary, the reversionary interest will be charged with the rents, and sold to pay them.

APPEAL from *Yell* Circuit Court.
Hon. S. C. HALL, Special Judge.

J. T. Harrison and *W. N. May* for appellants.

Appellants have had adverse possession for sixteen years, and appellees are barred. As to what is adverse possession, see *17 Ark., 627; 30 Ib., 640; 33 Ib., 150.* Where one dies in possession of land it is *prima facie* evidence that he was *seized in fee.*

Possession of land for the full period of limitation, amounts to an investiture of title. (*34 Ark., 534.*) Any color of title coupled with possession, adverse, open, notorious and continuous for seven years is sufficient. *34 Ib., 547, 598; Hempstead, 624; Fort Smith v. McKibben, 41 Ark., 45.*

Since the passage of married woman's act, April 28, 1873 (*Acts of 1873, p. 378, sec. 9; sec. 4487 Gantt's Dig.*), and by virtue of *section 7, article 9, Constitution of 1874,* the disabilities of married women have been removed, and the statute of limitations runs against them. They no longer have three years after discoverture, to bring suit. *33 Ark., 611; 30 Ib., 23; 34 Ib., 17; 35 Ib., 480; 36 Ib., 355 and 476.*

W. D. Jacoway for appellees.

The deed from Dacus and wife to Kimball was void. The land was the wife's separate property, and apt words were not used in the operative clause of said deed. She only relinquished dower when she owned the fee. *3 Wash.*

Real Prop., 4th ed., p. 353, par. 17, and p. 257, par. 20; 1 Bishop on Law of Married Women, secs. 589 to 604.

Equity can not cure a void deed. (*Ib., sec. 599.*) Equity will correct defective acknowledgments or mistakes in a deed against a married woman. *Ib., note 1 and 2.*

The statute of limitation does not run against married women until discoverture. (*Gantt's Digest, sec. 4113.*) The act of 1873, and the Constitution 1874 only enlarge and extend their rights for their better protection, and take away none of the safeguards by which she has ever been shielded. (See *36 Ark., 588.*) In all statutes containing general words there is an implied exception in favor of persons whose disabilities the common law recognizes. *Parsons on Contracts, 6th ed., vol. 1, * p. 334; 34 Ark., 547, 534.*

The disabilities which the law has thrown around married women remain except in so far as they have been removed by statute. *39 Ark., 361; 32 Ib., 776; 33 Ib., 432; 35 Ib., 365; 29 Ib., 346; Bishop Married Women, vol. 1, p. 601.*

See also *21 Ark., 539.*

SMITH, J. In 1862 the land in controversy was conveyed to Mrs. Ferrell by a deed which did not exclude the marital rights of any future husband she might take. In 1865 she was married to Dacus, but the land was never scheduled as her separate property under the provisions of the married woman's law then in force. In 1866, Dacus sold and conveyed the land to Kimball with covenants of general warranty and seizin in himself. At the end of this deed is the following clause of joinder: "And for the consideration aforesaid and for divers other good and valuable considerations, I, Ellen J. Dacus, wife of the said William Dacus, do hereby release and quit claim unto the

said George L. Kimball, and his heirs and assigns, all my right, title, interest, claim or possibility of dower, in or out of the aforesaid premises."

The acknowledgment was in the form prescribed for a joint deed by husband and wife of the wife's lands. Kimball took possession, and in 1868 sold and conveyed to Jones, who died in December, 1878, in possession and claiming the fee. But in January, 1878, Dacus and wife made a deed of gift of the same land to the children of the Ferrell marriage. And they have conveyed their interest to Freed and Jacoway, who brought ejectment against the heirs at law of Jones. The defendant set up the deed of Dacus and wife to Kimball, and of Kimball to their ancestor, and relied on their adverse possession for more than seven years. The cause was without objection transferred to chancery and a receiver was appointed. The court below decreed the land and the rents in the receiver's hands to the plaintiffs.

1. DEED: Married woman's must contain apt words of conveyance.

In order to pass her estate, apt words of conveyance must be used by a married woman. She must join not only in the formal execution of the deed, but in the operative words of grant. The relinquishment of dower did not carry the fee. *3 Wash. Real Prop., 3d ed., ch. 4, sec. 1, paragraph 20, and cases cited; 1 Bish. Married Women, sec. 594; Agricultural Bank v. Rice, 4 Howard, 225.*

2. Husband's deed to wife's land

But although the deed to Kimball was of no validity as to Mrs. Dacus, since it only released what she never had, nor could have—a right and possibility of dower in her own land, yet it was effectual to convey the interest which her husband had acquired by marriage; that is to say, the use of the land and the right to take rents and profits during coverture, and his right to curtesy if there has been issue born alive of this marriage and Dacus survives his wife. *Elliott v. Pearce, 20 Ark., 508; Harrod v.*

Myers, 21 Ib., 592; Tiller v. McCoy, 38 Ib., 91; Shryock v. Cannon, 39 Ib., 434.

3. STATUTE OF LIMITATIONS: Against married woman and her vendee.

If there could be an adverse holding of the land by the heirs of Jones, the statute of limitations would not run against the plaintiffs except from the date of the conveyance by Mrs. Dacus, she being a married woman when such holding began, and the coverture continuing until the deed of gift was made to her children. *Drennen v. Walker, 21 Ark., 539.*

2. SAME: Against reversionary interest.

But in truth Dacus, the tenant for life, having conveyed the estate in fee, the statute does not run against the reversioner until the particular estate has been determined. *3 Wash. Real Prop., ch. 2, sec. 7, par. 30, and cases cited.*

The present suit is premature. The plaintiff will not be entitled to the possession of the premises during the joint lives of Dacus and his wife, nor until the death of Dacus, if he has curtesy.

5. Tenant for life and reversioner: Rights of tenant.

Reversed and remanded, with directions to the Circuit Court to place the parties in *statu quo*, and then to dismiss the action at the cost of the plaintiffs. If the receiver has not been discharged, let him pass his accounts and pay to the defendants whatever funds are in his hands. If the plaintiffs have obtained possession, or received any rents, that possession must be restored, and those rents refunded to the defendants. And, if necessary to the indemnity of the defendants, the court may charge the reversionary interest of the plaintiffs with the repayment of these rents, and subject it to sale.

DAVIDSON ET AL. v. DAVIDSON ET AL.

FRAUD—MISTAKE: *Relief against: Bona fide purchasers.*

A party who carelessly executes a deed which includes a tract of land not intended to be conveyed, under the fraudulent misrepresentation of the grantee that it includes only the land purchased, may have relief against the grantee but not against a subsequent purchaser for value without notice of the fraud or mistake.

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

P. C. Dooley for appellants.

If the deed was a forgery, no title passed, and there can be no innocent purchaser. *37 Ark., 205; 49 Am. Dec., 390; 32 Ib., 545; 20 Wend., 267; 39 Am. Dec., 557; 6 Rob. La., 192; 28 Am. Dec., 482–685; 4 Whart. Pa., 382; 10 Penn. St., 295; Nemo plus Juris a alieno transferre potest quamipse habet. 2 Kent's Com., 324; 10 Pet., 175; 1 Smith L. C., 7th Am. ed., 1195; 40 Ill., 320; 43 Mo., 216; 10 Tex., 109; 16 Wall., 550; 25 Am. Dec., 606.*

According to the weight of the evidence the deed *was* a forgery. If the lands in controversy were included in the deed by mistake, or a fraud practiced, equity will relieve. *35 Ark., 103.*

Price does not bring himself within the rule of innocent purchasers. (*29 Ark., 568; 27 Ib., 102; 1b., 6; 31 Ib., 87–98; 34 N. J. Eq., 496; 58 N. Y., 73.*) There must be a denial of notice down to the time the purchase money is paid and deed made.

Appellees are barred by limitation.

G. W. Davidson, pro se, makes the same points as the above.

Martin & Trimble, *J. A. Gibson* and *J. M. Pinnell* for appellees.

Argue from the evidence that the deed is genuine.

A bill to quiet title will not lie unless parties are in possession. Treated as a bill to quiet title *27 Ark.*, *234* is conclusive. Appellees being in possession the remedy was ejectment. *37 Ark.*, *645*; *24 Ib.*, *745*; *Ib.*, *431*; *27 Ib.*, *77*; *Ib.*, *414*; *29 Ib.*, *612*; *30 Ib.*, *579*.

Even if a mistake was committed, equity will not reform a deed against an innocent purchaser. Where one of two innocent parties must suffer loss, it must be borne by him to whose act or omission it is due. (*11 Ohio*, *542*; *16 Penn*, *357*; *31 Ib.*, *331*; *Herman's Law of Estoppel*, *sec. 427*.) Price had a right to stand upon the title as it appeared upon the deed. *16 N. H.*, *122–127*; *31 Mo.*, *400*

The land has been continuously, openly, etc., and adversely occupied by Price and vendors for more than eight years, and the statute invests title in him. *Wash. Real Prop.*, *vol. 3*, *p. 145–6*, *156*; *26 Ark.*, *368*; *34 Ark.*, *54*; *33 Ark.*, *151*.

EAKIN, J. The object of this suit was to effect the cancellation or reformation of a certain conveyance of lands, upon the alleged alternative grounds, that, either it was a forgery; or, if not, that there was such a mistake as to its provisions as required reformation. It was intended thereby to quiet the title of complainants to certain lands which had in his lifetime been owned by Jackson Davidson, deceased.

Outside of the question of forgery, in case it should be established, there would arise the supervening question of adverse possession by the defendants, beyond the period of limitation. The facts are as follows:

On the fourteenth of March, 1868, Jackson Davidson,

being the owner of a large body of lands, conveyed to George W. Davidson a portion of them lying contiguous to the others. The lands so conveyed were the northeast quarter of section twelve, and the east half of the southwest quarter, and the west half of the southeast quarter of section one, making a tolerably compact body of three hundred and twenty acres.

To eighty acres of this Jackson Davidson had then no title of record, to wit, the north half of the northeast quarter of section twelve. He had received a conveyance of it from two parties, Belknap and Marquis, which had been lost. After his death, however, Belknap who had acquired the title to the whole, conveyed this half quarter to Sallie E., the wife of George W. Davidson, with the latter's consent. This deed was executed on the twenty-fourth of April, and filed for record on the twenty-fifth of June, 1877. The expressed consideration was $100. Jackson had died intestate on the nineteenth of January, 1873, leaving lands and personalty. Amongst his heirs was a brother, Matthew O. Davidson, the uncle of George W., who was the son of a deceased brother.

There were other heirs, six in all. No administration was taken upon his estate. They all agreed that Matthew O. should take the property as his own, pay the debts, and make of it what he could, and to carry that out, intended to execute to him a deed of release of all their interests. They did so, and the controversy in this case regards that instrument. Whether the deed copied from the records and relied upon by the defendant, Price, who claims under Matthew, be the real deed of relinquishment, or whether the real one has been suppressed and this be a forgery, is the pivotal question. Complainants, G. W. and wife and grantee, contend that the real relinquishment was only general in its terms with re-

gard to all interests in Jackson Davidson's estate, describing no lands specifically; and that George W., in signing it, did not pass, nor mean to pass the lands conveyed to him by Jackson in his lifetime, which lands were no part of his estate at death. The original instrument attacked, and which it is sought to cancel, has been brought before us by "*subpœna duces tecum*" for our examination. It specifically describes as part of the lands of the estate, the tracts claimed by complainants. It bears no date, but purports to have been acknowledged before Thomas J. Atwood, a justice of the peace, on the twentieth day of March, 1873. It is written without erasures or interlineations, on a sheet of foolscap, occupying only one leaf of the sheet. The deed itself and signatures taking up a page and a half of the reverse—the acknowledgment filling out the second page, leaving the other leaf of the sheet blank. It is signed by all the heirs of Jackson, save Matthew.

It bears upon its face nothing suspicious except that it may be noted the lands conveyed formerly to George W. are not included in the mass of lands properly belonging to the estate, but are added in another clause; which may nevertheless have been an innocent afterthought. The deed was not then recorded. The complainants, George W. and wife and Mary T. Butler, to whom George W. afterwards conveyed all of his interest, insist, that this is not the instrument which George W. and the other heirs actually executed; that the real instrument was a very short document, of not exceeding twelve or fifteen lines, containing a sweeping and general release of their interest in Jackson's eatate, without any descriptions of property. George W. says that when he signed there were two or three signatures of other heirs already attached; whereas, in the instrument in question, his own appears first.

On the twenty-fifth of December, 1875, M. O. Davidson, by a short instrument, in consideration of one dollar, released to Isaac M. Rowan, "all my rights, titles and interest to and unto the estate of my deceased brother, Jackson Davidson." No property was described. The release was witnessed and duly acknowledged, but does not appear to have been recorded.

On the thirty-first of January, 1876, as appears by an indorsement on the instrument here shown, Rowan paid the fee, and caused it to be recorded as the genuine relinquishment of the heirs of Jackson to M. O. Davidson.

If genuine, it ends the controversy, unless George W. signed it under such mistake as a court of chancery will, under the circumstances, correct—a matter to be considered later.

The defendants hold under Rowan by several mesne conveyances, all the lands in the body once owned by Jackson, including those in controversy. Valuable considerations in the several transfers have been paid by the purchasers, and there is nothing to affect them with notice of any trusts. When this instrument was executed and recorded, the wife of George W. Campbell had not acquired any interest, save a possibility of dower, which she of course can not now assert, during coverture, if ever. It would be a question whether Belknap had any title left in him to convey to her, and her husband's assent would amount to nothing after he had conveyed all his estate to Mathew O.

The proofs which tend to show forgery are substantially these: George W. Davidson swears positively that this is not the relinquishment he signed, and that he never acknowledged any. The paper he signed contained only about fourteen or fifteen lines, on a piece of account paper; that there were then signatures on it above his. He

does not suspect that the forgery was done by his uncle, M. O.

John B. Butler, the husband of M. E. Butler, one of the heirs, says that he signed a relinquishment, with other heirs, of his wife's interest, after the death of Jackson Davidson. His name does not appear on that in question. His wife did not sign at the time, or if she ever did, witness does not know it. Witness never acknowledged his signature before any officer. The paper he signed was a very short one, about half a sheet on one side of the paper, foolscap size. None of the heirs of Jackson Davidson claimed the lands in controversy as belonging to his estate.

Sarah M. Coldcleugh, (formerly Willis) and one of the heirs, says she executed, with others, an instrument of release, which she read before signing, but which she never acknowledged, so far as she can remember. The instrument described no lands, simply conveying their interest in the estate. It was quite short, in about fifteen lines, leaving space below the signatures. Her name was about the third. In that exhibited her name is fourth.

Thomas J. Atwood, the justice of the peace, whose name appears to the certificate, denies all recollection of having taken the acknowledgment; does not think he ever did. He feels sure that he would have recollected it if he had, for the parties are all neighbors. They never came to his office in a body on the same day to make such joint acknowledgment as the certificate purports, and he would have remembered it if he had gone to their homes.

A disinterested witness, Thomas Green, says the relinquishment was on a strip of paper about six by ten inches. The names of the heirs came to the center of the paper. There were about eight signatures, and that of G. W. Davidson was near the last. The witness had it in his possession and custody three or four months, and was then

requested by M. O. to turn it over to Rowan. He declined to do so until he received a note from George W., directing it. He swears positively that it was not acknowledged, and that there was in it no specifications of lands by numbers. The release was only in general terms.

John R. Walton says the relinquishment was signed by himself, his wife and other heirs. His name does not appear to the deed exhibited, but that of Jennette D. Walton does. He says it was very short, and in general about as follows: "We, the heirs of J. Davidson, do quit claim to all our rights and interest in the real and personal property of J. Davidson to Dr. M. O. Davidson." This, he says, was never acknowledged before any officer.

These are depositions for complainants. The deed in question is signed, and by the certificate purports to have been acknowledged by G. W. Davidson, Sallie M. Willis, Jennette D. Walton, M. E. Butler and Ann S. Davidson.

Upon the other hand, two witnesses testified that they were acquainted with the handwriting of G. W. Davidson, and that his signature to the instrument exhibited was genuine. One of them also testified that he was acquainted with the handwriting of Atwood, the justice, and that the body of the certificate, and the signature thereto, was in that hand.

The court held the instrument genuine, and dismissed the suit for want of equity. The complainants appeal.

We derive little aid from the inspection of the original document, except upon two points, which tend to support the finding of the court. The body of the deed and that of the certificate of acknowledgment were evidently written by different persons, and the body of the certificate is in the hand of the justice's signature.

If the instrument is a forgery it is the work of two

hands, which would have much increased the danger and chances of detection.

The other point is that, upon inspection, we find the paper such that when folded one way, being thin, it presents the appearance of a short instrument, occupying with writing and signature about half a page of foolscap. Although written on the reverse side, this would not be apt to be noticed by parties executing it carelessly, as we presume all the heirs did, except G. W. Davidson. They had nothing to be careful about. Davidson, himself, says he was busy, and executed it hurriedly.

It is somewhat notable too, in a case of this nature, that neither G. W. Davidson, nor Atwood, nor a single one of those who deny any recollection of having executed this instrument, denies that his or her signature is genuine. That is, looks at it, and specifically says so. Their testimony would have carried more conviction if they had. The complainants seem to have had access to the paper, and could have used it that way. We do not know that Atwood or Davidson, or any of the signers, would deny their signatures if asked and called to examine it. The sight might have revived recollection. It is certainly strange that so much has been forgotten, and that so many should concur in a false impression. Yet the proof of forgery is not satisfactory, and it is a thing which should be shown with considerable preponderance to overcome the presumption against felony, and the strong *prima facie* effect of an official certificate of acknowledgment.

It is obvious that if there was any mistake on George W. Davidson's part, as to the contents of the instrument he signed, it was the result of his carelessness, and his confidence in Matthew O., his uncle. He says his uncle told him at the time that the instrument did not mean to include the lands which Jackson Davidson had conveyed in

his lifetime, only those belonging to the estate, and that he signed hastily, in the bustle of business, and without examination.

That might be ground of relief against M. O., but not against innocent purchasers from him for value, who relied upon recorded title. It is not a case of mutual mistake of facts, as if both parties had supposed an instrument to express or omit something which it did not, but it would be, if the allegations were true, a case of fraud by misrepresentation. In no view, however, would one suffering from such mistake or fraud have an equity for relief from the effects of his carelessness to the detriment of a subsequent purchaser for value, without notice. Here there have been several mesne conveyances between Matthew O. Davidson and the defendant, Price, who now claims the lands, amongst persons to whom no notice nor hint of fraud has been brought home. The question of limitation is not important. The defendant need not resort to it. The deed of the heirs to Matthew O. being sustained, nothing ever vested in Mrs. Davidson, the wife of George W., and the deed of George W. and wife executed to complainant, Mary T. Butler, was subsequent to the record of the deed of the heirs of Jackson to Matthew O., which include the same lands and was signed by George W.

We find no error in the decree.

Affirmed.

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LOWMAN, EX PARTE.

APPEAL: *Order of Circuit Court rejecting collector's bond.*

The order of a Circuit Court rejecting a collector's bond when presented for approval is final and subject to appeal to the Supreme Court.

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

L. A. Pindall for appellant.

The approval of official bonds are judicial proceedings (*Oliver v. Martin, 36 Ark., 143*), and within the supervisory jurisdiction of this court. *Sec. 4, art. 7, Constitution.*

There is now no sheriff in Desha County. *Constitution, art. 7, sec. 50; Callaway v. Miller, 32 Ark., 666.*

The act of 1877, page sixteen, session acts, is unconstitutional so far as it attempts to confer power of the appointment of elective officers on the executive, at least, if parties can delay the qualification of officers elected to fill vacancies, by not extraordinary delays of the law. The *pro tempore* appointment authorized by that act, can be unconstitutionally extended to the whole unexpired term.

The sole question before the court is the sufficiency of this bond. *Woodruff County v. Bosely, 28 Ark., 306.*

An officer should be required to give a good bond, but should not be subject to such excessive caution as to defeat the policy of the law. The power of the courts to reject bonds must be confined to such reasonable bounds as will not defeat the right of the people to elect officers.

The act of 1874, page 192, makes the affidavits evidence of the solvency of the sureties, and where the sureties justify in a sufficient amount, until their affidavits are traversed, they will be taken as true. In this case the aggregate value of the sureties' property is over the amount of the bond, and this is all the law requires. No citizen or taxpayer made objections to its sufficiency, and no issue was made as to its sufficiency.

The non-residents of the county were shown to be men of means, and are bound by the bond. *29 Ark., 127; 38 Ark., 72.*

EAKIN, J. Lowman, at a special election to fill a vacancy, was elected sheriff of Desha County, on the eleventh of February, 1884, and received a commission from the Governor the twenty-ninth of March, 1884.

On the eleventh of April he presented his bond to the Circuit Court of Desha County for approval; exhibited his commission; moved the court to approve the bond, and to administer to him the oath of office. The court of its own motion referred the bond to the prosecuting attorney, who next day returned it, with the indorsement that he considered it insufficient.

Upon hearing, the court adjudged the sureties insufficient, and refused to approve the bond, ordering the appellant to furnish an additional bond in fifteen days. He excepted, took a bill of exceptions and appealed.

It is sufficient to say, of the proof, that it shows by the oaths of the several proper sureties, and by other evidence taken, that the bond was good for the amount required, to wit, the sum of ten thousand dollars. Besides these proper sureties, there were others, non-residents of the county, who, being liable at common law, corroborated the security given by the solvency, and proof of the sufficient means of the residents.

The indorsements of the prosecuting attorney, as a matter of practice, is unobjectionable for the purpose of inducing closer examination, and making a *quasi* issue, but it is in no sense evidential of insufficiency of the bond. The record discloses no ground upon which the court could doubt the sufficiency of the bond.

The order of the court is final so as to be the subject of appeal. Nothing further remains by the court to be done to settle the matter.

If the bond is not given in fifteen days, by force of the order itself, and by law, the office becomes vacant. *Sec. 1 of act of March 1, 1875, p. 192, Pamph. Acts.*

The action of the court in rejecting the bond partakes of a judicial nature, and is subject to revision here. See *Oliver v. Martin, 36 Arkansas, 134*, which was a case arising under the same statute, to which reference is here made to avoid repetition.

The power vested in the Circuit Courts to approve or reject these bonds is not an arbitrary one. It is discretionary, but it must be exercised with a sound, reasonable discretion. It is a discretion which may, in good or in bad faith, be abused, and is subject to control. Otherwise the circuit judge might come to assume the power to annul the commissions of all county officers in his district at his pleasure. The Legislature did not certainly contemplate this.

The offices are very important to the public. They involve large pecuniary responsibilities, which the Legislature has been careful to secure by very stringent provisions with regard to the amounts of bonds and the justification of sureties. On the other hand, it is apparent with regard to some of these offices, like that of collector, for instance, that if the amounts be too large, or the means of sureties be required to be much in excess of the penalties, and if they be required, as they are, to be all residents, it would be often impossible for the most efficient men to give bonds at all, and the evil would be increased if the circuit judges should arbitrarily fix in their own breasts conditions of approval not required by law.

If the bond should not be approved, where the oaths of the sureties and the proof in the case show without any conflict of testimony that the bond fulfills all the requirements of the statute, and where there is no proof nor intimation of any other objection to it, we can not say that the circuit judge has acted with a sound discretion. That would be to abnegate the supervisory power of the court.

If there be any objection to the bond it should have been in some way shown, after it had been made by the proof indubitably good.

Reverse the action of the court in refusing to approve the bond, and remand the cause, with instructions to the court, if in session, to approve it, or to the circuit judge to do so, if it be in vacation, and for further proceedings in accordance with law and this opinion.

HAWES V. FETTE.

STATUTE OF LIMITATIONS: *When suspended by bankruptcy.*

When a creditor proves his debt against a bankrupt who fails to get a discharge, the interval between the proof of the debt and the termination of the proceedings in bankruptcy, is excluded in computing the time limited for bringing suit on the debt.

APPEAL from *Pulaski* Circuit Court.
Hon. F. T. VAUGHAN, Circuit Judge.

T. B. Martin for appellant.

The record, as we conceive, presents two questions of law.

First. The statute not having begun to run at the date of the adjudication in bankruptcy, and the issuance of the certificate of protection, did the adjudication prevent its beginning?

Second. If the statute had begun to run, did the adjudication suspend its operation upon demands *duly proved*, during the pendency of them in the bankrupt court? *Section 5105 of Revised Statutes, U. S., provides,* "no creditor proving his debt or claim shall be allowed to maintain any

suit at law or in equity therefor against the bankrupt, but shall be deemed to have waived all right of action against him;" * * * and by U. S. Statute of June 22, 1874, section 7, this section has been amended by adding, "but a creditor shall not be held to have waived his right of action or suit against the bankrupt when a discharge has been refused or the proceedings have been determined without a discharge."

What is the effect of the above quoted provisions, but to prohibit suit during the pendency of the claim in the bankrupt court, but to allow suit to be brought after a discharge is refused?

We are not unmindful of the general rule that the courts will not engraft an exception upon the statute, that is not mentioned in the act itself. But the running of the statute may be *suspended* by causes not mentioned in the statute itself. See *Hanger v. Abbot, 6 Wall., 532; Ross v. Jones, 22 Wall., 576; Braun v. Sauerwin, 10 Wall., 218.*

Appellant's demands were all duly proved in bankruptcy, and do not stand in the same relation to the plea filed that they would if they had not been proved so, as is intimated by the Supreme Court of Massachusetts, in the case of Doe v. Irwin, decided March 3, 1883, and reported we suppose in 133 Massachusetts.

Section 5106 of U. S. Revised Statutes prevents the creditor from prosecuting to final judgment any suit already begun; and we think the object of section 5105 was to prevent the bringing of a suit on any provable claim, during the pendency of the bankruptcy proceedings. It says "no action or suit," etc.

If we admit that under the bankrupt law, as was contended by the attorney for the appellee in the lower court, the appellant could have obtained leave to sue and prosecute his demand to final judgment, still as against the last

three demands the statute never begun to run until the twelfth day of May, 1882. Mr. Wood says:

"When an action can not be brought until leave to sue is granted by a court, especially when this preliminary is imposed by statute, the statute of limitations does not begin to run upon the cause of action until such leave has been granted." *Wood on Lim. of Actions, p. 334;* citing *Wood v. Myrick, 16 Minn., 494.*

In the case of *Rogers v. Wentworth*, decided by the Supreme Court of New Hampshire, in June 1878, Foster, J., for the court, said: "When a bankrupt's discharge has not been refused, and the bankruptcy proceedings have not been determined without a discharge, a creditor proving his claim in bankruptcy can not maintain a suit therefor against the bankrupt; but is deemed to have waived all right of action against him. (*U. S. Rev. Statutes, sec. 5105.*) His right of action is suspended by the Government. The statute providing, not that his suit shall be stayed, but that he shall not be allowed to maintain it, does not distinguish between a suit brought before, and a suit brought after his proving the claim in bankruptcy.

"*The running of the statute of limitations is suspended while the right of action is suspended by the Government.*" *Reporter, vol. 9, p. 744.*

Also see same case, *58 New Hampshire, p. 318.*

J. M. Moore for appellee.

The point to be determined by the court is whether the adjudication of bankruptcy suspended the operation of the statute. The proof of a claim in bankruptcy is not a suit. It is wholly *ex parte* as to the assignee, and *a fortiori* this is true as to the bankrupt. *12 Bankrupt Reg., 547.*

The statute stops running *as to the assignee*, at the date of the adjudication, but it is otherwise as to the bankrupt. *Ibid, 545.*

Proceedings in insolvency do not suspend the statute as to the insolvent, though it is suspended as to the assignee. *Richardson v. Thomas et al., 13 Gray, 381; Callister v. Hailey, 6 Ib., 517; Stoddard v. Doane, 7 Ib., 387 and 274; Howell v. Steel, 17 Ala., 372; Sacia v. Degroff, 1 Cowen, 356; Bowie v. Henderson et al., 6 Wh., 514; Denny v. Henderson, 2 Cr. Ct. Ct., 121; Hudson v. Carey, 11 Serg. & Rawl., 10.*

In *In re Wright, 6 Bissell, 319*, it was held that the statute does not continue to run against debts valid at the time of the filing of the petition in bankruptcy, *as to the assignee.* The reasoning of the court implies strongly that the rule would be different in the case of the bankrupt.

The local statute of limitations is applicable to claims against the bankrupt's estate, and continues to run *as against the estate or assignee* until proof of the claim. *Nicholas v. Murray, 5 Federal Rep., 320.*

In *McIver v. Ragan, 2 Wheaton, 25*, the court say "that whenever the situation of the party was such as in the opinion of the Legislature to furnish a motive for excepting him from the statute, the Legislature has made the exception, and that it would be going too far for the court to add to these exceptions."

In *Kirkland v. Kubbs, 34 Md., 937*, the court held the statute continued to run during the operation of the stay laws, saying: "To permit the statute to run when it is impossible to prevent its operation by suit, or *otherwise*, would be unjust," etc. "The exceptions, therefore, in such cases, are put on the express ground that the parties are deprived of all remedy whereby the cause of action may be kept alive."

The bankrupt was required to apply within one year from his discharge (*Rev. Stat. U. S., sec. 5108*), and any creditor could, upon his failure, have his certificate of protection vacated, or obtain leave of the bankrupt court

to sue, and even to issue final process. This was a very common practice. *In re Lowenstein, 2 Cent. L. J., 349; In re Donaldson, 2 Dillon, 547.*

In *Howell v. Steel, ante,* the court held that the bankruptcy of the maker of a note did not suspend the statute.

The only exceptions to the statute are those provided in the act itself. Courts will not make exceptions of cases that are within the spirit of the statute unless they are also within the letter of the exceptions. (*Bennett v. Worthington, 24 Ark., 488; Mayo & Jones v. Cartwright, 30 Ark., 410.*) Where the Legislature makes no exception to the statute, the courts can make none. *Bank, etc., v. Dalton, 9 Howard (U. S.), 529.*

SMITH, J. The plaintiff was the holder of sundry promissory notes and bills of exchange made and accepted by the defendant, which matured, respectively, on the sixteenth of October, the ninth of November, the sixteenth of November, and the seventh of December, 1875. The action was begun August 19, 1882, and the defense was the statute of limitations of five years. The cause was tried before the Circuit Court, a jury being waived, upon an agreed statement of facts.

It appears that the defendant was adjudged a bankrupt, upon his own petition, on the nineteenth of October, 1875, and a certificate of protection issued to him; that these debts were duly proved against his estate, and were pending in the bankruptcy court until the twelfth of May, 1882, when the application of the bankrupt for his discharge was refused, and the certificate of protection was revoked.

The Circuit Court declared these instruments to be barred, and gave judgment for the defendant.

It seems to be well settled that the pendency of the proceedings under State insolvent laws, does not suspend the

operation of the statute of limitations upon debts; and the reason is, such proceedings do not prevent the creditor from suing. The same principle applies to the case where the creditor does not prove his debt against the bankrupt estate. The law does not prohibit him from bringing his action against the bankrupt. (*Doe v. Irwin, 134 Mass., 90.*) But "no creditor proving his debt or claim, shall be allowed to maintain any suit, at law or in equity, therefor against the bankrupt; but shall be deemed to have waived all right of action against him." "But a creditor shall not be held to have waived his right of action or suit against the bankrupt, when a discharge has been refused, or the proceedings have been determined without a discharge." *Rev. Stat., U. S., 5105, amendatory act of June 22, 1874, sec. 7.*

This is a suspension of the right of action, and consequently of the running of the statute, by the Government.

The creditor has been disabled to sue, by a superior power, without any default of his own; and unless the statute ceases to run during the continuance of the supervening disability, he is deprived of a portion of the time within which the law contemplated he might sue. (*Braun v. Sauerwein, 11 Wall., 218; Bayers v. Wentworth, 58 N. H., 318.*

STATUTE OF LIMITATIONS. Suspension by bankruptcy.

The interval between the proof of the debts and the termination of the bankruptcy proceedings, is to be excluded from the computation of the time limited for bringing suit. The inactivity of the creditor during that period was an enforced one.

Reversed for a new trial.

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WILLIAMS v. THE STATE.

EVIDENCE: *Admissions of guilt by silence.*

Where one is accused of crime and is silent, it may go to the jury as a tacit but weak admission of guilt. Such silence is worth but little as a tacit admission, and should be received with great caution.

APPEAL from *Drew* Circuit Court.
Hon. J. M. BRADLEY, Circuit Judge.

ENGLISH, C. J. This case has been here before on appeal by Matilda Williams, and the judgment on a verdict of murder in the first degree was reversed.

The indictment charged, in substance, that on the fifteenth of November, 1880, in the county of Drew, William Johnson and Cæsar Pitts murdered Calvin Williams, with an ax, and that the defendant, Matilda Williams, at the time the murder was committed, was present, standing by, and then and there unlawfully, feloniously and of her malice aforethought, and with premeditation and deliberation did aid, abet and assist said William Johnson and Cæsar Pitts to do and commit the murder in the manner and form aforesaid.

In other words, she was indicted as a principal, and not as an accessory before the fact. The judgment was reversed, on her former appeal, because there was no evidence that she was present when the murder was committed, and because the trial judge erroneously charged the jury, in effect, that she might be convicted under the indictment, though not present, if she advised and encouraged the perpetration of the crime. See *Matilda Williams v. The State, 41 Ark., 173.*

On the remanding of the cause she was again tried, on

the same indictment, at the February term, 1884, and the jury returned the following verdict:

"We, the jury, find the defendant, Matilda Williams, guilty of accessory before the fact to murder in the first degree, as charged in the indictment."

She was refused a new trial, sentenced to suffer the death penalty, took a bill of exceptions, and prayed an appeal, which was allowed by one of the judges of this court.

I. We endeavored to make it very plain, in the opinion delivered on the former appeal in this case, that, though accessories before the fact are punishable under our statute as principals, yet they are not indictable as such, and that one indicted as a principal can not be convicted on proof of being an accessory before the fact.

The verdict rendered on the second trial was not strictly responsive to the allegations of the indictment. If the allegations of the indictment had been proved, the jury should have found the accused guilty of murder in the first degree, and not as an accessory before the fact to such murder.

II. The proof of the *corpus delicti* on the second trial was about the same as on the first, and its substance is stated in the opinion delivered on the first appeal.

Calvin Williams disappeared from his home on the Prewit plantation, in Drew County, on a day of October, 1880, and his skeleton was discovered on the fourth of June, 1883, by a man plowing in a new ground about a quarter of a mile from his house. The place where his bones were found was an old deadening and thicket when he disappeared.

Appellant, Matilda, was his wife, and William Johnson and Cæsar Pitts, laborers on the Prewit place, were boarding with him at the time he disappeared. After the dis-

covery of his bones, Johnson and Pitts were indicted for murdering him, and appellant was separately indicted as above stated. At the time of her second trial, Johnson and Pitts had been convicted, and Pitts had obtained a new trial, and his case was still pending.

No eye witness to the murder of Calvin Williams was produced on the trial of appellant. She was convicted on vague proof of admissions, or assumed admissions by silence.

EVIDENCE: Admission of guilt by silence.

The rule on the subject of admissions by silence is, that where one is accused of crime and is silent, it may go to the jury as a tacit but weak admission of guilt. Such silence is worth but little as a tacit admission, and should be received with great caution. *Ford v. The State, 34 Ark., 654*, and authorities cited.

The State attempted to prove by Alex. Walker that appellant by silence acquiesced in a threat made by Johnson against her husband.

Walker testified that on the fourth of July, 1880, he stopped at the house of Calvin Williams, on his way to a barbecue, and, while sitting back of the fireplace blacking his shoes, heard Calvin say to Matilda: "I want some clean clothes to wear to the barbecue." Matilda said, "You have no clean clothes." There was a shirt lying on the bed, and Calvin, pointing to it, said, "Whose shirt is this?" Matilda said, "It is Johnson's." Calvin said, "How is it you can do up Johnson's shirts, and can't do up mine?" She said "I did not have time to do up your clothes." Calvin then walked out of the house and said no more. Johnson said, "Never mind, we will get rid of him before long." Matilda was busy doing something, and witness did not know whether she heard what Johnson said or not. Witness heard it, and she was closer to Johnson than he was, etc. They all went to the barbecue

together. Witness did not tell Calvin of the remark that Johnson made.

It was in evidence that at some time after the disappearance of Calvin Williams, William Johnson and appellant intermarried, and afterwards she left him.

Mariah Gray, a witness for the State, testified that after Matilda had left Johnson, she heard Johnson ask her in the spring of 1883, if she was coming back to him; she said "No, William Johnson, I am not." He said, "If you don't come back to me, I am going to give myself up to the State, and get us both in the penitentiary." She said, "I have done nothing; I have killed nobody." He said, "I know you have not killed anybody, but you had it done; you fixed the way for it to be done, and I can go and put my hand on it, and that will be proof enough." About this time witness walked off, and did not hear them say any more.

Josephine Simmons, another witness for the State, was present at this interview between Johnson and appellant, and her testimony was the same as that of Mariah Gray.

Both of them failed to prove any tacit admission on the part of appellant. To Johnson's first remark they heard and stated her response in denial. They both walked off when he made the second accusation, and heard nothing more. They failed to prove that she tacitly admitted this accusation by silence.

It was in evidence that after that interview, appellant went back and lived with Johnson.

Alex. Johnson, witness for State, testified that he was put in jail with William Johnson, Cæsar Pitts and Mrs. Williams, and that "one day while in jail, William Johnson got to persecuting Cæsar Pitts, and said he did it. William Johnson said Mrs. Williams 'suaded him out in the old deadening, and you hit him in the head, and broke

his back. Cæsar Pitts said "No, you knocked him in the head, and broke his back." This conversation was in the hearing of Matilda Williams. Matilda Williams said, "I don't know anything about it." She was in a cell on the other side of the hall. She said she did not know anything about it. Witness was put in jail concerning the killing of Calvin Williams."

Here again the State failed to prove that appellant made any admission by silence.

It was in evidence that Calvin Williams, on the morning of the day of his disappearance, went to Tillar's Station, and bought a pair of boots and a piece of meat; and at some time on the same day, was seen with the boots and meat, on the road between the station and his house, about half a mile from his home. It was not proved that he was seen by any one after that.

Before and up to that day, he and wife, Johnson, Pitts and others had been picking cotton in a field not far from his house together. He was not at the field on that day, and Johnson and Pitts were both absent from the field during the whole day. Appellant picked cotton as usual, the whole of the day, with the other hands. At the dinner hour they went with her to her house, and after dinner they returned by her house, and she went with them to the field.

After carefully examining all the evidence, we repeat what was said in the opinion delivered on the former appeal:

"Appellant was indicted as a principal, and without proof that she was present, but on slight, vague and unsatisfactory testimony that she advised and encouraged the commission of the crime, she was convicted."

We are not willing to affirm a sentence of death on the evidence disclosed in the bill of exceptions.

Reversed, and remanded for a new trial.

MOORE AND WIFE V. BOOZIER ET AL.

EXECUTION: *Exemptions on debts prior to Constitution of* 1868.

Exemptions from execution on debts existing at the time of the adoption of the Constitution of 1868 are governed by the statute of exemptions then in force.

APPEAL from *Washington* Circuit Court.
Hon. A. B. GREENWOOD, Special Judge.

E. B. Wall for appellants.

1. Charles Boozier, having married Mary Hargrove, took possession of the property January 1, 1868, hence is liable from that date, if at all, for Rhoda Hargrove's (now Moore's) half interest in the same. *53 Ga., 485; 50 Ib., 81; 54 Ib., 359; Const. 1868, art. 12, sec. 1.*

2. If, at that time, Boozier held the half interest of Moore other than as a trust, he held it subject to execution, save as protected by the then existing homestead law. *4 Green (Iowa), 568; 15 Wall., 610; 9 Pet., 359; 8 Ib., 88; 69 N. C., 396.*

3. The Constitution of 1874 having increased the exemption in force January 1, 1868, appellees could not schedule except under the exemption law in force January 1, 1868. *54 Ga., 355; Const. Ark., 1868, art. 12, sec. 1; 15 Wall., 610; 9 Pet., 359; 49 Miss., 790 and 528; 22 Gratt., 266; 26 Gratt., 705; 5 S. C., 470; Thompson on Homestead and Ex., secs. 9 and 10.*

4. Appellee not having scheduled according to law, the supersedeas is based upon a nullity, and should have been quashed. *1 Iowa, 441; 25 Ill., 612; 16 Minn, 161.*

5. *Chapter 68 Gould's Digest* was the law in force January 1, 1868, and appellee could schedule under it only, if at all.

ENGLISH, C. J. This was a motion to quash an exemption supersedeas, determined in the Circuit Court of Washington County, the material facts of the case being as follows:

In a suit in chancery pending in that court, at its July term, 1882, wherein William Moore and wife, Rhoda, formerly Hargrove, were complainants, and Charles Boozier and wife, Mary, also formerly Hargrove, and other heirs and distributees of Archibald Hargrove, deceased, were defendants, a decree was rendered in favor of complainants against defendants Charles Boozier and wife, Mary, for the sum of $269 principal, and interest thereon at six per cent. from the first of January, 1868, amounting to $234.03, and making the whole decree for principal and interest $503.03. The recitals of the decree show the origin and nature of this liability of Boozier and wife to Moore and wife.

The cause was heard between Moore and wife, complainants, and Boozier and wife, defendants, the other defendants failing to appear and make defense, though warned.

The decree recites that Archibald Hargrove died in Washington County, in December, 1867, leaving him surviving as his heirs at law, the complainant, Rhoda Moore, the defendant, Mary Boozier, and other defendants named.

That the defendants not answering, received from Archibald Hargrove, in his lifetime, a large "sum" of personal property, and accepted the same in full satisfaction of their interest in the estate of said Archibald.

That complainant, Rhoda Moore, and defendant, Mary Boozier, were the only heirs who are entitled to "inherit" the personal estate of said Archibald at the time of his death, and that they were entitled to receive the said personal estate share and share alike.

That said Archibald Hargrove, at the time of his death, left personal estate of the value of $538, and that said defendants, Charles and Mary Boozier, on or about the first day of January, 1868, took possession of said personal estate, and converted it to their own use, and that they have made no return or restitution thereof, nor have they paid said plaintiff, Rhoda Moore, for her share in the same; that they hold one-half of said sum, to wit, $269; that they should pay her interest thereon after the first day of January, 1868, at the rate of six per cent., making due and owing said plaintiff, Rhoda Moore, by and from Charles and Mary Boozier, said defendants, $503.03.

Then, after these recitals, follows the decree in favor of Moore and wife against Boozier and wife, as stated above.

An execution was issued upon this decree the thirtieth of August, 1882, and, on the second of the following October, Charles Boozier filed in the office of the clerk of the court a schedule of all his real and personal property; the former consisting of seven small tracts of land, lying contiguous, amounting to twenty-four and three-fourths acres, and the latter of farm animals, implements, household furniture, etc., valued at $507.

Attached to the schedule was his affidavit that he was a citizen of the State, the head of a family, and resided on the land, claiming it to be his homestead and exempt from execution; and also claiming an exemption of all the personal property except a black mare, valued at ten dollars.

Upon this schedule the clerk issued a supersedeas against the execution upon the decree.

At the January term, 1883, of the court, Moore and wife filed a motion to quash the supersedeas, on the grounds that the schedule did not comply with the statute, and that

the supersedeas was issued contrary to law, and that plaintiffs were entitled to an execution under the decree, regardless of the alleged exemptions.

The court overruled the motion to quash the supersedeas, and Moore and wife took a bill of exceptions, setting out the facts, and appealed to this court.

The schedule was made under the act of March 9, 1877 (act of 1877, page 53), and the exemptions were claimed under article 9 of the Constitution of 1874, which is not applicable to the liability in question.

The debt or liability for which the decree was rendered, was, as shown by its recitals, incurred the first of January, 1868, which was before the Constitution of 1868 was declared to be ratified.

The exemption provision of that Constitution (article 12) applied to debts contracted after its ratification, and not before.

So the exemption provisions of the present Constitution (article 9) apply to debts contracted or liabilities incurred after its adoption.

Section 9 of article 9 provides that "the exemptions contained in the Constitution of 1868 shall apply to all debts contracted since the adoption thereof, and prior to the adoption of this Constitution."

And section 1 of the *Schedule* provides that "all laws exempting property from sale on execution or by decree of a court, which were in force at the time of the adoption of the Constitution of 1868, shall remain in force with regard to contracts made before that time."

By the homestead act of December 8, 1882 (*Gould's Dig., chap. 68, secs. 29, 30–1*), "every free white citizen of this State, male or female, being a householder or the head of a family, shall be entitled to a homestead, exempt from sale or execution (except as hereafter mentioned),

not exceeding one hundred and sixty acres of land, or a town or city lot, being the residence of such householder or head of a family, with the appurtenances and improvements thereunto belonging.

"Nothing herein contained shall be so construed as to exempt said homestead from sale for taxes, or the owners thereof from any liabilities or debts contracted prior to the passage of this act," etc.

This act was amended as to the homestead in a town or city by section 6 of the act of March 11, 1867, extending the exemption laws of the State. *Acts of 1867, p. 309.*

Boozier claimed as exempt from sale on execution under the decree, less than one hundred and sixty acres of land. He showed that he was a citizen of the State, the head of a family, and resided on the land, claiming it as a homestead. He was doubtless free, and probably white.

The court below did not err in overruling the motion to quash the supersedeas so far as it protected the homestead of Boozier from sale on execution under the decree.

EXEMPTIONS: On debts existing prior to Constitution of 1868

The act of the eleventh of March, 1867, to extend the exemption laws of the State, as above cited, was in force when the Constitution of 1868 was adopted, and regulates exemption of personal property as to debt and liabilities incurred before that time. This act specifically exempts certain articles of personal property from sale on execution, and Boozier must make his claim of exemption of personal property under this act, and not under the Constitution of 1874.

So much of the judgment of the court below as overrules the motion to quash the supersedeas as to the homestead exemption is affirmed.

So much of the judgment as overrules the motion to quash the supersedeas as to the exemption of personal property claimed, is reversed.

The case will be remanded to the court below with instructions to quash the supersedeas as to the personal property claimed in the schedule to be exempt, with the privilege to Boozier to file an amended schedule, and obtain a supersedeas as to such articles of personal property as may be owned by him, and specifically exempted from sale on execution under the act of the eleventh of March, 1867.

RUSHING ET AL V. PEOPLES.

PARTNERSHIP: *In profits: Rights of partners.*

Rushing, a merchant, owned a stock of goods of the value of $3,000. He formed a partnership with Peoples, a physician, who put into the business $125 worth of drugs, $250 in cash, and his practice as a physician. The partnership extended only to the profits, which were to be equally divided. In a month the goods were seized by attaching creditors of Rushing, Peoples being allowed to withdraw his drugs. Soon afterwards, by arrangement between the creditors and Rushing, the goods were sold and delivered to Ragsdale and Baggess. Peoples was no party to this arrangement, but knew of it, and was present when the invoice was taken, and made no claim to the goods. He afterwards filed his bill for an account against Rushing and Ragsdale and Baggess, and a judgment for what might be due him. *Held*, that his interest was only in the profits. He had none in the goods. They were subject to Rushing's debts; and Peoples was entitled to no relief against Ragsdale and Baggess, but was entitled to an account from Rushing.

APPEAL from *Pope* Circuit Court, in Chancery.
Hon. W. D. JACOWAY, Circuit Judge.
W. C. Ford for appellants.
H. S. Carter, *contra.*

SMITH, J. In December, 1880, Rushing was a merchant at Galla Creek, in Pope County, with a stock of goods

worth between $3,000 and $3,500. He formed a partnership with Peoples, who put into the concern drugs of the value of $122.80, cash $250, and his practice as a physician. The partnership extended only to a participation in the profits, which were to be equally divided between them.

The partnership only endured about one month. Rushing was heavily indebted, and his creditors sued out attachments, and caused them to be levied on the goods in stock, Peoples, however, being permitted to withdraw the remnant of his drugs. By an arrangement between Rushing and the attaching creditors, the goods were sold and delivered to Ragsdale and Baggess.

Peoples was no party to the arrangement, but was cognizant of what was going on, and was present when an invoice of the stock was taken, and made no claim of any interest in the goods.

His bill prayed for an account between him and Rushing, and a judgment for what might be found due him. After a demurrer to the bill had been overruled, the defendant answered, and it was referred to a Master to take and state an account. Upon the coming in of his report, the court rendered judgment against all of the defendants for $262.50, the amount of the plaintiff's interest in the firm of which he had been a member.

The judgment against Ragsdale and Baggess can not be sustained upon any legal principle known to us.

The court below proceeded upon the idea that they had received and appropriated to their use the goods which constituted the capital stock of the firm in which Peoples was interested, without his consent, and without recognition of, or provision for, his rights in the premises. But it must be remembered that Peoples had only a community of interest in the profits of the business, without any community in the property out of which those profits were to

arise. The goods still belonged to Rushing, after his association with Peoples, and were liable to seisure at the suit of his creditors, or to be disposed of in satisfaction of his debts. And the profits, in which alone Peoples was interested, depended on the continuance of the business.

The partnership itself, and, of course, Peoples' interest in it, were liable to be suddenly terminated by a sale, either voluntary or forced, of the stock of goods. After that he would have a right to an account from Rushing.

It follows that Ragsdale and Baggess received nothing that was the property of Peoples, or upon which he had any lien. The judgment against them is therefore reversed, and a decree will be entered here dismissing the bill as to them.

The judgment against Rushing is affirmed.

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HALEY, CORONER, v. PETTY ET AL.

1. COLLECTOR OF REVENUE: *For what revenue he and his sureties bound.*
The collector of revenue and his sureties are bound on their bond for revenue collected in the preceding term, and in his hands at the time of the execution of the bond; but the sureties are not bound for revenues misapplied or squandered by him before the execution of the bond.

2. SAME: *Duration of his term.*
The term of a collector of revenue continues until his successor is elected and qualified; and revenue collected up to the qualification of his successor, is collected during his term.

3. DISTRESS WARRANT: *When and for what to be issued.*
A distress warrant can be issued by the Auditor only for the balance found due from the collector upon the annual settlement required to be made with the Auditor, after the settlement made with the clerk after the tax sales; and it should be issued promptly and immediately in the time required by the statute. The Auditor can not, as a general rule, delay, and issue it afterwards at some indefinite time, at his option.

APPEAL from *White* Circuit Court, in Chancery.
Hon. J. W. MARTIN, Judge, on exchange of circuits.

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

The authority for issuing the distress warrant, and the proceedings under it, are found in sections 5247–5254 Gantt's Digest. No time is limited for its service and return, but, *quere*, is it to be regarded and treated as an execution?

As to the liability of the sureties, see *Goree v. State, 22 Ark., 236.*

The condition of the bond is sufficiently broad to cover his liabilities and that of his sureties, for all revenue that might come into his hands *during 1878*, whether of the revenue of 1877 or 1878.

W. R. Coody and *J. W. House* for appellees.

Petty was not *ex officio* collector (*Acts 1875, p. 225*), and the bond given by him as such, on the thirty-first day of January, 1878, was a nullity, at least, as a statutory bond; because there was no law authorizing the execution of such a bond at the time it was executed. *10 Ark., 89; 23 Ib., 278; 35 Ib., 327.*

No distress warrant could issue for any alleged deficit in the revenue of 1878, until the taxes for that year had been collected, and the time expired for the collector to make settlement, June 30, 1879. See *17 Ark., 440; 21 Ib., 426; Ib., 475; 22 Ib., 595; 23 Ib., 107; 35 Ib., 95.*

The sureties were not liable for licenses collected before the execution of the bond, nor after the expiration of the collector's term of office. *Brandt on Suretyship and Guaranty, secs. 450, 451, 460, etc., and notes.*

The sureties on this bond not liable for moneys collected on account of whisky license. *Miller's Digest, secs. 185, 186, 187, 188, 189, 203, 202, 201 and 208*, etc.

The distress warrant, at the time of the levy, was defunct, having been issued and placed in the hands of the coroner more than eighteen months before; for it is nothing but an execution, and is inoperative after sixty days. *Gantt's Dig., secs. 5247 and 5248; Miller's Dig., sec. 189.*

The bondsmen could not be held for the revenue of 1877, and the Auditor exceeded his authority in issuing the distress warrant directing the coroner to distrain, etc., for the revenue collected or which *should have been collected* during the years 1877 and 1878. *24 Ark., 142; 29 Ark., 173; Brandt on Surety, etc., sec. 138–9–40–41; 37 Am. Rep., 449; 10 Am. Dec., 644; 14 Ib., 259; The Reporter, July 27, 1881, 111.* The sureties on a *collector's* bond can not be held liable for the default of the sheriff. *4 Greene (Me.), 72.*

Petty's accounts had never been adjusted by the county court, and the Auditor had no right to adjust the matter of whisky licenses. *35 Ark., 555, etc.*

EAKIN, J. Petty, sheriff of White County, failed to execute his bond as collector, before the first Monday in January, 1878, whereby the office of collector, which *ex officio* pertained to him as sheriff, became vacant. Afterwards he was appointed collector by the Governor, and on the thirty-first of January, 1878, executed his bond with all the other appellees as sureties. It is in the sum of $75,000. It recites that Petty "has heretofore been duly elected and commissioned as sheriff, etc., and is, by virtue of his office, *ex officio* collector of the revenue, etc., for the time prescribed by law; and is conditioned that he shall faithfully perform the duties of collector of the revenue for the county aforesaid, for the year 1878, and well and

truly pay over any moneys collected by him, by virtue of his said office."

On the seventeenth of December, 1878, the Auditor of the State issued to the coroner of White County, a distress warrant against Petty and his sureties, reciting that, upon an adjustment of Petty's accounts, it had been found that he was due for revenue which had or should have been collected for the years 1877 and 1878, the sum of $2,332.35, including commissions forfeited, and the penalty of 25 per cent. on the amount due and unpaid at the time fixed by law. It further recited that a part of this sum, to wit, $1,630.95, bore interest at the rate of 5 per cent. per month, from the first day of July, 1878.

From indorsements on the back and margin of the distress warrant, it appears that this sum is made up of the following items:

Balance due on liquor licenses	$1,900 00
Penalty of 25 per cent. on $1,600 of that amount which was due June 30, 1878	400 00
On estrays	30 95
Forfeited commissions on estrays	1 40
	$2,332 35

The warrant remained in the hands of the coroner until the ninth day of July, 1880, when it was levied upon some real estate of one of the sureties. Whereupon they all, with the principal, made this application to the White County Circuit Court. The nature of the suit is not well defined. They pray for a writ of *certiorari* and supersedeas to quash the warrant, but none was issued. But they pray for general relief, also, and such proceedings were had as would be proper in a bill to enjoin the execution of the warrant upon the ground that it would cloud the title to real estate, and otherwise produce inconveniences not

easily remediable at law. The Auditor is not made a party, and the proceedings being merely against the coroner of White County, in the White Circuit Court, the suit can only be supported as a bill for an injunction. As such it will be treated. After an interlocutory injunction the defendant, Haley, appeared and rested the case upon demurrer.

The points of law are all made upon matters set forth in the complaint with its exhibits. The court made the injunction perpetual, and Haley appeals.

1. For what revenues collector and sureties liable.

Petty was not *ex officio* collector. He had held the office in that character as connected with his office of sheriff, and might have retained it if he had filed his bond in time. But he lost the office by failure to file his bond before the first Monday in January, 1878. (*Act of March 5, 1875; sec. 12, Pamph. Acts of 1874–5, p. 225.*) Upon being notified of that, it became the duty of the Governor to appoint a "competent person" to perform the duties of collector. He might have appointed any one having the requisite qualifications. The bond given by such appointee would not relate to any act which had been done by the sheriff as *ex officio* collector of the previous year, but would only cover the official acts of the appointee during his own term. That is all the sureties can be supposed to have contemplated. It can make no difference that the sheriff and former *ex officio* collector is the same person with the special collector appointed by the Governor. The bond appertains to his new character of special collector, and covers only such funds as may be considered to have come into his hands as such.

It appears from the pleadings that $1,200 of the liquor licences were collected by Petty as *ex officio* collector from the fourth of September, 1877, to the sixth of January, 1878, all before he entered upon the duties of special col-

lector. The first question is, had the Auditor authority to include this amount in a distress warrant based upon the new bond, with so much also of the twenty-five per cent. penalty as resulted from the failure to pay these collections over?

Although in 1878 Petty held the office of collector by appointment, and not *ex officio*, yet he had been collector, at that time, for the previous year, without any settlement that appears, for the amounts which had come into his hands. He was his own successor in fact, holding the same office continuously, with a small abeyance between the time of his failure to execute a bond on the first Monday in January, and the execution of the bond now in judgment, on the thirty-first of that month. If at that date he had in hand, or may be presumed to have had, the funds formerly received by himself as collector, it would have been his duty to have continued to hold them as such, and to pay them over, when required, to the State, and the new bond would cover that obligation as effectually as if some one else had been appointed and had received the fund. He would in effect have *received* them in his new term. He and his sureties contracted under penalty, that he would "faithfully perform the duties of collector of the revenue for the county aforesaid for the year 1878, and shall well and truly pay over all moneys collected by him by virtue of his said office." There is no difference in principle between money originally collected by an officer and money paid into his hands by his predecessor. This court has so held with regard to an officer's right to commissions. *Lawrence County v. Hudson, 41 Ark.*

It is quite as plain, upon the other hand, that if Petty had before the execution of the bond of 1878 misappropriated, squandered or otherwise converted the liquor

license fees collected in 1877, the former securities would be liable, and in no sense could it be said that he had received the funds in such manner as to make the second sureties accountable for failure to pay it over. What the exact facts are we can not fully gather from the present record. It does not disclose whether or not there has ever been any settlement with the county court at its quarterly meetings, or any ascertainment there of the amounts due the State to be certified to the Auditor, or when it was the duty of the collector to have paid them in. These things depended on the action of the county court. In the absence of this information, and as the warrant with regard to these first licences may entirely consist with the supposition that the collector had these funds, unconverted, in his hands on the thirty-first of January, 1878, we can not say that a distress warrant issued for failure to pay them over after the annual settlement in June, was improperly issued against the new sureties. We consequently decide nothing as to the facts, leaving them to be decided in some proper contest between the two bodies of sureties, if such should ever be made. Waiving that, we only say that in this case now in judgment and upon this transcript, we can not pronounce the distress warrant void on this ground. Equities between different and successive bodies of sureties are complicated, delicate, and not always easily discernible upon a casual glance.

2 Duration of collector's term.

It is objected that the distress warrant includes sums collected for licences after the term of office had expired. This is a mistake of counsel. The collector appointed held his office until his successor should be elected and qualified. *Pamph. Acts of 1874–5, p. 165.*

Upon another ground, however, it must be seriously considered whether the inclusion of these last named amounts can be permitted.

3. Distress warrant: When and for what to issue.

The authority to issue a distress warrant is special, and rests upon peculiar grounds.

It does not exist at common law, and could only be conferred by statute, upon the high grounds of absolute political necessity. It is essential to the Government, and therefore within the power of the Legislature, but it is dangerous and exceptional, and therefore must be strictly confined to the conditions and modes prescribed for its exercise.

This court, in *Crawford v. Carson*, had occasion to remark that there was no express provision of law authorizing the Auditor to issue distress warrants for the sums found to be due the State for liquor licenses, on the quarterly settlements with the county court. It was intimated also in that case, and shown by reference to and analysis of the different sections of the revenue act of 1873, that the provisions of the section authorizing a distress warrant applied only to balances appearing due to the State upon the annual settlement required to be made with the Auditor, after the settlement made with the clerk after the tax sales. Although the distress warrant might then cover all sums from any source appearing officially due to the State from the officers, embracing liquor licenses before that time, and then ascertained and adjusted in the statutory mode. The conclusion was not there formally announced, as it was not necessary; but it nevertheless follows that the Auditor can not, at his option, and at any time, collect from an officer and his sureties by distress warrant, balances due the State as they accrue and are ascertained.

Distress warrants must be rigidly confined within the statutory powers. They were sometimes of very doubtful validity even under the clearest and most direct legislative provisions. It has been settled that they may be sustained *ex necessitate*, but there are none of the ordinary

intendments used in remedial statutes which can be invoked to sustain them in their application beyond the express terms of the statute, to the full reach of its reason and design. Not only must the bond be in accordance with the statute (for if it be merely good at common law it will not suffice), but all the statutory conditions must exist. "The steps leading to it must all have been taken." "If it is issued under any other circumstances than those under which the statute gives it, the officer issuing it will be a trespasser." "The liability is *strictissimi juris*, and can not be extended a *single step* beyond the statutory permission." These expressions are quoted from page 506 of Judge Cooley's work on Taxation.

The annual settlement in this case appears to have been made before the first of July, 1878, or about that time. For all balances then appearing due from the collector, and unpaid, a distress warrant might well have issued in fifteen days, according to law, and the express consent of the principal and sureties in the bond.

This court held also, under the peculiar circumstances of *Crawford, Auditor, v. Carson* (*supra*), that a delay beyond fifteen days did not vitiate the warrant. It is not to be taken as a general rule, however, that the Auditor may in all cases delay the issue of the distress warrant, and issue it afterwards, at some indefinite time, at his option. The statute requires prompt and immediate action, and distress warrants are, of all things, most dependent for vitality on statutory permission, and owe their existence to absolute conformity with statutory conditions.

Waiving the matter of delay, it yet appears that when the warrant was issued, on the seventeenth of December, 1878, it included not only the balance on liquor licenses found to be due on the thirtieth of June, and the penalty for their non-payment, but several hundred dollars more

for liquor licenses collected since the time of the settlement, for which no penalty was claimed. The statute does not authorize this use of a distress warrant. It was void.

Moreover, the warrant directed to the coroner slept in his hands, without any action upon it whatever, as shown by any return, until this bill was presented for an interlocutory injunction, on the fifteenth of July, 1880—more than a year and a half. It is alleged that the coroner had then recently levied it upon the real property of one of the defendants, and would proceed in the same way with regard to the others.

No time is prescribed for the return of a distress warrant. It is not clear that they must be governed, in this respect, by the law regulating executions. Yet it is quite clear that such use of a distress warrant is wholly foreign to the objects and purpose which have enabled them to exist, against the constitutional inhibitions which would otherwise avoid them wholly. Those objects and purposes being the *speedy* collection of the revenue without the delays incident to "due process of law."

Although the grounds upon which the decree below was based, may have, in some respects, been mistaken, yet the decree itself is correct. The distress warrant would, if executed, have made a cloud upon the title of complainant's real property, and it was properly enjoined.

None of the proper rights of the State are affected by the decree.

Affirm.

McCain v. Portis et al.

1. Sale: *Of fund in court.*

No one can sell a fund in court as a fund. He can make no delivery of it. He can sell only his interest when it may be adjusted; and all parties must contemplate that in the adjustment, the court will, before ordering it out, subject it to all claims upon it properly brought to the notice of the court in favor of any other parties, or in favor of any officer of the court rendering services concerning the subject matter.

2. Attorney's Lien: *On fund in court.*

The purchaser of a fund in court during the pendency of the suit, purchases with notice of the attorney's lien upon the fund for his fee for services rendered in reference to it.

3. Same: *Filing lien with clerk: Notice.*

It is not necessary for an attorney to file with the clerk his claim of lien on the judgment recovered, to protect him against the purchaser of the judgment.

APPEAL from *Jefferson* Circuit Court, in Chancery. Hon. J. A. Williams, Circuit Judge.

McCain & Crawford for appellant.

Where a creditor has retained an attorney and brought suit, and pending the suit sells his claim to a third person without the attorney's knowledge, and such third person suffers the attorney to conduct the suit to judgment, and to secure money on the judgment through a receiver, the court will not permit such third person to withdraw the money without the attorney's fee. *33 Ark., 233; 13 Ark., 193; 36 Ark., Porter, Taylor & Co. v. Hansen.*

Our statute has made no change affecting this case.

Eakin, J. A suit under the style of "Merchants & Planters Bank v. J. Simon et al." was pending in the Jefferson Circuit Court, in chancery. It involved con-

flicting claims under liens and purchases, to a large quantity of real estate, asserted by different parties. The object of the suit, taken with the cross-bills, was to adjust them, and eliminate the rights of each. J. C. Meyer had been allowed to come in as a defendant, to answer the bill, and set up his claim by cross-bill. McCain, the appellant here, was his attorney. The suit was prosecuted to a decree, in which, amongst other things, the right of J. C. Meyer was established to an interest in the property to a considerable amount, over $2,000. The property had been put in the hands of a receiver, who had a considerable amount of money subject to distribution under order of the court, to a part of which J. C. Meyer under the decree was entitled.

Upon a motion subsequently made for distribution, made by one of the parties interested, McCain, by written motion applied to be allowed out of the part of the fund which under the decree would be coming to Meyer, a reasonable attorney's fee, and that so much be paid to him in the distribution. He claimed that $150 would be a reasonable fee, and that he had already received one-half, leaving properly due to him the sum of seventy-five dollars. The court refused the motion and he appeals.

The record discloses by statement of facts made matter of record, in nature of bill of exceptions, that the claim was resisted by Mattie B. Portis, and other parties to the suit; that McCain had appeared in the suit as solicitor for J. C. Meyer, and had prosecuted the claim of Meyer to a valuable decree in his favor, which entitled Meyer to a part of the fund; that after he had filed Meyer's cross-bill, and before the decree, Meyer, upon a settlement out of court with Mattie B. Portis, had conveyed to her all his interest in a part of the property in question, which he had bought under a certain execution against W. N. Portis, in

favor of Talbott & Packard, and a half interest in all the property which had been sold to Portis & Bro. The consideration was $1,300, which was expressed to be in full of all the claims of the Talbott and Packard judgment against said W. N. Portis. There were other stipulations in the agreement not affecting this question, but nothing was said of the solicitor's fee. The amount was admitted to be reasonable on one hand, and upon McCain's part the payment of one-half was admitted. It was made by those interested in the other half interest of the property. Mattie B. and those interested with her, had then no actual notice of the claim for a fee, or its amount. The first and only lien ever filed was the claim put in on the motion for distribution. The half interest claimed by Mattie B. was of property in the hands of the receiver, who had in his hands from rents enough to pay the claimant. There was nothing to show on McCain's part any knowledge of, or assent to the agreement between Meyer and Mattie B.

There is a dictum of this court, in the opinion delivered in the case of *Porter, Taylor & Co. v. Hansen et al., 36 Ark., 604*, to the effect that both by statute, and upon general principles of equity practice, the attorneys have a lien for compensation upon a fund in court recovered by their services.

1. Sale of fund in court.

That case, however, was decided upon our statute, as, indeed, we think this may be. The cases are very similar. Here was a case in which valuable real estate had been taken into the possession of the court, and was held and managed by its officer, for the benefit of whom it might concern of the parties, original or admitted, and which was producing rents *pendente lite*. A party claiming an interest in the property and its proceeds, employs an attorney, who has his client admitted as a party, and put in position to claim. He then prosecutes his client's claim to

2. Attorney's lien on fund in court.

recognition by decree, and, upon asking that his reasonable fee be allowed out of the products of his professional skill and faithful work, is met by the claim of another party to the suit, who has purchased his client's interest *pendente lite* without the solicitor's knowledge or assent. It is obvious that no one can sell a fund in court as a fund. It is not in the control of any vendor. There can be no delivery of the thing itself. One can only transfer an equitable right to his net interest in the fund when that may be adjusted; and in the adjusment all parties must contemplate that the court will, before ordering it out, subject it to all claims upon it, properly brought to the notice of the court, in favor of any other parties, or in favor of any officer of the court rendering services concerning the subject matter. It is like one partner selling his interest in a particular asset, whether it be an article of property, or a debt due the firm. He can not convey to any one a right in the substance, to one half to be plucked out clean; but only a resultant interest, after settlement of partnership affairs. The question here is whether under our system a solicitor's fee in chancery, properly claimed and brought to the notice of the court, is to be taken into the account in making the adjustment of the net interest of the party vendor. If the Chancellor may do that, then parties purchasing such interests *pendente lite*, buy in contemplation of that, and take only that net interest so diminished.

Confining our view to the power and duty of the Chancellor, in disposing of a fund in court, and leaving out of view the numerous phases of an attorney's lien in suit at law, let us first examine the English equity practice which has been adopted in this State from a very early period of our territorial history, and which remains in force, with very slight statutory alterations, except in so far as the

somewhat slightly different organization of our courts requires its modification.

In the case of *Turwin v. Gibson, 3 Atk., 720,* Wade had been solicitor in a cause for Arthur Harding, and had obtained a decree for his client, for a sum which seems to have been, some way, under the control of the court. Although the report is meagre, Harding died leaving bond debts, which, if Wade had no lien, would, in the course of administration, have taken precedence of Wade's claim for compensation. His widow petitioned the court that the sum should be paid to her, as her husband's representative. Lord Hardwicke denied the petition, saying, "a solicitor, in consideration of his trouble and the money he disburses for his client, has a right to be paid out of the duty decreed for the plaintiff, and a *lien upon it,* before the bond creditors of the deceased plaintiff;" and he adds "it is *constantly the rule of this court.*" The Reporter says that the Lord Chancellor had laid down the same rule upon another petition a short time before. Again, in the case of *Ex Parte Price, 2 Vesey, sen.,* Lord Hardwicke held that a solicitor who had rendered services in taking out a commission of lunacy, was not bound to look for payment to the effects of the person who took out the commission, and who was bankrupt, but might be allowed out of the lunatic's fund, saying, "solicitors have this equity allowed to them, to be entitled to a satisfaction out of the fund for their expenses, whether it was in the way of *suit,* or prosecution in lunacy or bankruptcy."

In *Skinner v. Sweet, 3 Mad., 245,* Vice Chancellor Leach held that a woman's solicitor had a lien on the proceeds of her annuity which had come under the control of the court in the case.

In *Lann v. Charde, 4 Mad., 391,* the same Vice Chancellor held directly that a solicitor had a lien for his costs

in the cause upon a sum of money which had been decreed to his client.

This was conceded, indeed, by the opposing counsel, who only contended that the lien was not general for costs in other suits.

Also in point is the decision of the same Vice Chancellor in the case of *Ex Parte Moule, in re Dark, 5 Mad., 463*, in which he says: "The lien of the solicitor upon the fund in the court *which is the result of the proceedings*, can not be defeated by the insolvency of the client. The assignees of the insolvent can only take his property subject to the claims by which it was affected as against him."

Where there is a fund in court in a chancery case, I have found no single English authority in conflict with this down to the act of 23 and 29 Victoria, which was a statute like ours, of a remedial nature, more accurately to define and prescribe the liens of attorneys and solicitors. It has been, nevertheless, held that a solicitor's lien for costs upon a *fund in court* recovered by his exertions, is independent of the statute, and that he has priority over a judgment creditor of his client, who had obtained an order charging it. There can be no doubt of the English practice.

I can not conceive that it makes any difference in principle, that under the English system the fees of solicitors in chancery, like those of attorneys at law, were subject to taxation by the court. That has never been our practice, since we leave the amounts of compensation to be determined between solicitor and client. Courts of chancery, however, before awarding a fund in court, exercises the authority of inquiring if the fee be reasonable, and the equity to allow it must be the same as if it were taxed under the English system.

The case of *Jones v. Frost, L. R., 7 Chancery Appeals (S. C., 3 Moak's Eng. Rep., 622)*, was under the act of Vic-

toria to enforce a lien on property recovered, and, although not in point upon the question being considered, is applicable to the question of notice, which also arises in this case; it being urged in behalf of the appellee, Mattie B. that when she bought the interest of Meyer, she knew nothing of McCain's claim. She can not say that, purchasing a fund in court *pendente lite.* In the case last cited the court says, concerning the purchaser of the property resisting the lien, "he knew there was a pending suit and that cost must have been incurred in it, and he ought to have inquired *if the solicitor had been paid.* At all events, the purchaser ought not to stand in the way of the solicitor's right to a charge." This may be well said of Mrs. Portis. She ought not to have taken and enjoyed the fruits of McCain's labor without inquiring if he had been satisfied; or, at least, having taken the assignment of Meyer's interest, she ought not to stand in the way of the charge.

Our statute is remedial on the subject of attorney's liens, and cumulative. It does not affect the right to a lien under the old principles; if, indeed, it does not actually, by its own force, give McCain a lien in this case, independent of the former practice in equity, and considered merely as a decree for money, not already in court. It provides that an attorney shall have a lien on any judgment recovered in a court of record. (*Gantt's Digest, sec. 3622.*) It provides, however, that such lien for services should not prevail against any one who in good faith, and without notice of the lien, has made payments to the person in whose favor such judgment was rendered, upon or in consequence of such judgment, unless the attorney shall have, within ten days after the rendition of the judgment, filed with the clerk a written statement setting forth his claim to a lien. *Ib., secs. 3625, 3676.*

This was for the protection of those bound to pay the judgment, either legally, or at least by some obligation of interest which would make it in some sense a duty. It could not apply to a mere purchaser. For purchase money can not be said to be paid "upon or in consequence of" the judgment. The case shows no obligation on Mrs. Portis to pay the decree in favor of Meyer, nor any interest the protection of which would impel her to pay it. Perhaps, being a party to the suit, she may have had other interests in the property, but they are not disclosed. And it would make no difference if she had. The decree was not rendered when she bought. The whole matter was *lis pendens*, and she was one of the litigants. She may, as matter of fact, be presumed to have known that some attorney was prosecuting for Meyer an interest which was so valuable that, even before it was decided, she considered worth over a thousand dollars. What she paid was purchase money of a claim in litigation. It was not paid on or in consequence of a decree. Her case does not come within the statute.

The Chancellor should have allowed the claim to be paid out of the portion of the fund allotted to Meyer, whom Mrs. Portis represented. McCain is not bound to take any notice of the equities between her and her vendor as to which shall exonerate the other, or whether they will contribute.

Reverse the order refusing the allowance, with directions to allow the same, and for such other proceedings in the cause as may be consistent with this opinion and the principles and practice in equity.

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77 103

WINTER & CO. v. SIMPSON ET AL.

1. APPEAL FROM JUSTICE OF THE PEACE: *On refusal to issue supersedeas.*
An appeal may be taken from an order of a justice of the peace refusing to allow a schedule of property claimed as exempt, and to issue supersedeas.

2. EXEMPTION: *Of debt due to defendant: Garnishment: Appeal.*
A judgment debtor may exempt from garnishment a debt due him from the garnishee, and if his exemption be refused and judgment be rendered against the garnishee the debtor can appeal.

APPEAL from *Nevada* Circuit Court.
Hon. C. E. MITCHEL, Circuit Judge.

Smoote & McRae for appellants.

I. Did the Circuit Court err in overruling the motion to dismiss the appeal? The act of the justice of the peace, in granting or refusing a supersedeas upon it, is merely ministerial, and the issuance of it, when improperly refused, can only be enforced by mandamus, and the Circuit Court obtains no jurisdiction on appeal. *Smith v. Ragsdale, 36 Ark., p. 297.*

In that case the justice of the peace refused the supersedeas, because the schedule was against an execution on a judgment in replevin. This amounted simply to holding that Smith was not entitled to his supersedeas under the law—which was in effect disposing of it as upon demurrer. But, in whatever way the objection may be presented, the act of the justice of the peace, in granting or refusing it, is ministerial and not judicial, and, if wrongfully refused, the remedy is by mandamus and not on appeal. If Simpson under the law was entitled to his supersedeas, his remedy was perfectly plain, having been directly pointed out by the Supreme Court in *Smith v. Ragsdale, supra.*

II. In its final disposition of the case, the Circuit Court erred in ordering a supersedeas. Not having control or jurisdiction of the case on appeal, it had no power to make any order about it, except to dismiss. It is unnecessary to cite this court to authorities showing that a court having no jurisdiction can render no judgment.

III. The court likewise erred in quashing the judgment against the garnishees. That judgment was not appealed from. The only appeal was from the refusal of the justice of the peace to issue the supersedeas as to Simpson's debt against the garnishees, Britt & Duvall. And the only question which could have been made on the appeal, if the law had allowed it, would have been as to whether the justice of the peace erred in refusing the supersedeas as to the debt in question. But even if the judgment against the garnishees had been before the Circuit Court on appeal, it could not have quashed it. Cases on appeal, where it is allowable, are tried *de novo* in the Circuit Court. Judgments are quashed only on *certiorari*.

IV. The remaining question, if this court shall think proper to pass upon it, is this: Had Simpson the legal right to schedule, as exempt, the said debt due him from Britt & Duvall? Under the ruling of this court, in *Probst & Hill v. Scott, 31 Arkansas, page 652*, he had not. This court held, in that case, that choses in action were exempt under the Constitution of 1868, because that Constitution "abandoned the policy of exempting specific articles, and provided for the exemption of personal property to the value of $2,000, to be selected by the debtor." *Sec. 1, art. 12, Const. of 1868.*

Now the exemption in this case turns upon the Constitution of 1874, and that Constitution returns to the doctrine of the exemption of "specific articles." *Secs. 1 and 2, art. 9, Const. of 1874.*

The absence of the terms "specific articles" from the Constitution of 1868, and their use in that of 1874, mark the difference between the two Constitutions in this respect, and show the force of *Probst & Hild v. Scott, supra*, as authority in support of our position. The schedule act of March 9, 1877, page 53, has no bearing on the point under discussion. It was probably well enough for the act to require the scheduling of choses in action, but it does not follow therefrom that they are exempt. The right of exemption depends on the Constitution and not on the act.

Montgomery & Hamby for appellee.

I. An appeal was the proper and only remedy under the circumstances.

First—The acts of 1877, page 53, latter clause of section 1, give either party the right of appeal from any order or ruling of the justice.

Second—Mandamus will not lie to control discretion or judicial acts of inferior courts. *8 Ark., 424.*

The ruling on the demurrer by the justice of the peace was certainly a judicial act, and the judgment in sustaining said demurrer is and was the cause and grounds of appeal to the Circuit Court. See *39 Ark., p. 82, and 27 Ark., p. 116.*

To force the justice to issue a supersedeas after he has judicially passed upon a question involving the construction of the Constitution, and in which construction he has decided that he has no right to issue the supersedeas, would be simply to control his discretion and reverse his judgments by mandamus, which can not be done. See *25 Ark., p. 614.*

The justice of the peace, as a judge, had to pass upon the petition for supersedeas, and the appellee's right to claim choses in action as exempt. It is true that a justice

of the peace often acts as both a ministerial and a judicial officer, but in this case the justice had to render a decision upon a question of law, and render a judgment thereon, and in doing this he certainly acted judicially—exercised a judicial power and discretion—from which act the only remedy is by appeal. See *6 Ark., p. 437.*

We have not overlooked the decision in *36 Ark., page 297*, but think this case quite different from the one decided there. We admit that where the justice is required to do nothing save simply a ministerial act, that mandamus is the proper remedy, but insist that when he makes any order or ruling upon a legal question against one party, that party has the right to appeal, under the act of 1877, page 53. And that when he, as a judge, renders a judgment upon a legal question, that an appeal is the remedy. Mandamus will not lie to compel a judge to grant an injunction, nor to force the approval of an official bond. See *23 American Reports, p. 559*, and *26 Ib., p. 115.*

Mandamus will only lie to compel judicial officers to act, but not to act in a certain way. It will not lie to revise nor correct, but to compel officers to act. See *American Law Register, vol. 1, New Series, p. 379.*

Mandamus is not proper when the party has any other specific remedy (*American Law Register, N. S., vol. 14, p. 646*), and in this case the statute gives the specific remedy. See *Acts of 1877, page 53.*

II. Appellee insists that the demurrer was properly overruled, and that choses in action can be scheduled and claimed as exempt the same as any other personal property.

First—The Constitution of 1874, section 2, article 9, exempts from seizure on attachment, or sale on execution, or other process, from any court, five hundred dollars' worth of personal property, to be selected by the debtor,

regardless of the kind of property thus selected, just so it does not exceed in value the $500; and in this instance the writ of garnishment is but a species of attachment, and is clearly within the meaning of the Constitution, so far as the writ is concerned.

Second—The act of 1877, page 53, contemplates the scheduling of choses in action just the same as other personal property. And *section 5629, Gantt's Digest*, declares debts and choses in action to be personal property.

Third—Debts or choses in action can be claimed as exempt the same as other personal property. See *29 American Reports, p. 707;* also, *sec. 860 of Thompson on Homesteads and Exemptions.*

Exemption laws should be liberally construed. See *38 Ark., p. 113*, and *31 Ark., p. 652;* also, *sec. 7 of Thompson on Homesteads and Exemptions.*

Appellants insist that because the Constitution says specific articles, that those articles must be such as were exempt under the old law; for instance, horses, cows, etc. The word specific was inserted for the purpose of showing the creditor just what property the debtor claimed as exempt. And if the creditor could find any property not described and specified as required by the Constitution, he could have it seized. Again, if the debtor failed to appraise the property at its true value, the creditor could have appraisers appointed by the court to say what the property scheduled was actually worth, and the Constitution requires the property to be specified in the schedule, so that these appraisers can readily find, appraise and value it. Defendant insists that this position is sustained by the act of 1877, page 53.

The word article comprehends anything that can be mentioned, named, or that exists. (See *Webster's Dictionary, page 78.*) And the word specific means that which can

be named, pointed out, described or designated in any way or manner. (See *Webster's Dictionary, page 1267.*) And as all exemption laws are liberally construed, all words contained therein must be given a liberal construction.

It would certainly be contrary to the intention of the framers of the present Constitution to hold that a debtor could schedule a bale of cotton, when if he sold it his creditors could get the proceeds thereof simply by serving a writ of garnishment on the purchaser, before he could settle with the debtor.

This court, in *33 Ark., page 762*, held that a debtor can schedule his property and then turn round and sell it, and the creditor is without remedy.

EAKIN, J. Appellants, in March, 1881, before a justice of the peace, recovered a judgment against T. J. Simpson and another. On the seventeenth of October, following, they sued a writ of garnishment against John Duval and M. Britt, to appear and answer as to their indebtedness, etc., to Simpson. On the twenty-third of October, Simpson gave Winter & Co. notice of his intention, and on the thirtieth, filed a schedule on oath, of articles of property claimed by him as exempt, including the debt due him from Duval and Britt, and prayed that the writ of garnishment which had been issued for that debt might be superseded.

The plaintiffs demurred to the schedule, alleging for grounds, that defendant was not entitled to have the debt due him exempted; which demurrer the court sustained; entering on his docket an order to that effect, and that no supersedeas issue, and that the garnishees be held to answer all interrogatories and allegations. There was, however, a supersedeas as to the other property in the schedule. Defendant gave notice of an appeal.

The parties then all consented to a judgment against the garnishees, to be suspended and await the action of the Circuit Court upon the appeal from the order sustaining the demurrer to the schedule.

In the Circuit Court Winter & Co. moved to dismiss the appeal for want of jurisdiction in the Circuit Court. This was overruled, and they renewed the demurrer to the schedule, which was also overruled. The court then entered judgment that the supersedeas issue, and that the judgment of the justice against the garnishee be overruled. From this the plaintiffs here appealed.

The motion to dismiss the appeal was based on two grounds:

1. Because no appeal could be taken from an order of a justice refusing to issue a supersedeas on a schedule.

2. Because the garnishment was a separate suit, and defendant could not appeal from a judgment against the garnishment.

The grounds of the demurrer seems to have been that a chose in action could not be scheduled.

1. APPEAL FROM JUSTICE OF THE PEACE

On refusal of supersedeas.

By act of March 9, 1877, providing the practice in securing exemptions, it is expressly declared that an appeal *may* be taken to the Circuit Court from any order or judgment rendered by the justice of the peace, upon the filing of the affidavit and executing the bond required in other cases of appeal. (*Pamph. Acts 1877, p. 53.*) It has direct reference to any order made upon filing the schedule, and of course embraces an order striking, as it were, a portion of the schedule out, and denying a supersedeas as to that. The remark of our former learned and remarkably careful associate, Mr. Justice HARRISON, in *Smith v. Ragsdale, 36 Ark., 297*, to the effect that an appeal would not lie in such cases, but that mandamus was the proper remedy, was not in fact necessary to decide the case then in judg-

ment. The decision upon other points was quite correct. The remark was based upon a very correct estimate of the general nature and function of the writ of mandamus, and the attention of the court was not called to the peculiar provision in the act of 1877. I claim to assume my share of responsibility for an inadvertence into which the court fell, but the declaration is not correct. An appeal in such cases properly lies by force of the statute.

Upon the second ground it is plain that the order affected only the defendant in the original suit, and was made in that suit, upon a matter which, if left at rest, would deprive defendant of his rights to retain the special chose in action as his property. It could not concern the garnishees whether the debt was exempt or not. They were willing to the judgment against them for whom it might concern.

2. EXEMPTION: Of debt due the defendant.

Upon the merits it has already been held by this court that choses in action are property, and may be specifically scheduled, and that the schedule will protect as well against garnishment, which is a kind of execution, as against direct process to be levied on tangible property. *Probst & Hilb v. Scott, 31 Ark., 652.*

We find no error.

Affirm.

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ST. LOUIS, IRON MOUNTAIN & SOUTHERN RY. v. SHACKELFORD.

RAILROADS: *Injury from negligence of fellow workmen.*

A railroad company is not liable to an employe for an injury occasioned to him by the negligence of a fellow workman engaged in the same service.

APPEAL from *Ouachita* Circuit Court.

Hon. C. E. MITCHEL, Circuit Judge.

Dodge & Johnson for appellant.

1. The doctrine of fellow servant is settled in this State. *39 Ark., 26; 35 Ark., 613.*

2. The verdict was not sustained by the evidence. The conductor, engineer, *all* were fellow servants, and even if there was negligence, which is denied, it was simply the carelessness of a fellow servant, and was one of the risks incident to the employment. No negligence can be imputed to the company. Its officers and servants were all capable and competent men, and the evidence does not prove that anybody was negligent except the plaintiff.

3. The question of who are *fellow servants*, is one of law to which the facts are to be applied. *39 Ark., 26; Wood's Master and Servant, sec. 435 and notes; 35 Ark., 613.*

4. Price, the foreman, is the only one who could possibly have been performing *master duties*, and he was in the depot at the time of the accident, and neither saw it nor had anything to do with it.

5. The verdict is excessive.

Barker & Johnson for appellee.

The court did not err in giving the instructions that it did in this case. They were the law; and the damages were not excessive. *St. L., I. M. & S. Railroad v. Cantrel, 37 Ark., 522; L. R. & F. S. R. R. Co. v. Duffey, 35 Ark., 602, and Barton v. Lowden, 35 Ark., 492.*

Plaintiff and McCaughey, the conductor, who was at the time acting as road master and superintendent, with power to discharge plaintiff, were not fellow servants, and did not come within the rule laid down in *Fones et al. v. Phillips, Guardian, 39 Ark., 17.* They came within the rule laid down in Duffey's case, *supra*, and *Beemes, Adm., etc., v. C. R. I. & P. R. Co. (advance case, Iowa, April 20, 1882)*, and reported in *6 A. & E. R. Cases, 222.*

In this last case it was held that whoever, at the time of the injury, had charge of the train upon or by which the party was injured, whether employé or otherwise, and stood toward the injured party in the relation of superior or vice-principal, and through the negligent or careless orders of such superior the plaintiff was injured, without any contributory negligence on his part, the defendant company would be liable, and the jury were the judges of carelessness, upon the part of the company on the one hand, and contributory negligence on the other; also *Cox v. G. W. R. R. Co., 6 A. and E. R. R. Cases, 485; Miller v. W. P. R. R. Co.; C. C. D. Co., 12 Fed. Rep., 600; 6 A. and E. R. R. Cases, 614; Totten v. Penn. R. R. Co., 11 Fed. Rep., 564.*

The rule in *Slater v. Jewett, 84 N. Y., 61,* does not apply here—appellee and McCaughey were not fellow servants. (*Mullen v. Phil. and Steamship Co., 28 S. M., 25; Gonaly v. Vulcan Iron Works, 61 Mo., 402; Malone v. Hathaway, 64 N. Y., 5.*) Whenever the agent has power to discharge an employé, then the relation of fellow servants does not exist. *Fike v. B. and A. R. R. Co., 53 N. Y., 551; Huntington and Broad Top R. R. v. Decker, 82 Penn. St., 119; Kansas Pacific R. R. Co. v. Solomon, 11 Kan., 82; Dick v. I. C. & L. R. R. Co. (Ohio advance case); 8 A. and E. R. R. Cases, 101.*

See, particularly, *Beemis, Ad., v. C. R. T. & P. R. Co., Am. & Eng. R. R. Cases, vol. 10, p. 658.*

SMITH, J. Shackelford was in the employment of the railway company as a laborer upon a construction train. At the time the injury was received, for which he sued, he was specially engaged in moving heavy iron rails from one flat car to another. While he and his co-laborers had a bar of iron in their hands, and were in the act of shifting

it from one car to another, the train was put in motion without warning of any kind. This caused the men to drop the iron, which rolling over and catching the thumb of plaintiff's right hand, crushed it. The answer denied that the injury was the result of the defendant's negligence. A jury trial resulted in a verdict of $1,250 damages for the plaintiff.

The verdict was assailed, in the motion for a new trial, as being without evidence to support it.

The material facts are not in dispute. The train was standing at a station. All of the hands upon it, conductor, engineer, brakemen, and laborers, were under the control, and subject to the orders of the foreman, Price. And all were engaged in the same common pursuit, viz., in repairing the defendant's track from the effect of a recent washout. At the time of the accident Price was in the depot building. He had just before given directions for the unloading of the iron, and as soon as it was unloaded that the train should be cut into two separate parts, and one car be placed on the side track.

The men were in the act of handling the last bar of the iron and the proximate cause of the injury was their carelessness in dropping it, or the carelessness of the engineer in starting the train without a signal.

Now it is unimportant whether it was the negligence of the conductor or of the engineer, or of his immediate colaborers that produced the injury. They were one and all fellow servants, within the meaning of the rule which exempts the master from responsibility for such accidents. The plaintiff, when he engaged to do construction work on a railway, undertook to run all the risks incident to the service, including the risk of negligence on the part of his fellow workmen. He must have known that he was liable to be injured by their want of care, and that against

such hazards his employer was powerless to protect him. The implied contract of the company did not extend to indemnify him against the negligence of any one but the company itself. *Cooley on Torts, 542, and cases cited; Wood on Master and Servant, sec. 428; Bartonhill Coal Co. v. Ried, 3 Macq., 266; Farwell v. B. & W. R. Corp., 4 Met., 49.*

In the case last cited, a locomotive engineer was injured through the carelessness of a switchman.

In *Hodgkins v. Eastern R. Co., 119 Mass., 419*, a brakeman sustained injury by reason of the making up of the train of cars with platforms of unequal height by the ordinary servants of the company.

In *Rohback v. Pacific R. Co., 43 Mo., 187*, a track man was injured through the carelessness of an engineer in backing a train of cars, without ringing the bell or sounding the whistle, on to the plaintiff who was at work, with his face from the train.

And in all these cases it was decided that the master could not be held to respond in damages; the difference in the grade of the servants being of no consequence, so long as both serve and are paid by the same master, work under the same control, and are engaged in the same general business.

There is no proof that the conductor, engineer, or other servants employed by the company, were incompetent by reason of want of skill or prudence, for the business intrusted to them; nor, with the exception of the foreman, that any one of them had any control over the others. Price, if any one, occupied the position of superintendent of this work, yet there is no pretense that he was guilty of such negligent conduct as to render the principal chargeable as for its own personal fault.

Errors in the charge of the court were also complained of.

After laying down the law correctly in the second insruction given at the instance of the defendant, the court practically nullified its direction by telling the jury to find a verdict for the plaintiff if any of the defendants "caused the cars to move up whilst the workmen were at work, without notice to the plaintiff, whereby plaintiff's thumb was mashed."

The court, also, of its own motion, gave the following: "If the jury find from the evidence that the injury complained of was the result of the negligence of an employé of the defendant, who was at the time performing master duties of the defendant, they will find for the plaintiff."

There is no evidence in the record upon which to base such directions.

Reversed for a new trial.

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JONES, MCDOWELL & CO. V. FLETCHER.

1. JURISDICTION: *Local—transitory.*

Jurisdiction of a chancery court to enjoin the sale of land under a fraudulent or satisfied mortgage, or for an account of the amount due on the mortgage, and to cancel fraudulent conveyances of the land, and to inquire into alleged partnership matters in the land, is not local—confined to the county in which the land is situated, but may be exercised in any county where jurisdiction of the defendants can be obtained by personal service of process upon them; and this jurisdiction is not ousted by filing an amendment to the bill, setting up title and right to possession, and praying for recovery of the land; but the amendment will be stricken out. (Martin, Special Judge, dissenting from this last, holding that the jurisdiction for injunction, account, etc., would draw to it for final determination the matter of local jurisdiction.)

2. EXECUTION: *Partner's interest in land subject to.*

A partner has such an interest in partnership lands as is subject to the lien of a judgment against him, and to be levied on and sold under execution.

3. PARTNERSHIP: *Equity of partnership creditors to assets: How lost.*
The equity of partnership creditors to have the partnership property applied to their debts can be enforced only through subrogation to the like equity of the partners. If, therefore, a partner's interest in the property has been transferred, either by his own sale, or by sale under execution against him, the equity of the creditors is gone; for the partner has no such equity left to which the creditors can be subrogated; and this whether the sale be to a co-partner or a stranger. (Martin, Special Judge, dissenting.)

4. MORTGAGE: *Liability of mortgagee in possession.*
A mortgagee in possession of the mortgaged land will not be charged with rent of improvements put upon the land by him at his own expense.

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

U. M. & G. B. Rose for appellants:

This was a suit brought in Pulaski County, in reference to the title to lands lying in Saline County. The venue in such cases is local, and the Pulaski Chancery Court, therefore, had no jurisdiction. *Gantt's Digest, sec. 4532; Jacks v. Moore, 33 Ark., 31; 1 Jones on Mortgages, sec. 699; Fitzgerald v. Beebe, 7 Ark., 319; Gilchrist v. Patterson, 18 Ib., 579; Hewitt v. Wilcox, 1 Met., 155; Pomeroy's Equity Jur., sec. 135; Ib., sec. 166; Bliss on Code Pleading, sec. 284; Watts v. Waddell, 6 Pet., 164; Watkins v. Homan, 16 Ib., 57; Ring v. McCoun, 3 Sandf., S. C., 524; Wood v. Hollister, 3 Abb. Pr. R., 15; Stark v. Bates, 12 How. Pr., 465; Mairs v. Remsen, 3 Code, R., 138; Ring v. McCoun, 10 N. Y., 268; Leland v. Hathorne, 42 N. Y., 547.*

The bill in this case prayed for an injunction in aid of an ejectment suit already pending. As the filing of the suit established a *lis pendens*, the injunction was unnecessary, and should have been refused. *High on Injunctions, sec. 333.*

Under our present mode of procedure, there is no such thing as a bill in equity in aid of a suit at law. The demurrer to the bill should therefore have been sustained. *Pomeroy's Eq. Jur., secs. 142, 124, 83, 87; Bliss on Code Pleading, sec. 167; Pomeroy's Rights and Remedies, sec. 81; Gantt's Digest, secs. 4457, 4461, 4897, 4462.*

The bill is bad, because the plaintiff offers to pay only half of the mortgage debt. To redeem he must pay all. *Dalton v. Hayter, 7 Beav., 319; Beekman v. Frost, 18 John., 544; 2 Jones Mort., 1095; Anthony v. Anthony, 23 Ark., 481.*

The evidence clearly shows that the lands were held in partnership by W. R. and C. R. Vaughan. The judgment and execution under which the plaintiff claims were against C. R. Vaughan alone. He therefore has no claim upon the lands as against the appellants, who claim under a judgment against the firm for a partnership debt.

The mere fact that the lands are conveyed to the partners in their individual names, does not make them tenants in common.

The true criterion is whether they were bought with the money of the individuals, and intended to be held as individual property; or whether they are purchased with the money of the firm, and intended to be held in partnership. The form of the conveyance is of no significance in equity. The cases holding that where the lands are conveyed to the partners in their individual names, they take as tenants in common as to third parties, are all cases where the rights of innocent purchasers have intervened. The plaintiff, claiming under a judgment, is not an innocent purchaser.

Case v. Beauregard, 99 U. S., 126, can not avail the plaintiff. There the court held that where one partner sells his interest to the other *in good faith,* the lien of the partnership creditors is extinguished. Here it is specially charged

in the bill that the sale of C. R. Vaughan to W. R. Vaughan was fraudulent.

Real estate purchased for and appropriated to partnership uses, is, in equity, the property of the partnership, though the title be taken in the name of the individual partners, or in the name of one of them, or of a third person. *Columb v. Read, 24 N. Y., 505; McGuire v. Ramsey, 9 Ark., 518; Drewry v. Montgomery, 28 Ib., 256; Hogle v. Lowe, 12 Neb., 286; Fowler v. Bailley, 14 Wis., 125; Cibley v. Hughes, 40 N. H., 358; Gantt's Dig., sec. 2648; Gossett v. Kent, 19 Ark., 602; Fall River C. v. Borden, 10 Cush., 458; Dupuy v. Leavenworth, 17 Cal., 262; Uhler v. Semple, 20 N. J. Eq., 288; Aboot's Appeal, 50 Penn. St., 234; Lime Rock Bank v. Phetterplace, 8 R. I., 56; Hiscock v. Phelps, 49 N. Y., 97; Matlock v. James, 13 N. J. Eq., 126; Smith v. Tarleton, 2 Barb. Chy., 336; Buffum v. Buffum, 49 Me., 108; Patterson v. Silliman, 28 Penn. St., 304; Roberts v. McCarthy, 9 Ind., 18; Carlisle v. Mulhern, 19 Mo., 58 Ross v. Henderson, 77 N. C., 170; Wells v. Freeman, 35 Vt., 45; Robinson v. Baker, 11 Fla., 192; Collyer on Partnership, sec. 166.*

The creditor of one member of an insolvent partnership can not seize his interest in the partnership in satisfaction of his individual debt. *Willis v. Freeman, 35 Vt., 44; Conroy v. Woods, 13 Cal., 626; Thomas v. Lusk, 13 La. Ann., 277; Tappan v. Blansdell, 5 N. H., 190; Commercial Bank v. Wilkins, 9 Greenl., 36.*

A levy of an execution for a firm debt on partnership property will have a preference over a levy for the individual debt of one of the partners. A sale under the firm judgment will convey all the interest of the partners in the property, and the purchaser will acquire a clear title, leaving the creditors of the individual partner only the right to intervene for any surplus that may remain after

satisfying the firm creditors. *Pierce v. Jackson, 6 Mass., 242; Morrison v. Blodget, 8 N. H., 250; Jarvis v. Brooks, 23 Ib., 3 Foster, 135; Crane v. French, 1 Wend., 311; Dunham v. Murdock, 2 Ib., 553; Douglass v. Winslow, 20 Me., 89; Collyer on Partnership, sec. 166.*

The plaintiff being a purchaser at execution sale, can not claim to be an innocent purchaser, and he can acquire by his purchase only the interest that C. R. Vaughan had in the property, viz., a right to the surplus after the payment of the partnership debts. *Allen v. McCaughey, 31 Ark., 253; Williams v. McIlroy, 34 Ib., 85; Pickett v. Merchants National Bank, 32 Ib., 369; Tuley v. Ready, 27 Ib., 98; Horner v. Hanks, 22 Ib., 572; Pindall v. Trevor, 30 Ib., 247.*

Clark & Williams, John Fletcher and *Z. P. H. Farr* for appellee.

It is a well established rule that a court of chancery may enjoin a person from doing an act or compel him to do an act with reference to lands in a foreign jurisdiction. *2 Story's Eq. Jur., secs. 899, 900, et seq.; Penn v. Baltimore, 1 Ves., 444; Arglasie, Ex., v. Muschamp, 1 Verm., 75; Massie v. Watts, 6 Cranch, 148; Great Falls v. Worster, 3 Forst. (N. H.), 470; Mitchell v. Bunch, 2 Paige Chy., 606; Mead v. Merritt, 2 Paige Chy., 404; Dehon et al. v. Foster et al., 4 Allen (Mass.), 545; Bumby et al. v. Stevenson, 24 Ohio St., 474; Dunn v. McMillen, 1 Bibb, 409; Gardner v. Ogden et al., 22 N. Y., 327.*

The rule is the same whether the property is situated within or without the State. *Mead v. Merritt, 2 Paige Chy., 404; Dehon et al. v. Foster, 4 Allen, 545.*

Actions for the recovery of real property, or an estate or interest therein, or for an injury done to it, as specified in *section 4532 Gantt's Digest*, belong to common law courts

or ordinary proceedings, such as ejectment, unlawful detainer, trespass, etc., and does not embrace such actions as that now before the court. *Newman on Pleading and Practice, 19; Butler et al. v. Bukley et al., 13 Ohio St., 519; Owens v. Hall, 13 Ohio St., 571; Hubbell v. Sibley, 4 Abb. Pr. Reps., N. S., 403; Rawls v. Carr, 17 Abb. Pr. Rep., 96; Webb v. Wright, 2 Bush. (Ky.), 126.*

The fact that the court decreed the title to be in Fletcher, and that he recover the property, can not affect the question of jurisdiction. The court having rightfully taken jurisdiction of the *person* and *cause* of *action*, the proceeding *in rem* attached as an incidental remedy, which gave the court jurisdiction of the land, though situated in another county. *Webb v. Wright, 2 Bush. (Ky.), 126; Walker, Exr., v. Ogden, 1 Dana (Ky.), 247.*

It may often happen that an action will be brought for ascertaining and settling the amount due, or for matters of jurisdiction *in personam*, and in such cases the jurisdiction is transitory as well as local. The jurisdiction of one court *in personam* draws to it the local jurisdiction *in rem* of another, and *vice versa*. The court having jurisdiction for one purpose will retain it for all purposes. *Newman on Pleading and Practice, 21, 22, 38, 39, 44, 45, 46; Caufman v. Sayre et al., 2 B. Mon. (Ky.), 202; Breckinridge's Heirs v. Ormsby, 1 J. J. Marsh (Ky.), 256, 257; Gantt's Dig., sec. 3640; Crawford, Auditor, v. Carson et al., 35 Ark., 565; Estes, Ad., v. Martin, etc., 34 Ark., 410; Denton et al. v. Roddy, 34 Ark., 648; Dugan v. Cureton, 1 Ark., 31; Conway et al., ex parte, 4 Ark., 302; Witner v. Arnett, 8 Ark., 57; Price v. State Bank, 14 Ark., 50; Dyer v. Jacoway, ante, 186.*

The question of jurisdiction was not raised in the court below. It is true that appellants demurred to the jurisdiction, but never insisted on it, and it was treated as waived.

And they should not be heard to urge the objection in this court for the first time, and this court will lay hold of *any shred or vestige* of chancery jurisdiction before it will dismiss the cause and send the plaintiff to begin anew in another court, and possibly find the statute of limitations has run against him. *Sexton et al. v. Pike, 13 Ark., 193; Daniels v. Street, 15 Ark., 307; Mooney v. Brinkley, 17 Ark., 340; King et al. v. Payan & Co., 18 Ark., 583; Ryan v. Jackson, 11 Texas, 391.*

Equity always proceeds against the person; the *res* is always essentially incidental. *Green's Pl. & Pr., sec. 56; Hart v. Sanson, U. S. Supreme Court, MS. Op., January 21, 1884.*

The rule of partnership creditor's priority was one originally adopted in England in bankruptcy, and followed then in equity. Judge Story doubts its ordinary propriety. (*Story on Partnership, secs. 376, 382.*) The fluctuations of the rule were fully discussed in *Murrey v. May, 5 Johns. Ch., 73–77.* The rule is discarded in Pennsylvania. (*Bull v. Newman, 5 Serg. & R., 78.*) So in Georgia a separate creditor can levy on and sell the debtor's undivided interest without reference to claims of the firm. (*Ex Parte Stebbins v. Mason, R. M. Charlton, 77.*) The most extreme cases hold that a creditor who levies upon partnership personalty gets the interest subject to partnership accounts. *Eddie v. Davidson, Douglass, 650; Fox v. Mabury, Cooper Rep., 445;* and in equity the doctrine is well established that title passes with all that means subject to partnership accounts. (*Water v. Taylor, 2 Ves. & B., 299, 301; Bevins v. Lewis, 1 Simons, 376; Phillips v. Cook, 24 Wend., 359; Andrews v. Keith, 34 Ala., 722; Black v. Black, 15 Ga., 445; Green v. Ross, 24 Ga., 613; Gilmore v. North American Land Company, Peters C. C. Rept., 460; Case of Peter Smith, 16 Johnson, 102.*) Thus far we have treated the rule as

though it involved personalty, but where real estate is involved, as in this case, the *prima facie* presumptions are that it is held as such, and these presumptions are not overcome in this case by the evidence. When real estate is conveyed to a firm, or to the members thereof, the partners become tenants in common of the estate, and neither of them alone can convey more than an individual interest, and it can not be treated as personal property. (*Anderson v. Thompson, 1 Brockenborough, 456; Arhold v. Stephens, 2 Nev., 234; Donaldson v. Bank of Cape Fear, 1 Dev.* (*N. C.*) *Eq., 103; Wild v. Peter, 1 La. Ann.; McWhorter v. McMahon, 1 Clark* (*N. Y.*), *400.*) It will never do to hold that any real estate is personalty in its broadest sense, without destroying the value of our system, which requires deeds to be recorded and stand as evidence of title. It will never do to hold that the secret equities of a partner or his creditor are any better than the secret equities of any one else. Real estate, in order to become partnership property, must be purchased for partnership purposes, with partnership funds, and by agreement at the time of the purchase that it shall be treated as partnership property; all must concur. *1 Washburn on Real Property, 668; Cox v. McBurney, 2 Sandf.; Arnold v. Wainwright, 6 Minn., 370; Lancaster Bank v. Mylor, 15 Penn. St., 544; Drewing v. Colt, 3 Sandf., 284; Cohen v. Huling, 27 Penn. St., 84; Smith v. Jackson, 2 Edwards Chy.* (*N. Y.*), *28, 36.*

And the deed to the property must describe the parties as partners, or state the purchase to have been made by them for the benefit of the firm, otherwise the parties will be treated as tenants in common. *Ridgeway's Appeal, 15 Pa. St., 177, 181; Lancaster Bank v. Myley, 1 Pa. St., 544; Hale v. Humic, 2 Watts, 143; McDurmot v. Lawrence, 7 Serg. & Rawle, 38; 71 Pa. St., 488; Bispham's Equity Principles, sec. 513; Ford v. Heron, 4 Mumf.* (*Va.*), *316; Dela-*

ney v. Hutchinson, 2 Rand. (Va.), 183; Jackson v. Shueford, 19 Ga., 14; Gordon v. Gordon, 49 Mich., 501; Goodwin v. Richardson, 11 Mass., 469; Gantt's Digest, sec. 837.

Improvements made on lands held by partners are not, nor are rents proper to be taken into partnership accounts. *Jones v. Jones, 23 Ark., 212.*

A creditor of a partnerthip, simply as such, has no lien; it is merely a right to be subrogated to the equity of a partner, and when by agreement, *bona fide*, and for value, the assets of the partnership are vested in one of the partners in consideration of his promise to pay the firm debts, the partnership creditors will have no prior lien upon such assets, either apart from, or by reason of this promise. *Barhim v. Jones, 2 Jones' Eq., 169; Hapgood v. Comwell, 48 Ill., 64; Robb v. Madge, 14 Gray, 534; Demon v. Hazard, 32 N. Y., 65; Howe v. Lawrence, 9 Cush., 553; Seegel v. Chedsey, 28 Penn. St., 279; Jones v. Lusk, 2 Met. (Ky.), 356.*

The doctrine that the separate debt of one partner should not be paid out of the partnership estate until all the debts of the firm are discharged, does not apply until the partners cease to have a legal right to dispose of their property as they please. It is applicable only when the principles of equity are brought to interfere in the distribution of the partnership assets among the creditors. Those principles operate on the property remaining in the possession of the partners, * * * but they do not extend to such as has been previously disposed of. *McDonald v. Beach, 2 Blackf. (Ind.), 55; Case, Receiver, v. Beauregard et al., 99 U. S., 119; Cockman v. Mauphins, Assignee, 78 Ky. (Rodman); Mayfield v. Barbour (Ky., Nov. 1881), 13 Law Rep., 74; Land v. Warring, 25 Ala., 625.*

Courts of equity will not disturb the legal title, except it is necessary to protect equitable rights of the respective partners. *Land v. Warring, supra.*

Our statute (*Gantt's Dig.*, *secs. 2643*, *2649*) has provided a remedy which requires the partner, even when personalty is levied on, to give notice of his equity; and, if it is not done, the officer is to proceed to sell, and, if he sells, title passes.

A partner who permits the separate creditors of his copartner to set off lands on execution to satisfy such copartner's debts, and recover judgment in ejectment for its possession, without asking before levy for an account of the partnership effects, can not afterward disturb the levy on the ground that the land was partnership property. *Clark v. Lyman*, *8 Vermont*, *290*.

A party who acquires a lien on, or makes purchase of, the individual interest of a partner in partnership lands without notice that they are held as such, acquires a good title, acquit of the equities of partnership creditors. *1 Jones on Mortgages*, *sec. 119*; *Hunt v. Rankin*, *41 Iowa*, *35*; *Duprey v. Leavenworth*, *17 Cal.*, *262*; *20 Conn.*, *130*.

Again, the parties in this case all derive their title from C. R. Vaughan, as *an individual*, neither of them claim from him as *partner*, or from *the partnership*; therefore neither can dispute the title of C. R. Vaughan. This point has been fully settled by this court in the case of *Wilson and wife v. Spring*, *38 Ark.*, *184*; *and Stafford et al. v. Watson et al.*, *MS. Opinion*, delivered October 20, 1883. These cases are directly in point, and, we think, settle this case.

The fact that William R. Vaughan was a partner, does not change the nature of the case; he purchased as an *individual*, and the case is the same as if the deed from C. R. Vaughan had been made directly to English, Rozelle or any third party. The judgment to Allen & Co. was rendered after both of the Vaughans had parted with their interest in the property, and constituted no lien.

STATEMENT.

W. F. HENDERSON, Special Judge. On the seventeenth day of January, 1876, the appellee, Thomas Fletcher, as executor of Richard Fletcher, filed his complaint in the Pulaski Chancery Court, alleging, in substance, the following facts: On the first day of February, 1872, William R. Vaughan and C. R. Vaughan purchased a plantation, known as the Workman place, from Jones, McDowell & Co., and took an absolute deed therefor, and executed a mortgage back, with power of sale, to Jones, McDowell & Co., for the balance of the purchase money, of that date. The deed to the two Vaughans, on its face, was to them as tenants in common, and the mortgage to Jones, McDowell & Co., was executed in like manner. On the eleventh day of October, 1873, Thomas Fletcher, as executor of the will of Richard Fletcher, deceased, recovered a judgment in the Pulaski Circuit Court against C. R. Vaughan, for the sum of four thousand and fifty-six dollars and thirty-three cents. On the seventh day of November, 1873, C. R. Vaughan conveyed his half interest in and to the land to William R. Vaughan, together with all his interest in the crop, stock, etc., on the plantation. On the eleventh day of November, 1873, William R. Vaughan conveyed the entire farm, with all the crop, stock, etc., to E. H. English. On the sixteenth day of March, 1874, English conveyed all the land, crop, stock, etc., to George F. Rozelle. Rozelle conveyed to Adams, and Adams to White. On the third day of March, 1874, Fletcher caused execution to be issued on his judgment, and levied on an undivided half interest in the land as the property of C. R. Vaughan. Fletcher purchased at the execution sale, and, no redemption having been made within the year, a deed was executed and delivered to him by the sheriff on the fifteenth day of December, 1875. Jones, McDowell & Co. gave no-

tice that they would sell the lands under the power contained in the mortgage to them on the twenty-fourth day of January, 1874. The mortgage was made to secure a note of six thousand dollars, dated February 1, 1872, for balance of purchase money on the place. This note was payable eleven months after date, with interest at the rate of twenty per cent. per annum until due, and thirty per cent. after due till paid. On the twenty-sixth day of February, 1874, Jones, McDowell & Co. transferred and assigned this mortgage to Rozelle & Young. That Young claimed no interest under the mortgage, and was merely a nominal party to the transfer. The complaint charges that the consideration from George F. Rozelle to Jones, McDowell & Co. for the transfer of the mortgage by them to him, if any was paid, was the money and funds of C. R. and William R. Vaughan, and that this transfer was taken in the name of George F. Rozelle and Wm. N. Young for the purpose of aiding William R. and C. R. Vaughan in hindering and delaying their creditors. That the conveyances from C. R. to William R. Vaughan, and from William R. Vaughan to E. H. English, and from English to Rozelle, were made for the fraudulent purpose of hindering, delaying and defeating the plaintiff in the collection of his debt, and that, whatever interest they acquired under these conveyances, they took with notice of plaintiff's judgment lien and the fraudulent purpose of the Vaughans as grantors. It is alleged that the mortgage debt had been paid off by C. R. Vaughan, or some of the defendants for him, and that Jones, McDowell & Co. hold the same for him, in trust, or in trust for some of the defendants. The complaint contains an offer to redeem in the following terms: "If he is mistaken in the allegations as to the payment of the said mortgage, by or in behalf of the said mortgagee, Vaughan, and anything is really and honestly due to said Jones, Mc-

Dowell & Co., your orator is ready, and has always been ready ever since his said purchase by him, to pay half of the same, and now is ready and offers to pay his undivided half of the same, or such part as the said C. R. Vaughan was liable for, under the mortgage, or the whole of said mortgage." That Rozelle, Adams or White, or some of the defendants, are in possession of the whole of said land, and refuse to deliver the plaintiff's half to him, or to permit him to participate in the rents and profits. That this suit was in aid of an action at law then pending in the Pulaski Circuit Court for the recovery of these lands.

Dudley E. Jones, Charles N. McDowell and Cyrus Bussey, partners, as Jones, McDowell & Co.; E. H. English, George F. Rozelle, John D. Adams, A. P. White, C. R. Vaughan and William R. Vaughan were made defendants. The prayer is that each and all of the defendants be compelled to discover and set forth what amounts have been paid upon the mortgage, whether any of the defendants had ever paid Jones, McDowell & Co. any money under pretense of purchasing the said mortgage of them with the understanding that they, in consideration thereof, should hold the same in trust for them or some of them, and whether the sale, if made as advertised, is not for their benefit. That Jones, McDowell & Co. be enjoined from selling the lands, or the undivided half interest so purchased by plaintiff at the said sale, until said action at law can be tried, or until the matters contained in the complaint can be inquired into in that court, and for other relief.

Rozelle, Adams, White, C. R. and William R. Vaughan, filed a joint and separate answer, in which they admitted the grant of letters testamentary and the recovery of the judgment as stated in the complaint. But deny that C. R. Vaughan, at the date of the rendition of the judgment, was the owner in fee of an undivided half interest of the

lands as a tenant in common with W. R. Vaughan, as charged. It is alleged that before the date of the recovery of the judgment, William R. and C. R. Vaughan were the owners of the lands as partners, and continued so until some time thereafter. That they were partners in business in buying and selling agricultural lands, raising crops of cotton and other produce thereon, and selling the same, and in buying machinery and necessary implements for the cultivation of the lands so purchased or leased.

That they were equally interested in the business, and that the capital stock consisted of the lands, machinery, implements, etc, necessary to carry on said business. That they owned and had other lands rented in addition to this place, all of which were embraced in the partnership. That all their business, including the price paid for the Workman place, was kept as one account. They deny that C. R. Vaughan had any interest in the place except as a partner. That there was an extensive and unsettled account between the partners which had never been adjusted between them. They allege the insolvency of the parnership, and of the individuals composing the firm in the fall of 1873, and that the firm assets had been sold in payment of the firm debts. That no settlement had ever been made between the partners, because their assets were gone. It was also stated that notwithstanding no accounting had ever taken place between the partners, it was a fact that C. R. Vaughan was largely indebted to his partner, and that such indebtedness exceeded C. R. Vaughan's interest in the partnership property. They set up the mortgage in favor of Jones, McDowell & Co., assigned to Rozelle, and say that a large sum is due. They admit that William R. Vaughan paid no money to C. R. Vaughan for his interest, but insist that the five thousand dollars named as the consideration in the deed was credited by

him on the partnership account. They deny that the money paid by Rozelle to Jones, McDowell & Co. was that of either of the Vaughans, or that the conveyances were made to hinder or delay their creditors. They say that the conveyance by C. R. to W. R. Vaughan was made in good faith and for a valuable consideration. They demur and assign for cause:

1. The complaint does not state facts sufficient to constitute a cause of action.
2. For want of equity.
3. The court has no jurisdiction of the suit.

The plaintiff afterwards filed an amendment to the complaint, and charged therein that the Vaughans owned and held the lands as tenants in common and not as partners. That the purchase money paid by them was not paid out of a common or partnership fund, but was paid by them severally, out of their separate funds, and that if the Vaughans were partners, the debt held by Fletcher was a partnership debt. He charges that the judgment was for rent of the Dick Fletcher plantation for the years 1871, 1872, in Pulaski County. That the lands were used and the crops applied in this instance in the same way other lands and crops of the said Vaughans were used, about which a partnership is asserted. Prayer as in the original complaint, and that he recover an undivided half of the lands. Rozelle answered the amendment, denying the statements contained in it, and asserted more fully the purchase of the lands with partnership funds and their use for partnership purposes. Rozelle, Adams, White, William R. and C. R. Vaughan filed an amendment to their answer, in which they set up a judgment, execution sale and purchase by Rozelle of these lands, under a judgment recovered in the United States Circuit Court for the Eastern District of Arkansas, in favor of Thomas H. Allen & Co.,

against the two Vaughans as partners, and assert title under a marshal's deed procured in this manner, as superior to the title of the plaintiff.

The Chancellor decreed that Fletcher, by his purchase, acquired a half interest in the lands, subject to whatever might be found due on the mortgage, and ordered the Master to take and state an account of the amount due, and to take an account of rents received by the defendants, and apply the same to the mortgage in payment thereof. The report of the Master shows a sum on account of rents in excess of the balance due on the mortgage. The Chancellor found as a fact that Fletcher had no actual notice of the partnership, and that there was nothing to import constructive notice to him. And that although as between the Vaughans a partnership might have existed, it could not be asserted as against Fletcher or any third person without notice. The decree sets aside all the deeds from C. R. Vaughan down to that of A. P. White, and awards a writ of possession to appellee.

OPINION.

By the third section of an act of the Legislature entitled "an act to define the boundaries of Pulaski and other counties," approved December 7, 1875, the lands embraced in this controversy were detached from Pulaski and added to the territory of Saline County. It will be seen from the date of the filing of the complaint that these lands were not in Pulaski County when the suit was commenced. It is again urged by the counsel for appellants, after the overruling of the motion to dismiss for want of jurisdiction, that the Pulaski Chancery Court could not entertain jurisdiction on the facts stated in the complaint. The argument on the jurisdictional ground is pressed upon us with so much zeal and ability that we feel constrained to

1. JURISDICTION: Local: Transitory.

go somewhat at length into a further consideration of this question. The facts material and important to a proper determination of the question are: The defendants were served with process in Pulaski County. The mortgagees, under the power contained in the mortgage, were about to sell the lands in this county. The principal object of the plaintiff's suit, as disclosed by his original complaint, was to have an account stated of the balance, if anything, due on the mortgage, and to redeem in part, or the whole, as might be directed by the Chancellor; to enjoin the sale as to the half interest, and to set aside certain deeds made to hinder and delay him in the collection of his debt, and the recovery of the lands in his action at law.

Looking at the pleadings as a whole, on the part of the plaintiff, it is argued, that the chief or principal object of this suit was the recovery of real property, or of an estate or interest therein within the meaning of section 4532 Gantt's Digest, which is as follows:

"Actions for the following causes must be brought in the county in which the subject of the action, or some part thereof, is situated:

"I. For the recovery of real property, or of an estate or interest therein.

"II. For the partition of real property.

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

"IV. For an injury to real property."

When the suit was commenced the Circuit Court of Saline County was the proper and only forum in which these lands or of an estate or an interest therein could have been recovered. But the first and most important question to be determined, is, was the main or leading object of the plaintiff's suit, as indicated by the scope and purposes of his original complaint, the recovery of these lands, or of an

estate or an interest therein? It is certainly true that the claim of the plaintiff was and is, that he is legally and equitably entitled to an undivided half interest in these lands, and it is conceded that no part of them are in Pulaski County. It is very clear that the Legislature intended, in the adoption of section 4532 Gantt's Digest as a part of our *code procedure*, to make all actions, whether at law or in equity, where the judgment or decree is to operate directly upon the estate or title, local, and to restrict the remedy to the proper tribunal of the county where the subject of the action, or some part of it, is situated. All such actions, whether by name foreclosure, partition, ejectment, or without any special designation as to title, whether expressly mentioned in the statute or not, are local, within the meaning of this section. The courts will look to the effect of such judgments and decrees, and endeavor to give full force to the statute, and carry out the defined policy of the legislative department in limiting the remedy to the proper courts of the county where the land lies.

The chief question is, and must be, in its ultimate form and effect: Does the decree appealed from operate directly and primarily upon the estate or title, or does it operate alone upon the persons of the appellants, and only indirectly and incidentally upon the estate or title? To determine this question it is important to ascertain when, how, and for what purposes the court acquired jurisdiction, if at all. It will be seen that until the coming in of the amendment to the complaint, no direct effort was made by any allegations in the original complaint or prayer for judgment in which a recovery of the lands, or of an estate or an interest therein, was sought. The plaintiff alleged that he had succeeded, through a judicial sale, to all the rights of C. R. Vaughan, one of the mortgagors, in a mortgage which was about to be carried into effect by a sale in Pulaski

County. That the mortgage had been paid off; or, if not fully paid, he would redeem as to the balance found due upon an accounting. He sought to have certain conveyances set aside and canceled on account of their having been made to hinder and delay creditors, and especially himself. He prayed that the sale be enjoined, as to an undivided half interest in the lands, until his equities could be inquired into. The defendants were served with process in Pulaski county, and answered the complaint on the merits, reserving exceptions by way of demurrer to the jurisdiction of the court. But it is suggested by counsel for appellants, that the plaintiff elected to amend his complaint, and to enlarge the scope of his remedy, so that the suit as a whole was an action to recover real property, or of an estate or an interest therein, brought in a county where no part of the subject of the action was situated.

It is also urged that the jurisdiction of the court over the subject of the action, if acquired at all, must have been in consequence of the primary and principal object of plaintiff's suit, not as a mere incident to an asserted jurisdiction *in personam*, but as an original jurisdiction *in rem*. It would seem to be clear, if we consider the entire pleadings as stating plaintiff's whole case, that the principal or chief object of his suit was the recovery of an estate in lands lying in Saline County. But appellee contends that the court having properly acquired jurisdiction over the persons of the defendants and the cause of action for a personal judgment or decree, that jurisdiction over the lands attached as incident to the principal or primary objects of his suit.

We are referred, by appellant's counsel, to the case of *Jacks v. Moore, 33 Ark., 31*, as authoritatively settling the question of jurisdiction raised here. That was an action of trespass brought in the Circuit Court of Phillips County for a trespass committed on lands lying in Lee County, in "cutting

timber growing thereon, and otherwise injuring the land." The court says: "The action ought to have been brought in Lee County where the land is situated. The language of the code is unequivocal. The injury and the action is local, and was so at common law, and the code simply follows the common law." That case fell directly and palpably within the very terms of the statute, and no question is made but that it was correctly decided. We are, however, unable to perceive any analogy between this case and that. Nor are we disposed to follow counsel in his speculations and possible deductions flowing from it. This suit is not founded upon any claim even remotely connected with an injury to real property. If any argument or reason as applied to this, can be deduced from that, it is against rather than favoring the position of appellants. That case declares that the code provision follows the common law, and is simply declaratory of what the law was before.

It is very well known that the section of our statute above quoted is an exact copy of a corresponding code provision in the Code of Kentucky, in force there when we adopted ours.

It is important to ascertain what interpretation has been placed upon this provision by the courts of that State, and, if sound, to adopt it as the true construction of ours.

Mr. Newman, in his Pleadings and Practice, commenting on this provision, says: "Actions for the recovery of real property, or of an estate or interest therein, or for an injury done to it, as specified in the section of the code above quoted, are subjects belonging mostly to the common law courts, or ordinary proceeding, while the partition of real property and the sale of it under a mortgage lien, or other incumbrance or charge, belong chiefly to a court of equity." (*Newman Pleading and Practice, page 19.*) At page 38 he says: "But, in the absence of any statutory

enactment, the general rule is perhaps still to be observed, that where the judgment or decree is for the doing of an act which may be done anywhere, the person of the defendant, wherever he may be served with process, gives jurisdiction to hear and determine the controversy. All actions, therefore, for the recovery of money, settlements of accounts between partners or others, the specific execution or rescission of contracts for land, or compensation for its deficiency, and also bills of discovery under the former practice, and actions to cancel deeds or other instruments of writing, where not otherwise provided by statute, are transitory. Even an injunction to stay proceedings on a judgment, as it operates on the person enjoined and not directly on the judgment itself, nor on the court that rendered it, would be transitory, were it not for the express requirement of the statute." Citing *Dunn and Wife v. McMillan, 1 Bibb, 409; Mason v. Chambers, 4 J. J. Marsh, 407; Sharp v. Pike's Admr., 5 B. Monroe, 157; Cowan v. Montgomery, 7 J. J. Marsh, 299; Cave v. Trabue, 2 Bibb, 444; Owings v. Beall, 3 Little, 103; Lewis v. Morton, 5 B. Monroe, 3; Williams v. Burnett, 6 Me., 323; Parrish v. Oldham, 3 J. J. Marsh, 535; Dickens v. King, Ib., 591; Taylor v. Bate, 4 Dana, 198; Walker's Exrs. v. Ogden, 1 Dana, 247; Kendricks v. Wheatley, 3 Dana, 34; Austin's Heirs v. Bodley, 4 Monroe, 434.*

At page 45 Mr. Newman says: "Other cases may arise in which jurisdiction of one court *in personam* draws to it the local jurisdiction *in rem* of another. It may often happen that the courts having local jurisdiction of the controversy in part, will dispose of the whole transaction, notwithstanding it involves the exercise of a jurisdiction which in part belongs to another tribunal." And in support of this position cites *Webb v. Wright, 2 Bush. (Ky.), 126.* See, also, *Butler et al. v. Buckley et al., 13 Ohio*

St., *519*; *Owens v. Hall*, *13 Ohio St.*, *571*; *Hubbell v. Sibley*, *4 Abb. Pr. R.*, *U. S.*, *403*; *Caufman v. Sayre et al.*, *2 B. Monroe*, *202*; *Breckenridge Heirs v. Ormsby*, *1 J. J. Marsh*, *256*.

In order to sustain the jurisdiction over the lands another general rule is sought to be applied here, which is, that a court of equity, when it properly acquires jurisdiction over a cause for one purpose will usually retain it and decide all questions presented. *Estes*, *Ad.*, *v. Martin*, *Ad.*, *34 Ark.*, *410*; *Crawford*, *Auditor*, *v. Carson et al*, *35 Ark.*, *565*; *Price v. State Bank*, *14 Ark.*, *50*; *Heilman v. Martin*, *2 Ark.*, *168*; *Robertson v. Thompson*, *3 Ind.*, *190*; *Morgan v. Morgan*, *2 Wheaton*, *290*; *Coway et al.*, *ex parte*, *4 Ark.*, *302*.

In further support of the jurisdiction, the case of *Denton v. Roddy*, *34 Ark.*, *648*, is relied upon. In that case Justice EAKIN said: "If the complainant can successfully attack the decree upon any ground recognized in equity, she will have the right to do so in the Woodruff court, as incident to and connected with the principal end of her bill, to wit, to be endowed of lands in Woodruff County. The jurisdiction of the court for that purpose, will draw to it the jurisdiction to remove the impediment of a fraudulent decree of another tribunal."

EAKIN, J., in *Dyer v. Jacoway*, *ante*, *186*, says: "The suit was properly brought in the forum of the administration. It is competent to the court, having the parties before it, to do full justice, and to that end it may make orders affecting real estate lying out of the district. The two districts of Yell County are as distinct counties. This by special statute."

This was a suit by creditors of an estate against the administrator, his sureties, and the wife of the administrator, to set aside for fraud the settlements made by the adminis-

trator to hold the sureties liable, and to subject real estate of the wife of the administrator, to any decree rendered. The real estate was in the Dardanelle District of Yell County, and the suit was brought in the Danville District, the forum of the administration, etc.

In *Walker's Exrs. v. Ogden, 1 Dana, 247*, Chief Justice ROBERTSON, in speaking of the power of a Chancellor to award restitution of lands to a vendor, said: "Restitution is, *per se*, a matter of local jurisdiction, and if it could be entertained by the Circuit Court of Bourbon, it must be so sustained only as incidental to, or in consequence of, some other matter which gave jurisdiction to that court over the parties *and their contract.*

In *Kendricks et al. v. Wheatley, 3 Dana, 34*, it was held that a suit for the rescission or specific execution of a contract for land, the venue was not local but transitory, and that the defendant must be summoned in the county or enter his appearance, to give jurisdiction. Fictitious allegations, as of a lien upon land, with a prayer to enforce it by sale, though such matter is local, will not confer jurisdiction when it appears from the whole bill that no decree can be rendered on such allegations.

Morgan & Hoggins v. Masterson, 11 B. Monroe, was a bill filed in the Madison County Circuit Court to impeach and set aside an alleged fraudulent and fabricated will of one Mrs. Shackelford, who was domiciled in Lincoln County at the date of her death, owning property there, in which county the alleged forged will was admitted to probate. The plaintiffs claimed as heirs to Mrs. Shackelford, and also under the will. The defendant, Masterson, was the executor of the will and a devisee. The testatrix died owning lands in Madison County from which Masterson had collected rents as executor. The objects of the bill were to set aside the will and to annul its probate in Lin-

coln County; to charge Masterson with the rent of lands in Madison County, and to have partition of the lands in that county. Defendant set up the will and its probate in Lincoln County and demurred to the jurisdiction of the court.

It was conceded in argument in that case, that the jurisdiction to determine the principal question was in the Lincoln, and not in the Madison Circuit Court, according to the authority of *McCall and Wife v. Vallandingham, 9 B. Monroe, 449.* But two grounds were insisted upon in favor of the jurisdiction: First—That the objection to the jurisdiction had been waived. Second—That the Madison Circuit Court had jurisdiction to settle with the executor for rents and profits of the land, and to decree partition thereof among the claimants; and having jurisdiction for these purposes, and especially to decree partition which is also local, that it thereby acquired jurisdiction to inquire into the validity of the will, that being necessary to be done before partition could be made.

SIMPSON, Judge, in delivering the opinion, after showing that the objection to the jurisdiction had not been waived in disposing of the other ground, said: "If the admixture of subjects concerning which the court had jurisdiction, could operate to transfer the jurisdiction as to the others, from the court to which they properly belonged, and impart it to the court where the suit was instituted, there would be no difficulty in effecting a change of jurisdiction in almost every case in which there might be a contest about a will. The real question presented by complainant's bill is in relation to the validity of the will. All the other questions are subordinate to that one, and to a great degree dependent upon it. That question ought to have been tried and determined in the proper court, and when that had been done, a suit for partition in the county where the land is situated might have been brought there."

The Supreme Court of the United States, in *Hart v. Sansom*, a recent case, published in *No. 8, vol. 29, Albany L. J.*, uses the following language: "Generally, if not universally, equity jurisdiction is exercised *in personam*, and not *in rem*, and depends upon the control of the courts over the parties, by reason of their presence or residence, and not upon the place where the land lies in regard to which relief is sought. Upon a bill for the removal of a cloud upon the title, as upon a bill for the specific performance of an agreement to convey, the decree, unless otherwise expressly provided by statute, is clearly not a judgment *in rem* establishing a title in lands, but operates *in personam* only." See, also, *Massie v. Watts, 6 Cranch, 148; Orten v. Smith, 18 Howard, 263; Vandever v. Freeman, 20 Tex., 334.* Our statute on this subject is as follows: "In all cases where the court may decree the conveyance of real estate, or the delivery of personal property, they may by decree pass the title of such property, without any act to be done on the part of the defendant, where it should be proper, and may issue a writ of possession if necessary to put the party in possession of such real or personal property; or may proceed by attachment or sequestration." *Section 2640 Gantt's Digest.*

It will be seen that, in the case of *Hart v. Sansom, supra*, the court says that the decree, unless otherwise *expressly provided by statute*, is clearly not a judgment *in rem* establishing title in land, but operates *in personam* only. The language of our statute is: "Where the courts may decree the conveyance of real estate, they may by decree pass the title of such property without any act to be done on the part of the defendant, when it shall be proper, and may issue a writ of possession." The decree in this case did vest title in the plaintiff without any act to be done on the part of the defendant. It was made in strict conformity to

the statute, and if it be not a judgment *in rem*, it is difficult to conceive an instance in which such an effect can be given under a judgment or decree.

We can not say, in the face of this statute and the decree as found in the record, that it is a judgment *in personam* only. Nor was it the exercise of a merely incidental jurisdiction *in rem*. If the court acquired jurisdiction for the purpose of decreeing title, and passing the estate in the lands to the plaintiff and awarding him a writ for its possession, as prayed in the amendment to the complaint, the incident became at once the chief or principal object of the suit. All of the grounds for the interference of a court of equity set up in the original complaint were subordinate to the claim of title and the right to be put into possession. These were from that time forward the chief objects of the suit. To hold that jurisdiction was acquired as an incident to the other grounds stated for a purely personal judgment, would, in our opinion, contravene not only the letter, but the spirit of the section of the statute in question. Nor can the old equity doctrine found in *Penn v. Baltimore, 1 Vesey, 444; Anglasie, Ex., v. Maschamp, 1 Vern., 75; Massie v. Watts, 6 Cranch, 148*, be appealed to for the purpose of sustaining the jurisdiction. The judgments in these cases were *in personam*. The power of the court was exerted through the person of the defendant. Our statute has modified that rule as to lands situated in this State. But it does not follow from what has been said that in no case would the incidental jurisdiction arise.

JURISDICTION: Acquired by service of process, and not ousted by amendment of local jurisdiction.

It was properly asserted in *Dyer v. Jacoway, supra*. The court acquired jurisdiction over the parties by service of process in this county and by their appearance to the action, and to the extent of granting relief *in personam*, it was properly exercised. The Pulaski Chancery Court had jurisdiction to enjoin the sale, to have an account stated of

the balance due on the mortgage, to cancel the conveyance, and to inquire into the partnership matters brought before it. The filing of the amendment did not oust the court of a jurisdiction already acquired, but it had none to decree the title and award the writ of possession, and it was error to do so.

2. EXECUTION: Partner's interest in land, subject to.

It will be seen from the statement of facts that the appellants insisted in their answer that the plaintiff acquired no lien upon the lands by the judgment against C. R. Vaughan, although at that time the lands were in Pulaski County, because they belonged to C. R. and William R. Vaughan, not as tenants in common, but as partners; that they were purchased with partnership funds and used for partnership purposes, within the terms of the partnership; that the partnership and the partners were insolvent at the date of the rendition of the judgment and have been ever since. It is further argued that the proof fully sustains the claim.

3. PARTNERSHIP: Equity of partnership creditors to assets: How lost.

Without going fully or minutely into the evidence, it becomes important to ascertain and determine whether or not the consequences must follow of a denial of all right to the appellee under his purchase. It is not denied that within less than a month after the recovery of the Fletcher judgment against C. R. Vaughan, and while such interest as he might have had in the lands, whether that of an undivided half, as a tenant in common with his brother William R., or his contingent or possible share after the payment of all partnership debts, still whatever interest he had, it was an interest in lands lying in the county where the judgment was rendered, and was bound by the lien of that judgment. Fletcher clearly had a right to levy upon and sell the lands if they belonged to C. R. Vaughan as a tenant in common. He had also a right to levy upon them if they belonged to the partnership. In the former

case he would acquire a title to a half interest in the property thus purchased. In the latter he took the place of the debtor partner, subject only to the demands of partnership creditors, whose claims will be preferred to that of an individual creditor, provided the property remains the joint estate of the partners, in such condition as to enable the partners to assert their equities for the benefit and protection of that class of creditors. If, however, the joint estate was severed by the act of the partners in such manner as to cut off the right of the partners to assert their equities over the partnership estate, the equity of the partnership creditors is also gone.

C. R. Vaughan, by deed of November 7, 1873, conveyed all the interest he had in the lands, crop, stock, etc., to William R. Vaughan for five thousand dollars, which he received in the way of credits on debts due by him to Rozelle.

This dissolved the partnership to the extent of these lands, crop, stock, etc. He thereby parted with all right, interest and power of control over this property. It was not conveyed in trust or in any way bound for the payment of any debt or charge except such as might be lawfully asserted. He had no right thereafter to insist, in a court of equity, that the firm owed partnership debts, and to have the lands applied to their payment. His equity as a partner was gone. The Chancellor found that the conveyance was made in good faith and for value. It is true that the *bona fides* of the sale was attacked by the complaint, but there is perhaps little or no proof to sustain the allegations. The plaintiff purchased at a sale under his judgment, and procured a sheriff's deed in regular form. Assuming the partnership to have been proven (of which we entertain some doubt) what estate or interest did Fletcher buy at the sale? Did he buy subject to an ac-

counting between the partners and to the partnership debts, or did he buy whatever interest or estate C. R. Vaughan had, with the superior claim of the partnership creditors cut off by the act of the partner in selling, or did the sale in any manner affect the power of the other partner to dispose of the property in payment of a partnership debt, and thereby defeat the lien of plaintiff's judgment, and cut off all further remedy on the part of Fletcher to subject the estate of C. R. Vaughan to the payment of his debt?

Very great confusion and conflict of judicial opinion may be found on this and other questions of a similar character growing out of the respective rights and remedies of individual and partnership creditors against the property of insolvent partners. The general rule undoubtedly is, that a creditor of one of the partners buys at an execution sale with the rule *caveat emptor* before him, and that he must take notice of all equities, whether liens, strictly speaking, or not, and that at such purchase he buys only the share or interest of the debtor partner. In *Allen v. McGaughey et al., 31 Ark., 252,* the court said: "The defendant claims as purchaser at an execution sale, to which the rule *caveat emptor* applies. He gets no warranty of title by his deed, but takes the estate incumbered with all the equities upon it, at the time of his purchase, such, only, as the defendant in the execution had, charged with all the equities that might be asserted against him." See, also, *Byers v. Fowler, 12 Ark., 286; Miller v. Fraly, 21 Ark., 22; Pindall et al. v. Trevor & Colgate, 30 Ark., 249.* The contention in this case is, that at the time Fletcher purchased, the lands were affected with a trust or lien in favor of the partnership creditors of C. R. and W. R. Vaughan.

Creditor's equity enforced only through equity of the partners.

The trust or equity of the partnership creditors against property of the partnership is not a lien or trust, such as a court of equity can recognize and enforce except through

the partners, to whose equities they are, under some circumstances, subrogated. If, therefore, at the time the superior claim of the partnership creditor is asserted by him, the partners are not in a condition by reason of any act of theirs to assert this right, the derivative equity in favor of the partnership creditor will be lost. They can not stand in a higher or more favorable position than that of the partners. The equity of the partnership creditor is worked out by and through that of the partners.

In *Case v. Beauregard, 99 U. S., 119*, Justice STRONG, delivering the opinion, said: "No doubt the effects of a partnership belong to it, so long as it continues in existence, and not to the individuals who compose it. The right of each partner extends only to a share of what may remain after the payment of the debts of the firm, and the settlement of its accounts. Growing out of this right, or rather included in it, is the right to have the partnership property applied to the payment of partnership debts in preference to those of any individual partner. This is an equity the partners have as between themselves, and in certain circumstances it inures to the benefit of the creditors of the firm. The latter are said to have a privilege, or preference, sometimes loosely denominated a lien, to have the debts due to them paid out of the assets of a firm in course of liquidation, to the exclusion of the creditors of the several members. This equity, however, is a derivative one. It is not held or enforceable in their own right. It is practically a subrogation to the equity of the individual partner, to be made effective only through him. Hence, if he is not in a condition to enforce it, the creditor of the firm can not be. It is indispensable, however, to such relief that the partnership property should be within the control of the court, and in the course of administration, brought there by the bankruptcy of the firm, or by an assignment, or by the

creation of a trust in some mode. So, if before the interposition of the court is asked, the property has ceased to belong to the partnership, if by a *bona fide* transfer it has become the several property, either of one partner or a third person, the equities of the partners are extinguished, and consequently the derivative equities of the creditors are at an end. It is, therefore, always essential to any preferential right of the creditor, that there shall be property owned by the partnership when the claim for preference is sought to be enforced." See, also, *Ex Parte Ruffin, 6 Ves., 119; Price v. Bernard et al., 20 Vt., 479; Appeal of the York County Bank, 32 Penn. St., 446.*

The only exception or qualification to this rule is, that of the *mala fides* of the retiring partner. *Kimball v. Thompson, 13 Metc. (Mass.), 283; Allen v. The Center Valley Company et al., 21 Conn., 130; Ladd v. Griswold, 9 Ill., 25; Smith v. Edward, 7 Humph., 106; Robb et al. v. Mudge and another, 14 Gray, 534; Baker's Appeal, 21 Penn. St., 76; Sigler & Richey v. Knox County Bank, 8 Ohio St., 511; Wilcox v. Kellogg, 11 Ohio, 394.*

In such case the joint estate is converted into the separate estate of the assignee by force of the contract of assignment. And it makes no difference whether the retiring partner sells to the other partner or to a third person, or whether the sale is made by him, or under a judgment against him. In either case the equity is gone.

In *Vosper v. Kramer et al., 31 N. J. Eq., 420,* in speaking of the lien of the partner, the Chancellor used the following language: "This lien may be lost by the unqualified sale and transfer by the partner of his interest in the partnership to his copartner, whereby the property before that time held by them jointly, becomes the several property of the latter." To the same effect see *Giddings v. Palmer, 107 Mass., 269; Robertson v. Baker, 11 Fla., 192; Croone*

v. Bivens, 2 Head., 339; West v. Chasten, 12 Fla., 315; Griffith v. Buck., 13 Md., 102; Lindley on Part., vol. 2, pp. 683–4. The answer of the defendants denies the charges of fraud made in the complaint, and alleges that the conveyance made by C. R. to W. R. Vaughan was in good faith, and for value, and the Chancellor so finds as a fact. The *bona fides* of that sale is not now called in question on this appeal, and, for the purpose of disposing of this question, we will treat it as a sale made in good faith. Whatever may have been the objects or purposes had in view by C. R. Vaughan in selling, and W. R. in buying, it is quite clear that C. R. Vaughan had a legal right to sell such estate as, under the rules of law applicable to the condition of the property, he might own at that time. No superior legal title is shown in any other person. Nor was the Fletcher judgment anything more than an incumbrance upon the title. The fee was in the partnership, which was composed of the grantor and the grantee, and we can not question the operative effect or efficacy of the deed to pass the title to William R. Vaughan, subject to the outstanding liens of Jones, McDowell & Co. and Thomas Fletcher. Both the Vaughans say in their depositions that the partnership ceased in the latter part of 1873. When, therefore, this suit was instituted, no such partnership was in existence. It had been dissolved for more than two years.

When C. R. Vaughan conveyed to William R., and when William R. conveyed to E. H. English, the lien of the Fletcher judgment was in force and bound such interest as C. R. Vaughan had to the extent of creating a lien for the amount thereof. It was a valid transfer for the purpose of severing the joint estate, and did have that effect, as between the partners.

This disposes of the defense based upon the partnership, unless the Marshal's deed held by Rozelle, under the sale

by Allen & Co., on their judgment in the United States Court, shall be deemed a superior title to that of Fletcher.

Without repeating the facts, it is sufficient to say that Allen & Co. recovered a judgment in the early part of 1874, in the United States Circuit Court for the Eastern District of Arkansas, against the Vaughans jointly, and proceeded to levy upon and sell the plantation in question to satisfy that judgment. Rozelle bought at the sale, and procured a deed which is exhibited and relied upon as a superior title to that of the appellee, because it springs out of a partnership debt, and that, as a partnership creditor has a preferential right to satisfaction out of partnership assets, his title, although junior in point of time, is superior in equity. The point just ruled confronts us again, for it is only another mode of stating the claim for preference.

The indebtedness upon which Allen & Co. recovered their judgment, was an obligation dated January 1, 1874. The debt may have accrued during the existence of the partnership, but the evidence of it was made to bear date after the dissolution of the firm.

The partnership had been dissolved and a considerable portion of the assets had been sold, and this plantation had become the property of two different purchasers who held it in severalty, when the note was given, and the judgment recovered. Had Allen & Co., immediately after the recovery of their judgment, filed a bill to marshal the assets of the late firm, and in that proceeding had attempted to assert the former lien of the partners, it will be seen, by an examination of the authorities above cited, that the joint estate in these lands having been severed by the deed, the lien of the partner was gone, and with that the derivative equity of the creditor founded upon it.

In a recent decision of the Court of Appeals of Kentucky this subject was very thoroughly discussed. It was

said in that case, that "no act of an execution defendant, while execution is in the hands of an officer, can defeat the lien acquired upon his property by delivery of the writ." It was also declared that creditors of a partnership have no lien upon partnership property except such as is derived through the partners—and that, where partners from any cause are in a position that they can not assert their lien upon the partnership effects, the creditors of the firm are equally unable to do so. *Couchman's Admr. v. Maupin et al., Rodman's R., 78 Ky., 36, and authorities there cited.*

It can make no difference whatever that one of the partners did what it is possible a court of equity would have compelled both partners to do, had the firm remained in business or in existence at the time the partnership creditor attempted to seize and sell what had before that time been partnership property. Nor could either party have defeated this equity in behalf of partnership creditors by any act done *mala fides.* To hold otherwise would certainly place many embarrassing restraints upon the alienation of property, and charge it with secret liens without any compensating good results. As the law now stands the favor shown partnership creditors over individual creditors of a partner is well recognized and enforced. But the creditor of one partner, in cases like the present, if he is sufficiently diligent, may be permitted to reap the fruit of his vigilance.

A large mass of evidence was taken both before and after reference to the Master. So much as may be necessary to determine whether or not the appellant's exceptions to the Master's report should have been sustained, will be looked into.

Jeff Fletcher, introduced on behalf of the plaintiff, testified that he was well acquainted with the Workman place.

That he had resided in the same neighborhood for many years; had been engaged in planting or farming for twenty-five years on lands of a similar kind to that of the Workman place. That he had owned and cultivated from one hundred and fifty to six hundred acres near this place, and in short had every possible opportunity for knowing the true rental value of the lands for the years 1876 to 1881 inclusive, covered by the final report of the Master. This witness places the rental value, where the lessee or tenant keeps the lands in repair, at from five to six dollars per acre, and says that he would not give over five dollars for any land. Isbell, sworn on behalf of the defense, now occupying under a purchase from Adams, says that it is worth about five dollars per acre. Reynold places the value at about seven dollars an acre, but thinks five or six high enough where tenant makes annual repairs. The Master made a sort of average and fixed the value at seven dollars per acre. We think this more than the proof shows the land to be worth, and that the exceptions of the defendants should have been sustained. There is a wide difference also as to the number of acres of land fit for cultivation and in a fair state of improvement, when Rozelle, the mortgagee, took possession. He says there was not to exceed two hundred and fifty acres fit for cultivation in 1874, when he took charge of the place, and that when he left, at the end of the second year, about four hundred and fifty acres.

3. MORTGAGEE: Not liable for rents or improvements made by himself, and entitled to credit for necessary disbursements.

R. H. Rozelle, who had charge of the place for George Rozelle, says that it contained between two hundred and seventy-five and three hundred acres when he first went to it, and that by actual survey, made by George Merrick, Rozelle cleared up and put in cultivation ninety-eight acres. He says that about twenty-five acres more at different times, he thinks, were added to it by Rozelle.

Some witnesses speak of this added land as having been once cleared up or "deadened," and that it was in a rough state of improvement when Rozelle went in, but that it had grown up in cane. From what is shown in an account attached as a part of the deposition of R. H. Rozelle, it appears that George F. Rozelle expended a considerable sum of money in making judicious and valuable improvements on the place. He is shown to have cleared up and put in cultivation ninety-eight acres. He built houses and made many improvements and thereby enhanced the value of the property. It was error to charge Rozelle, or those who claim under him as a mortgagee in possession, for rents of land put into cultivation by himself at his own cost. Somebody must have kept the taxes down and made repairs. No credit seems to have been given or estimate made of these necessary and proper disbursements. A mortgagee's account, as stated by Jones on Mortgages, is as follows: "Upon the redemption of the mortgaged premises by any one interested in them, he is obliged to state an account of his receipts from the mortgaged property, and he is entitled to allowances for all proper disbursements made by him in respect of the premises. The mortgagee in possession takes the rents and profits in the *quasi* character of a trustee or bailiff of the mortgagor. And in equity he must apply them as an equitable set-off to the amount due on the mortgage. It depends, however, upon the result of the accounting, upon equitable principles, whether any part of the rents and profits received shall be so applied. The mortgagee is entitled to have them applied in the first instance to reimburse him for taxes and necessary repairs made upon the premises, for sums paid by him upon prior incumbrances upon the estate and the cost in defending it; and if he has made permanent improvements upon the land in the belief that he was

the absolute owner, the increased value may be allowed him. *Jones on Mortgages, vol. 2, secs. 1114–15.*

The defendant's exceptions to the Master's report ought for these reasons to have been sustained. The decree of the Pulaski Chancery Court is reversed for the errors herein indicated, and the cause remanded to that court to be proceeded with according to the rules of that court, and according to this opinion, with directions to strike out plaintiff's first amendment to his complaint and to limit the relief to the other matters contained in the pleadings and embraced in the general or special relief prayed.

DISSENTING OPINION.

MARTIN, Special Judge. I regret that I can not concur with my brother judges, altogether, in the able and exhaustive opinion delivered by the court in this case.

In so far as the opinion holds that the court below had jurisdiction, under the peculiar circumstances, to enjoin the sale made under the Jones, McDowell & Co. mortgages, to take an account as to the extinguishment thereof, and to settle the equities growing out of the partnership alleged in the defendant's answer, it has my concurrence. It seems to me, however, on this branch of the case, that, having all the parties before it, the court below would find it very embarrassing to make any satisfactory decree without going forward to make a final settlement of all matters, and a decree, if necessary, for the possession of the property in controversy. The court having in the first instance taken jurisdiction as to the injunction account and partnership, the other is necessarily drawn to it, as incidental, though independently, beyond its jurisdiction.

As well expressed by Chief Justice WATKINS, in *Price v. State Bank, 14 Ark., 56*, "a court of chancery having taken jurisdiction of a cause for one purpose, and having

all the parties in interest before it, will do complete justice between them and *end litigation* by disposing of all questions in the cause." *Estes v. Martin, 34 Ark., 410; Dyer v. Jacoway, ante, 186.*

Partnership.

It seems to me the doctrine as stated by the court, or rather as applied to the facts of this case, is not sustainable either on principle or by the authorities. In my endeavor to convince myself that my brothers were correct, I have given a careful examination to all the cases cited in the opinion, so far as I am advised, in support of that doctrine. And, without discussing them separately, it may be said of them all, they simply lay down the rule to be, that where two partners holding partnership property agree to and do divide the property, or one conveys to the other, the conveyance severs the partnership claim, and the *grantor* or *vendor*, who has parted with his interest, has no further interest in the property, or equity to have the property so *conveyed away* by him subjected to the debts of the firm.

The language of the courts, I am aware, in some of the cases, is very broad; but when applied to the facts of the cases under consideration, the above is a fair statement of the rule as applied, and beyond that it becomes mere *dicta*.

Now a very slight glance at the facts in this case will serve to show that such a rule has no operation here.

For the purpose of discussing this branch of the case, it is necessary to advert to only a very few of the prominent facts. And, in view of the manner in which the question is raised here, it may be assumed, as is conceded in the argument on this point, that the partnership is established, and the land mentioned was *partnership property*. While such partnership property, Fletcher recovered a judgment

in Pulaski Circuit Court against Crad. Vaughan. This, by law, became a lien on all his real estate in the county, the land being then in Pulaski. Crad. Vaughan, one of the partners, subsequent to recovery of this judgment, conveyed to William R. Vaughan, his partner, "all his right, title and interest" in the lands. W. R. Vaughan in a few days conveyed to English, in settlement of a *claim against* the firm. English conveyed to Rozelle, and Rozelle to Adams. The lands, it may be stated, were bought in the names of William R. Vaughan and Craddock R. Vaughan, as though they were held as tenants in common, and so the records showed the title.

This I think, however, and we are agreed on that proposition, cuts no figure in the case. The decisions are abundant that equity will, as in favor of a *mere execution purchaser*, only inquire into the actual interest, and not what appears by the record of land titles or otherwise. *22 Ark., 580; 27 Ark., 101; 31 Ark., 258; 29 Ark.; 34 Ark., 92.*

The question which we have now to settle here is, simply, what interest in this land did Fletcher take by virtue of his execution.

It is evident, and not controverted by any of the able counsel, if the transfer from Crad. Vaughan to William R. had been made before the recovery of the judgment, Fletcher would have taken nothing. Then it must be by virue of the *lien* thus by the *judgment* fixed on the property, that he can recover, if at all.

The proposition of the court, speaking through the majority in this case, is, that this lien held the half interest of Crad. Vaughan, subject only to the equities growing out of the partnership, and of firm creditors to be first satisfied; that by the conveyance of Crad. Vaughan all equities of creditors was destroyed by a severance of the estate. Thence Fletcher is let into this full half interest, acquit of

all such equities, and as though Crad. Vaughan were then a tenant in common of one half interest in the land.

Respectfully deferring to the good judgment of my brothers, I can not subscribe to this doctrine, and submit that a careful examination of the real question will show it not well founded. The question for solution, is, what did Fletcher get by his sale? He got what was fastened and saved by the lien. What was that?

Mr. Freeman, in his excellent work, says: "The judgment is a lien only on the *interest of the debtor*, whatever that may be; therefore, though he seems to have an interest, if he have none in fact, no lien can attach. The rights of a lien owner *can not exceed* those which might be acquired by a *purchaser from the defendant*, with full notice of all existing legal or equitable rights belonging to third parties. The attaching of the lien upon the legal title forms no impediment to the operation of all equities previously existing over the property. *Freem. on Judgment, secs. 357–357a.*

In *Parsons on Partnership*, **350*, the rule is laid down thus: "The first point, therefore, is to adopt no theory and no conclusion that will offer to an attachment or execution *anything more or anything else than the debtor has.* * * One partner may sell to his copartner, but no such arrangement liberates his share from the debts of the firm. (*Ib.*, **p. 472.*) Real estate, while partnership property, fulfills all the functions of personalty; *when divided between them* the character of real estate remains.

In *Tallman v. Forly, 1 Barb., 280*, Tallman sold a lot to Forly, Forly, at the time of conveyance, executing a mortgage for the purchase money, and also mortgage to DeAlfero to secure him for moneys advanced in improving the property. Judgments were then outstanding against Forly. Tallman afterward foreclosed, and the property was sold for more than enough to satisfy the claim for pur-

chase money, and the *prior* judgment creditors applied to have surplus turned over to them. The court held the surplus went to mortgagors, and said:

"Judgment creditors are entitled only to such rights as *the debtor has.* * * If the creditors could find a *moment* of time when the *debtor had a right to sell* in preference to secured mortgagees, they might find some aliment on which their claim might feed."

In *Watkins v. Wassell, 15 Ark.*, this court say: "The interest of the creditor in the real estate of the debtor is limited to the actual interest of the debtor at the time the lien (of the judgment) attaches."

In *27 Penn. St., 212, Jones v. Jones*, thus: "When the interest of one partner passes to another it is immaterial whether by sale, descent, *execution*, or assignment in bankruptcy, in all these cases the person coming in by right of the partner, comes into nothing more than an interest in the partnership, which can not be tangible; can not be made available or delivered but under an account between the partnership and the partner, and it is an item in the account that enough must be left for debts."

In *Northern Bank of Kentucky v. Keiser, Ky.*, the rule is thus stated: "No individual creditor of any of the partners can subject *his debtor's* interest otherwise than *cum onere*, or, in other words, could not make his debtor's interest available until all *partnership debts shall have been paid.*"

Mr. Waits states it thus (*6 Waits' Acts and Defenses, pp. 745-6*): "The purchaser must accept the debtor's position as to liabilities, legal or equitable, existing either as incumbrances or as incidents to the title." And, further, at *page 753*: "The right of a separate partner in the *corpus* of the firm property, is simply his proportionate share after the *firm debts are paid*," with a large number of author-

ities cited. *Sutcliff v. Derhman, 18 Ohio, 182; 8 N. H., 251; 41 Iowa, 39; Offert v. Scott, 32 Ala., 167; 71 Penn., 488; 35 Vt., 44; 28 Ala., 629.*

The books are full of authorities on this point, and to the same effect. That is, that the creditor can not take by his judgment lien, or execution, more than the debtor might, at the time it attaches, or is enforced, sell or convey.

Now it does seem to me, my brother judges can not, in consistence with this plain principle, hold that Fletcher's judgment lien, or sale under it, can possibly take more than Crad. Vaughan's interest, subject to the debts of the partnership. There might be more reason for holding that he, as judgment creditor of William R. Vaughan, would have fastened his lien on the property. But how it is to be sustained as to Crad. Vaughan's interest is difficult to comprehend.

Before Crad.'s conveyance to Wm. R., Fletcher had a lien, if anything, on his *equitable right to an account from the partnership for his surplus.* The *corpus* of the firm property belonging, as Mr. Parsons says, to the partnership as distinguished from either partner separately. When Crad. Vaughan conveyed, "whatever interest, right and title" he had, went to William R., subject to *this lien.* Lien for what? Evidently a right to have his debt satisfied out of Crad. Vaughan's *surplus* in the property—only this, and nothing more.

But, it is argued, when the Vaughans made this transaction, they severed the partnership and opened it up to all creditors alike.

The most that any of the authorities have held in this direction is, that when such conveyance is made the property is subject to the individual debts of the separate partners to whom the *conveyance is made.*

The court has considered the result precisely the same as

if William R. and Crad. Vaughan had divided the estate, each conveying to the other a one-half interest. This might well be claimed to have the effect of giving a new vitality and extended sweep to Fletcher's lien, by which he could take all that Crad. got by the conveyance, as well as what he had before.

But here we have adopted the simple legal proposition that a conveyance *away from* the debtor to a third party has vastly enlarged the interest he had before, and thereby enabled his execution creditor to take instead of a mere empty "equity for an account," an estate worth thousands of dollars. If the deed of Crad. Vaughan was efficacious to sever the joint estate of the partnership, that effect could only succeed the cause which produced it. The severance would take effect *after* the transmutation of the estate passed thereby, and hence *after* the *vesting* in William R. Vaughan of all the estate it was possible for Crad. Vaughan to convey. And hence after the conveyance it simply left Fletcher in an attitude by virtue of his lien (if worth anything) to demand that the interest Crad. Vaughan had before his transfer, his claim to the surplus, should be subjected to the payment of his debt. And he might have brought all parties in interest into a court of equity and had an accounting to show what he could take by that right.

This, it seems to me, is all that he could possibly claim by virtue of his lien, if, as I said, he had any lien at all. There are many authorities denying that any lien attaches in such cases to partnership property. That is, that any lien would attach until the severance of the estate; and here the severance was affected by a transfer of all interest he could transfer from Fletcher's debtor to the other partner. It is very certain there was never any time in which Crad. Vaughan could himself have conveyed a half interest in

these lands to a third party. For these grounds, briefly stated, I can not assent to so much of the opinion as relates to the effect of this transfer. I think that W. R. Vaughan had an obvious equity to appropriate this property to the payment of partnership debts, and, having done so, the most in any court Fletcher could demand, would be to have it uncovered to satisfy his lien, and that only on payment of the debt which this interest went to satisfy.

William R. Vaughan, through the conveyance to himself and from himself to English, simply accomplished his equity to have the assets applied to payment of firm debts. He no longer, after the conveyance by C. R. Vaughan, required any lien to support his conveyance to English, for he had the legal estate all vested in him, and nothing remained except as above stated, possibly the equity of Crad. Vaughan passed to Fletcher by his purchase, to have an account taken and get the *surplus after payment of all firm debts.*

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HOT SPRINGS RAILROAD V. TRIPPE & CO.

RAILROADS: *Injury to goods: Several carriers.*

An association among carriers for the transportation of through freights and a division of the receipts in prescribed proportion, does not constitute a partnership, nor render the carriers jointly liable for loss or injury occurring to goods transported.

APPEAL from *Garland* Circuit Court.
HON. J. B. WOOD, Circuit Judge.

John M. Moore for appellant.

The bill of lading, of itself, was not competent, as against defendant, to establish a partnership, or joint relation. It is only after the relation is established that the

acts of one party are received to affect the other. *29 Ark., 526.*

Hutchinson on Carriers, after an extended review of the authorities, sums up the rules on this subject at *section 169*, as follows: "From these cases it may be deduced: First, that where carriers over different routes have associated themselves under a contract, on a division of the profits of the carriage in certain proportions, or of the receipts from it, after deducting any of the expenses of the business, they become jointly liable as partners to third persons; but that where the agreement is that each shall bear the expenses of his own route and of the transportation upon it, and that the gross receipts shall be divided in proportion to distance or otherwise, they are partners neither *inter se* nor as to third persons, and incur no joint liability.

"Secondly, that where they jointly employ a common agent in the prosecution of a joint enterprise as carriers, they become jointly liable for his defaults, but do not become responsible for each other's acts merely by reason of the employment of such common agent. Nor will a contract for through transportation over several lines made by him, although authorized by an agreement between them, create a joint liability or a liability for the defaults of each other, it not being shown that such companies were jointly interested in the expenses of the transportation.

"Thirdly, that in order to hold one carrier responsible for the defaults of another, a partnership between them must be shown, either expressed or implied from the circumstances; or it must appear that one was acting in the transportation as the agent of the other against whom the recovery is sought; and that the mere employment of a common or joint agent, with authority to contract for through transportation over connecting routes, under an arrangement for the division of the receipts from such

transportation, in proportion to distance or other service, will generally constitute neither such a partnership nor agency, each for the other, as will make them jointly liable for each other's acts in the transportation."

This court, in *Packard et al. v. Taylor, Cleveland & Co., 35 Ark., 401–2*, say: "Justice Redfield, in the case of *Farmers and Mechanics Bank v. Champlain Transfer Company, 23 Vt., 309*, considered the better and more just and rational rule to be that, in the absence of a special contract, each carrier is only liable to the extent of his own route, and the safe storage and delivery to the next carrier." "And," say the court, "to the same purport are a vast concourse of American decisions."

See, also, *Darling v. Boston and Worc. Railroad Company, 93 Mass., 298.*

1. The instruction given by the court at the instance of plaintiffs was abstract and misleading. There was no evidence tending to establish a joint relation or partnership between the carriers; and the court should have instructed the jury that the defendant was not liable unless the injury occurred on its road. *Tobins et al. v. Jenkins et al., 29 Ark., 151.*

2. The instruction does not state the law correctly. An association among carriers for the transportation of through freights and division of the receipts in prescribed proportions, does not constitute a partnership or render the carriers jointly liable. *Converse v. N. & N. Y. Transportation Company, 33 Ct., 166–179.*

3. The first instruction asked by the defendant should have been given. As originally framed it stopped at the star; being refused, what follows the star was added—the exception was reserved to the refusal to give it as modified. See authorities cited above.

4. According to the special findings the goods were

injured before they came into the custody of the defendant. It is true the jury also found that the defendant was jointly associated with the other carriers in the transportation of the goods—but all the evidence on that point was clearly and distinctly to the contrary. There was not only a total want of evidence to sustain the first finding, but it was contrary to the whole of the evidence. The court erred in submitting the question to the jury; the jury found contrary to the evidence; it also found contrary to the instructions of the court. The court should have set aside the general verdict and entered judgment for defendant on the special findings. *Gantt's Digest 4680; L. R. & F. S. Ry. v. Miles, 40 Ark.; Proffatte on Jury Trials, sec. 439.*

R. G. Davies for appellees.

There is no error in the instruction of the court, and the verdict of the jury is in accordance with the evidence and instructions. The instructions given for plaintiff were in accordance with instructions asked for by defendant, and the special finding of the jury according to defendant's instructions entitled plaintiff to a verdict, and the amount of the verdict was exactly what the damage was, as assessed by the parties, and not excessive.

SMITH, J. The railroad company was sued as a common carrier for damage done to a lot of dry goods *in transit* from New York to Hot Springs. The Baltimore and Ohio Railroad Company had signed a "through" bill of lading between the two points, guaranteeing a certain rate of freight per hundred weight for the entire distance. There was no stipulation for exemption from liability for losses beyond its own route, but the Baltimore and Ohio road expressly reserved the right to forward the goods by any rail-

road line between the points of shipment and destination. The goods were sent to St. Louis, and were there delivered to the St. Louis, Iron Mountain and Southern Company, which carried them to Malvern and turned them over to the defendant to be transported to Hot Springs. When the packages were opened by the consignees, it was discovered that the goods had been injured by wetting.

The jury returned a general verdict for the plaintiffs, but in response to interrogatories propounded to them, accompanied it with the following special findings:

"1. Do you find from the evidence that the Hot Springs Railroad Company was jointly associated with the other carriers in the carriage of said goods?"

Answer: "We do."

"2. Do you find that the goods were injured while they were in the possession of the defendant; or do you believe they were injured before they were delivered to the defendant?"

Answer: "We do believe said goods were injured *before reaching Malvern, Arkansas.*"

The jury thus substantially found that the injury did not occur on the defendant's road. And as that finding is abundantly supported by the evidence, we are not at liberty to uphold the judgment rendered upon the general verdict upon the theory that the jury might have presumed that the goods remained uninjured until they came to the hands of the last carrier, and that the loss occurred through its fault. Such a presumption could be indulged only in the absence of all evidence to the contrary. *Laughlin v. C. & N. Y. Ry. Co., 28 Wis., 204; Smith v. N. Y. C. R. Co., 43 Barb., 225.*

The liability of the defendant, if it is liable at all, must, therefore, depend upon the relation it sustained to the other carriers in regard to the transportation of the goods.

All the evidence upon that point was the bill of lading, to which the defendant was not a party, and which did not mention even its name, specifications of the rate of charges on first-class freight from New York to Hot Springs indorsed on the bill of lading, and the testimony of defendant's superintendent as follows:

"The charge of each railroad company was separate and distinct from the charge of the other companies. The way-bill contains, in one column, the charges that were paid by the St. Louis, Iron Mountain and Southern Railway Company, which is the freight on the goods from New York to St. Louis; in another column it contains the freight charged by the St. Louis, Iron Mountain and Southern Railway Company from St. Louis to Malvern, and in another and separate column, the freights to be charged by defendant for carrying the goods from Malvern to Hot Springs. The defendant collected all the freight due on the goods from New York to Hot Springs; and paid to the St. Louis, Iron Mountain and Southern Railway Company the freight due it, and the charges it had paid for freight due to St. Louis, and reserved for itself the freight for carrying the goods from Malvern to Hot Springs. The defendant had informed the St. Louis, Iron Mountain and Southern Railway Company of its rate for freight upon its line, and the St. Louis, Iron Mountain and Southern Railway Company made out the freight from Malvern to Hot Springs from the rate as furnished it. Neither company had any connection with, or interest in, the freights due to the other. They did not divide the earnings over their respective lines or share the expense, but the charges of each company were distinct and independent, both as to the earnings and expense on its line."

The court gave the following instruction at the instance of the plaintiff, and against the objection of the defendant:

"The court instructs the jury that when several distinct corporations associate together and form a continuous line of common carriers, each being empowered to contract for freight for the whole line and to receive pay for the same, which is to be divided in prescribed proportions, all such carriers, so associated, are jointly liable for losses or injuries upon any part of the line; and if they believe that the Hot Springs Railroad was so associated with other common carriers, either from St. Louis, Missouri, or New York, that it is liable for the said losses or injuries whether upon its line or that of any carrier with whom said Hot Springs Railroad is associated."

The defendant asked the following instruction, but the court refused it:

1. "If the jury believe from the weight of the evidence that the plaintiff's goods were injured before they came into the possession of the defendant, they will find for the defendant * * unless they further find that the defendant and the other railroad companies engaged in the transportation of said goods are jointly liable to plaintiffs for such injury; and in order to render said companies jointly liable the jury must find from the evidence that they were jointly interested."

SEVERAL CARRIERS: Joint liability.

In *Darling v. B. & W. R. Co.*, *93 Mass.*, *295*, a similar question came before the Supreme Judicial Court of Massachusetts. It was there said: "Payment of freight in advance is generally inconvenient, and as the goods are generally presumed to be of sufficient value to pay the freight, an arrangement is sometimes made by which each carrier, subsequent to the first, pays what is due when the goods are delivered to him, and the last carrier collects the whole bill from the consignee. Such an arrangement creates no partnership or joint liability. If a further arrangement is made between the carriers that the freight bills shall not

be paid on the receipt of each parcel of goods, but an account shall be kept on each line on a particular route, and periodically settled, this will not create a partnership or joint liability, for each line charges separately for its own freight. If it is further arranged that each line shall charge only a stipulated rate of freight, so that any customer can be informed beforehand what the amount of freight will be to a given place of destination, this does not create a partnership or joint liability.

"Arrangements of this character are convenient to the public because they enable carriers to transport goods at low rates. They are inconvenient in some respects. They render it difficult to obtain compensation for injuries to goods, because it is difficult for the owner to prove where the injury was done, and, if he can prove it, he may be obliged to carry on a litigation in a distant State. But if the law is adhered to and contracts are enforced according to their legal interpretation, business will regulate itself, and methods will be discovered to avoid inconveniences."

See, also, *Converse v. N. & N. Y. Transportation Co., 33 Ct., 166*, upon the point that an association among carriers for the transportation of freights and a division of the receipts in prescribed proportions, does not constitute a partnership, nor render the carriers jointly liable.

The general verdict and the first special finding of facts are unsupported by testimony. And the instruction for the plaintiff copied above was inapplicable to the state of facts in proof. The court likewise erred in refusing the defendant's prayer for the above mentioned direction.

The remedy of the plaintiff was either against the company upon whose line the damage occurred, or against the company which signed the bill of lading.

Reversed for a new trial.

ANDREWS v. COX.

1. SALE: *Of dam reserving unborn foal: Replevin.*

When the dam of an unborn foal is sold reserving the foal, the foal remains the property of the vendor, and after its birth may be recovered by replevin from the purchaser of the dam, or from one purchasing her from him, although he purchases without notice of the reservation.

2. SAME: *Same: Statute of frauds: Replevin.*

A, by parol contract, sold and delivered to B the dam of an unborn foal, reserving the foal, and agreeing to furnish to B ten bushels of corn to feed the dam while suckling the colt. Afterwards, and before the birth of the foal, B sold the dam to C, giving him no notice of the reservation of the foal. After the birth of the foal, A tendered the corn to B, and demanded the foal of C, when weaned. C refused, and A brought replevin for it. *Held*, that the property in the foal remained in A—that C acquired no title to it by purchase of the dam of B, though he purchased without notice of A's reservation,—that the parol reservation of the foal was not void by the statute of frauds (sec. 2957, Gantt's Digest)—that B lost all claim to the corn by the sale of the dam, and that C had no lien on the colt for its care and nurture.

3. SALE: *By vendee of property purchased on condition.*

Where the owner of personal property is induced by fraud to sell and deliver it, he may, upon discovery of the fraud, rescind the contract and recover the property from the vendee, but not from one who has purchased it from the vendee without notice of the fraud. But where the owner sells and delivers property reserving the title until the performance of some condition, no title passes until the performance of the condition, and a purchaser from the vendee, though without notice of the condition, acquires no title to the property. The difference is, in the first case the owner intentionally parts with the title—in the second he expressly retains it, and his vendee has none to sell.

APPEAL from *Nevada* Circuit Court.
Hon. C. E. MITCHEL, Circuit Judge.

Smoote & McRae for appellants.

1. There was conflicting evidence as to the time and manner agreed upon for the delivery of the corn, and it

was for the jury to determine, not alone from the sale of the mother, but from all the evidence, whether appellee had complied with his contract to deliver the corn, or had been released; and, if not, the corn would still have been a charge upon the mule. (*16 Ark., 90; 21 Ib., 559.*) Whether the sale of the mother prevented the delivery of the corn, was a question of fact for the jury, to be considered with all the other evidence, and the court should not have assumed it. *14 Ark., 286, 530; 16 Ib., 309, 569; 20 Ib., 171.*

2. The court erred in instructing the jury that a waiver under all circumstances operates as a release. It should have been left to the jury to determine whether there had been a waiver or not. *14 Ark., 286 and 530.*

3. This case does not come within the rules applicable to conditional sales, where the vendor reserves title until payment.

If appellant's vendor had notice, it would not affect appellant unless he had notice also. *12 Pick., 307; 20 Wend., 267; Benjamin on Sales, sec. 433 and note i; Wade on Notice, secs. 61–2.*

The sale and delivery of the mother retaining the brood, is in the nature of a secret trust—strongly analogous to a sale leaving the vendor in possession. In such cases innocent purchasers are protected. *18 La. Ann., p. 608; 17 Serg. & R., 99.*

Where the real owner has intentionally conferred on the vendor the *apparent* (not the actual) ownership or right of selling—clothes him with the external *indicia* of right of disposing of his property, a *bona fide* purchaser without notice is protected. *20 Wend., 267; 25 N. Y., 507; 2 Daly, 426; Wade on Notice, sec. 67; Sadler v. Lewers, ante, 148.*

As a general rule the brood belongs to the owner of the

mother. (*1 Blacks. Com., top p. 309; 33 Ark., 208.*) The sale and delivery of the mother, conferred upon appellant's vendor the apparent right—clothed him with the external *indicia* of authority to sell the mule, and as appellant bought without notice he should be protected.

4. The reservation of the mule not being in writing was void. *Sec. 2957 Gantt's Digest.*

The appellee, pro se.

The corn could not have been a charge upon the mule, after the dam was sold by Milton M. Waddell to John S. Waddell. *Smith's Mercantile Law, 3d ed., 697; Third Parsons on Contracts, 6th ed., 244 *p.; Sixth Jacobs' Fisher's Digest, 8483; Bennett et al. v. Mason et al., 7 Ark.; 253; McFarland v. Wheeler, 26 Wend., 467; Jenkins v. Eichelberger, 4 Watts (Penn.), 121.*

A lien is a right in one man to retain that which is in his possession until certain demands of him, the person in possession, are satisfied. *Alexander v. Pardue, 30 Ark., 359.*

Evidently appellant could not retain possession of the mule until appellee paid Milton M. Waddell the corn, for if there was ever a lien, and it was assignable, it was never assigned.

We submit that this case does come under the head of conditional sales, retaining or reserving title until some act is performed, or some condition happens, subsequent to the sale.

For the owner of a female domestic animal may during the period of gestation contract for the sale of the increase. *McCarthy v. Blevins, 5 Yerger, 595.*

If he could contract for the sale of the increase he could upon the same principle reserve title to himself, for a party may retain title to himself to property which has only a potential existence at the time of

the contract. But he can not retain a lien upon it at law. *Homlet v. Tollman & Graves, 30 Ark., 505; Zutcherman v. Roberts, 109 Mass., 53; Singer Man. Co., v. Grayham, 8 Oregon, 17; Aultman v. Mallory, 5 Neb., 178; Mount v. Horris, 1 S. & M. (Miss.), 185; Lane v. Bourland, 14 Me., 177.*

Appellee's delivering the corn to Milton M. Waddell was not a condition precedent to his right to recover the colt. Had it been made so by contract, as contended by appellant, appellee's performance was waived and excused by action of said Milton M. Waddell. *Newman Pleading and Practice, 337, et seq.*

EAKIN, J. Replevin for a young mule. Cox had sold the dam to a third party whilst in foal, reserving the property in the foal to be produced, and agreeing to furnish the vendee ten bushels of corn to feed the dam whilst suckling the colt. It was all verbal.

Before parturition the dam passed into the hands of appellant Andrews, for a valuable consideration, and without notice of the rights of Cox, who claimed the mule from his vendee, and offered to haul the corn according to agreement. His vendee advised him of the sale of the dam, and that she had passed into the hands of Andrews, and advised him not to haul the corn as Andrews claimed the colt. He then demanded the young mule of Andrews, and being refused, brought this suit. He recovered judgment upon a verdict of a jury in the Circuit Court, to which the case had been taken by appeal for trial *de novo*, and Andrews saving all points by motion for a new trial and bill of exceptions, now appeals here.

The sale of the dam was in February, 1879, and the terms were about these: The vendor reserved the foal as his own property, and agreed to give the vendee ten bushels of corn as compensation for allowing the mare to suckle

the foal until it was four months old. He says the corn was to be delivered the next fall. The vendee says the corn was to be delivered when the colt should be foaled, to support the mare in suckling. Neither of them, however, say that the payment of the corn was to be a condition precedent to the vesting of title in the plaintiff. The mule colt remained his property according to the contract, both *en ventre* and after birth, never having been sold.

Two questions arise: 1. Was the property of the vendor lost by the sale of the mare by the vendee to an innocent purchaser, before the birth of the mule? 2. If not, did the innocent purchaser of the dam have a lien on the colt, either for ten bushels of corn or its value, or for a *quantum meruit* for the use of the mare in suckling?

The common law maxim is that in case of animals, *partus sequitur ventrem*, and generally the owner of the dam is the owner of the offspring before birth and after. But all potential products of specific property, such as growing crops, the increase of animals, wool on sheep, etc., are, if the articles be specific, subjects of sale, even before production. (*Blackstone's Commentaries, Book 11, p. 390; 1 Parsons on Cont., 523.*) There is no difference in principle between the sale of an unborn foal, reserving the dam, and the sale of the dam reserving the foal, except that in the latter case there is, or may be, immediate delivery. There can be no doubt that as between the parties in this case, at common law, the dam became the absolute property of the vendee, and the foal remained that of the vendor.

From this standpoint the instructions given by the court, upon the part of plaintiff, proceeded further to state, that, as Cox's vendee of the mare had no title to the foal, he could transfer none to be vested in Andrews, and that even if the agreement to pay the corn should be held a condition precedent to the plaintiff's right of property and pos-

session, it was waived by the sale of the dam to a third party; and also that it would be waived by declining an offer to perform it.

On the other hand the court refused to instruct the jury to the effect, that by failure to furnish the corn as agreed, the plaintiff lost the right to take the mule, or that the defendant would be protected in the property of the foal as an innocent purchaser without notice; or, that the contract of reservation of the foal, being without writing, was void.

The *prima facie* evidence of title to the foal, resulting from the common law maxim, and which always prevails in the absence of some special contract, is not so conclusive as not to permit a separate and distinct property in the foal even *en ventre*—that is, an entire and distinct property in some one other than the owner of the dam—as distinct as if the animals were separate. Hence, to sell the dam without the foal is in no true sense a reservation out of the thing sold. It is simply the sale of one piece of property, without another, which remains the property of the vendor.

There is a large class of cases in the books proceeding from this general doctrine, that where, as between two innocent parties, the title of one or the other must be lost, the misfortune must rest upon the one who designedly or by negligence has placed some third person in such apparent control of the title as to enable him to perpetrate a fraud upon the other, if that other be deprived of the title. It was upon this doctrine that the case of *Sadler v. Lewers*, *ante*, *148*, was decided at the present term. A pretty extensive review of this group of cases discloses that they are, almost all, cases in which the party on whom the burden was cast, really intended to part with his title, or to give another the authority to affect it, although he may have been induced thereto by such fraud or mistake as would have enabled

him to annul the transaction. In such cases he must suffer before an innocent purchaser for value, because the title or right to affect the title has once gone voluntarily out of him, if even but for a short time, and it would be unjust for him to retake it to the injury of one as innocent as himself. Such was the case of *Sadler v. Lewers.* Further illustrations of the principle as applicable to sales may be seen in cases reported as follows: In Kentucky, *3 J. J. Marsh, 440; 7 B. Monroe, 92;* Maine, *33 Me., 202;* Massachusetts, *6 Mete., 68; 12 Pick., 307;* New York, *31 N. Y., 507; 32 Barb., 490;* Pennsylvania, *40 Pa. St., 417;* Tennessee, *5 Sneed, 703;* Virginia, *6 Gratt., 268.*

Cases of equitable estoppel by standing by, etc., rest upon a different equity. We are now considering questions at law.

But the great mass of cases, with some few exceptions, only, decline to extend this principle to deprive one of title to a chattel, who never meant to dispose of it at all, nor to enable any one else to affect his title, nor did any act with regard to it which he might not properly and fairly do in the management of his own concerns. One of the few cases, *per contra*, in which this matter is discussed, is that of *Hall v. Hicks; 21 Md., 406.* In that case there was evidence of fraud also, and the case may thus be brought in line with others; but the court did not put it on that, treating the matter as a conditional sale, by which property was to remain in the vendor after delivery, until conditions should be performed, which never were. The court held that an innocent purchaser from the vendee in possession would be protected. Mr. Justice BARTOL, delivering the opinion, said that it was universally conceded that property obtained by fraud, even under a void contract which would authorize reclamation from the vendee, could not be reclaimed from an innocent purchaser from the vendee,

and added: "An examination of the authorities, and a careful consideration of the subject, have led us to the conclusion that the same rule applies, and that a *bona fide* purchaser without notice of the condition upon which his vendor has acquired the possession, will be protected against the claim of the original vendor, in the same manner, when the sale and delivery are conditional, as where the possession has been obtained by fraud. It seems to us that the same equitable principle lies at the foundation of the rule, and is equally applicable to both classes of cases."

It certainly seems so, at first blush, and this may, indeed, be the correcter view in a broad sense of justice, but upon somewhat technical grounds, perhaps, the current of authorities seems otherwise. See the matter discussed in *Coghill v. Mitford and New Haven R. R. Co., 3 Gray, 545*, where the distinction is clearly stated as follows: "By a sale and delivery of goods, procured by fraud, *the property passes* because such is the *agreement* and *intent* of the parties. Therefore, the vendee, having the property as well as the possession of the goods, can pass a good title to a purchaser, who takes the goods in good faith, and without notice of the fraud. * * * But in the case of a conditional sale, and delivery, the title does not pass from the vendor until the condition is fulfilled. The vendee obtains no right under such sale to dispose of the property, but only to hold it until the terms of the contract be complied with."

Reference is made to the case of *White v. Garden, 10 C. B. 918*, which was a case of fraud, but the remarks of the judges sustain the view of the Massachusetts court.

Without citing the authorities here, it may suffice any one desirous of pursuing the investigation, to say, that in the twelfth edition of Kent's Commentaries, which had been relied on in the Maryland case (marg. p. 497, of vol.

2), there is a note collecting the authorities, which hold that in case of a conditional sale with delivery, which amounts to an executory agreement that the title shall not pass until the happening of a certain event, the title of the vendor is preferred to that of a *bona fide* sub-purchaser. In other words, the doctrine of *caveat emptor* prevails notwithstanding the possession. A very little reflection will satisfy the mind that it will not do to make possession of personal property in modern times conclusive evidence of title in favor of a *bona fide* purchaser. Personal property is not required to be conveyed by deed and recorded. That would be intolerably burdensome. The business usages and social customs of modern life render it convenient that the property of one man should be frequently intrusted to the control of another, and now, even less than formerly, can possession give any assurance of title. It is enough that one who designed to denude himself of title, should be estopped from reclaiming from an innocent purchaser, otherwise there is no principle upon which we could stop short of holding that one who had loaned a horse or carriage to a friend, might have it sold without his consent.

This case now in judgment is not a case of conditional sale, but it stands upon the same grounds, in so far as the vendor of the dam never sold nor meant to sell the foal—that although he gave possession, he never gave property, nor any right to property in the foal. And it stands upon stronger grounds in favor of the original owner of the dam, that he was *obliged* to give up the possession, if he chose to exercise the right of selling the dam separate from the foal. It was not a voluntary thing, as the foal could not be retained in his own hands. The nature of the case relieves it of all color of fraud. The strictest good faith could not have managed better.

It results that the property in the foal never passed out of appellee Cox; that his vendee of the dam has no interest in the foal to sell, and that Andrews took none, as a sub-purchaser.

The reservation of foal not within statute of frauds.

It is contended, however, that Andrews is protected by section 2957 of Gantt's Digest, the same being part of our statute of frauds. It provides, amongst other things, that "where any reservation or limitation shall be pretended to have been made of any use of property, by way of condition, reservation or remainder in another, the same shall be taken, as to all creditors and purchasers of the persons so remaining in possession, to be void, and that the absolute property is with the possession, unless such loan, reservation or limitation of the use or property, were declared by will or deed in writing, proved or acknowledged, and recorded as required, etc."

We think this statute has no application to the case under consideration. There was no pretended sale of the foal, no loan of it, nor with regard to it was there any reservation or limitation pretended to have been made, of any use of the property, by way of condition, reservation or limitation in another. It was simply never sold at all. The dam was, and the foal must of necessity have been, carried out of the owner's possession by the dam, but there was no contract nor intention to change the title. See *State Bank v. Williams et al., 6 Ark., 156.*

Conceding the right to sell the dam separately, the rest follows. The reservation of the foal was only apparent. The confusion of ideas results from the necessity that the possession of the foal should attend the possession of the dam, and it was necessary to express in the contract that the foal was reserved from the sale. But that is not a use, limitation or condition with regard to the property sold.

In the discussions of this question the court has not overlooked the case of *Carroll v. Wiggins, 30 Ark., p. 402,* in which it was held that upon a conditional sale of personal property, the title does not vest in the vendee until the condition be performed, and it is cited now to show that the statute above set forth has no bearing upon property not really meant to be sold, and the title changed, until the happening of the designated event. In that case the question of innocent purchaser did not arise, but the court in quoting *Story on Sales, sec.* —, upon another point, that is to show that the property did not pass until the performance of the condition, used also the language of Mr. Story, "except as to *bona fide* purchasers for a valuable consideration." The court, however, afterwards cites from the same author (on contracts) the expression that "as to subsequent *bona fide* purchasers, etc., of the vendee the case may be different." There are indeed cases of sale in which the vendor reserves some "special claim" on the property until performance of a condition, in which *bona fide* purchasers would get a good title, and it is in connection with this class that Mr. Story speaks. However that may be, the point was not considered nor determined in the case of *Carroll v. Wiggins,* as it was not in any manner involved. All that we now determine here is, that where there has been no sale at all of the property in question, but a necessary cessation of possession, in company with other property sold, the owner can no more lose his title, by a *bona fide* purchase by a third party, than if he had loaned or lost the goods.

No lien for care and nurture of the colt.

Passing to the question of lien, we say in the beginning, that there is no manner of construction of the contract proven, which would make the payment of ten bushels of corn a condition precedent to the vesting of the property in the foal in Cox. He had never parted with it at all.

Of necessity, the colt at first must be reserved, and to preserve his property until he might prudently take it back, he made it part of the contract of sale of the dam that his vendee should allow the colt to suckle her for four months, agreeing as compensation to give ten bushels of corn. His vendee abandoned that contract at once, and by selling the dam before parturition, not only put it out of his own power to fulfill his agreement, but attempted to appropriate the property in the colt. At least that was the result of selling the dam in foal without notice that the foal was another's. He lost all claim to corn, then or at any other time. He seems to have conceded this, and very properly declined to receive it. He made no effort, either, to assign the claim for corn to Andrews. The latter stands as if no such contract was ever made between Cox and the first vendee.

The colt was not received and nurtured by Andrews upon any contract with the owner. It was not held by him by virtue of any right. In the best aspect of the case, the foal came into his possession involuntarily and he bestowed upon it care, and provided for its nurture, supposing it to be his own. No lien is given by law in such cases. If he is entitled to any compensation it must be by suit against the owner on a *quantum meruit* or *quantum valebat.*

Taking the instructions together with the evidence, we find no error in refusing a new trial.

Affirm the judgment.

HOT SPRINGS RAILROAD COMPANY v. HUDGINS.

1. APPEAL FROM JUSTICE OF THE PEACE: *Issues in the Circuit Court.*

The issues in the Circuit Court, on appeal from a justice of the peace, will be the same as noted on the justice's docket, if not amended in the Circuit Court.

2. COMMON CARRIER: *Breach of contract to deliver goods: Pleading: Evidence.*

WHEN in an action against a common carrier for non-delivery of goods to a consignee, it pleads, only, that it never received the goods, this is an admission of the non-delivery to the consignee, and proof of the non-delivery to the consignee is not necessary to entitle the plaintiff to a judgment.

APPEAL from *Garland* Circuit Court.
Hon. J. B. WOOD, Circuit Judge.

J. M. Moore for appellant.

The court, without any evidence whatever, found for the plaintiff, and adopted a declaration of law to the effect that the delivery of the cotton to Senter & Co. not being specifically denied by *defendant's answer*, must be taken as confessed.

Defendant had not undertaken to answer; was not required to do so, in fact. The plaintiff, in proceedings originating before a justice of the peace, is required to prove his cause of action whether any defense is interposed or not. The ruling of the court was based on a misconception of the practice applicable to this class of cases.

The declarations given by the court were erroneous, and it erred in refusing defendant's proposition of law.

R. G. Davies for appellee.

While the law does not require written pleadings before

a justice, yet the facts which do constitute a cause of action or defense, and the issues are the same as in the Circuit Court. The evidence must *correspond* with the allegations and be confined to the point at issue. (*Greenl. Ev., sec. 50, p. 68, 7th ed.*) The evidence must be directed solely to the matter in dispute, and is sufficient to prove the substance of the issue raised. *Best on Evidence, sec. 111, vol. 1, Morgan's ed.*

Every material allegation of the complaint not specifically controverted by the answer must be taken as true, etc. (*Gantt's Dig., sec. 4608.*) The only material allegation in the complaint controverted by the answer was the delivery of the possession, and the only issue of fact for the jury was whether or not the possession had been delivered, and if so, the value of the property. Plaintiff having proved delivery of the cotton, properly rested, as that was the only issue, and the court, after the refusal of the defendant to introduce any testimony, properly found for plaintiff.

SMITH, J. This action was begun before a justice of the peace.

The plaintiff alleged that he had delivered to the railroad company a bale of cotton to be transported to Senter & Co., at St. Louis, and that the defendant had failed to deliver the same to the consignee. The action was defended, as we learn from the justice's minutes, upon the ground that the company had never received the cotton. But the plaintiff recovered a verdict and judgment.

On appeal to the Circuit Court, no other or different issue appears to have been tendered. A jury was waived and the trial was by the court.

The plaintiff proved the delivery of the cotton to the de-

fendant by the production of the bill of lading, signed by the defendant's agent at Hot Springs, and the value of the cotton. This was all the testimony.

The court declared that the sole issue was, whether or not the railroad company had received the cotton, and refused to declare that non-delivery to the consignee must also be proved to sustain the action.

In an action against a carrier for the loss or non-delivery of goods, the complaint involves three points of facts, which the plaintiff must establish upon the general issue, viz., the contract for carriage, delivery to the carrier, and the defendant's breach of promise or duty. *2 Green. Ev., secs. 208, 213.*

But the effect of every special plea is to narrow the issues. And a party is not required to prove what his adversary admits.

Before a justice of the peace the pleadings are not required to be in writing; but, if oral, it is the duty of the justice to note down in his docket the substance of them. *Gantt's Digest, sec. 3740.*

By denying that it had ever received the goods for transportation, the defendant admitted that it had never delivered them to Senter & Co. Consequently, when it was proved that the defendant had received the cotton under a contract for carriage, the case was legally adjudged against it. We must presume, in the absence of any amendment of the plea, that the parties went to trial upon the same issue that was made in the justice's court.

Such was evidently the understanding of the trial court.

Affirmed.

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ADLER, GOLDMAN & CO. v. CONWAY COUNTY.

BILL OF EXCEPTIONS: *Must be filed in time allowed.*

When time is given to reduce exceptions to writing, the bill of exceptions must be prepared and signed by the judge, and filed with the clerk so as to become part of the record, within the time given.

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

U. M. & G. B. Rose for appellants.

The points made by the learned counsel for the appellee are entirely technical, and destitute of substantial merit. Whatever force they may have had originally has been destroyed by the return to the *certiorari.*

It is objected that the bill of exceptions is signed by "W. D. Jacoway, late judge of the Fifth Judicial Circuit of Arkansas."

This objection is certainly untenable. The record shows that it was Judge Jacoway who tried the case, and therefore he alone was competent to sign the bill of exceptions. *Watkins v. State, 37 Ark., 370.*

It is a sufficient answer to the charge that the bill of exceptions was filed out of time, that time was expressly given for its filing, as shown by the return of the *certiorari.*

Besides, there is nothing in the transcript indicating an adjournment of the court before the signing of the bill of exceptions, and it will be presumed that the court remained continuously in session. *Omnia presumuntur rite et solemniter esse acta.*

The mere fact that the judge was due in another place at an intermediate time is of no consequence, since he may have had business requiring a continuous session, and preventing his attendance in the next county.

Ratcliffe & Fletcher for appellee.

There was no motion for a new trial—that is, the transcript does not show it, outside of what purports to be a bill of exceptions—and we contend hereafter that what purports to be a bill of exceptions is no part of the record.

"Where no motion for a new trial is made, nor any question of law reserved at the trial, there is nothing before this court for adjudication." *State Bank v. Conway, 13 Ark., 344; Gardener v. Miller, 21 Ark., 398; Farquharson v. Johnson, 35 Ark., 536; Gaines and Wife v. Summers, 36 Ark., 482.*

There is no bill of exceptions. What purports to be such is signed by "*W. D. Jacoway, late Judge of the Fifth Judicial Circuit of Arkansas*"—signed the twenty-third day of November, 1882. The term was evidently adjourned and past, the judge *functus officio*, and no time given to file a bill of exceptions. If the judge had been legally *alive* he could not have signed it after the term, unless the time had been extended. *A fortiori*, being officially *dead*, there was no life anywhere. *Carroll v. Sanders, 38 Ark., 216.*

It must be signed by the judge. *Turner v. Collier et al., 37 Ark., 528.*

This was signed by *no* judge.

This court will take judicial notice of the fact that Judge Jacoway's term of office had expired November 23, 1882. *Constitution 1874, art. 7, sec. 17; 1 Greenleaf's Ev., sec. 6.*

This court will also take notice that the October term, 1882, of the Conway Circuit Court could not extend beyond the first Monday in November, 1882, and could not last until November 23, 1882, the time of signing. *Act February 16, 1881, Acts of 1881, p. 11, secs. 1 and 2.*

No time was given for filing. Nothing appears in the

transcript in reference to it, except in the closing part of what is called a bill of exceptions appear these words: "To prepare which, they at the time of overruling said motion for a new trial obtained leave." This does not help the case any. The *record* does not show any overruling of any motion for a new trial, neither does it show that any time was granted for filing the bill of exceptions. A judge, *functus officio*, inserting these words in the supposed bill of exceptions, could not make it a record. Besides it does not show what time was given. No period is fixed. It is indefinite and uncertain and of no effect. *Garabaldi v. Carroll, 33 Ark., 568.*

It is the *record* that must show "the filing of a motion for a new trial," "the overruling a motion for a new trial," and "that time was given to file the bill of exceptions." These words will be of no avail when stated in the bill of exceptions. *Ashley v. Stoddard, Jr., & Co., 26 Ark., 653; Rogers et al. v. Diamond, 13 Ark., 482; Anthony v. Brooks, 31 Ark., 725; Touchstone v. Harris, 22 Ark., 365.*

What is claimed to be a bill of exceptions, was never marked filed, and there is no record entry showing that it was filed. *Walker v. State, 35 Ark., 386; Toliver v. State, 35 Ark., 395.*

In the absence of a bill of exceptions, no error can be presumed. (*37 Ark., 528.*) There being no motion for a new trial, nor bill of exceptions, there is nothing before this court to determine. *35 Ark., 438.*

SMITH, J. There is no question which the appellants attempt to present, that does not depend upon the bill of exceptions. And there is no bill of exceptions in the record that we can notice. After jndgment for the appellee below, a motion for a new trial was denied on the second

of November, 1882, and twenty days were given appellants to present and file their bill of exceptions.

The paper purporting to set forth the exceptions taken at the trial was not signed by the judge who had presided until the twenty-third of November, which was one day too late. And there is no file mark, or other indication to show when, if ever, it was filed in the clerk's office. Where time is allowed to reduce exceptions to writing, the bill of exceptions must be prepared, signed by the judge, and filed with the clerk, so as to become a part of the record, within the time given. *St. L., I. M. & S. Ry. Co. v. Rapp, 39 Ark., 558, and cases cited; Walker v. State, 35 Ib., 386; Toliver v. State, Ib., 395; Board Kosciusko Co. v. Epperson, 50 Ind., 275.*

Affirmed.

HANF, AD., v. WHITTINGTON, AD.

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1. STATUTE OF LIMITATION: *Against administrator for fraud: Laches.*
The statute of limitations begins to run against a creditor's bill to open an administrator's account for fraud, from the confirmation of the account by the probate court, as to parties then capable of suing; but against the estate of a party then deceased, will not begin to run until there is an administrator upon his estate; nor will laches be imputed where there is nobody capable of suing.

2. ADMINISTRATION: *Administrator obtaining false credits.*
The obtaining of a false credit by the administrator for pretended payments which he had never made, by pretending to file vouchers which he never had, is a gross fraud upon the creditors, an imposition upon the court, and an abuse of the trust confided to him.

APPEAL from *Drew* Circuit Court, in Chancery.
Hon. J. M. BRADLEY, Circuit Judge.

W. T. Wells and *McCain & Crawford* for appellant.

1. As to the question of limitation, this case is "on all fours" with *33 Ark., 141*, and *38 Ib., 243*. Under certain circumstances a claim may be considered stale, but certainly not one confessedly not barred by limitation.

2. The allegations of fraud are sufficiently specific. (See *23 Ark., 444; 20 Ib., 526.*) If merely to omit a debit is a fraud, certainly the taking of a false credit is.

While it is true that a solemn record imports verity, yet the exception is fully as well established that all records can be attacked for fraud. See *Chitty's Blackstone, volume 3, p. 24, note 3*, and every text writer on the subject since.

Harrison & Harrison for appellee.

1. The account was a matter of record, and showed that the vouchers were filed, and it is well settled that nothing shall be averred against a record, or proof admitted to the contrary. (*3 Black. Com., 24; 1 Greenleaf's Evidence, sections 19, 227.*) The supposition is inadmissible that the probate court so far disregarded its plain duty as to allow the credits without proper vouchers and proof.

2. The allegation of fraud is too vague and general. *Story Eq. Pl., secs. 251–2; 35 Ark., 555; 24 Ark., 464; 14 Ark., 360; 8 Ark., 276.*

3. The demands are stale, and no good reason shown for the laches or delay. *1 Sto. Eq. Jur., sec. 64a, 529; 2 Ib., 1520–1522; Wood on Limitations, 118–121; 14 Ark., 478; 15 Ib., 286; 16 Ib., 129; 19 Ib., 21; 22 Ib., 272; 35 Ib., 137.*

And the objection when apparent on the face of the complaint may be taken by demurrer. *Sto. Eq. Plead., secs. 503, 751; 14 Ark., 478; 16 Ib., 129.*

SMITH, J. This is a bill by three creditors of an estate to open an administrator's account for fraud, upon the allegation that he had obtained credit for certain sums alleged to have been paid upon their claims, and had pretended to file receipts in support of such disbursements, when, in truth, no such vouchers were exhibited, nor had any such payments been made. Meyer Meyer, the intestate, had died in 1865, and the plaintiffs had proved their several debts and recovered judgments of allowance in the probate court, as follows:

John Bloom for $3,037.50; Charles Weil for $810; and Augustus Meyer for $2,800.

The administrator had filed his final settlement account in July, 1871, and the same had, after due advertisement, been approved and confirmed by the probate court in October of the same year.

In this settlement he had claimed and received the following credits:

Paid on J. Bloom's claim, No. 8	$243 00
Paid on C. Weil's claim, No. 9	64 80
Paid on A. Meyer's claim, No. 10	235 00

Bloom and Weil at this time resided at Pine Bluff, fifty miles distant from the county seat of Drew County, where this administration was proceeding. Augustus Meyer had been dead for several years and no administration had been then granted on his estate, nor afterward, until recently, before the commencement of this suit, in the year 1883.

To the bill setting up these facts, a general demurrer was sustained, and the bill dismissed.

STATUTE OF LIMITATIONS: Against administrator for fraud.

Weil and the personal representative of Bloom are barred of all relief against the administrator of Meyer Meyer and his sureties. More than eleven years have elapsed since the accrual of their cause of action. The statute began to run against them from the confirmation of Whit-

tington's account, and their complaint, however well founded, can not now be heard. The laws assist the vigilant, and not those who slumber over their rights.

But the administrator of Augustus Meyer is differently situated. His intestate was dead when Whittington made his settlement. No one was then in existence who could lawfully receive his *pro rata*, or give a valid acquittance therefor. Nor, until the qualification of Williamson, has there been any party in being who could institute a suit in his behalf, calling into question the payment upon his claim. In *McCustian v. Ramey*, *33 Ark.*, *141*, and *Word v. West*, *38 Ib.*, *243*, it was ruled that when the cause of action accrues to the estate of a decedent, the statute of limitations does not run until the appointment of an administrator. Nor can laches be imputed when there is nobody capable of suing; though, even in that case, after a great lapse of time, a court of equity might well decline to take cognizance from the difficulty of making proofs, and despair of doing exact justice between the parties.

FRAUD. Obtaining false credit.

The charges of fraud contained in the bill are sufficiently specific. They apprise the defendants and the court of the material facts on which the asserted right depends, and invite attention to the points to which testimony should be directed. *Conway v. Ellison*, *14 Ark.*, *360*; *Crockett v. Lee*, *7 Wheat.*, *527*.

Here it could be easily seen that the one thing which would require proof would be whether Whittington had paid Augustus Meyer's *pro rata* as shown by his account.

In *Ringgold v. Stone*, *20 Ark.*, *526*, and in *Stone v. Stillwell*, *23 Ib.*, *444*, it was held fraudulent for an administrator, knowingly and intentionally, to omit to charge himself with a debit, wherewith he was fairly chargeable. So the obtaining of a false credit was, if true in fact, a gross fraud upon the persons interested in the estate, an imposi-

tion upon the probate court and an abuse of the trust confided to this administrator.

The argument that Whittington's settlement account having been confirmed has become itself a record, which imports absolute verity, and can not be contradicted, hardly deserves mention. The rule is, that a fact once adjudicated by a court of record can not afterwards be inquired into. But the exception is as well established as the rule, viz., that even a solemn record may be impeached for fraud. This principle is independent of the statute, but section 128 of Gantt's Digest is an express recognition by the Legislature of the principle as applicable to this class of cases.

The decree is affirmed so far as it affects Weil and the administrator of Bloom, but as to the administrator of Augustus Meyer it is reversed, and the cause remanded, with directions to overrule the demurrer to the bill and to require the defendants to answer.

HOLT v. HOLT.

DIVORCE: *Husband's liability to support children in custody of wife.*

A decree of divorce giving the custody of infant children to the mother, either temporarily or permanently, will not relieve the father from his obligation to support them. He is bound to maintain them as long as they are too young to earn their own livelihood; and chancery will at a subsequent term entertain the petition of the mother to recover from him her reasonable and proper advances for their support since the divorce, and for an order for their future support.

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

Blackwood & Williams for appellant.

There is no doubt but what the court rendering the original decree could have provided for the care of the children and have decreed that the father should pay so much for the support of the children, although they were taken temporarily from his custody.

Then, did the court, under a supplemental petition, filed at the same term at which the decree was rendered, have jurisdiction to make a supplemental decree?

We contend that it did have, and cite in support of this view *Plaster v. Plaster, 47 Ill., 290; Plaster v. Plaster, 53 Ill., 445; Buckminster v. Buckminster, 38 Vt., 249; Andrews v. Andrews, 15 Iowa, 423; Boggs v. Boggs, 49 Iowa, 190; Cook v. Cook, 1 Barb. (Ch.), 644; Ahrenfeldt v. Ahrenfeldt, 4 Sandf. (Ch.), 494; Harvey v. Lane, 66 Maine, 536; Wilson v. Wilson, 45 Cal., 400; Stanton v. Wilson (as to appellee's liability), 3 Day, 55.*

These cases are also in point as showing both the jurisdiction of the court and the liability of the father to support the children.

The divorce simply changes the status of the father and mother, and does not relieve the father of his duty to provide for his offspring.

W. L. Terry & T. E. Gibbon for appellee.

1. The court had no jurisdiction of the subject of the action, for the reason that it was a suit to recover on implied *assumpsit,* or book account, for goods, wares and merchandise furnished, and money paid, laid out and expended, which could only be a ground of action at common law. The complaint was not filed for more than two years after the decree of divorce was granted, and with certain exceptions the decrees of courts pass out of their control after the end of the term at which the final decree is rendered.

The authorities cited by appellant's counsel, with the exception of *Plaster v. Plaster*, were all brought under statutes expressly authorizing the court which had granted the divorce to make such subsequent changes in its orders and decrees concerning the custody and support of the children as it might deem necessary and proper. Nowhere in our statutes can there be found any authority to the court to alter or amend in any way the decree touching the children. *Gantt's Digest, secs. 2204, 2205, etc.*

2. The complaint does not state facts sufficient to constitute a cause of action. This was an original action, and not supplemental to the original divorce proceedings, as in *Plaster v. Plaster*. Appellant has a complete and adequate remedy at law, etc.

Appellee not liable *to the mother* for the support of the children from the time of her desertion to the time the divorce was granted. (*2 Bishop on Mar. and Divorce, sec. 558.*) At the most, he would be liable for contribution only. *Finch v. Finch, 22 Conn.; Pawling v. Wilson, 13 John. Str., 200.*

See, also, on liability of husband, *Fitler v. Fitler, 9 Casey, 50; Bauman v. Bauman, 18 Ark., 333.*

SMITH, J. On the twenty-eighth of January, 1880, Allen Holt obtained a divorce from his wife Cora, in the Pulaski Chancery Court, on the ground of her desertion of him. The care and custody of their two infant children were awarded to the mother until they should severally arrive at the age of six years, and thereafter to the father. No provision was made in the decree as to who should defray the expenses of rearing the children whilst they were in charge of the mother.

More than two years after the rendition of this decree, Mrs. Holt filed her petition in the same court, alleging

that she had paid out near one thousand dollars in board, clothing and medical bills for the children; that their father is in good circumstances and amply able to provide for them; and praying for reimbursement and for an order for their future support.

To this petition a demurrer for want of jurisdiction, and because it did not show that the plaintiff was entitled to the relief sought, was sustained, and the petition dismissed.

DIVORCE: Husband's liability for support of children in custody of wife.

The objections to the jurisdiction are, that after the expiration of the term at which the decree was rendered, the Chancery Court loses all jurisdiction over the subject matter of the suit and matters incidental thereto, and that the plaintiff, if she has any cause of action, has a complete remedy at law by action of assumpsit for money paid, laid out and expended for the defendant's use.

It appears to be reasonably well settled in the American States that the custody and support of the children, during and after a suit for divorce between the parents, belongs appropriately to the court hearing the divorce cause. That is the most competent tribunal to regulate and control divorced parents in respect to the support and education of their minor children, and to determine how much each shall pay therefor. *2 Bish. on Mar. and Div., secs. 530, 552, et seq.; Buckminster v. Buckminster, 38 Vt., 248; Snover v. Snover, 2 Beasley, 261.*

A majority of the cases have been decided under statutes expressly authorizing the court which had granted the decree of divorce, to make subsequent changes in its directions about these matters. But the divorce law of Illinois is admitted in argument to be substantially the same as ours. And in *Plaster v. Plaster, 47 Ill., 290,* and *53 Ill., 445,* it was determined that chancery, having once acquired jurisdiction over the subject matter, would proceed to do com-

plete justice between the parties. In that case the parties had been divorced in the year 1854. The decree gave the custody of the child to the wife, but was silent respecting its future maintenance. In 1866, eleven years after any orders had been made in the original suit and it had been stricken from the docket, the mother of the child filed her petition setting forth that she had supported the child, and praying for an order that the father reimburse her for reasonable past expenses, and that a suitable provision be made for the child's future support.

In *Stanton v. Wilson, 3 Day (Conn.), 37*, where there had been a legislative divorce and the mother had been appointed guardian of the minor children, the father was held liable, in an action at common law, to compensate her and a stranger whom she had married, for the education and support furnished them. But this doctrine has not been followed, even in Connecticut; it being intimated that the mother, under such circumstances, has, at the utmost, only a right to sue for contribution. *Finch v. Finch, 22 Conn., 411; Pauling v. Wilson, 13 John., 192.*

The rules of the common law are too rigid and inflexible for the proper adjustment of the relative rights and duties of divorced parents. Their pecuniary condition, the ages of the children, the necessity for, and propriety of particular expenditures, and many other considerations are to be taken into account. And, after all, a great deal must be left to the Chancellor.

The dissolution of the marriage tie and decreeing the custody of the children, either permanently or temporarily to the mother, do not relieve the father of his obligation to support them. If they are too young to earn their own livelihood, the father must continue to furnish them a maintenance out of his estate, regard being had to his means and condition in life.

It does not follow that Mrs. Holt will be entitled to recover the whole of her demand. That will depend upon the reasonableness and propriety of her expenditures. And in no event can she obtain anything for the maintenance of the children prior to the decree of divorce.

Reversed and remanded, with directions to overrule the defendant's demurrer to the petition.

TURMAN v. LOOPER.

PRINCIPAL AND SURETY: *Usury, etc.*

In a suit by a surety to foreclose a mortgage given by the principal to indemnify him against the note, the principal can not plead usury in the note as a defense to the mortgage, where the surety was not privy to the usurious agreement.

APPEAL from *Scott* Circuit Court.
Hon. WILLIAM WALKER, Circuit Judge.

S. R. Allen for appellant.

The notes were usurious and the appellee had notice of the fact, and, under the ruling in *German Bank v. Deshon, 41 Ark.*, appellant is not liable.

Clendenning & Sandels for appellee.

1. Usury does not avoid the debt in the hands of *National* Bank.

2. It is a purely personal defense, and if Looper, one of the joint makers, saw fit to pay the debt to the bank prior to any defense of that kind by Turman, he had a perfect right to do so.

German Bank v. Deshon has no application here.

SMITH, J. Turman as principal, and Looper and others as his sureties, made to the National Bank of Western Arkansas, five promissory notes, each for $400, and payable at different dates between July 7 and October 7, 1879, with interest from maturity at ten per cent. per annum. To save his sureties harmless, Turman executed to them a mortgage upon lands and other property. He provided for the first note, but neglecting to meet the others, Looper, in order to avoid a lawsuit, paid them to the bank. On July 12, 1881, Turman gave his note to Looper for the interest that had accrued on the $1,600 paid out for him, computed at ten per cent. per annum. But this note is not involved in the present suit.

USURY: As between principal and surety.

Upon a bill filed for foreclosure of the mortgage, Looper was met with the defense that the original transaction between Turman and the bank was tainted with usury, and that this infected the counter security given by the principal to his sureties. The court below rendered judgment against the defendant for $1,600, principal and interest, from the twelfth of July, 1881, and decreed a foreclosure and sale of the mortgaged premises.

From the testimony, it appears that the consideration of the notes to the bank was a loan of money. But it does not clearly appear that any usurious interest was included in the notes. Certainly no usury is apparent on the face of the paper. Nor was any separate instrument made for the payment of the excessive interest. If, therefore, there was usury in the transaction, it must have been in the discounting of the paper by the bank. But Turman is not positive that the bank took out any interest in advance, and of course he is not prepared to say that it reserved more than the law allows.

Moreover, Looper was not present when the notes were discounted. He lived in the country and had signed them

at his residence upon the solicitation of Turman. And there is no proof that he was privy to any corrupt agreement between his principal and the bank; although Turman says, in a vague way, that he thinks his sureties understood that he was to pay more than lawful interest for the accommodation.

There is an old case—Robinson against Maybroke, Elizabeth, 588, to this effect: The surety sued the principal upon an obligation to hold the plaintiff harmless from a bond to pay J. S. £100. The defendant pleaded that the bond to J. S. was upon an usurious contract. And his plea was adjudged bad; for he ought to take heed to save his surety harmless, instead of which he has let him pay the debt.

In *Ford v. Keith, 1 Mass., 139*, the surety, who knew not of the usury when he signed the note, but did know it when he paid it, sued the principal for indemnity. And it was held he was entitled to recover unless he had been expressly notified that the principal did not intend to pay the contents of the note, and the plaintiff himself had been forbidden to pay it. The principal might not choose to avail himself of the statute against usury and the surety could not know his uncommunicated intention in that regard.

German Bank v. Deshon, 41 Ark., has been urged upon us, but has no application. This suit is not upon the notes given to the bank, which may or may not have been void as affected with usury. But it is a suit for indemnity, and to recover money laid out and expended for the use of the principal.

Affirmed.

End of November Term, 1883.

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF ARKANSAS,

AT THE

MAY TERM, 1884.

GAINUS V. CANNON ET AL.

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1. TRUST: *Declaration of.*

Where one purchases land with his own money, no contemporaneous or subsequent parol declaration of trust can affect his title. There would be neither a resulting nor an implied trust. It would be within the statute of frauds, and not within the saving of section 2963 of Gantt's Digest.

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2. SAME: *Purchase by one with funds of another.*

Where land is purchased by a husband with funds of his wife, there is a resulting trust in her, although the deed be taken in his name; and in a contest between him, or his heirs, and her, in the absence of all claims of creditors, his declarations, then, or afterward made, are admissible, not to prove an express trust, but to prove that the funds were hers, and raise a resulting trust.

3. HUSBAND AND WIFE: *Dealings between.*

In equity husband and wife may have separate interests—may make fair contracts with, or reasonable gifts to, each other, which, though not binding on creditors, will be supported between the parties and their heirs and distributees; and in all such cases the husband holding possession of the property will be considered as the wife's trustee.

4. SAME: *Separate use.*

A wife's separate use need not be declared by any express words, but must, nevertheless, be clearly shown to have been intended, in order to remove the presumption that the husband holds by marital right for his own benefit.

5. PRESUMPTION: *That act proceeds from obligation.*

Wherever a thing is done by one under an obligation or duty to do it, equity will presume that it is done in pursuance of the obligation or duty.

6. HUSBAND AND WIFE: *His right to her distributive share.*

At common law a husband has the marital right to receive his wife's distributive share in her father's estate, and payment to her is payment to him.

7. HOMESTEAD: *Pleading, etc.*

A complaint stating a general claim of homestead, and in a vague and indefinite way, the grounds of the claim, and praying relief, is, in the absence of a motion to make it more specific, sufficient to authorize a decree, without stating the specific facts necessary to constitute the right of homestead, if the facts be proven by the evidence.

8. AMENDMENT: *After trial.*

After proof and hearing, a formal amendment of a *defective* statement is not necessary; otherwise, perhaps, as to the total want of an essential allegation.

9. HOMESTEAD: *Hotel.*

A husband with his wife occupying one room of his hotel as their residence, does not lose his homestead right in the premises by renting out the balance for use as a hotel.

10. SAME: *Widow's right to.*

A widow who has no other place of residence, is entitled to the homestead of her deceased husband for life, whether she occupies it or not, and is not accountable to any one for rents received for it.

11. WIDOW: *Purchasing vendor's lien on homestead.*

A widow who pays off her husband's note given for the homestead, may enforce the vendor's lien against the homestead, or collect the note out of the general estate before any distribution to his heirs or distributees.

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

John Hallum for appellant.

1. Our statute and Constitution for 1874, creating and defining the homestead right, does not limit and restrict the uses to which the homestead may be applied. *Thompson on Homesteads and Ex., secs. 135–6–7–8–9; 37 Ark., 283 and 298.*

2. The husband never reduced the wife's money to possession—he was only the custodian and agent of the wife, upon the express condition that it was to be invested in a homestead for her. He was a trustee, and a trust attached to the property purchased with her money. As to the rights of the husband to the wife's property, see *Tyler on Infancy and Cov., ed. 1873, p. 373, sec. 244; 23 Penn., 460; 14 Ohio St., 448; 5 Wheat., 138; 3 Stewart, 375; 12 Vesey, 497; 16 Ib., 413.*

Geo. M. Chapline for appellee.

The legacy was not to the separate use of the wife, and having been reduced to possession by the husband, became his absolutely. *Tyler on Inf. and Cov., pp. 375 and 385.*

To claim a homestead right the claimant must bring herself within the requirements of the statute. (*Thompson on Homest. and Ex., sec. 702.*) It must be affirmatively shown that she has no separate homestead in her own right. *Art. 9., sec. 6, Const. 1874.*

The proof shows that she owned property in Mississippi; that this property was rented out as a hotel; never occupied, characterized or impressed with that of a homestead, or resided upon as a family residence. *29 Ark., 280.*

EAKIN, J. J. J. Gainus and his wife, Sarah A., were married in Mississippi, and for some time were residents of that State. They removed to this State, and J. J. Gainus died.

Many years ago, his wife was entitled to, and received as distributee of her father's estate, the sum of $900 in gold, which went into the hands of her husband. When the money was paid to her is not shown. Her father died about twenty years before the commencement of this suit, and we infer the distributive share was paid before the passage of the act of April 28, 1875, or the Constitution of 1868.

After the parties came to this State, upon the eleventh day of November, 1879, J. J. Gainus purchased a lot in Lonoke.

The conveyance was made to himself for the consideration of $600, of which a half was paid in cash, and the rest secured by note at twelve months with a lien.

J. J. Gainus died childless and intestate. His widow, after a small payment had been made, from the rents, took up the note. It was assigned to her, and she now files this bill against the collateral heirs of the husband to have her title to the lot declared and established, claiming both as owner and by virtue of a homestead right.

The cause was heard upon pleadings and proof. The point relied upon by complainant, chiefly, being this: That the money coming to the wife, from her father's estate, was her separate property. That it had been received by her husband as her trustee, to be kept and invested for her separate use; that her husband was *quoad hoc* her trustee, and made the purchase in pursuance of the trust, taking the deed in his own name under a mistake as to the law, supposing that the property would after his death go, all, to his wife, and intending that it should. There was testimony directed to establish this theory.

The Chancellor held that the legal title to the land descended to the heir of Gainus, subject to the widow's dower of one-half, there being no children; that the heirs were entitled to one-half the rents, from the death of Gainus; and she to the other half, by virtue of her dower, to be set apart to her during her natural life, and to be received and collected by herself; that she was the assignee of the note given for the purchase money, and entitled to the lien upon the property.

A Master was appointed to take an account of the rents received by complainant, and of the amount due upon the note, and of expenses, etc., connected with the subject matter. To this decree the complainant excepted.

When the report of the Master came in, no exceptions thereto were filed, both parties admitting that it was correct under the directions given. Upon that report, the court found that she had expended upon the property, in balance of purchasee money, taxes and improvements, the sum of $427.62, and had collected of rents, the sum of $615.20, being an excess of receipts over expenditures of $188 and some cents. Thereupon, a receiver, who had been appointed in the case, was continued for the collection of rents, to hold the same subject to the order of the court, after paying certain attorney's fees, against which there was no objection. The report of the Master is by consent omitted from the transcript, and the appeal is taken from the first decree, which is decisive and final in fixing the rights of the parties. That is to say, in confining the rights and equities of the complainant to her dower and advances, and in holding that there was no trust of the lands in her favor, whilst held by her husband, such as would make her the equitable owner of the whole, and that the property subject to her dower and incumbrances had descended to the heirs of the husband.

First. As to her claim of ownership. At the time when her distributive share of her father's estate came to her husband's hands, it was by the law of this State subject to all his marital rights, under the common law. We are not sure, from the evidence, of the residence of the parties at the time; but that is of no importance in the absence of proof as to the laws of Mississippi, her former residence, and the domicile of her father. We know that in that State, as here, the common law was adopted as the basis of their jurisprudence, and presume that it regulated the rights of the parties. In that case, the distributive share of the wife when received by him, became his absolutely, unless he received it under a contract, valid in equity, to hold it, not as his own, but as her trustee; or unless declining to receive it for himself, and waiving his marital right, he, by some mode capable of definite proof, voluntarily agreed to stand as her trustee for the amount. This, in the absence of any question of fraud upon his own creditors, would be good against himself, his heirs and personal representatives. It would be, in effect, a gift.

But the burden of proof, as to these matters, is upon the wife, or those claiming in her right. Until rebutted, the common law presumption prevails, that he received the money as his own by marital right. And the proof should be definite to overcome such a presumption, going not only to the extent that he took the money for the use and benefit of the wife, but that he meant to hold it for her *sole and separate* use. Mere kindly expressions by husbands of their intentions to use certain property for the benefit of their wives are quite common; and do not, of themselves, amount to agreements to constitute themselves trustees for the sole and separate use of their wives. Such is the doctrine announced by this court in the case of *Sadler v. Bean and Wife.* There must be something to

impart the existence of a separate property. *9 Ark., p. 202.*

The evidence is substantially as follows: B. V. McGuffie, who closed up the business of the estate of complainant's father, says he paid Mrs. Gainus $900 in gold, and that he had heard both her and her husband afterwards say that it was intended to be used for her benefit in purchasing a home. When the purchase was afterwards made by Gainus, she wrote to witness that she had invested her money in a home in Arkansas.

Elizabeth Pitman knew the parties long and well; says that Gainus lived at Lonoke, Arkansas, where he died; saw the money paid to Mrs. Gainus from her father's estate. It was her and her husband's intention to invest it in a home for her use and benefit. Mr. Gainus was her agent, and this was the understanding. Often heard Mr. Gainus say he intended to so invest it. The place is now the home of Mrs. Gainus. After the purchase she wrote to her friends that she had bought a home.

Complainant testifies that at the time of Gainus' death, their home and residence was at Lonoke. She regarded her husband as her agent, and when she received the money from her father's estate she turned it over to him, with instructions to buy her a home. It was invested in the Central Hotel in Lonoke. Her money was also used in improving the property. She, herself, paid off the last note. Her husband during his life recognized her as the owner, and expected the property to descend to her at his death. When the property was purchased it was in the possession of Mrs. Tague, who remained in possession until the sixteenth of February, 1880, when it was again rented to another tenant, who was in possession at the time of her husband's death.

The letter alluded to was written in January, 1880, and

was addressed to her brother (McGuffie). It is a familiar letter, such as a sister would write. It speaks of the purchase as made by herself and husband, using the plural. "We have bought a home," "and with my money, too, that I have kept so long," "at least, it will pay a part of it," "we are building now," etc. This is all detailed as news, amongst much other matter of mere family interest. Her brother, in his answer, congratulates her on her prudence in keeping the money so long for the purpose, and speaks of his having always advised her to keep her own so that nobody could take it from her. He says he had been amused to think how particular she had been with the money, and adds, "you certainly did cling to it, and at last made the best use of it." The rest, like her own, concerns family matters.

Mr. Cordey, the tenant in possession under Gainus, at the time of the latter's death, says that he often heard Gainus and his wife talk about the property, and that "it was claimed and regarded by both of them as a permanent home." He says further that "the property in question was claimed by Mrs. Gainus, from the time it was first purchased, as her private and separate property, and Mr. Gainus knew this and did not controvert it." Mrs. Gainus, after her husband's death, was anxious and nervous about paying off the balance of the purchase money, and, to raise the amount, sold, at very low figures, a lot she had at Holly Springs, Mississippi. He often during Gainus' lifetime, heard her urge her husband to have the title to the property vested in her, and he replied "that there would be no trouble about that; that the property would be a home for them, and that it would all be hers, or go to her at his death." Mr. Gainus knew that she always claimed the property as her own, and as bought with her money, and never, at any time, disputed or controverted it.

On the part of defendants, there was evidence tending to show that the money paid by Gainus for the land, and work done on the premises, was partly raised by him from his own services in his occupation.

The equitable principles to be applied to this evidence, so far as they are well settled, are these:

1. If the purchase of the lots was really made by Gainus, with his own money, no contemporaneous nor subsequent parol declarations of trust can have any effect upon the title. The trust would be neither a resulting nor implied one, and would be within the purview of the statute of frauds, and would not be within the saving of section 2963 of Gantt's Digest. 1. TRUST: Declaration of.

2. If the purchase was made with funds which he held as trustee of his wife, although the deed might be taken in his own name, it is yet well settled that a resulting trust would spring up in her favor; and, in a contest between himself, or his heirs, and her, in the absence of all claims of creditors, his declarations made then, or at any subsequent time, may be considered, not for the purpose of showing the express trust, but as tending to establish the fact that the funds used in purchasing were, in fact, trust funds of the wife, pre-existing in his hands. They would be self-disserving declarations in the nature of admissions of facts, out of which the law would impose upon him a resulting trust. 2. SAME: Purchase by one with funds of another.

3. In equity, husband and wife may have separate interests; may make fair contracts with each other, not in fraud of creditors, or gifts of property within reasonable limits, which, though not binding as to creditors, will be supported between the parties and their heirs or distributees. And in all such cases the husband holding possession of the property will be considered as the wife's trustee. 3. HUSBAND AND WIFE. Dealings between.

4. SAME: Separate use.

4. A separate use need not be declared by any express words, but must nevertheless be clearly shown to have been intended, in order to remove the presumption that the husband held by marital right for his own benefit.

5. PRESUMPTION: That act proceeds from obligation.

5. Whenever a thing is done by one under an obligation or duty to do that thing, he will be presumed in equity to have done it in pursuance of his obligation or duty.

The fundamental fact to be determined is this: Did Gainus have money of his wife in his hands in trust to buy a home for her separate use?

6. Husband's marital right to wife's distributive share.

He was entitled by marital right to receive his wife's distributive share of her father's estate, and the payment to her was payment to himself. She had no right to receive and hold it in opposition to him. She might, indeed, have invoked the aid of chancery to obtain a settlement of a portion of it to her use if he had himself been forced into equity to obtain it; or, according to some modern decisions, she might probably have done so, if he had been compelled to proceed at law; but nothing of the sort occurred. It was voluntarily paid to her with her husband's assent, and became his by force of the common law; unless he, then or subsequently, by some agreement, valid between them, constituted himself her trustee. This as against all the world except creditors, he might do, without valuable consideration.

An examination of the evidence, which has been made under a very natural tendency to support her claim against the collateral heirs of her husband, fails to disclose any definite, clear argument, on his part, to receive and hold this fund as her trustee for her *separate* use. Much of it consists of correspondence, acts, and understandings, amongst others, which can in no way bind him. Much of it consists of casual expressions with regard to his wife's ownership, which are very commonly used by husbands

with regard to property obtained through the wife, or which has been furnished by the husband with a special view to the wife's comfort or gratification. It is the conventional language of domestic affection, and does not ordinarily mean to imply legal or equitable title. Throughout all there is a want of clearness about the *separate* nature of the interest to be taken by the wife in the home to be purchased. The intention may have been, quite consistently with all that has been shown, to have the husband purchase land to be used as a homestead by both, and by her in case of his death. Such appears to have been the understanding of Gainus, who took the deed to himself, thinking it would have precisely that effect. The proof that the husband received the money under a self-imposed trust to convert it into a home for her *separate* use, is too indefinite and unsatisfactory to warrant a reversal of the decree upon this point. It is unnecessary, therefore, further to pursue the inquiry as to whether she is entitled to claim the property in fee.

7. HOMESTEAD: Pleading, etc.

The bill states that the property was purchased as a homestead for her, and that she "claims and sets up a homestead interest in the same, and prays the court to so order and decree." It states, further, that she went into possession by tenant and actual occupancy immediately after the purchase, and that her husband spent her money in improving it, and afterwards died away from home. Upon a motion to make this part of the complaint more specific, if such had been made, the Chancellor should doubtless have considered the bill defective in certainty and precision. There is no positive allegation "*totidem verbis*" that the husband was the head of a family, and resided upon the place at the time of his death; nor of the area of the lot, nor the value, nor that she had no other homestead, if she were required to negative that. The claim is defec-

tively stated, but, nevertheless, so stated as to advise defendants generally of its nature, and to show that if sustained by proof it would be valid. It is a general claim of homestead; accompanied by a prayer for general relief, and showing, in a vague and inferential way, the grounds of the claim.

8. AMENDMENT: After trial.

But the defendants did not require the complaint on this point to be made more specific. They *denied* that Gainus had any fixed home, and went to hearing on that. If the proof shows complainant to be entitled to a homestead, it is too late for the defendants to insist that she would not be entitled to a decree for it, on account of the defect in her mode of claiming it. If such objection to granting the relief had been indicated in the findings and decree of the Chancellor, she might, even then, have made the amendment. But after proof and hearing, a formal amendment of a *defective* statement is not necessary; *secus*, perhaps, as to the total want of an essential allegation.

9. HOMESTEAD: Hotel.

As to the proof upon this point, it sufficiently appears that the parties resided in Lonoke; that Mrs. Ganius had no other place of residence, and that both she and her husband claimed this property as their home, and that it was much below the value of $2,500. These facts are deducible from the proof, and in the absence of any denial, or controversy on the point, we may well presume that the lot did not exceed an acre in area. It would be very unusual to find a lot of that size in any subdivided block, in any platted town—quite out of the usual course of affairs.

Specially upon the point of residence, a witness who knew the parties intimately, and who rented the premises from Gainus, save what was reserved, says: "I occupied the property from February, 1880, up to the present time as tenant. I often heard Mr. Gainus and his wife talk about the property. It was claimed and regarded by both

of them as a permanent home. The large room, up stairs, in the east end, was specially designated and fitted up by them as a private room for themselves, and reserved by them as a private room." It was during such occupancy and claim that Gainus died, suddenly, away from home.

We can conceive of no good reason why a couple, having no children, may not claim and hold a homestead in that way. If one room suffices all their wants there is nothing in the law to compel them on that account to dispense with as large a house as they may choose and be able to own, or to prevent them from making their homestead available in their living, by renting them out for hotel, or other purposes. The important thing is to see that it be really their place of residence, claimed *bona fide*, with the intent to make it a permanent home. It is a strange and irrational idea, sometimes advanced, that a man ought to lose his homestead as soon as he attempts to make any part of it subservient to a trade or occupation, or to make it helpful in family expenses. Homestead laws are liberally construed, and this would be a very illiberal restriction. It is the policy of the State to encourage every freeman to the exercise of industry, thrift, and good management of his resources; and within a limited area to make it as valuable as possible. It makes better citizens, and increases the taxable wealth of the body politic.

The husband of complainant in his lifetime did not forfeit, or fail to acquire, a homestead right, by renting out all the spare rooms of his house as a hotel. He reserved what sufficed his family. He did not hold the rooms as a guest under a landlord, but in his own right.

10. Widow's right to homestead free of rents.

We think the Chancellor erred in refusing to declare the complainant entitled to the property as a homestead during her natural life. She is entitled to that whether she may continue to reside upon it or not. *Const. of Ark., art. 9, sec. 6.*

It follows that she is not accountable for any of the rents and profits. They are all absolutely hers.

11. Widow, paying vendor's lien, entitled to reimbursement.

He correctly held that she was entitled to be paid the note for the balance of the purchase money of which she had taken the assignment.

The upaid note, although a lien upon the land, which practically she can not enforce as a specific lien, without detriment to her home, is nevertheless a primary charge upon the general estate of her husband. She has an equity to have the debt discharged before any property shall go to heirs or distributees, in exoneration of her rents and profits advanced to pay it off. If the husband had discharged his duty, the rents and profits would have been hers absolutely. Since she was forced by the sacrifice of her own means to discharge his debt, she is entitled to full restitution in addition to the rents and profits. These she does not take by grace of the husband, but by law.

The Chancellor, we think, should have denied so much of the prayer as claimed the property as her own in fee, declaring the fee to have descended to the heirs of J. J. Gainus, subject to all claims of dower and homestead on the part of the wife, and to all debts against the estate; and should have declared her entitled to the property as a homestead during her natural life, with all the rents and profits, free from accountability to any one whatever; and should further have declared her subrogated to all the rights of the creditor, in the note which she paid off, to be, with interest, a subsisting charge against the estate, to be enforced in any proper mode she might elect, unless paid by the heirs for the relief of the inheritance. This would have been sufficient in this suit, since he could not know whether she would be advised to proceed at once against the property on the specific lien, or to raise an ad-

ministration and prove the debt, to be enforced against the residuary interest.

The accounts of the receiver must be passed by the Chancellor below, and any balance in hand should be paid at once to complainant, allowing all proper charges made by the receiver.

For the errors above indicated, reverse the decree, and remand the cause, with instructions to the court below to enter a decree, and make further proceedings in accordance with this opinion, and the principles and practice in equity.

THE STATE V. THOMPSON.

EMBEZZLEMENT: *Indictment must describe money.*

An indictment for embezzlement must describe the money embezzled as specifically as in larceny.

APPEAL from *Miller* Circuit Court.
Hon. C. E. MITCHEL, Circuit Judge.

Barker & Johnson and *C. B. Moore*, Attorney General, for appellant.

An indictment charging defendant with embezzling a certain amount of money, to wit,—— dollars, on a day certain, is sufficient. *Rix v. Carson, Russell & Ryan's Crim. Cases, 303; 1 Moody Crim. Cases, 447; Jacobs' Fisher's Dig., vol. 3, 3175; 1 Car. & Payne, 313, 454; Arch. Crim. Pro., vol. 2, 1331; Gantt's Dig., secs. 1793–5; 9 Metc., 138; Roscoe Cr. Ev., 439, marg.; 3 Car. & Payne, 422; 5 Ib., 300; Jacobs' Fisher's Dig., vol. 3, 3171.*

R. B. Williams and *Paul Jones* for appellee.

In indictments for embezzlement it is necessary to describe the property stolen with the same particularity as in larceny. Cites *Bishop's Crim. Law, 3d ed., top p. 328, note 5, 320-1-2 etc.; sec. 1367 Gantt's Dig.; Rix v. Furneau, Russ. & Ry., 325; Arch. Cr. Pr. & Pl., vol. 3, p. 447, notes 3 and 4; Bish. Crim. Pro., p. 329, note 2; 4 Zab., 9; Chitty Cr. Law, vol. 3, p. 61 of addenda; 8 Cal., 42, 43, 44.*

Our statute is similar to 39 Geo. III, c. 85, and under that statute the indictment must contain all the requisites of an indictment for larceny. *Arch. Cr. Pr. & Pl., 447, 3 and 4 notes, and cases supra; Bishop Cr. Pro., top 329 and note 2.*

Our Legislature failed to pass an *enabling* statute similar to *7 and 8 Geo. IV, ch. 29, sec. 48*, under which the English courts held that no specific coin or values need be alleged, and, until this is done, indictments for embezzlement stand upon the same ground as for larceny, and must be drawn with the same particularity.

EAKIN, J. These cases are identical, save as to the time of the offenses. The appellee was indicted for embezzlement, as clerk of John O'Conner. Each indictment sets forth the fiduciary character of the defendant, by virtue of which it is charged he did "receive and take into his possession *certain money to a large amount, to wit, to the amount of one hundred dollars*, for and in the name and on the account of the said John O'Conner, his master," and that he did "fraudulently and feloniously" embezzle the same against the will and without the consent of said O'Conner. Demurrers to the indictments were sustained and the State appeals. The point, in each case presented, is the sufficiency of the indictment in not describing the property; the defendant contending that the description should

be as specific as in case of larceny. This seems to have been the ground of the ruling by the Circuit Judge.

EMBEZZLEMENT: Indictment must describe money embezzled.

Embezzlement, at common law, was not a crime. Being, however, akin to larceny in its nature, and involving something of the same moral turpitude, it has been thought necessary in England and America, to make it a species of larceny, or to so extend the definition of larceny as to embrace it. There was little need of that in the earlier stages of the common law, when chattels were comparatively few, and when the simpler modes of business did not afford trusted employés the same facilities, or scope for peculations, as are now found inseparable from business transactions.

These statutory provisions in England have been subsequent to the fourth year of James I, and have not been adopted here with the common law. There was indeed an act of 21 Henry VIII, ch. 7, which made it a felony in any servant to take away with intent to steal, any casket, jewels, money or other goods, given to him by the master to keep; but as in such cases the possession was supposed to be in the master at the time of taking; the law was rather declaratory than new, for that would be larceny at common law.

The first of the peculiar statutes, covering the offense of embezzlement as now understood—that is, embracing within the prohibition and punishment of larceny, acts which before that were not indictable as such—is the statute of 39 George III, passed in 1799, and which is substantially the same with the provision of our revised statutes, brought forward in *Gantt's Digest, section 1367*. The difference is merely verbal.

Under that statute the English decisions are numerous and uniform, to the effect that the indictment must describe the property embezzled, with the same clearness and precision as

was required in the case of larceny. (See text and cases cited in *Russell on Crimes, vol. 2, p. 185*, and *Bishop's Criminal Procedure, vol. 2, sec. 320.*) This naturally flowed from the idea that embezzlement was rather a species of larceny, included within enlarged boundaries of the definition, than an offense of a distinct nature. The same rules for charging and proving the offense were applied.

This, evidently, did not meet the requirements of modern business, and tended to neutralize the good which might have been expected from the act. After nearly thirty years the act of 7 and 8 George IV was passed, which provided, amongst other things, "that it shall be sufficient to allege the embezzlement to be money, without specifying any coin or valuable security," and that a conviction might be had upon such indictment if it were proved that the offender had embezzled any piece of coin or valuable security of any amount. Upon this statute the modern English forms of indictment have been modeled, and can not be safely taken as guides in a State like this, where the thirty-ninth George III has been enacted, without the enlarging and remedial provisions of the seventh and eighth George IV.

If this were an indictment for larceny, the description of the property would not be considered sufficient. (*Barton v. State, 29 Ark., 68.*) Following the English rulings upon the act of 39 George III, it can not be held good in a prosecution for embezzlement. The case of *The King v. Flowers, 5 Barn. and Cress., 736*, is directly in point. See also *Rex v. Furneaux, Russ. and Ryan*, being volume 1 of "*British Crown Cases,*" *p. 334*, where the property received was charged to be "one pound eleven shillings." This was held insufficient by all the judges save one, at Trinity term, 1817.

If the Legislature of our State may deem the present

act inadequate to effect as much good as may be desirable and practical, it is for them to consider what changes may be made. We find no error in the judgment.

Affirmed.

GIST v. BARROW.

1. PRACTICE OF SUPREME COURT: *Findings of a Chancellor.*

The reason of the rule that the Supreme Court will not reverse the verdict of a jury when there is any fair evidence to sustain it, does not apply to the findings of a Chancellor when the evidence is as fully before the Supreme Court as before the Chancellor; although this court will always respect and sustain the findings of a Chancellor on facts, unless the preponderance otherwise be clear and decided.

2. FRAUD: *Purchase by creditor to save his debt.*

A creditor has the right to purchase the land of his debtor in satisfaction of his debt; and, if necessary or convenient to effect the object, may advance cash to the debtor for balance in value, without any obligation to see to the application of the cash to the debts of others.

APPEAL from *Lee* Circuit Court, in Chancery.
Hon. M. T. SANDERS, Circuit Judge.

Thomas C. Gist, pro se.

Contends that the evidence totally fails to show any fraud on the part of Thomas Gist in the sale; that the appellant was an innocent purchaser, for an adequate price, from one who had a record title; that fraud is never presumed, but must be proved. Cites *Story's Eq., sec. 381; 37 Ark., 145.*

J. D. Barrow, pro se.

The conveyances were made to cover up the property of Thomas Gist, and defraud, etc., creditors, and void. *Gantt's Digest, sec. 2954; 31 Ark., 548; 1 Story's Eq. Jur., sec. 353.*

There are several badges of fraud in this transaction: 1. Heavy indebtedness. 2. Transfer of all property. 3. Pendency of suit. 4. Calling Govan to witness payment. Any one of which would be conclusive in the absence of satisfactory proof. (*Bump on Fraud. Conv., pp. 78–80–1, 95, etc.*) 5. T. C. Gist's inability to make the purchase. (*Ib., 93 and 552; 31 Ark., 346.*) Failure to show where he got the money. (*Ib., 95, etc.*) See also *23 Ark., 735; 32 Ib., 251; 26 Ib., 317–321; 23 Ib., 258.*

The secret agreement to reconvey made the deed a mortgage. (*4 Kent, Redf. ed., star p. 141; 13 Ark., 112; 3 Ib., 364.*) Under this agreement Gist had an equity of redemption; and his reserving this interest was a fraud on his creditors. *31 Ark., 666.*

Quere. Was the deed executed by Lownsbury with a blank grantee, sufficient to pass title? *Greenl. Cruise, title 32, ch. 2, sec. 2; 28 Ark., 75–8; 10 Am. Rep., 266.*

EAKIN, J. This is a bill by Barrow, a judgment creditor, against the debtor, Thomas Gist, and his son, T. C. Gist, who holds under mesne conveyances from his father. The object of the bill is to annul those conveyances as fraudulent, and to subject the lands to the payment of the debt. The judgment rendered October 27, 1881, was founded upon a promissory note executed in August, 1875. There had been execution, and no property found. The bill was answered by T. C. Gist alone, putting in issue all the allegations of fraud, and claiming to be an innocent purchaser. Upon hearing, the Chancellor granted the relief as prayed, and the defendants appealed.

1. PRACTICE IN SUPREME COURT: Findings of Chancellor not conclusive.

This case depends upon the proof and the effect of the circumstances in showing fraud, the only question being their sufficiency to sustain the finding. There was no oral evidence, and the matter is as fully before us as it

was before the Chancellor. In such cases the reason of the rule which sustains, upon any fair evidence, the findings of jurors, and courts trying facts, does not apply; although this court will always so far respect the findings of a Chancellor upon facts as to sustain them, unless the preponderance otherwise be clear and decided.

It appears that in the spring of 1878, Thomas Gist was overwhelmed with debt. He owned some valuable bodies of land, amongst others, section 34, in township 1 north of range 3 east, which is the land in controversy. He seems, amongst other creditors, to have owed a large debt to King & Clopton, who had sued him; and were, as he thought, pressing him ungenerously. He resented that, and expressed the determination not to pay them until he got ready, which is usually understood to mean, as long as it can be avoided. He also owed to two firms a debt of about $1,000. J. D. Lownsbury had an interest in one or both of these debts, and had, besides, some individual claims against Gist, amounting in all, as he says, to about $2,000. He had also been instrumental in influencing the firm of Harris, Mallory & Co. to extend credit to Gist, and was naturally desirous of having them secured.

Gist about this time sold off a portion of his lands, concerning which no fraud is alleged. Another portion he conveyed in trust to secure Harris, Mallory & Co., and the rest, being the land in question, he ostensibly sold and conveyed to Lownsbury for $3,000, which from all that appears is an adequate price.

The consideration was the debt to Lownsbury, and the two firms above mentioned; and the balance in cash, which was paid in the presence of a witness called for the purpose of seeing it done. Lownsbury swears it was a *bona fide* payment, and so does Gist himself. The note, however, executed by Gist for the consolidated indebted-

ness assumed by Lownsbury was retained by the latter, and was plainly considered by both parties as a continuing debt. It does not appear to have included the cash advanced.

At or near the same time, and evidently as part of the same agreement, Lownsbury executed to Gist a written obligation to reconvey the land to Gist, or to any one he might designate, upon payment of the debt within a certain time. This agreement is not produced, but shown orally. Lownsbury executed and left with a friend a deed, with the name of the grantee in blank, to be filled up and delivered to whomsoever he, Lownsbury, might thereafter designate. The debt was afterward ostensibly paid by T. C. Gist, the substantial defendant, and sole respondent to the bill, and upon the order of Lownsbury the deed was filled up in his name and delivered to him. Thomas Gist, the original grantor, had, before that, announced that he would be unable to redeem. T. C. Gist claims to have paid his own money, and to be an innocent purchaser. The proof shows that he was a young man without any considerable means, with whom the father had been living for several years before this suit. He says he paid to Lownsbury $3,300 for the land, a part of this sum was one year's rent which Lownsbury had received. He says he obtained $500 of the money from the sale of a house and lot, but does not explain the source from which he derived title to the house and lot, nor even say it was his own. He says he paid the balance in two several payments in the same month, but can not remember how much at each time, nor explain how he got it. He makes no effort to approximate the amounts; says he carried the $500 from Marianna and got some more. He took the deed from Lownsbury without any general warranty or covenant.

Such are the material facts.

FRAUD: Purchase by creditor of debtor's effects.

If Lownsbury still held the land there would be little doubt of his equity to retain it until repaid all that might be found honestly due him. The transaction was certainly in effect a mortgage by conveyance, and separate defeasance. Lownsbury had the right to insist upon and take a preference for his own debt without subjecting himself to the imputation of fraud, and if requisite, or convenient to effect the object, he might advance cash to the debtor for the balance in value; and he would not be under any obligation to see to the application of the cash to the other debts. Such might have been the only terms on which he could obtain any security at all. There is no evidence of bad faith on the part of Lownsbury, or if there be supposed to be any, on account of the unrecorded defeasance, it could affect only the value of the equity of redemption, which was all left for the other creditors, to which they were entitled.

But Lownsbury is paid up, and fully satisfied. If he had sold to a stranger, his vendee, purchasing in good faith, would have obtained a good title against everybody. But he sold to the son of the grantor and mortgagor, with whom the father was living, and who knew that the father had the equity of redemption, which, if of any value, belonged to the creditors. If he, in good faith, bought, with his own money, he was entitled to stand in Lownsbury's shoes. If his father furnished the funds, then the son is a mere trustee, and the attempt to hold the land as his own would be fraudulent. The court below did not consider him a *bona fide* purchaser, holding that the deed to him was made to hinder and delay creditors.

It is always unfortunate, when persons in embarrassed circumstances, so dealing with their property as to throw it into the hands of near relations, are not careful to have the whole world see and understand the entire good faith

of the whole matter. *Uberrima fides* is expected of those who, under such circumstances, would expect their dealings to pass unchallenged and unsuspected. Mystery, vagueness in explanation of what seems unaccountable, reticence, want of memory as to details on the part of those most interested, and, in the nature of things, most apt to remember, all give rise to doubt and suspicion. An accumulation of such things may make an array of circumstances which, though not sufficiently strong to prove fraud at law, may amount to fraud in equity.

There is nothing to show that defendant, T. C. Gist, ever owned any considerable property, or made any; or that any of the money used to pay Lownsbury belonged to him as his own. That he got the $500 from the sale of lots amounts to nothing. It is not shown that the lots were his. How he *got more* is left almost absurdly uncertain in one professing to vindicate his own good faith by his own testimony. A portion of the purchase money was certainly paid by the father—the portion allowed for rent, which belonged to the father in case of redemption, by the contract, and which, independent of such express stipulation, would be his by the equitable rules of chancery.

No special rules have been, nor can any be established for the demarcation of fraud. It is Protean. The Chancellor must determine each case by the surrounding circumstances, considered with reference to the ordinary courses of business, and the ordinary motives of men. He was, in this case, satisfied of the fraud. We see much in it to justify the conclusion, and can not say he erred.

Affirmed.

TEXAS AND ST. LOUIS RAILWAY COMPANY v. EDDY.

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1. RAILROADS: *Damages for right of way: Excessive.*

Verdicts for damages for right of way are not set aside for excess, except when they are not supported by proof, or are so excessive as to indicate passion, prejudice, or an incorrect appreciation of the law applicable to the case.

2. SAME: *Evidence of value of land.*

The tax assessment of land is not admissible as evidence of its value in assessing the damages for right of way. It is made for a different purpose and is not a fair criterion of its market value.

APPEAL from *Columbia* Circuit Court.
Hon. C. E. MITCHEL, Circuit Judge.

L. A. Byrne for appellant.

1. The verdict was excessive and should be set aside. *39 Ark., 387; 25 Ib., 49.*

2. The court erred in permitting and compelling witnesses to state in round numbers their opinion of the damages. See rule *39 Ark., 167.*

3. The assessor's books were admissible to contradict the evidence of defendant. *8 Nev., 165.*

SMITH. J. The railway company filed its petition to condemn a right of way, one hundred feet wide, through the defendant's farm. The tract consisted of two hundred acres, proved to be worth about $10 per acre. The railroad traversed the cultivated portion of it for the distance of half a mile. The land actually appropriated was computed to be six acres; but it cut up the remainder into an inconvenient shape, leaving fifteen or eighteen acres south of the railroad in a long narrow strip, of the average width of one hundred yards. As the houses and mass of improved land lay to the north, this strip was rendered

more difficult of access and its value impaired for agricultural purposes.

The defendant estimated his damage at $550. Another of his witnesses thought the whole tract had been depreciated in value by the construction of the road to the extent of one-third; while one of the petitioner's own witnesses put the damage at one-fifth of the value of the entire tract. The jury gave $425.

RAILROADS Damages for right of way: Excessive.

The principal error assigned is in the amount of the recovery. Verdicts are set aside for this cause only when they are not supported by proof, or when they are so excessive as to indicate passion, prejudice, or an incorrect appreciation of the law applicable to the case. *Ayliff v. Hardy's Exrs., 25 Ark., 49; Kelly v. McDonald, 39 Ib., 387.*

The assessment of damages in this case awards a liberal compensation to the land owner; but upon the evidence is not shocking to the sense of justice, nor even unreasonably large.

Evidence of value of land: Tax assessment is not.

It was no error to exclude from the jury the valuation of the same land made by the assessor for purposes of taxation. The determination of value, being for a different purpose, is not a fair criterion of its market value. *Brown v. Providence R. R., 5 Gray, 35.*

Affirmed.

TEXAS AND ST. LOUIS RAILWAY COMPANY V. CELLA.

1. RAILROADS: *Damages for right of way: Value of the land.*

In estimating the damages for right of way for a railroad, evidence of the value of the land before the projection of the road is not admissible. The inquiry must be confined to its value at the time of appropriation.

2. SAME: *Same: Elements of damage.*

The cost of additional fencing required by the building of a railroad, and the increased danger of fire, are proper elements of damages for a right of way.

APPEAL from *Miller* Circuit Court.
Hon. C. E. MITCHEL, Circuit Judge.

L. A. Byrne for appellant.

1. The verdict was excessive; so much so as to show passion, prejudice, or incorrect appreciation of the law applicable to the case. *39 Ark., 387.*

2. Owner not entitled to increase of value derived from the contemplated railroad as part of his damages. *Pierce on R. R., p. 219; Const., art. 12, sec. 9.*

3. The court erred in instructing that extra fencing was an element of damage, when there was no proof that any extra fencing would ever be required. Increased liability to damage by fire not an element of damage. *57 Iowa, 636.*

Oscar D. Scott for appellee.

Argues upon the evidence, and contends that the verdict is not excessive. A crib was upon the right of way, for which appellee was entitled to be paid. (*Mills on Em. Dom., sec. 223.*) Increased danger from fire, inconvenience in crossing, etc., elements of damage. *Ib., sec. 162.*

Testimony of what land of like character and grade was selling for, inadmissible. (*Ib., sec. 170.*) Nor was the valuation made by the assessor admissible. *5 Gray, 35.*

The instructions correctly announce the law.

SMITH, J. This was a proceeding by the railway company to condemn a right of way through one corner of a tract of land containing forty acres. The jury assessed the

owner's damages at $250. It is insisted that that was excessive.

The land was worth $12 or $15 per acre. The improvements consisted of a dwelling house and corn crib, estimated in value at $270 to $335. The land lay two or three miles from Texarkana, and the owner had bought it for a summer residence. The railroad ran through the tract for the distance of 308 yards, consuming one acre in the right of way, and cutting off another acre, which lay detached from the main body on the opposite side of its track. The crib was only thirty feet from the track and included within the right of way, but the owner was still permitted to use it. The house was seventy five or one hundred feet from the track and its value for residence purposes was much impaired by the proximity of the road; insomuch that, according to one of the two witnesses for the petitioning company, the value of the whole tract at the date of the appropriation was as stated above, and afterwards only eight or ten dollars. It is in vain to appeal to us to set aside a verdict for this cause, when it is supported by all of the evidence offered for the successful party, and by one-half of that offered for the defeated party.

1. RAILROADS: Damages for right of way: Value of land.

The company proposed to show what was the value of the land before its road was projected, but the court properly confined its inquiry to the market value of the land at the time it was taken.

2. Elements of damage.

An exception was reserved to a direction, by which the court told the jury, in arriving at the *quantum* of damages, to take into consideration the cost of extra fencing required in consequence of the building of the road, and the increased exposure to fire. These are proper elements of damage. *St. L., Ark. & Tex. R. R. v. Anderson, 39 Ark., 167.*

Affirmed.

COLLINS, AD., v. RAINEY.

TRUST: *Purchase of tax certificate by agent of owner of the land.*

Where one acting as agent of the owner purchases a tax certificate for land sold at tax sale, and afterward receives the tax deed in his own name, he will be held a trustee for the owner and compelled to account for net rents and profits received, and the deed will be canceled on payment of his outlay.

APPEAL from *Ouachita* Circuit Court, in Chancery. Hon. C. E. MITCHEL, Circuit Judge.

H. G. Bunn for appellant.

There does not appear any privity between appellees and Fellows in regard to the negotiation between Fellows and Tufts; nor does it appear that Fellows' act of purchasing from Tufts placed the appellees in a worse position than if he had never purchased. So it matters not how false may have been the representation of Fellows to Tufts, the appellees have no rights growing out of that transaction. See *Darvy v. Jarris, 46 N. Y., 310.*

A mere proof of friendly intent by defendant to let plaintiff redeem, if he pay in reasonable time, would not entitle plaintiffs to a decree. *Abernathy v. Hoke, 2 Iredel, 157.*

What representations necessary to create trust. (*Gillespie v. Stone, 70 Mo., 505.*) As to what constitutes a confidential relation in law, *Hemingway v. Coleman, 49 Conn., 390.*

Disclaiming the idea that the action is founded on a mere verbal contract, without consideration, the appellees seek to have the court fix the property as a trust in the hands of appellants for the benefit of appellees. This theory is better for the appellees, if sustained, because it cuts

off the defense of both the statute of limitation and of frauds ; and also provides a source of revenue for appellees, that otherwise would belong to appellants.

Trusts are never presumed, unless clearly intended by the parties, except when a failure so to declare would operate as a fraud upon one of the parties. *Pillow v. Brown & Childress, 26 Ark., 240.*

In this case the trust must have resulted, if at all, at the instant Fellows purchased from Tufts, or at least on the twentieth of February, 1873, when as between the parties he became the owner of the fee, and that, too, by reason of some act or language of Fellows, creating a trust, to which appellees were privies. (*Perry on Trust, vol. 1, sec. 133.*) Nor will a trust result from mere parol agreement, where there is no consideration. (*Ibid, sec. 134.*) Nor against an agent purchasing with his own money. *Ibid, sec. 135; Fowke v. Slaughter, 3 A. K. Marshall, 56.*

In order to show Fellows to have been a trustee *ex maleficio*, that is, that by the fraud of Fellows upon the rights of appellees, it must be shown that Fellows by fraud and deceit, prevented appellees from securing or protecting some right, which they would otherwise have done; and in support of this, we refer to the principal case relied on by appellees in the court below. *Woodford v. Herrington, 74 Pa. St., 311.*

Upon this point the only evidence is the testimony of Tufts, because it is the only testimony as to things said or done by Fellows prior to his ownership; for anything he may have said or done afterwards, and failed to comply with, or act up to, if anything, would only be a breach of contract. And we submit that, from Tufts' own statements, he perfectly understood that Fellows was buying to secure an outside indebtedness, and of course to be reimbursed. Nor had Tufts any reason to believe that Fel-

lows would permit rents which belonged to him, to go toward settling appellees' debts owing to him, or to redeem the property for them.

If it be true that Hervey for appellees, paid Fellows $450 to redeem or purchase the lot, we submit that the case is one of mere contract and will not be specifically enforced because of the statute of frauds, payment of purchase money being no part performance. *Johnson v. Craig, 21 Ark., 423, and other cases.*

No agreement, express or implied, made by Fellows after twentieth of February, 1873, can be shown by parol, and no such a re-conveyance of the lot can be enforced in favor of appellees, there being no performance shown. *Fourth subdivision of section 2951 Gantt's Digest; Underhill et al., Adms., v. Allen, 18 Ark , 465; Hickman v. Grimes, 1 A. K. Marshall, 86; Sutton v. Myrick, 39 Ark., 429.*

Unless Fellows is made a trustee *ex maleficio*, by reason of his alleged representation to Tufts before he acquired title, there is no ingredient of a trust in this case, and we have seen what Tufts' testimony amounts to.

R. E. Salle and *Montgomery & Hamby* for appellees.

The depositions of Tufts and Hervey conclusively show that Fellows, at Hervey's request, redeemed the lot from Tufts for the appellees, and that Hervey refunded and paid Fellows the money he expended in redeeming said lot.

I. It is well settled by this court that a constructive trust of real estate can be established by parol evidence. (*39 Ark., p. 309.*) And in this case the fact that Fellows used his own money cuts no figure, because he declared, himself, that at the time of the redemption he was acting for appellees, and the evidence shows that afterwards he received back the money he thus expended in redeeming this lot. See *15 Ark., p. 312; 19 Ark., p. 39; 20 Ark., p. 272;*

26 Ark., p. 351; 39 Ark., p. 309; also *34 American Decisions, p. 664,* and *Woodford v. Harrington, 74 Penn., p. 311.*

II. Fellows and those holding under him are bound by the statements he made at the time he redeemed the lot. See *Perry on Trust, vol. 1, p. 195,* and *Story's Equity, secs. 192, 193,* and *1638, 12th edition.*

Fellows and those holding under him are estopped from denying the statements and declarations made by him, if by such statements and declarations he obtained the advantage of appellees. See *Story's Equity, sec. 308, 12th ed.,* and *33 Ark., p. 465;* also *Wilson v. Eggleston, 27 Mich., p. 257;* and *Laing v. McKee, 13 Mich., p. 124.*

Fellows' heirs and administrator have no better title than he had, and if he held the property as trustee for appellees, so do the defendants. See *Perry on Trust, vol. 1, p. 346,* and *45 Maine, p. 52.*

SMITH, J. The appellees are respectively the widow and sole heir of John H. S. Rainey, who died in the year 1865, seized of the property in controversy—a house and lot in the town of Camden. The widow owned a life estate in the premises, the same having been allotted to her as part of her dower, and the reversion belonged to the heir. The lot was sold in February, 1871, to one Tufts, for non-payment of the taxes of 1869 and 1870, amounting to $112.30. Tufts assigned his certificate of purchase to Daniel W. Fellows for the consideration of $350, and after the expiration of the time for redemption, a tax deed was executed to Fellows.

Rainey's widow and heir filed this bill against Fellows, charging that the purchase of Tufts' certificate was in reality a redemption for them, Fellows acting as their trustee and taking an assignment only as security for the reimbursement of the amount advanced by him; and that

this amount had been refunded to him. The prayer was that the defendant be required to convey to them, and for an account of rents and profits.

Fellows died shortly after the service of process upon him, and the cause was revived against his administrator, widow and heirs at law. Their answer denied any relation of trust or confidence between the plaintiffs and Fellows, alleged that he had bought for his own benefit, and that no redemption had ever taken place.

The evidence tended to show that, in the negotiations for the purchase of Tufts' certificate, Fellows represented himself as acting in the interest of Mrs. Rainey, stating that he had been requested by Hervey, her agent and brother-in-law, and also his partner in business, to redeem the property; and that he desired to hold the tax title as security for a considerable sum of money which she owed him. Mr. Salle had afterwards proposed to buy the property of Fellows, but he declined to sell, giving as a reason that he held it for the plaintiffs. As soon as Mrs. Rainey heard of the tax sale, she requested Hervey to redeem. And on the seventeenth of June, 1873, Hervey wrote her that he had paid Fellows $400 or upwards in redemption of the property. Hervey also testified to this payment.

The court found as facts proved that, in making the purchase of Tufts, Fellows was the agent of the plaintiffs, although he used his own money; and that Hervey had afterwards refunded to him the amount so paid. It therefore canceled the tax deed and rendered judgment against the administrator of Fellows for $671.23, the net rents after deducting taxes.

And that decree is fairly supported by the testimony. Fellows' object in purchasing the lot doubtless was to secure a debt then due to himself from Mrs. Rainey. And if there were any proof in the record that this debt was

unpaid, the purchase might perhaps be permitted to stand until the accruing rents should satisfy it. But it is not shown that Mrs. Rainey owed Fellows anything when the bill was filed. On the contrary Hervey testifies that in 1873, when his partnership with Fellows was dissolved, he, besides paying the $400 redemption money, assumed and paid Mrs. Rainey's liabilities to his partner.

Affirmed.

PHILLIPS COUNTY v. SISTER ESTELLE.

TAXATION: *School buildings and grounds exempt.*

The constitutional exemption of school buildings and grounds used exclusively for school purposes, from taxation, applies to private as well as public schools.

APPEAL from *Phillips* Circuit Court.
Hon. J. C. PALMER, Special Judge.

Tappan & Horner for appellant.

From a careful consideration of *article 16, section 5, Constitution 1874,* and *section 1, act March 5, 1875, p. 222*, it is clear that it was the intention of the laws to exempt *only* such property as was used for *public* purposes, and not that used with a view to profit. The property is not exempt under the latter part of section 5, "that it was used *exclusively* for public charity." The performance by the owner of some charitable acts will not exempt his property from taxation; nor will the gratuitous education and supplying of books to some pupils while the remainder are charged, constitute an exemption under that clause.

W. L. Terry for appellee.

1. The property is exempt under that provision of our Constitution exempting *school buildings* and apparatus and "libraries and grounds used *exclusively for school purposes.*"

2. It is entitled to such exemption under the clause exempting "buildings and grounds and materials used exclusively for *public charity.*" See *Const., art. 16, sec. 5; sec. 5055 Gantt's Dig.; Acts 1883, p. 213; 25 Ohio St., 241-7; St. 43 Eliz., ch. 4; 14 Allen, 554; 2 Story Eq. Jur., sec. 1160; 25 Ohio, 229, 231, 244; 29 Ohio St., 201.*

SMITH, J. This is an appeal from a judgment of the Phillips Circuit Court, holding that the buildings and grounds of the convent in Helena, known as the "Academy of the Sacred Heart," in Phillips County, Arkansas, were exempt from taxation under the provisions of the Constitution of 1874. Thereupon it was "ordered, adjudged and decreed that the levy and extending of the taxes for the years 1880 and 1881, against said 'convent property,' on the tax books of those years are *erroneous*, and that said convent property be relieved from taxation for said years, and that the aforesaid erroneous levy and extension of taxes for said years against said convent property on the tax books of said years be *quashed or set aside*, and the clerk of the county court of said county of Phillips, is hereby ordered to strike from the delinquent list of Phillips County, for the year 1881, by writing on the margin thereof, 'erroneously taxed and stricken from the delinquent list by order of the Circuit Court, November term, 1882.'"

The case was originally begun by a petition filed by appellee in the Phillips county court, claiming such exemption.

From the finding of facts made by the court, it appears that the Sisters of Charity of the Convent of Nazareth, Kentucky, purchased the property in question some time prior to the year 1879, for the purpose of establishing a school and academy for the education of the young, and in the year 1879, for that purpose, sent out a colony of *Sisters of Charity* from the mother convent, who thereupon established a school under the name of the "Academy of the Sacred Heart," *not with a view to profit, but for general school purposes and the charitable purpose of educating as many poor children* as their means and facilities would permit, *free of charge*, and that *said school is, in fact, conducted on the said charitable principles;* that tuition in said school is less than in any pay school in Helena, and that poor pupils, unable to pay, are *given their tuition and text books free of charge*, and that the charge against those able to pay, *is only made to cover the expenses of the school and make it possible to carry it on and give free education to the poor*, and that the teachers and employés of said school, save one, being Sisters of Charity, *make no charge for their services*, and only receive their *board and clothing*, and that the said convent property is *devoted wholly to aforesaid purposes of education*, and that all the buildings and grounds of said convent are used *exclusively for school purposes.*"

It was also admitted that, during the session next before the filing of the petition, fourteen poor children had been given their tuition and school books free of charge, and the parents of nine of these were non-Catholics. Two scholars had also been furnished with board and tuition without charge.

Section 5, article 16, Constitution of 1874, provides that school buildings and grounds used exclusively for school purposes shall be exempt from taxation. As the case falls within the plain meaning of this provision, it is unneces-

sary to consider whether the petitioner is entitled to this privilege of exemption, under another provision of the same section, which exempts buildings and grounds used exclusively for public charity.

Affirmed.

HARBISON v. VAUGHAN.

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1. HOMESTEAD: *Object of homestead laws: Head of family.*

The protection of the family from dependence and want is the object of all homestead laws. Apart from his family the debtor is entitled to no special consideration. But it is not necessary that the homestead claimant should be a husband or parent.

2. SAME: *What is a family?*

To constitute a family, within the meaning of the homestead laws, a mere aggregation of individuals in the same house is not sufficient. There must be an obligation upon the head of the house to support the others, or some of them, and on their part, a corresponding state of dependence. (*Greenwood & Son v. Maddox & Toms*, 27 *Ark.*, 648, explained.)

3. MORTGAGE: *Foreclosure against heir.*

In foreclosing a mortgage against the heir of the mortgagor it is error to render a personal decree against him for the debt.

4. INTEREST: *Judgment.*

A judgment on a contract bearing interest above ten per cent. per annum, will bear only ten per cent. from the date of the judgment.

APPEAL from *Ashley* Circuit Court.
Hon. J. M. BRADLEY, Circuit Judge.

T. F. Sorrells and *F. W. Compton* for appellant.

The father of appellant, at the time of the execution of the mortgage, was the "head of a family," within the meaning of the Constitution of 1868, which positively forbids the incumbrance of a homestead. He was a resident

of the State; the owner of a dwelling occupied as a home; possessed household and kitchen furniture; kept family supplies, etc. His family consisted of two nephews, one a minor, and his father, who was aged, infirm and dependent, etc. It was not necessary that he should be either husband or father. *20 Mo., 75; Thompson on Homesteads, sec. 59; 14 How. Pr. (N. Y.), 521; 11 Iowa, 104; 27 Ark., 658; Wesbter's Dic., "Family," etc.*

Homestead statutes are remedial and liberally construed. *24 Ark., 155; 25 Ib., 101.*

It is a mistake to suppose that the word "dependent" necessarily means dependence upon the head of a family for nothing more than food and raiment. The family organization is not recognized for such purposes *only;* other elements—moral and intellectual—enter into it, and tend to promote the welfare of its members. The fact that the nephews had property, and that the father lived with other children at times, will not take away the claimant's right to homestead. See cases *supra* for illustrations.

SMITH, J. Jackson P. Harbison, in the year 1872, borrowed of Vaughan $957.50, for which he made his note, payable at two months, with interest at the rate of three per cent. a month until paid. For security he mortgaged three lots in the town of Hamburg, upon which were situate his dwelling house and a livery stable, with power of sale upon default of payment. When the property was advertised by the mortgagee, Harbison filed his bill to enjoin the sale, claiming that the mortgage was void under section 2, of article 12, of the Constitution of 1868, which forbade a married man, or head of a family, incumbering his homestead.

When the mortgage was executed, Harbison had neither wife nor children; indeed, had never been married. But

his aged father occasionally paid him long visits, not being dependent, however, on the son for a home; for his wife, a woman of property, had a residence in Little Rock, and he had other children with whom he was in the habit of spending a portion of his time. Harbison had, also, two nephews living with him, one of whom was twenty-three or twenty-four years old, and in his employment. The other was not quite of age. Both had means of their own, and pecuniarily were independent of their uncle.

The court below decreed foreclosure of the mortgage upon the cross-bill of the defendant.

1. Object of homestead laws.

The protection of the family from dependence and want is the object of all homestead laws. Apart from his family the debtor is entitled to no special consideration. *Tomlinson v. Swinney, 22 Ark., 400; McKenzie v. Murphy, 24 Ib., 157; Ward v. Mayfield, 41 Ib., 94.*

2. What is a family?

However, it is not necessary that the homestead claimant should be a husband or a parent. But to constitute a family, within the meaning of such statutes, something more is required than a mere aggregation of individuals residing in the same house. The cases seem to unite upon this test—that there must be an obligation upon the head of the house to support the others, or some of them, and a corresponding state of dependence on the part of the members so supported. *Thompson on Homesteads and Exemptions, ch. 2, and particularly sec. 46.*

Greenwood & Son v. Maddox & Toms, 27 Ark., 648, is not in conflict with this. For although it is there intimated that an elder brother, having charge of minor sisters, who were possessed of property in their own right, might be considered the head of a family, yet the case arose and was actually decided under section 3, article 12, Constitution of 1868, which did not restrict the benefit of exemption to married men or heads of families, but extended to all residents of the State.

3. No personal judgment against heir for mortgage debt.

The decree below must, however, be modified in two particulars. During the pendency of the suit, Harbison married and afterwards died, and the cause was revived in the name of his infant son and sole heir. Against him a personal judgment for the debt and damages was entered. This was unwarranted. He was not personally liable. All the relief that the defendant could have in this suit was a condemnation of the lots to sale in case the debt and interest were not paid.

4. JUDGMENT: Conventional interest.

Again: The judgment is made to carry interest from its rendition at the rate of three per cent. a month. This is to be reduced to ten per cent., according to the rule settled in *Badgett v. Jordan, 32 Ark., 154, and Miller v. Kempner, Ibid, 573.*

Reversed and remanded, with directions to render a decree in favor of the defendant in accordance with this opinion and to proceed with its execution.

The appellant will recover the costs of this court.

WARD v. YOUNG.

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1. MASTER AND SERVANT: *Master's liability for servant's torts.*

The master's liability for the torts of the servant springs out of the relation itself, and does not depend upon the stipulations of their contract.

2. SAME: *Same: Keeper of penitentiary and convict.*

When the keeper of the penitentiary places a trusted convict in charge of his premises to protect them from trespassers, the relation of master and servant exists between them, and the master is liable for an unlawful injury inflicted there by the servant, in the scope of his employment, upon the person of another, notwithstanding it may have been done contrary to the express orders of the master.

3. EVIDENCE: *Party contradicting his own witness.*

A party may contradict his own witness by proof of his statements different from his testimony.

4. SAME: *Relevant: What is.*

Relevant testimony is that which conduces to the proof of a hypothesis, which, if sustained, would logically influence the issue. Hence, it is relevant to put in evidence any circumstance which tends to make the proposition at issue either more or less improbable.

APPEAL from *Pulaski* Circuit Court.
Hon. F. T. VAUGHAN, Circuit Judge.

Clark & Williams for appellant.

The relation of master and servant can not exist between the lessee of the penitentiary and a convict. A convict is not a servant in any legal sense. A servant must be an agent, and have discretionary power, which is inconsistent with his status as a prisoner. A convict is not the employé of the keeper. The rule *respondeat superior* can not apply. *Wood's Master and Servant, p. 4, sec. 4; Wait's Actions and Defenses, p. 307, secs. 1–2.*

The injury was not in the scope of the convict's agency. It was not done in pursuance of any employment. No one is bound to respond as master for the wrongs or outrages committed by a servant, unless he expressly commands them, or they were done within the scope of the purpose of his employment. *Wood Mas. and Serv., p. 534, sec. 277; Ib., 278–9; Ellis v. Turner, 8 T. R., 533; Wood Mas. and Serv., secs. 285–6.*

Admitting that a party may sometimes impeach his own witness, no party is at liberty to do so by contradicting him upon a fact collateral to the issue. (*Greenl. Ev., 462, and notes.*) Ward's statement that he *did not* put the convict there, and that he *did not* admit it to Young, were wholly immaterial and foreign to the issue.

There is an absolute want of testimony to show that the convict was put in the orchard with authority from any one to keep out trespassers; without such proof, there can

be no negligence on part of defendant. See *Wood M. and S., secs. 303–307; Shear. and Red. on Neg., sec. 63; 20 Conn., 284; 1 Wend., 273; 2 Thompson on Neg., p. 885, secs. 2–3; Wharton on Neg., sec. 168; 41 Iowa, 308; 109 Mass., 154.* These authorities show that the simple test is, whether the acts were done by the servant *within the scope* of his authority, not whether they were done while prosecuting the master's business. *But whether they were done by the servant in furtherance thereof, and were such as may fairly be said to have been authorized by him.*

The court erred in admitting testimony that Hawkins was seen with a gun, riding about the field, before and after the injury. It was immaterial and irrelevant, and calculated to excite predjudice against Ward.

It is always error to instruct the jury *that they are to say what facts have been proven.* The jury can only determine the weight of testimony, when there is testimony to weigh; whether there is such testimony, is a question of law.

W. L. Terry and *Blackwood & Williams* for appellee.

It was proper and right to contradict Ward's testimony, the necessary foundation having been laid. *Gantt's Digest, secs. 2523–5; Greenl. Ev., secs. 444–8–9.*

Proof that the convict was seen in the orchard with a gun, before and after the injury, was relevant, because it went to establish the fact, the main issue in the case, that the convict was a *trusty*, and was put there by Ward, or his representative, to keep out trespassers (*Wharton on Ev., vol. 1, secs. 20–21*), and made improbable the theory of the defense, that he was under guard, and not a *trusty*, etc.

A master is liable for the wrongful misconduct of his servant, *acting within the scope* of his employment, even though the *particular act* may not have been authorized, or

may have been contrary, even, to the master's orders. *Wood on Master and Servant, secs. 307, 590; 15 Ark., 126; Cooley on Torts, 538; Peck v. N. Y. C. R. R., 6 T. and C., N. Y., 436.*

It is not essential in order to constitute the relation of master and servant, *as to third persons*, that there should be *a contract* between the parties, or *any intention* on the part of either to create such relation. (*Wood Mas. and Serv., sec. 00, p. 10; Cooley on Torts, p. 532.*) The fact that Hawkins was a convict, and serving a term as a punishment, and was hired by Ward from the State, does not excuse Ward. The liability of the master does not depend upon circumstances with which the public has no concern. As to third persons, it matters not what the stipulations were, the master's liability springs from the *relation* itself. *Ib.*

The verdict is sustained by the evidence; is not excessive, and this court will not set it aside. This court has nothing to do with the truth or *weight* of the testimony. It was the province of the jury, properly instructed *as they were*, to draw their own *inferences of fact* and conclusions from the testimony before them. The court below heard the evidence as it *fell from the lips* of the witnesses, and refused to disturb the verdict. *22 Ark., 480; 103 Mass., 104; 34 Ark., 761.*

SMITH, J. The complaint alleges that Ward was lessee of the State penitentiary, and as such had charge of all the convicts, among whom was one John Hawkins, of an abandoned and malicious disposition. That on the twenty-sixth day of July, 1882, Ward permitted said convict to go at large as a "*trusty*," without any guard. *That Ward made him his agent and servant, and placed him in charge of one of defendant's places, near plaintiff's residence, with orders to take care of his said place, including defendant's orchard thereon,*

and mules; with orders, furthermore, to keep out all trespassers on said place, and to protect his orchard and mules, and to keep trespassers out of the orchard. That while controlling said place, and acting within the scope of his authority for that purpose, plaintiff entered the said place, and went into defendant's orchard, which the said convict had in charge, to shoot some birds, as he lawfully might; and while he was in defendant's inclosure, the said convict, while in the performance of his duties, as aforesaid, without any provocation, wantonly and maliciously struck, beat and wounded plaintiff with a gun.

The answer denies that the defendant permitted Hawkins to go at large without guard, or placed him in charge of said premises, or gave him orders to protect the orchard or to keep out trespassers—denies in short, that Hawkins was at the time the defendant's agent or servant for any purpose, or, if he was, that said injury was inflicted within the scope of such agency; and avers that Hawkins was at the time herding the defendant's mules upon the pasture lands in the defendant's inclosure, and that he was within reach of the guns of the guards.

A trial was had and the jury rendered a verdict of $600 for the plaintiff, which the Circuit Court, upon a motion for new trial, refused to disturb.

The evidence tends to show that the plaintiff, a lad of thirteen years, in company with his mother, his sister and another lady, who was their guest for the day, were walking in the defendant's field upon a summer afternoon for recreation. This field lay between the residence of the Youngs and the public road. It had been sown in oats, but the crop had been taken off, leaving a stubble-field, which was used for pasturing Ward's mules. There was also an orchard in the field. Willie Young had taken his gun along to shoot birds. While

the party were in the orchard, Hawkins, a negro convict, sentenced to a term of twenty-one years in the penitentiary for a murder he had committed, rode up, mounted on one of Ward's mules, and began to swear at them and ordered them out. They told him they would go, only give them time and they would get out. Hawkins said that Ward did not allow people in the orchard, that he was directed to keep them out, and he was going to do it or shoot their heads off. Here Willie Young remarked that, if any shooting was to be done, he could shoot too. Whereupon, Hawkins snatched the gun out of the boy's hands and struck him over the head with it, felling him to the ground and inflicting a severe wound upon the right temple. No guards were in sight, and they could have been seen for the distance of three or four hundred yards. The plaintiff was led to his father's house, near by, and a surgeon called in to dress his wounds. Hawkins rode off, but soon returned with a breech-loading needle gun, such as the guards over the convicts are armed with. He had also been seen in that field on other days before and after the day of the assault with a gun in his hands.

Furr was overseer of the plantation where the injury took place, and had control of the convicts there, and put them at such work as he saw fit. He was half a mile away at the time and never learned of the assault until several days afterwards. He testified that he had placed Hawkins in the orchard-field to look after the mules, with directions to inform him if any negroes came there from Little Rock after fruit; but denied that he had given him a gun or instructions to keep people out of the orchard.

Upon this last point—whether any one representing the defendant had given authority to Hawkins to keep trespassers out of the orchard—there was a conflict of testi-

mony. Ward was absent from the city at the time and his son, Will Ward, was managing the penitentiary. The latter denied that he had ever put Hawkins in charge of the orchard or the mules. But the plaintiff's father was permitted, against objection, to state the substance of a conversation had, next day after the injury occurred, with Will Ward, involving an admission that Hawkins had been put there to keep out trespassers, but had no orders to beat or assault any one. This was said, if at all, upon first receiving information of the affair, and without any knowledge of the circumstances, except as communicated by Young, and evidently with reference to what it was supposed Furr might have done. Mrs. Young also gave evidence that in a subsequent interview, Furr had admitted he had put Hawkins in the field and had told him not to allow people to carry off the fruit.

Here follows the charge of the court:

"The plaintiff brings the action for personal injuries received at the hands of a person whom the plaintiff contends was the servant of defendant, and that said person, as such servant, committed the injury while in the scope of his employment. The defendant does not deny that plaintiff was injured by the convict Hawkins, but denies that Hawkins at the time was his servant, acting within the scope of his authority, in such a way as to make him responsible. This is the issue for you to try.

"The burden of proof is upon the plaintiff. He must satisfy your minds by a preponderance of testimony, not only as to the extent of damage done, but also that the convict Hawkins was, at the time of the injury, the servant of the defendant, acting within the scope of his authority. If the plaintiff has done this, either by proof or circumstances, he is entitled to a verdict. If he has not done this you should find for defendant.

"As to what constitutes a servant, in the absence of express proof, depends upon the particular circumstances of each case. The mere fact that Ward was the lessee and Hawkins a convict, does not of itself constitute the relation of master and servant; nor that defendant merely let a convict go without a guard; nor, on the other hand, would it prevent the creation of such relationship.

"There are two things which must be established by proof or circumstances, before the plaintiff can recover:

"First—That Hawkins was the servant of Ward; and

"Second—That as such servant he was acting within the scope of his authority.

"If you find, however, that Hawkins was the servant of defendant, and was acting within the scope of his authority, it is no justification of the act of the servant that he disobeyed the instructions of his master.

"You are the sole judges of the facts, and the evidence is with you. You are to say what facts have been proved, and apply the law as given you by the court. It is your duty to reconcile the testimony—if you can—but if you can not, then to credit this or that witness, who by reason of all the circumstances—his appearance on the stand—his interest in the cause—you think most worthy of belief. While you are the sole judges of the facts, it may not be improper to refer to the testimony of Will Ward. He was put on the stand by the plaintiff, and the plaintiff was permitted to contradict him by other testimony. This was done solely for the purpose of contradicting him. Also, as to the declarations of Hawkins at the time of the accident. His statement that Ward did not allow people in the field or orchard, and that he had authority to keep them out, is not evidence of such fact or such authority, and the jury must disregard such testimony for that purpose.

"In actions of this kind, smart-money or exemplary damages, are not recoverable; only actual damages—medical expenses, loss of time, mental and physical suffering—should be allowed."

The defendant then asked three instructions, as follows:

"First—That this action can not be maintained unless the relationship of master and servant existed between the defendant, Col. Ward, and the convict Hawkins at the time of the injury, and this relationship does not exist merely by reason of the said Hawkins being a convict in the penitentiary, and Col. Ward being the keeper or lessee of the penitentiary; nor did the fact of the convict being put to work at any kind of employment by Colonel Ward, or his overseer or agent, create such relationship. To create the relationship of master and servant it must be proved that said defendant Ward by himself or overseer intrusted the said Hawkins with discretionary powers and duties independent and outside his duties and employment as a convict, and if the jury believe from the evidence that this relation of master and servant did not exist at the time, and in the employment in which the said Hawkins was engaged when the injury was inflicted, they will find for the defendant.

"Second—Notwithstanding the jury may find that the convict Hawkins was a servant of the defendant at the time of the supposed injury, unless they further find that said Hawkins, at the time of the alleged injury, was in the employ of said Ward as such servant, *with authority and direction to keep trespassers or persons from the orchard and grounds*, where it is charged such injury was inflicted, and that the injury was done in the performance of such duty, the jury will find for the defendant.

"Third—That the evidence of the plaintiff to the effect that William Ward stated to him that Hawkins, the con-

vict, who is alleged to have inflicted the injury, was given charge of the orchard or field in which the injury occurred, with authority to keep trespassers out of the same, is not evidence that said convict was in fact given or had any such authority, but evidence only to impeach the witness, Will Ward, by showing that he had made different statements."

The court gave the first two instructions, but refused the third, as demanded, but gave it with the following addition to the end thereof:

"But it is for the jury to say, under the proof and all the circumstances (independent of the statements of William Ward to Young), whether the convict was the servant of Ward at the time of the injury."

The verdict is certainly not without evidence to support it. It is, indeed, suggested that the relation of master and servant did not exist between Ward and Hawkins, and hence the rule *respondeat superior*, has no place. The process of reasoning by which ingenious counsel have reached this conclusion is, that Hawkins was a convict, undergoing his punishment for a crime; that the defendant, as keeper of the penitentiary, stood in the place of the State; that the Legislature had authorized him to work convicts at the place where Hawkins was, and in the manner in which he was engaged, at the time of the injury; and that the working of convicts, considered either as a mode of punishment or as a means of bearing the expenses of imprisonment, is an official act of the State Government. Hence it is argued that the convict could not be a servant, by reason of his status, so as to render Ward chargeable for his acts.

1. MASTER AND SERVANT. Master's liability for torts of servant.

Now, although the relation of master and servant springs out of a contract, yet as to third persons it can make no difference that Ward hired the services of this convict from the State. The servant may be a minor and the con-

tract be with his parent. The master's liability, if any, arises from the relation itself, and does not depend on the nature of the stipulations in his contract. "If one is injured by the servant of another, and the injury is in any manner connected with the fact of service, it would be immaterial to the injured party what the contract of service was, how long it was to continue, what compensation was to be paid for it, or what mutual covenants the parties had for their own protection." *Cooley on Torts, p. 532; Wood's Master and Servant, secs. 4 and 7.*

Ward's right to direct and control the actions of Hawkins is the important circumstance. The particulars of the arrangement whereby he obtained that right are wholly unimportant.

2. SAME: Keeper of penitentiary and convict.

The main issue of fact was, whether or not the convict, Hawkins, had been put in charge of the orchard for the purpose of excluding trespassers. That issue was fully and fairly submitted to the jury under instructions which stated the law correctly. And the jury had a right to infer, from all the facts and circumstances in evidence, that Hawkins was clothed with authority to protect the property. If this were so, then the act of Hawkins was, in law, the act of Ward, notwithstanding it may have been contrary to express orders. "Having employed the servant to protect his property, or to maintain his possession, he is liable for all the acts done in pursuance of such employment, and within the power implied therefrom, even though he expressly directed the servant what to do. Having set in motion the agency for producing mischief, he is bound at his peril to prevent mischievous consequences." *Wood's Master and Servant, sec. 309; Barden v. Felch, 109 Mass., 154; N. W. R. R. Co. v. Hack, 66 Ill., 238.*

"It is not necessary, in order to fix the master's liability, that the servant should, at the time of the injury, have

been acting under the master's orders or directions, or that the master should know that the servant was to do the *particular act* that produced the injury in question. It is enough, if the act was *within the scope* of his employment, and if so, the master is liable, even though the servant acted *willfully*, and in direct violation of his orders." *Sec. 307 Wood on Master and Servant.*

"It is in general sufficient to make the master responsible, that he gave to the servant an authority, or made it his duty to act *in respect to the business* in which he was engaged when the wrong was committed, and that the act complained of was done in the course of his employment."

* * * * * *

"The master who puts the servant in a place of trust or responsibility, or commits to him the management of his business or the *care of his property*, is justly held responsible when the servant, through lack of judgment or discretion, or from *infirmity of temper*, or under the influence of *passion* aroused by the circumstances or the occasion, goes beyond the strict line of his duty or authority, and inflicts an unjustifiable injury upon another." *Cooley on Torts, page 538.*

3. EVIDENCE Party contradicting his own witness.

It was also insisted that the court erred in admitting J. O. Young's testimony, to contradict the testimony of Will Ward, the plaintiff's own witness.

Section 2523 of Gantt's Digest provides that "the party producing a witness is not allowed to impeach his credit by evidence of bad character, unless it is in a case in which it is indispensable that the party should produce him; but he may contradict him with other evidence, and by showing that he had made statements different from his present testimony."

The proper foundation was laid here by inquiring of the

witness, whom it was proposed to contradict, concerning the previous statement, with the circumstances of time, etc. *Ib., sec. 2525.*

Relevant testimony. What is.

Another alleged error consisted of the admission of testimony that the convict, Hawkins, was seen in the same field with a gun in his hands, before the said Willie Young and other persons with him had entered the field, and after the injury had happened and they had left the field and premises of defendant.

One of the issues involved in the pleadings was whether or not Hawkins was a trusted convict and permitted to go without guards. The theory of the defense was that he was kept under guard and not permitted to go at large. If he had been allowed certain liberties and invested with a certain discretion on previous occasions immediately before or after this occurrence, these were circumstances tending to show that he had been trusted both before and since, and rendering improbable the story that at this particular time he was covered by the guns of his guards.

"Relevancy," says Mr. Wharton, in his book on evidence, volume 1, section 20, "is that which conduces to the proof of a pertinent hypothesis; a pertinent hypothesis being one which, if sustained, would logically influence the issue." "Hence," says he, in section 21, "it is *relevant* to put in evidence any circumstance which tends to make the proposition at issue either more or less improbable."

Affirmed.

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ROGERS V. STEVENSON ET AL.

MORTGAGE: *Remedy of mortgagee after death of mortgagor.*

In February, 1874, Stevenson made his note to Rogers bearing interest at two per cent. per month from date until paid, and secured it by mortgage on land. Stevenson died in 1875 and his executor paid the debt in 1880, out of the assets of the estate, upon the affidavit of Rogers of its justness and non-payment. It was never presented to nor allowed by the probate court. When the executor claimed credit for the payment in his final settlement exceptions were sustained by the probate court to the excess of interest over ten per cent. per annum from April 27, 1876,—the time the probate court found it ought to have been presented to the court for allowance. Rogers then refunded to the executor the amount of the supposed over payment ($441), and filed his bill in equity to foreclose the mortgage. *Held*, first, That the debt not being probated, the executor had nothing to do with it, but the court might have ratified the payment. Second, But the court having repudiated the payment of the excessive interest, Rogers was left free to foreclose his mortgage in equity for the balance due on it, $441, with interest at the rate of two per cent. a month from the day it was paid by the executor to the date of the decree to be rendered.

APPEAL from *White* Circuit Court, in Chancery.
Hon. M. T. SANDERS, Circuit Judge.

W. R. Coody for appellant.

The mortgagee had three remedies, but could have only one satisfaction. He can sue, obtain judgment, sell other property, and collect what he can in any legal way; or he might take possession of the land mortgaged and apply the rents; or foreclose and sell the lands for the amount due on the mortgage. *7 Ark., 319; 18 Ark., 546.*

The proceedings at law on the note, and in equity for foreclosure are entirely distinct proceedings, and one can not affect the other. The payment of the judgment at law may or may not satisfy the mortgage; depending upon its

extent. *Chollar v. Temple, 39 Ark., p. 242; 38 Ark., pp. 171–2.*

A foreclosure of a guaranty by a previous suit, without sale and satisfaction, would not preclude a suit for foreclosure upon the original mortgage. *Ford v. Burks, 37 Ark., p. 95.*

A debt may be actually released, while the security remains with, and may be enforced by the creditor. *Oliphint v. Eckerly, 36 Ark., 72.*

Nothing but a full payment of the debt can satisfy the mortgage. *2 Jones on Mortgages. secs. 936–7 to 945.*

In this case what does the mortgage propose to secure? The note and interest. The interest, which is not usurious under the Constitution of 1868, is part of the debt. Then, how can the payment of the debt, with ten per cent. interest, satisfy the mortgage? A mortgage may be foreclosed for interest alone. *29 Ark., 346.*

Then if the appellant had brought a regular suit, and obtained a judgment, which bore only ten per cent. interest, it could not discharge the mortgage. It would only be a partial judgment or change of security, and its payment would only be a partial payment, and satisfaction *pro tanto*—a judgment or additional security does not release another security. *Brumojin v. Chew, 19 N. J. Equity, 130; Perkins v. Pitts, 11 Mass., 125.*

Then what was the effect of authentication and presentation in this case? Just what was intended, to enable the executor to pay what he could out of the estate, and have the mortgage security for the balance. It is clear in this case that the appellant was not bound to authenticate his claim against the estate, but might proceed to foreclose the land without the affidavit of non-payment required by the statute. (*28 Ark., 512; 32 Ark., 409 and 445.*) Nor does the fact that the claim was probated against the estate

affect this proceeding, unless the debt was fully paid. *32 Ark., 300; 29 Ark., 441.*

Here the mortgage was inadvertently satisfied upon the record, because it was thought to be paid. This is not controverted, and the facts of the case and the evidence taken clearly proves it. *1 Jones on Mortgages, sec. 876.*

And, in conclusion, we again submit that there was no judgment, no probate, and that a probate of the claim was a right and did not affect the mortgage; that if the debt was paid out of the estate, all right; if part paid, so far so good, but that a simple authenticating of the claim and presentation to the executor, could *never*, under any circumstances, affect the rate of interest or make the debt less.

J. W. House for appellees.

The matters have been adjudicated by a court of competent jurisdiction, and no appeal having been taken, appellant is concluded.

As the note in question was treated by him and the executor as an ordinary claim against the estate, the general administration law should govern.

It was the duty of appellant, after exhibiting his claim to the executor and having same allowed, to file it in the probate court for classification. (*Gantt's Digest, sec. 111.*) As the executor had made one payment on it and proposed to make more, it should have been reported and filed in the probate court for classification, etc. (*Ib., sec. 98*), it being a lien on real estate. *Ib., sec. 118.*

But the probate court was ignorant of this claim, until the exceptions were filed. It was the duty of the executor to report it, that it might be put into judgment, and thus stop the exorbitant rate of interest.

It is charged in the bill and reasserted in the answer, that appellant, although he made the affidavit and presented his claim to the executor, yet he did not intend to

permit it to be reported by the executor or classed by the probate court. The executor consenting to this, made it a fraudulent and collusive agreement, in connection with the other circumstances of the transaction. The allowance of the claim by the probate court would have cut down this exorbitant interest to ten per cent., for the allowance of a claim is a judgment. *5 Ark., 305–7; 12 Ib., 95; 32 Ib., 154 and 573.*

Having elected to have the claim paid out of the general assets, the appellant and the executor should have proceeded under the statute. *22 Ark., 538; 16 Ib., 144.*

It was the duty of the executor to pay this claim in full, *at once*, because it was to the interest of the estate to do so, and it was solvent. Herein he violated his trust. Appellant was the brother of the executor, and they acted in concert to the great detriment and injury of the estate, and all the circumstances show collusion, if not fraud. It was a flagrant injustice to allow appellant to refund the payments, and bring a new suit.

SMITH, J. In February, 1874, Alexander Stevenson made his note to Rogers, bearing interest at the rate of two per cent. a month, from date until paid, and secured the same by a deed of trust upon real estate. Stevenson died in 1875, and his executor paid the debt out of the general assets of the estate, the payment having been completed in 1880. The claim had never been presented to, or allowed by the probate court; but the creditor had made affidavit to its justice and non-payment; and this, it was supposed, authorized the executor to pay, as the estate was known to be solvent. When the executor in his final account claimed credit for these payments, exceptions were sustained to the payment of more than ten per cent. interest after April 27, 1876, the time when, in the opinion of

the court, said claim should have been presented to the probate court for allowance and classification. Thereupon Rogers refunded to the executor the amount of the supposed over-payment—$441—and filed his bill, alleging that this amount remained due and unpaid by the terms of the note, and praying foreclosure of the deed of trust. The defendants—the widow and heirs of Stevenson—pleaded payment and collusion between the plaintiff and the executor, they being brothers, whereby the debt was purposely not reduced to judgment, with a view to continue the exorbitant interest. At the hearing the bill was dismissed.

There being no proof of collusion, it only remains to consider whether anything has occurred, which in legal contemplation reduced the high rate of interest stipulated for in the contract, and which it was then lawful to take.

If the creditor had chosen to prove his debt against the estate, he would have recovered judgment for the principal and interest according to the tenor and effect of the instrument, computed down to the day of rendition. But such judgment would thereafter have carried only ten per cent. per annum. *Badgett v. Jordan, 32 Ark., 154; Miller v. Kempner, Ib., 573; Harbison v. Vaughan, ante, 539.*

Whether in that case the creditor could have been compelled to accept payment of his judgment in full satisfaction of his mortgage, it is useless to speculate. For Rogers being under no necessity to resort to the probate court for satisfaction of his demand, never did submit his rights to that tribunal. He relied upon his mortgage security.

The claim never having been proved against the estate, the executor properly had nothing to do with it. The probate court might, indeed, upon the application of any person interested in the estate, have ordered him to relieve the property from the incumbrance, if funds were in his hands available for that purpose. *Gantt's Digest, sec. 183.*

And it might well have sanctioned the payments made by him as beneficial to the estate, and not injurious to the creditors. But it refused to allow credit for the full sum that was required to redeem, and to that extent repudiated the act of the executor. This leaves the mortgagee free to foreclose for any balance that may be legally due.

The decree of the White Circuit Court is reversed, and a decree of foreclosure will be entered here for $441, with interest at two per cent. a month from the twelfth day of November, 1880, until the date of the rendition hereof, and henceforward until paid at ten per cent. per annum. And the cause is remanded for execution.

CLOPTON V. CARLOSS ET AL.

INJUNCTION: *Against judgments for errors.*

A court of equity will not enjoin a judgment for irregularities and errors in the proceedings. All errors of decision and in the proceedings must be corrected in the court in which the suit originated, or by appeal to a higher court.

APPEAL from *Phillips* Circuit Court, in Chancery.
Hon. M. T. SANDERS, Circuit Judge.

John C. Palmer for appellant.

There was no service on defendants, nor any service of the so-called writ of attachment.

The *man* who served them was not an officer at all. The court acquired no jurisdiction *in rem* whatever. The judgment against Clopton was a nullity.

It is true there are many errors that can be waived by consent, but *consent can not give jurisdiction.* This the court could only acquire by service of the writ by an officer,

which was necessary to give validity to the bond, which is the foundation of the judgment against Clopton. *3 Ark., 532; 5 Ib., 409.*

Calling the case *an attachment* by the justice, does not make it so. The amendments were all made without any additional affidavit, bond or service. Clopton was misled by the action of the justice, and did not consider himself in court, when the trial took place, or he would have appealed. It is clear that a fraud has been perpetrated.

C. B. Powell for appellee.

A court of equity will not correct errors in judgments of courts having jurisdiction. The remedy is by appeal. (*3 Wait's Actions and Defenses, 155; 3 Sneed, 271; 22 Wis., 311; Freeman on Judgments, sec. 487.*) It will vacate for fraud, but not when it does not appear the judgment defendant had a good defense on the merits. (*1 Ohio Dig., 693; 1 W. L. M., 278; 3 Ohio St, 445; Freeman on Judg., 448.*) No good defense is shown.

Where a defendant voluntarily enters his appearance jurisdiction is acquired. (*2 Ark., 449.*) Consent cures irregularities, and the agreement will be carried out by court. (*5 Ark., 252.*) The giving bond is an appearance. *6 Ark., 459; 23 Ib., 136.*

The acts of an officer *de facto* are legal. *38 Ark., 580, 150.*

SMITH, J. This is a bill to enjoin the execution of a judgment for $31, rendered by a justice of the peace. It appears that Carloss, in whose favor said judgment was rendered, held or claimed a landlord's lien upon certain seed cotton raised upon his land by his tenants, and that Clopton, who claimed the same cotton by virtue of a chattel mortgage, had removed the cotton against the protest

and objection of Carloss, and had caused it to be ginned and baled.

An action for the recovery of the property was then instituted and the cotton seized by the officer; Clopton being permitted to retain possession upon the execution of a bond conditioned to perform the judgment in the action. At the return day of the writ, the parties appeared and in open court entered into an agreement that the affidavit, writ and other papers and proceedings, should be so amended that the action should henceforward proceed as an attachment against the tenants, who were to be brought in; the cotton to be held by Clopton, subject to the final judgment, and the cause to be tried on its merits. To enable the parties to get ready, a continuance was had to a future day. At the adjourned day, Clopton appeared with his counsel, and claiming that the effect of the change in the proceedings had been to discharge him as a party to the action, refused to participate in the trial, and left the court-room. But the justice proceeded to try the case, gave judgment against the tenants, who had appeared, and also against Clopton, whom he treated as an interpleader, for the value of the cotton.

Upon the issue of an execution, Clopton filed his bill of injunction, alleging that he had no knowledge of the judgment until it was too late to take an appeal; that he had been misled by a statement of the attorney of Carloss to the effect that Clopton was no longer the defendant in the action, but might interplead if he chose; and also that he had been lulled into security by an assurance from the justice, after the trial, that no personal judgment had been entered against him. It was also set up that the person who had seized the cotton, taken Clopton's bond and performed other official acts in the progress of the action, professing to act as deputy sheriff, was not an officer at all, by

reason of the fact that his appointment had never been approved by the circuit or county court; and that the tenants, the principal defendants, had not been regularly served with process.

The transcript discloses glaring irregularities. But if we scanned proceedings before justices of the peace with too critical an eye, few or none of their judgments might be permitted to stand. When a party has once had an opportunity to be heard, and neglected it, he must abide the consequences. A court of equity can not relieve him, though the judgment is manifestly wrong. And if a final judgment can not be avoided in equity on account of errors of law entering into it and affecting the merits of the controversy, *a fortiori*, mere errors in proceeding will not have that effect. All errors of decision and of proceeding must be settled in the court where the suit originated, or by appeal to a higher tribunal. *Story Eq. Jur., sec. 1572; Freeman on Judgments, secs. 485–6–7.*

The Circuit Court found as a fact that Clopton was apprised of this judgment in time to prosecute an appeal, and that the evidence was insufficient to establish any fraud or collusion, whereby, without fault of his own, he was prevented from making his defense. And its findings are too well supported by the testimony to be lightly disturbed. Substantial justice seems to have been done. There is no allegation or proof that the result would, or ought to have been different, if Clopton had appealed from the justice's judgment; nothing, in short, to show that the cotton should have been appropriated to his debt, rather than to the satisfaction of Carloss's rent.

The decree below dismissing the bill is affirmed.

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1. *Of mortgage: What necessary.*

The acknowledgment of a mortgage must show that the mortgage was executed for the "consideration" expressed in it, or it will be void as to all persons except the parties to it, though they have actual knowledge of its existence. Wright v. Graham. 140

2. *Effect of curing act of* 1883.

The act of 1883 to cure defective acknowledgments of deeds, etc., can not operate in this court in a case decided in the Circuit Court before its passage. The judgment of the Circuit Court must be tested by the law as it then existed. Ib.

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1. *When it accrues on note.*

An action on a note payable on or before a particular day can not be brought until after that day. Moore v. Horsley. 163

2. *Right of fraudulent vendor of personal property.*

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3. MORTGAGEE: *Action against purchaser of mortgaged property.*

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ADMINISTRATION.

See FRAUD, 3; TRUSTS, 1, 2.

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The legal title to an intestate's lands descends and vests, upon his death in his heirs at law, subject alone to his widow's dower and payment of his debts. Except as against the widow's dower, the administrator is entitled to the possession and control of his lands until the debts are all paid and the administration closed, and to enforce this right may defend or maintain ejectment. Culberhouse v. Shirey. 25

2. ADMINISTRATOR: *Ancillary: His duties.*
It is the duty of an ancillary administrator in this State to pay the debts of the deceased which are proved here; to settle his accounts in the court that appointed him, and to transmit the residuum to the administrator in chief for distribution among the persons entitled to it. The court here may, however, sometimes order him to pay it to the heirs or legatees. Gibson v. Dowell. 164

ADMINISTRATOR.

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1. *Clerk of another State can not take, to be used here.*
A clerk of a court of another State is not authorized to take affidavits to be used in this State, and an appeal from a justice of the peace's judgment on such an affidavit will be dismissed. Love v. McAlister. 183

2. *By whom to be taken.*
If a statute does not name the officer before whom an affidavit may be made in the State it may be taken by any officer in the State authorized to administer oaths. Ib.

AGENCY.

1. *When question of, left to jury.*

When one carries on a butcher's shop through an agent and that agent sells the hides of the slaughtered animals, it should be left to the jury to decide upon the evidence, in a suit for the hides between the principal and the purchaser, whether the selling of the hides by the agent was within the fair scope of the business. Jacobson v. Poindexter. 97

2. AGENT: *By what acts of, the principal is bound.*

The principal is bound by all acts of his agent within the scope of the authority which he holds him out to the world to possess, although he may have given him more limited private instructions unknown to the persons dealing with him. Ib.

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See AFFIDAVIT, 1; EXEMPTION, 2.

1. APPEAL FROM JUSTICE OF THE PEACE: *Affidavit for: Jurisdiction of Circuit Court: Cost.*

Where there is no affidavit for an appeal from a justice of the peace the Circuit Court acquires no jurisdiction of the case, and can render no judgment for costs on dismissing it. Love v. McAlister. 183

2. *When order against garnishee appealable.*

An order ascertaining the amount of a garnishee's indebtedness to a defendant in an attachment suit, and directing him to pay it into court, is after judgment against the defendant in the attachment, final and appealable to the Supreme Court, and if superseded no action can be maintained on it during the pendency of the appeal. Furstenheim et al. v. Adams. 283

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The order of a Circuit Court rejecting a collector's bond when presented for approval is final and subject to appeal to the Supreme Court. Lowman, Ex Parte. 370

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5. APPEAL FROM JUSTICE OF THE PEACE: *Issues in the Circuit Court.*
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See COLLECTOR OF REVENUE, 3.

1. *Issuing warrants and certificates.*
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1. ADMINISTRATION: *Chancery jurisdiction, to correct errors and frauds.*
Chancery will not interfere for the correction of mere errors in the settlements of administrators in the probate court which could be corrected by appeal, nor of irregularities which, though illegal, were not of fraudulent intent, and have not resulted in substantial injustice; nor after a long period when explanations have become difficult, and evidences lost which in the nature of things might show matters which appear illegal on the record to have been really equitable. But it will interfere to correct fraud established either by direct proof, or by such circumstances as will fairly authorize an inference of intentional fraud. Dyer v. Jacoway. 186

2. SAME: *Same.*
In the correction in chancery of frauds in an administrator's settlements in the probate court, his accounts will be surcharged and falsified, or set aside altogether, and settlements required *de novo*, as the case may require. Ib.

3. CHANCERY PRACTICE: *Relief against conditions subsequent.*
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COLLECTOR OF REVENUE.

1. *For what revenue he and his sureties bound.*

The collector of revenue and his sureties are bound on their bond for revenue collected in the preceding term, and in his hands at the time of the execution of the bond; but the sureties are not bound for revenues misapplied or squandered by him before the execution of the bond. Haley, Coroner, v. Petty et al. 392

2. SAME: *Duration of his term.*

The term of a collector of revenue continues until his successor is elected and qualified; and revenue collected up to the qualification of his successor, is collected during his term. Ib.

3. DISTRESS WARRANT: *When and for what to be issued.*

A distress warrant can be issued by the Auditor only for the balance found due from the collector upon the annual settlement required to be made with the Auditor, after the settlement made with the clerk after the tax sales; and it should be issued promptly and immediately in the time required by the statute. The Auditor can not, as a general rule, delay, and issue it afterwards at some indefinite time, at his option. Ib.

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1. *Assumption of mortgage debt: Action.*

The acceptance of a deed subject to a specified mortgage does not imply a promise by the grantee to pay the mortgage debt; but if the deed contains a stipulation that the property is subject to a mortgage which the grantee agrees to pay, then a duty is imposed on him by the acceptance, and a promise is implied to perform it; on which, in case of failure, assumpsit will lie. Patton v. Adkins. 197

2. *Public binding.*

In 1882 the board of public contractors let to Mitchell the public binding for the State for the years 1883 and 1884, specifying the size and price of the binding. In March, 1883, the Legislature provided for the printing and binding of a new Digest of the Laws of the State, to be printed on royal octavo paper, which is of larger size than any specified in Mitchell's contract, and for which no price was specified in his contract. *Held*, that the binding of a Digest was not in contemplation of the parties to the contract, was not embraced in it, and he was not entitled to it. Berry v. Mitchell. 243

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The act of April 29, 1873, authorizing certain counties to fund their outstanding indebtedness is not in conflict with the Constitution of 1868. Pulaski County v. Reeve. 54

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A county is not properly a corporation, but a political subdivision of the State, which, for the more convenient administration of justice and for some purposes of local government, is invested with a few functions characteristic of corporate existence. Ib.

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See BAIL, 1; CRIMINAL PLEADING, 1, 2; INDICTMENT, 3.

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One who is present and participating, aiding and abetting in a murder is as guilty as if his own hand inflicted the fatal blow. Wright v. The State. 94

2. *False pretense: What is.*

The procuring by a hotel keeper of a guest to board with him, and to pay him money in advance for his board, by telling him falsehoods to induce him to become his guest, is not a false pretense for which he is criminally liable. A criminal false pretense must be the inducing motive to the obtaining goods by the defendant, and the result must be the obtaining of property. Morgan v. The State. 131

3. *Bail not released by destruction of indictment.*

Where an indictment is lost or destroyed and a new indictment is found against the defendant for the same offense, his bail for his appearance to answer the first indictment will be liable for the penalty of the bond if he fails to appear and answer the second. Price v. The State. 178

4. *Once in jeopardy.*

A conviction of petit larceny in a justice's court is a bar to a prosecution in the Circuit Court for grand larceny for the same offense. Southworth v. The State. 270

CRIMINAL PLEADING.

See INDICTMENT, 1, 2; PLEADING AND PRACTICE, 10.

1. *Once in jeopardy.*

A mistrial in a felony case, from the disagreement of the jury on a verdict, is not a jeopardy; and the defendant can not plead it as a former jeopardy to a new indictment for the same offense. Potter v. The State. 29

2. *In jeopardy: What is.*

When a trial jury is impanneled and sworn in a criminal case, the defendant is in jeopardy, and a dismissal of the prosecution and discharge of the jury before verdict, without his consent, is equivalent to an acquittal of the offense charged in the indictment, and a bar to any subsequent indictment for the same offense; but a dismissal for variance between the indictment and the proof is no bar to another prosecution for the same offense. Williams v. The State. 35

3. *Same.*

If upon the first indictment the defendant could not be convicted of the offense described in the second, then a dismissal of, or acquittal upon the first, is no bar to the second. Ib.

4. *Same: Money differently described.*

If upon the first indictment, charging larceny of money of various descriptions, the defendant could be convicted of stealing the money or any part or piece of it described in the second indictment, a dismissal of the first after the jury was impanneled and sworn, would be a bar to the second. Ib.

5. *Objections to grand jury: How raised.*

Objections to the organization of the grand jury must be made by a motion to set aside the indictment. A plea of "not guilty" waives the illegality of the grand jury. Wright v. The State. 94

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1. *Venue: Change of: Jurisdiction.*

When after change of venue in a criminal case there is a *nolle prosequi* of the indictment, a new indictment must be found in the county in which the crime was committed; and thereupon the defendant may have another change of venue. Potter v. The State. 29

2. *Serving defendant with copy of the indictment: Presumption.*

In the absence of any showing of a demand of a copy of the indictment, and of any affirmative showing that a copy was not furnished to defendant before the trial, it will be presumed that it was done, or that he waived it. Wright v. The State. 94

3. *On motion for continuance.*

Statham, indicted for selling liquor in violation of the three mile law, filed a motion for continuance for want of testimony of an absent witness, stating what the witness would testify. The State admitted that the witness would testify if present, as stated in the motion, and thereupon the motion was overruled. On the trial the court excluded the alleged testimony as incompetent. The testimony would have tended to prove that the witness, and not the defendant, sold the liquor. *Held*, error. The testimony was competent, but if incompetent the motion for continuance should have been refused on that ground, and not on the admission of the State. Statham v. The State. 273

4. BAIL BOND: *Defense to forfeiture of, before justice of the peace.*

Where a defendant appears before a justice of the peace for examination for a felony at the time fixed by his temporary bail bond, and the justice from press of other business postpones the examination to an unfixed day, and tells the defendant that he will have him notified of the day when fixed, he can not afterwards appoint a day and forfeit the bond without giving the defendant the promised notice. Flynn v. The State. 315

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1. *Loss of time attending court: Attorney's fees, etc.*

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1. *Destruction or return of, effect on title.*

The destruction or return of a deed by the grantee to the grantor does not re-vest the title in the grantor. It remains in the grantee though by his direction the grantor reconvey to another. Cunningham v. Williams. 170

2. *Married woman's—words of conveyance.*

In order to pass her estate in land apt words of conveyance must be used by a married woman. She must join her husband not only in the formal execution of the deed, but in the operative words of grant. A relinquishment of dower will not carry the fee. Jones v. Freed. 357

3. *Of husband to wife's land.*

A husband's deed in fee to his wife's land, not her separate estate, will pass to his grantee the estate in the land during the joint lives of the husband and wife, and during his own life if he survives the wife and there has been issue born alive of the marriage. Ib.

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1. *Adultery: Evidence of adulterer.*

Where the charge for divorce is adultery courts are reluctant to grant it upon the uncorroborated testimony of a *particeps criminis.* Payne v. Payne. 235

2. *Husband's liability to support children in custody of wife.*

A decree of divorce giving the custody of infant children to the mother, either temporarily or permanently, will not relieve the father from his obligation to support them. He is bound to maintain them as long as they are too young to earn their own livelihood; and chancery will at a subsequent term entertain the petition of the mother to recover from him her reasonable and proper advances for their support since the divorce, and for an order for their future support. Holt v. Holt. 495

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1. *In personalty governed by law of intestate's domicile.*

The succession to an intestate's personal property is governed by the law of his domicile, without regard to its actual situs at the time of his death. By a legal fiction it is deemed to be in the place of his domicile, and the rights of his widow, heirs and distributees are determined by the intestate laws of that domicile. Gibson v. Dowell. 164

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1. *Satisfaction of mortgage on the record.*
The indorsement on the record by the mortgagee, of satisfaction of a mortgage, is *prima facie* evidence of the extinguishment of the debt, as well as of the security, and the burden of showing the contrary is upon the creditor; but a contemporaneous indorsement by him on the original mortgage, of only part satisfaction is admissible to explain the record entry. Burke, Ex., v. Snell. 57

2. *Contradicting witness by his contrary statements.*
A material witness against a defendant on trial for murder was asked on cross-examination, "if he had ever expressed to Washington Smith or others, feelings of hostility towards the defendant," to which he answered: "I am on good terms with the defendant; never had a falling out in our lives; have known him a long time, and we have always been friends." The defendant then offered to prove by Washington Smith that he had heard the witness say that if necessary, he would swear the life of the defendant away, and that he knew that the witness and defendant had had differences and were not friendly. This testimony was refused. *Held*, that the defendant had laid sufficient ground for the admission of Smith's testimony, and its refusal was error. Frazier v. The State. 70

3. *Confessions: The whole must be admitted.*
When a defendant's confession is given in evidence against him, all that he stated in the confession, as well that for him as that against him, must be admitted. Ib.

4. DEPOSITION: *Of witness in another suit: When admissible.*
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The indorsement of forfeiture on a bail bond, by a justice of the peace, is not conclusive upon the bail that the forfeiture was properly taken. Flynn v. The State. 315

6. *Ex parte affidavit.*

A statement or declaration, though made under the sanction of an oath and reduced to writing, is not allowable as evidence on the trial of an issue raised by the pleadings, unless an opportunity has been afforded the adverse party to cross-examine the witness. Smith v. Feltz. 355

7. *Admissions of guilt by silence.*

Where one is accused of crime and is silent, it may go to the jury as a tacit but weak admission of guilt. Such silence is worth but little as a tacit admission, and should be received with great caution. Williams v. The State. 380

8. RIGHT OF WAY: *Evidence of value of land.*

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9. RAILROADS: *Damages for right of way: Value of the land.*

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10. *Party contradicting his own witness.*

A party may contradict his own witness by proof of his statements different from his testimony. Ward v. Young. 542

11. *Relevant: What is.*

Relevant testimony is that which conduces to the proof of a hypothesis, which, if sustained, would logically influence the issue. Hence, it is relevant to put in evidence any circumstance which tends to make the proposition at issue either more or less improbable. Ib.

12. *Witnesses: Accomplice: Corroboration.*

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2. *Land purchased by husband and conveyed to wife, subject to.*
Land purchased by a husband and conveyed to his wife in fraud of his creditors may be sold under execution at law against him, without first uncovering it by bill in equity. Hershy v. Latham. 305

3. *Partner's interest in land subject to.*
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1. *Witnesses in several cases.*
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3. *Administrator obtaining false credits.*

The obtaining of a false credit by the administrator for pretended payments which he had never made, by pretending to file vouchers which he never had, is a gross fraud upon the creditors, an imposition upon the court, and an abuse of the trust confided to him. Hanf, Ad., v. Whittington, Ad. 491

4. *Purchase by creditor to save his debt.*

A creditor has the right to purchase the land of his debtor in satisfaction of his debt; and, if necessary or convenient to effect the object, may advance cash to the debtor for balance in value, without any obligation to see to the application of the cash to the debts of others. Gist v. Barrow. 521

FRAUDULENT CONVEYANCE.

1. *Allegations and proof of.*

A judgment creditor assailing his debtor's conveyance made before the creation of his debt, as fraudulent, must prove that it was made with the intent of the debtor to put the property beyond the reach of debts he intended to contract and did not intend to pay, or had reasonable grounds to believe he would not be able to pay. Cunningham v. Williams. 170

2. FRAUD—MISTAKE: *Relief against: Bona fide purchasers.*

A party who carelessly executes a deed which includes a tract of land not intended to be conveyed, under the fraudulent misrepresentation of the grantee that it includes only the land purchased, may have relief against the grantee but not against a subsequent purchaser for value without notice of the fraud or mistake. Davidson v. Davidson. 362

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HOMESTEAD.

1. EXEMPTION: *Homestead must be occupied at time of levy.*

Land or a town lot can not be exempt from execution as a homestead, unless it is occupied as a residence at the time of the levy of the execution; and a supersedeas issued upon a claim of homestead, where there is no such residence, should be quashed. Patrick v. Baxter. 175

2. *Pleading, etc.*

A complaint stating a general claim of homestead, and in a vague and indefinite way, the grounds of the claim, and praying relief, is, in the absence of a motion to make it more specific, sufficient to authorize a decree, without stating the specific facts necessary to constitute the right of homestead, if the facts be proven by the evidence. Gaines v. Cannon et al. 503

3. *Hotel.*

A husband with his wife occupying one room of his hotel as their residence, does not lose his homestead right in the premises by renting out the balance for use as a hotel. Ib.

4. *Widow's right to.*

A widow who has no other place of residence, is entitled to the homestead of her deceased husband for life, whether she occupies it or not, and is not accountable to any one for rents received for it. Ib.

5. WIDOW: *Purchasing vendor's lien on homestead.*

A widow who pays off her husband's note given for the homestead, may enforce the vendor's lien against the homestead, or collect the note out of the general estate before any distribution to his heirs or distributees. Ib.

6. *Object of homestead laws: Head of family.*

The protection of the family from dependence and want is the object of all homestead laws. Apart from his family the debtor is entitled to no special consideration. But it is not necessary that the homestead claimant should be a husband or parent. Harbison v. Vaughan. 539

7. *What is a family?*

To constitute a family, within the meaning of the homestead laws, a mere aggregation of individuals in the same house is not sufficient. There must be an obligation upon the head of the house to support the others, or some of them, and on their part, a corresponding state of dependence. (*Greenwood & Son v. Maddox & Toms*, 27 *Ark.*, 648, explained.) Ib.

HUSBAND AND WIFE.

See DEED, 2, 3.

1. *Title to money in possession of wife.*
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2. HUSBAND AND WIFE: *Dealings between.*
In equity husband and wife may have separate interests—may make fair contracts with, or reasonable gifts to, each other, which, though not binding on creditors, will be supported between the parties and their heirs and distributees; and in all such cases the husband holding possession of the property will be considered as the wife's trustee. Gaines v. Cannon et al. 503

3. WIFE: *Separate use.*
A wife's separate use need not be declared by any express words, but must, nevertheless, be clearly shown to have been intended, in order to remove the presumption that the husband holds by marital right for his own benefit. Ib.

4. HUSBAND: *His right to her distributive share.*
At common law a husband has the marital right to receive his wife's distributive share in her father's estate, and payment to her is payment to him. Ib.

IMPROVEMENTS.

See TAX SALES, 9, 10, 11.

1. *Title not acquired by.*
A land owner can not be improved out of his estate. Improvements placed upon his land belong to him, and can be used by the maker, at the utmost, only as a set-off against rents and profits—never for the purpose of acquiring title. Pulaski County v. The State. 118

INDICTMENT.

See STATUTE OF LIMITATIONS, 1.

1. LARCENY: *Indictment: Ownership of the property.*
When the stolen property belongs to joint owners, the ownership must be laid in all of them, unless it was, when stolen, in the control and management of one of them; in which case the ownership may be laid in him. Scott v. The State. 73

2. *Principal and accessory in different counts: Misjoinder.*

An indictment in two counts, one charging the defendant as principal and the other as accessory before the fact, in the same felony, is no misjoinder of offenses, but a charge of the same offense in different modes. Lay v. The State. 105

3. *Obtaining goods under false pretense.*

An indictment charged, in substance, that the prosecutor went from Kentucky to Hot Springs with the fixed purpose of lodging and boarding while there at the same hotel where one Dr. Welsh, an acquaintance of his, boarded, whose society while visiting the Springs, he greatly desired. That he went to the defendant's hotel for breakfast, and was there informed by the defendant that he well knew Dr. Welsh—that the doctor had been boarding at his hotel for some time, but had left two days before for Eureka Springs. That by means of said representations he was induced to take board and lodging for one month, at defendant's hotel, and to pay him thirty dollars in advance therefor. That said representations were willfully false and fraudulent. That said Welsh had not at any time boarded at defendant's hotel, had not left the city, but was still there and boarding at another hotel. *Held*, that the indictment charged no criminal offense. Morgan v. The State. 131

4. EMBEZZLEMENT: *Indictment must describe money.*

An indictment for embezzlement must describe the money embezzled as specifically as in larceny. The State v. Thompson. 517

INFANT.

See PRACTICE, 4, 5; FRAUD, 2.

INJUNCTIONS.

See MUNICIPAL CORPORATIONS, 2.

1. *Against judgments for errors.*

A court of equity will not enjoin a judgment for irregularities and errors in the proceedings. All errors of decision and in the proceedings must be corrected in the court in which the suit originated, or by appeal to a higher court. Clopton v. Carloss et al. 560

INSTRUCTIONS.

See PLEADING AND PRACTICE, 1.

1. *Must be applicable to the evidence.*

It is error to give an instruction upon a state of facts not in evidence. Burke v. Snell. 57

INTEREST.

1. *On judgment.*

A judgment on a contract bearing interest above ten per cent. per annum, will bear only ten per cent. from the date of the judgment. Harbison v. Vaughan. 539

JUDGES.

1. SPECIAL JUDGE: *Parties can not agree on—must be elected.*

A special judge must be elected by the attorneys at the court, as provided by the Constitution, and not by agreement of parties to the cause to be tried. A judgment or decree rendered by a special judge selected by agreement, is *coram non judice* and void. Gaither v. Wasson and Wife. 126

JUDGMENTS.

See JUDGES 1; INTEREST, 1.

1. *Of other States unimpeachable collaterally.*

Where it appears that a superior court of another State has jurisdiction of the subject-matter of the suit and the person of the defendant it will be presumed, in the absence of evidence to the contrary, that the jurisdiction continued to the judgment, and the judgment can not be impeached or its verity denied in a collateral proceeding. Lockhart v. Locke. 17

JURISDICTION.

See APPEAL FROM JUSTICE OF THE PEACE, 1; CRIMINAL PRACTICE, 1.

1. JURISDICTION OF JUSTICE OF THE PEACE: *Action for damages for sale of horse.*

Stanley deposited with Bracht a horse in pledge for $24 which Bracht had paid for him on the horse. He afterwards tendered Bracht the $24 and demanded the horse. Bracht refused the tender, and afterwards sold the horse, and Stanley sued him before a justice of the peace for $100 damages. The justice found the value of the horse to be $30, and deducting the $24, gave Stanley judgment for $6. Stanley ignored this judgment and sued in the Circuit Court, in trover, for $150 damages. Bracht pleaded the former judgment in bar. *Held*, that the first suit was in effect an action for breach of a contract of bailment, and not for damages to property; that the justice had jurisdiction and his judgment was good in bar of the last action. Stanley v. Bracht. 210

2. CIRCUIT COURT: *Jurisdiction on bail bond.*

The Circuit Court has jurisdiction to render judgment on a forfeited bail bond for $100 taken by a committing court. Flynn v. The State. 315

3. *Local—transitory.*

Jurisdiction of a chancery court to enjoin the sale of land under a fraudulent or satisfied mortgage, or for an account of the amount due on the mortgage, and to cancel fraudulent conveyances of the land, and to inquire into alleged partnership matters in the land, is not local—confined to the county in which the land is situated—but may be exercised in any county where jurisdiction of the defendants can be obtained by personal service of process upon them; and this jurisdiction is not ousted by filing an amendment to the bill, setting up title and right to possession, and praying for recovery of the land; but the amendment will be stricken out. (Martin, Special Judge, dissenting from this last, holding that the jurisdiction for injunction, account, etc., would draw to it for final determination the matter of local jurisdiction.) Jones, McDowell & Co. v. Fletcher. 422

LANDLORD AND TENANT.

1. *Tenant buying outstanding title.*

A tenant can not be relieved in any court from the payment of rent and restoration of the premises to his landlord, by buying up the outstanding title from another during his tenancy. Brewer v. Keeler. 289

LEGISLATURE.

1. *No power to annul contracts.*

The Legislature has no power to deprive one of the benefit of a contract lawfully made by the commissioners for letting out public contracts. Berry v. Mitchell. 243

LESSOR AND LESSEE.

1. DAMAGES: *Lessor and lessee: Failure to deliver possession.*

In an action by a lessee against his lessor for damages for refusal or failure to deliver possession of the demised premises, the general rule for the measure of damages is the difference between the rent reserved and the value of the premises for the term; and if this value be not greater than the rent reserved, the lessee can in general recover only nominal damages, though the lessor without just cause refused to give possession. But if other damages have resulted as the direct and necessary or natural consequence of the lessor's breach of contract, it seems that they, also, are recoverable. Rose v. Wynn. 257

LEX LOCI.

See DOWER, 1.

LIEN.

See EXECUTION, 3.

1. LABORER'S LIEN: *Cutting and raking grass.*
Hay is the production of the laborer who cuts and rakes the grass, and he has a lien on it for the price or value of his labor. Emerson v. Hedrick. 263

LIQUOR.

1. *Local option law: Evasion of.*
Defendant had a billiard saloon at Dardanelle where the local option law was in force. Coats, by the defendant's direction, delivered to defendant's son at his billiard saloon, money for a quart of whisky. Defendant sent to his dram shop outside of the local option limits, got the whisky there, and his son delivered it to Coats at the billiard saloon in Dardanelle. *Held*, that the sale was in Dardanelle and defendant was rightly convicted. Blackwell v. The State. 275

LOCAL OPTION.

See LIQUOR, 1.

MARRIED WOMAN.

See STATUTE OF LIMITATIONS, 8.

1. *Need not schedule her property.*
Since the act of December 15, 1875, the neglect of a married woman to schedule her property does not prejudice her right and title to it. She may still show that it is hers. German Bank v. Himstedt. 62

MASTER AND SERVANT.

1. *Master's liability for servant's torts.*
The master's liability for the torts of the servant springs out of the relation itself, and does not depend upon the stipulations of their contract. Ward v. Young. 542

2. *Same: Keeper of penitentiary and convict.*

When the keeper of the penitentiary places a trusted convict in charge of his premises to protect them from trespassers, the relation of master and servant exists between them, and the master is liable for an unlawful injury inflicted there by the servant, in the scope of his employment, upon the person of another, notwithstanding it may have been done contrary to the express orders of the master. Ib.

MORTGAGE.

See CONTRACT, 1; MUNICIPAL CORPORATIONS, 2, 3; USURY, 1.

1. ACKNOWLEDGMENT: *Defective: Who may not avoid.*

A defective acknowledgment of a mortgage can not be avoided by one acquiring the mortgaged property without value. Moore et al. v. City of Little Rock. 66

2. *Liability of mortgagee in possession: Rents.*

A mortgagee in possession of the mortgaged land will not be charged with rent of improvements put upon the land by him at his own expense. Jones, McDowell & Co v. Fletcher. 422

3. *Foreclosure against heir.*

In foreclosing a mortgage against the heir of the mortgagor it is error to render a personal decree against him for the debt. Harbison v. Vaughan. 539

4. *Remedy of mortgagee after death of mortgagor.*

In February, 1874, Stevenson made his note to Rogers bearing interest at two per cent. per month from date until paid, and secured it by mortgage on land. Stevenson died in 1875 and his executor paid the debt in 1880, out of the assets of the estate, upon the affidavit of Rogers of its justness and non-payment. It was never presented to nor allowed by the probate court. When the executor claimed credit for the payment in his final settlement exceptions were sustained by the probate court to the excess of interest over ten per cent. per annum from April 27, 1876,—the time the probate court found it ought to have been presented to the court for allowance. Rogers then refunded to the executor the amount of the supposed over payment ($441), and filed his bill in equity to foreclose the mortgage. *Held*, first, that the debt not being probated, the executor had nothing to do with it, but the court might have ratified the payment. Second, but the court having repudiated the payment of the excessive interest, Rogers was left free to foreclose his mortgage in equity for the balance due on it, $441, with interest at the rate of two per cent. a month from the day it was paid by the executor to the date of the decree to be rendered. Rogers v. Stevenson et al. 555

MUNICIPAL CORPORATIONS.

1. CITIES: *Annexation of territory: Dedication.*

If the owner of land contiguous to a city of the first class lays it off into blocks and lots as an addition to the city, he thereby constitutes it an annexation, and dedicates the intervening streets and alleys to the city. Moore et al. v. City of Little Rock. 66

2. SAME: *Mortgagor can not annex: Taxes: Injunction.*

A mortgagor can not annex the mortgaged land to a city so as to affect the rights or security of the mortgagee; and the latter may enjoin the collection of taxes on such land annexed without his consent. Ib.

3. SAME: *Sale under mortgage avoids dedication.*

A foreclosure sale under mortgage, of land dedicated to a city by the mortgagor since the mortgage, avoids the dedication and the purchaser buys free from it. Ib.

NEGLIGENCE.

See RAILROADS, 1, 2, 9, 10.

NOTES AND BILLS.

1. PROMISSORY NOTES: *Bona fide purchaser, etc.*

Where negotiable promissory notes are taken by an agent to himself for debts due his principal, and before their maturity are transferred to a bank as security for advances to himself, the bank making advances on them before maturity, in good faith, in the usual course of business, and without notice of the principal's equity, the principal can not recover them or their value from the bank. They would stand good to the bank for all advances made on them before notice of the agent's want of title. Winship & Bros. v. Merchants National Bank. 22

2. SAME: *Possession of, evidence of title.*

Possession by the payee of a promissory note, is *prima facie* evidence of his title, and without notice to the contrary, a purchaser may safely buy it without inquiry as to his ownership. Ib.

3. PROMISSORY NOTE: *Stipulation to pay attorney's fee to collect void.*

A stipulation in a promissory note to pay the attorney's fee for collecting, if collected by suit, is void. Boozier v. Anderson. 167

4. *Acceptance of draft: What sufficient.*

The following indorsement by the drawee on a draft when presented for acceptance, "Protest waived, payment guaranteed," *held*, a sufficient acceptance to bind the drawee. Any words showing the intention of the drawee to accept or honor a bill will be sufficient. Block v. Wilkerson et al. 253

PARTNERSHIP.

See RAILROADS, 14.

1. *In profits: Rights of partners.*

Rushing, a merchant, owned a stock of goods of the value of $3,000. He formed a partnership with Peoples, a physician, who put into the business $125 worth of drugs, $250 in cash, and his practice as a physician. The partnership extended only to the profits, which were to be equally divided. In a month the goods were seized by attaching creditors of Rushing, Peoples being allowed to withdraw his drugs. Soon afterwards, by arrangement between the creditors and Rushing, the goods were sold and delivered to Ragsdale and Baggess. Peoples was no party to this arrangement, but knew of it, and was present when the invoice was taken, and made no claim to the goods. He afterwards filed his bill for an account against Rushing and Ragsdale and Baggess, and a judgment for what might be due him. *Held*, that his interest was only in the profits. He had none in the goods. They were subject to Rushing's debts; and Peoples was entitled to no relief against Ragsdale and Baggess, but was entitled to an account from Rushing. Rushing v. Peoples. 390

2. *Equity of partnership creditors to assets: How lost.*

The equity of partnership creditors to have the partnership property applied to their debts can be enforced only through subrogation to the like equity of the partners. If, therefore, a partner's interest in the property has been transferred, either by his own sale, or by sale under execution against him, the equity of the creditors is gone; for the partner has no such equity left to which the creditors can be subrogated; and this whether the sale be to a copartner or a stranger. (Martin, Special Judge, dissenting.) Jones, McDowell & Co. v. Fletcher. 422

PLEADING AND PRACTICE.

See FRAUDULENT CONVEYANCE, 1; HOMESTEAD, 2; RAILROADS, 15, 16.

1. PRACTICE IN CIRCUIT COURT: *Declarations of law.*

In trials before the court it is not necessary that the declarations of law should precede the finding of facts. Alexander v. The State, use, etc. 41

2. AMENDMENTS: *When allowed.*

Additional pleadings to correspond with the issues established by the evidence may be filed after the case has been argued to the jury. Burke, Ex., v. Snell. 57

3. PLEADING: *Multifariousness; how corrected.*
Multifariousness can not now, under the Code, be corrected by demurrer, but only by motion to strike out. Dyer et al. v. Jacoway et al. 186

4. PRACTICE: *Defense of infant, how made: Disabilities removed.*
A court should not permit an answer of an infant without guardian to be filed merely upon the statement in the answer that his disabilities have been removed by the probate court. The removal should be proved by the record of the probate court, and, if it is not, a decree against the infant upon such an answer will be reversed. Pinchback v. Graves et al. 222

5. PRACTICE: *Defense of an infant: Appointment and duty of guardian.*
The defense of an infant must be made by his regular guardian, if he has one; or, if he has none, by one specially appointed *after* service upon the infant. No attorney nor party in the suit should be appointed, and the defense of the guardian must be not merely formal, but real and earnest; he should put in issue and require proof of every material allegation to the infant's prejudice, whether it be true or not, and make no concessions on his own knowledge. Ib.

6. PRACTICE: *Judgment on constructive service, etc.: Issues must be disposed of.*
No personal judgment can be rendered against a defendant upon constructive service, when he has not appeared to the action. Nor can judgment be rendered without disposing, in some way, of the issues raised by the defense. Silver v. Luck. 268

7. PRACTICE: *Change of judges during a trial.*
When the judge at a trial becomes sick and unable to proceed after the evidence is all in and the instructions have been given to the jury, the trial should proceed under a special judge, before the same jury, and without rehearing the testimony. Bullock v. Neal, Ad. 278

8. PRACTICE: BILL OF EXCEPTIONS: *By whom to be signed.*
Where different judges preside during the progress of a trial, each should sign a bill of exceptions as to the proceedings before him. Ib.

9. PRACTICE: BILL OF EXCEPTIONS: *Order of court to file.*
When a bill of exceptions is properly signed and filed it becomes a record *proprio vigore* without any order of court making it so. Ib.

10. PRACTICE: *Summons on bail bond: Demurrer to.*
A summons on a forfeited bail bond is not a pleading, and not subject to demurrer for variance between it and the bond. If so fatally defective as not to be amendable, it may be quashed on motion, like any other bad writ. Flynn et al. v. The State. 315

11. PRACTICE: BILL OF EXCEPTIONS: *Must be filed in time allowed.*
When time is given to reduce exceptions to writing, the bill of exceptions must be prepared and signed by the judge, and filed with the clerk so as to become part of the record, within the time given. Adler, Goldman & Co. v. Conway County. 488

12. AMENDMENT: *After trial.*
After proof and hearing, a formal amendment of a *defective* statement is not necessary; otherwise, perhaps, as to the total want of an essential allegation. Gaines v. Cannon et al. 503

PRACTICE IN SUPREME COURT.

See BILL OF EXCEPTIONS, 1; CRIMINAL PRACTICE, 2.

1. *Finding of Chancellor on evidence.*
Where the Chancellor's finding of facts is sustained by a preponderance of testimony this court will affirm it. Pledger v. Garrison. 246

2. PRACTICE: *Trial before court: Incompetent evidence: Presumption.*
When, in a trial before the court, incompetent evidence is given by one party against the objections of the other, and the court reserves its ruling upon the objections until the final ruling upon the whole case, it must be presumed that the court, in making up its final judgment, excluded the incompetent testimony from its consideration. Tittsworth v. Spitzer et al. 310

3. *Findings of a Chancellor.*
The reason of the rule that the Supreme Court will not reverse the verdict of a jury when there is any fair evidence to sustain it, does not apply to the findings of a Chancellor when the evidence is as fully before the Supreme Court as before the Chancellor; although this court will always respect and sustain the findings of a Chancellor on facts, unless the preponderance otherwise be clear and decided. Gist v. Barrow. 521

PRESUMPTION.

CRIMINAL PRACTICE, 2.

1. *That act proceeds from obligation.*
Wherever a thing is done by one under an obligation or duty to do it, equity will presume that it is done in pursuance of the obligation or duty. Gaines v. Cannon et al. 503

PRINCIPAL AND SURETY.

See USURY, 1.

RAILROADS.

See EVIDENCE, 8, 9.

1. *Negligence: When presumed.*

When stock is killed by a railroad train, negligence is presumed against the company until excused or disproved. (For the facts constituting the excuse in this case, see the opinion.—REP.) St. Louis, Iron Mountain and Southern Railway v. Hagan. 122

2. SAME: *Stock found wounded near track: Presumption.*

The fact that stock is found near a railroad, wounded, creates no presumption that the injury was done by the railroad train, as in cases of killing or mortally wounding stock; but when it is proved that the injury was done by the train, then the same presumption of negligence arises against the company as in cases of killing. Ib.

3. DAMAGES: *Practice of the court when excessive.*

When juries give excessive damages against a railroad company for killing stock, the court should compel the plaintiff to enter a remittitur or submit to a new trial. Ib.

4. *Liability for goods deposited at depot.*

A railroad company is liable as a common carrier only when goods are delivered to, and accepted by it for immediate transportation in the usual course of business. If they are to await further orders from the shipper before carriage, it incurs, at the utmost, the liability of a warehouseman. Little Rock and Fort Smith Railway v. Hunter. 200

5. WAREHOUSEMAN: *Liability of.*

A warehouseman is not an insurer. He is bound only to ordinary and reasonable care of goods intrusted to him, and is not responsible for thefts not occasioned by his own negligence, nor for accidental fires. Ib.

6. *Liability for goods at depot.*

When goods are left with a railroad company's agent at their depot to be kept until the owner should be prepared to proceed on his journey, and to be returned on request if he should not go, then the company becomes a mere gratuitous bailee, provided the agent can bind it at all by the reception of goods under such circumstances. Ib.

7. DAMAGES: *Between railroad companies: Construction of grade at intersection.*

A railway company in building its road crossed the line of a projected railway upon a grade twelve or fourteen feet above the grade of the other. No work had been done on the projected line at or near the point of intersection, nor had the right of way been acquired from the owner, nor proceedings been taken to condemn it. *Held*, no injury to the projected road for which damages could be recovered. St. Louis, Iron Mountain and Southern Railway Co. v. Peach Orchard and Gainesville Railroad Co. 249

8. *Damages for right of way; evidence.*

Upon an inquest of damages for a right of way, the price which the owner gave for the land may be put in evidence as tending to show its value, but it is not conclusive. The owner may show in explanation, the circumstances under which he bought, the condition of the property at the time, and his improvements put upon it since his purchase. St. Louis and San Francisco Railroad v. Smith. 265

9. STREET RAILROAD: NEGLIGENCE: *Contributory—counter negligence.*

Although one injured by a collision from a street railroad car may have been guilty of negligence, yet if the driver could, by reasonable diligence, have discovered the negligence in time to have avoided the collision by using ordinary care, and failed to do so, the company would be responsible for the injury. Citizens Street Railway v. Steen. 321

10. NEGLIGENCE: WHAT IS: *Ordinary care, what is.*

The ordinary care required of a street railroad company to avoid a collision, is such watchfulness and precaution as are fairly proportioned to the danger to be avoided, judged by the standard of common prudence and experience; or such care as a reasonably prudent man, under the peculiar circumstances of the case, would exercise. Negligence is the failure to use such care and prudence. Ib.

11. STREET RAILROAD: *Rate of speed.*

A street railroad company may run its cars at any rate of speed convenient to it and not dangerous to passengers and the public along the track; and other parties have the right to drive along the street and cross and recross the track, using proper care and prudence to keep out of the way of the cars. Ib.

12. DAMAGES: *Compensatory—vindictive.*

The measure of damages for an injury from a collision of a street railroad car with a carriage is a fair pecuniary compensation for the injuries sustained by the occupant and his property; but if the injury be also willful, or wanton, or attended by such gross negligence as manifests a careless disregard of the consequences to the plaintiff, the jury may add such sum as they think proper under the circumstances, as vindictive or exemplary damages, or as punishment for the wrongful conduct of the driver. Ib.

13. *Injury from negligence of fellow workmen.*

A railroad company is not liable to an employe for an injury occasioned to him by the negligence of a fellow workman engaged in the same service. St. Louis, Iron Mountain and Southern Railway Company v. Shackelford. 417

14. *Injury to goods: Several carriers.*

An association among carriers for the transportation of through freights and a division of the receipts in prescribed proportion, does not constitute a partnership, nor render the carriers jointly liable for loss or injury occurring to goods transported. Hot Springs Railroad Company v. Trippe & Co. 465

15. COMMON CARRIER: *Breach of contract to deliver goods: Pleading: Evidence.*

WHEN in an action against a common carrier for non-delivery of goods to a consignee, it pleads, only, that it never received the goods, this is an admission of the non-delivery to the consignee, and proof of the non-delivery to the consignee is not necessary to entitle the plaintiff to a judgment. Hot Springs Railroad Company v. Hudgins. 485

16. *Damages for right of way: Excessive.*

Verdicts for damages for right of way are not set aside for excess, except when they are not supported by proof, or are so excessive as to indicate passion, prejudice, or an incorrect appreciation of the law applicable to the case. Texas and St. Louis Railway Company v. Eddy. 527

17. *Elements of damage for right of way.*

The cost of additional fencing required by the building of a railroad, and the increased danger of fire, are proper elements of damages for a right of way. Texas and St. Louis Railway Company v. Cella. 528

REDEMPTION.

See EXECUTION SALES, 1; TAX SALES, 3, 4.

REPLEVIN.

See SALES, 3, 4.

1. *For timber: Title to the land: Transfer to equity: Tax sale.*

Rogers sued Kerr in replevin for a lot of cord wood and railroad ties cut upon his land. Kerr answered, claiming the timber and land as his own; exhibited his title, alleged that Rogers claimed under an illegal tax title, and that neither party was in possession; and prayed that the cause be transferred to the equity docket, and Rogers' tax deed be canceled as a cloud upon his title, offering to pay the taxes paid by Rogers. Rogers demurred to the affirmative relief, and objected to the transfer. *Held:* That the demurrer was properly overruled and the cause transferred; and the tax sale appearing on the proof to be illegal, the tax deed was properly canceled; but Rogers was entitled to a decree for the taxes paid, and that they be made a charge upon the land. Rogers v. Kerr. 100

2. *For property obtained by fraud: Innocent purchaser protected.*
Where one voluntarily parts with his property in exchange for stolen property, he can not, upon surrendering the stolen property to the true owner. recover his own from one who has acquired it for value and without notice of the fraud. Sadler v. Lewers. 148

SALES.

1. SALE OF PERSONAL PROPERTY: *Fraudulent representations.*
Where a vendor of a mule sues for the purchase price and fails to recover on account of his false and fraudulent representations of its soundness, and the offer of the vendee in due time to return it, the mule becomes the property of the vendor. Overstreet v. Gallaher. 208

2. *Of fund in court.*
No one can sell a fund in court as a fund. He can make no delivery of it. He can sell only his interest when it may be adjusted; and all parties must contemplate that in the adjustment, the court will, before ordering it out, subject it to all claims upon it properly brought to the notice of the court in favor of any other parties, or in favor of any officer of the court rendering services concerning the subject matter. McCain v. Portis et al. 402

3. *Of dam reserving unborn foal: Replevin.*
When the dam of an unborn foal is sold reserving the foal, the foal remains the property of the vendor, and after its birth may be recovered by replevin from the purchaser of the dam, or from one purchasing her from him, although he purchases without notice of the reservation. Andrews v. Cox. 473

4. *Same: Statute of frauds: Replevin.*
A, by parol contract, sold and delivered to B the dam of an unborn foal, reserving the foal, and agreeing to furnish to B ten bushels of corn to feed the dam while suckling the colt. Afterwards, and before the birth of the foal, B sold the dam to C, giving him no notice of the reservation of the foal. After the birth of the foal, A tendered the corn to B, and demanded the foal of C, when weaned. C refused, and A brought replevin for it. *Held*, that the property in the foal remained in A—that C acquired no title to it by purchase of the dam of B though he purchased without notice of A's reservation,—that the parol reservation of the foal was not void by the statute of frauds (sec. 2957 Gantt's Digest)—that B lost all claim to the corn by the sale of the dam, and that C had no lien on the colt for its care and nurture. Ib.

5. *By vendee of property purchased on condition.*

Where the owner of personal property is induced by fraud to sell and deliver it, he may, upon discovery of the fraud, rescind the contract and recover the property from the vendee, but not from one who has purchased it from the vendee without notice of the fraud. But where the owner sells and delivers property reserving the title until the performance of some condition, no title passes until the performance of the condition, and a purchaser from the vendee, though without notice of the condition, acquires no title to the property. The difference is, in the first case the owner intentionally parts with the title—in the second he expressly retains it, and his vendee has none to sell. Ib.

SCHOOL TAX.

See TAX SALE, 3.

SEAL.

1. ACKNOWLEDGMENT OF DEEDS: *Notary's certificate: Seal, emblems, devices, want of.*

The absence from a notary's seal of the emblems and devices required by the statute does not invalidate his certificate of the acknowledgment of a deed. Sonfield v. Thompson et al. 46

SHERIFFS.

1. SHERIFFS AND CONSTABLES: *Liable for insufficient levy.*

A constable to whom a writ of attachment for $350 was delivered was instructed by the plaintiff's attorney to levy on such goods as the debtor should designate, but to get enough to pay the debt. He levied upon goods designated, of the value, as he testified, of $700 at their cost price as represented to him by the debtor's clerk. When they were afterwards sold at public auction they brought only $90, though they had not depreciated in value since the levy. *Held*, that the great disparity between the debt and the proceeds of the sale, in the absence of proof of any depreciation since the levy, was evidence of carelessness and negligence in not making a sufficient levy, and that the constable and his sureties were liable to the plaintiffs for the amount of their debt. Alexander v. The State, use, etc. 41

2. FEES: *Non-prepayment, when no defense for official neglect.*

An officer may refuse to execute civil process until his fees are paid or tendered; but if he accepts it and either expressly or tacitly assumes to execute it without demanding his fees, he must do so as promptly and faithfully as if they had been paid in advance. Ib.

3. SHERIFF AND COLLECTOR: *When bond must be filed.*

The sheriff must file his bond as collector of revenue with the county clerk *before* the first Monday in January. *On* that day is too late. The Governor may appoint a collector on that day if the bond is not filed before it. Alston v. Falconer. 114

4. USURPATION OF OFFICE: *Failure of sheriff to file collector's bond in time vacates office.*

If a collector of revenue fails to file with the county clerk his bond as collector *until* the first Monday in January, the Governor may on that day appoint a collector, who may, by an action for usurpation of office, recover the office from the other, and all fees or commissions received by him since the plaintiff's appointment and qualification. Elsey v Falconer. 117

STATUTES.

See ACKNOWLEDGMENT OF DEEDS, 2; TAX SALES, 1, 2; TIME, 1.

1. *Dividing county into judicial districts, constitutional. Ex post facto, when.*

The act of March 6, 1883, dividing Craighead County into judicial districts is constitutional, and the selection of a jury exclusively from one district to try an indictment for felony pending in that district at the time of the passage of the act, is no infringement of the defendant's constitutional right to be tried by an impartial jury of the county. Nor is the act an *ex post facto* law as to offenses committed before its passage, as it relates only to the procedure and not to the punishment. Potter v. The State. 29

STATUTE OF FRAUDS.

See SALES, 4; TRUSTS, 3.

1. *Delivery of possession.*

Delivery of possession of land to the vendee under a parol contract of purchase takes the case out of the statute of frauds. Pledger v. Garrison. 246

2. *Parol promise to pay another's debt.*

A parol promise to pay for goods previously sold to another is void; but if the promissor authorizes the goods to be charged to him at the time, or afterwards when informed of the charge ratifies it, he will be bound as for his own debt and not the debt of another. McTighe v. Herman. 285

STATUTES OF LIMITATIONS.

1. INDICTMENT: *Statute of Limitations.*

Where an indictment against a party for a felony is dismissed and a new indictment found against him for the same offense, the time of the pendency of the first indictment must be excluded in the application of the statute of limitations to the second, although in the first he was indicted as principal and in the second as accessory. Lay v. State. 105

2. *Fleeing from justice.*

It is not necessary in order to suspend the statute of limitations in a criminal prosecution, that the defendant should leave the State. It is a fleeing from justice within the meaning of the statute for him to abscond from his known place of abode and secrete himself in another county to avoid arrest and prosecution for the offense. Ib.

3. ADVERSE POSSESSION: *Permissive: Occupation by county: Presumption.*

In the absence of proof to the contrary, the use and occupation of the State's land by a county will be presumed to be by sufferance and without any intention of the county to appropriate it to itself; and mere permissive possession, however long, can never ripen into a title. Possession to be adverse must be hostile, and not subservient, to the rights of the true owner. Pulaski County v. The State. 118

4. ADVERSE POSSESSION: *Tenants in common.*

The possession of a part of tenants in common is the possession of all, and is not adverse to those not in actual possession until their rights are denied by some open, notorious and public act of those in possession amounting in law to an ouster. Brewer v. Keeler. 289

5. *Tenants in common.*

The filing of a bill for partition of the whole property between tenants in common in actual possession, ignoring the rights of a co-tenant not in possession, is such an open, public and notorious denial of his rights as amounts in law to an ouster, and sets in motion the statute of limitations against him. Ib.

6. *Staleness of claim.*

Though there be no positive statute bar to a claim, it may yet be so stale that a court of equity will give it no support. [For the facts constituting the staleness in this case see the opinion.—REP.] Ib.

7. *Judicial sales.*

The statute of limitations of five years as to judicial sales (sec. 4116 Gantt's Digest) has no application to sales under execution. They are not judicial sales. Hershy v. Latham. 305

8. *Married women: Saving clause not repealed by act of* 1873.

The act of April 28, 1873, which authorizes married women to sue alone and in their own names, does not repeal by implication the saving clause in their favor in the statute of limitations. Ib.

9. *Against vendee of married woman.*

The statute of limitations will not run against a married woman, nor against her vendee except from the date of his deed. Jones v. Freed. 357

10. *Reversionary interest.*

The statute of limitations will not run against the owner of a reversionary estate until the particular estate be determined; and so where a husband conveys in fee land of the wife in which he has curtesy, the statute will not run against the vendee of the wife until the husband's death. Ib.

11. *When suspended by bankruptcy.*

When a creditor proves his debt against a bankrupt who fails to get a discharge, the interval between the proof of the debt and the termination of the proceedings in bankruptcy, is excluded in computing the time limited for bringing suit on the debt. Hawes v. Fette. 374

12. *Against administrator for fraud: Laches.*

The statute of limitations begins to run against a creditor's bill to open an administrator's account for fraud, from the confirmation of the account by the probate court, as to parties then capable of suing; but against the estate of a party then deceased, will not begin to run until there is an administrator upon his estate; nor will laches be imputed where there is nobody capable of suing. Hanf v. Whittington, Ad., 491

TAXES.

See MUNICIPAL CORPORATIONS, 2.

1. *When defendant tax purchaser reimbursed, etc.*

A defendant in equity for land who under a *bona fide* claim of right to the land has acquired a tax title to it, or has redeemed it from a forfeiture for taxes, is entitled, in the decree against him for the land, to be reimbursed the taxes he has paid, though he asserts no title by virtue of his tax purchase or redemption, but claims to have purchased only to protect his own title which proves defective. Wright v. Graham. 140

2. *City local improvements: Act of March* 22, 1881, *constitutional.*

The act of March 22, 1881, for regulating the manner of assessing real property for local improvements in cities of the first class is constitutional, and if the city council refuse to levy a tax on the real property of an "improvement district" to complete an improvement therein, as reported by the board of improvements, it may be compelled to do so by mandamus. City of Little Rock v. Board of Improvements. 152

3. *School buildings and grounds exempt.*
The constitutional exemption of school buildings and grounds used exclusively for school purposes, from taxation, applies to private as well as public schools. Phillips County v. Sister Estelle. 536

TAX SALES.

See TAXES, 1.

1. TAXATION: *Power of the Legislature.*
The general powers for raising revenue granted to the Legislature by the Constitution must be measured by usages obtaining and well recognized at the time of its adoption, and any disposition of property for taxes that would arbitrarily cut off from the owner all possibility of benefit from the excess of value over the taxes would be an abuse of power. Bagley v. Castile. 76

2. TAX SALES: *Act of March* 16, 1879: *Purchasers under.*
The act of March 16, 1879, "to provide for the redemption of delinquent lands" is unconstitutional and void; but a purchaser of lands for taxes under said act, and his vendee, has a lien upon the land for the burden discharged, both in the purchase and for subsequent taxes. Ib.

3. *School tax illegally levied.*
The county court has no authority to levy any tax for a district school, except as voted at the annual school meeting and returned by the judges of that election; and if it does, a sale of land for taxes including such levy will be void. Rogers v. Kerr. 100

4. *Redemption: Who entitled to.*
Almost any right, either at law or in equity, perfect or inchoate, in possession or in action, or whether in the nature of a charge or incumbrance on land, amounts to such ownership as will entitle the party holding it to redeem from a sale for taxes. Sanders, Ad., v. Ellis. 215

5. *Purchase or redemption by wife in possession.*
A wife in possession with her children, of her husband's homestead (who has abandoned them and absconded) at the time it is sold for taxes, and receiving the rents and profits of it, can not acquire title to it as against him or his creditors by a purchase at a tax sale, nor by purchase of the tax certificate of another purchaser and taking the tax deed to herself. She will be held to be the agent or trustee of her husband. A stranger in the possession and use of premises can not acquire a title by such a purchase, and her obligations are no less nor her rights any greater than his. Ib.

6. TAX TITLE: *Confirmation of donation title. Effect of decree.*
Every question with respect to the assessment of land for taxes, the non-payment of taxes, or the regularity of the proceedings of the collector, is settled by a decree of confirmation of a donation title, if the court rendering the decree had jurisdiction of the petition, and the decree was not obtained by fraudulent misrepresentations or concealment of facts. Worthen v. Ratcliffe. 330

7. SAME: *Same.*
The petitioner for the confirmation of a tax title need not be in possession of the land, nor is it necessary that the land be unoccupied. The proceeding is *in rem*, and the decree is conclusive as well against the absent claimant as any who may intervene and contest the petitioner's right. Ib.

8. DONATION TITLE: *Infant donee.*
An infant donee of land forfeited for taxes is exempt from the duty of making the improvements required by the statute, but is not exempt from the duty to pay to the owner double the value of the improvements on the land at the time of the donation. Ib.

9. SAME: *The improvements, who is the owner of.*
The owner of the improvements on donated land is the person who made them, whether the owner of the land before forfeiture, or he or any other person since the forfeiture. Ib.

10. SAME: *Payment for improvements, condition subsequent.*
The condition of forfeiture of donated land, upon failure to pay to the owner of the improvements double their value in three months from the date of the deed, is a condition subsequent. The estate vests in the donee with the delivery of the deed, but subject to defeasance by non-performance of the condition; and may be defeated by the owner of the improvement donating the land as provided by the statute. Ib.

11. DONATION LAND: *Improvement on, right in; repeal of the act.*
The owner of an improvement on donated land previous to the repeal of the act of 1851, had a vested right to be paid double their value, which was not cut off by the repeal of that act. Ib.

TENANT FOR LIFE.

1. REVERSIONER: *Rights of tenant.*
Where a reversioner obtains possession of the land before the particular estate has determined he will be required to restore the possession and rents received by him to the owner of the particular estate; and, if necessary, the reversionary interest will be charged with the rents, and sold to pay them. Jones v. Freed 358

TIME.

1. *Computation of.*

When a certain number of days are required to intervene between two acts the day of one, only, of the acts is to be counted, but when a statute requires notice of at least a certain number of days before an act, this means so many full days, and the day of the notice and the act are both excluded from the computation. Jones v. The State. 93

TITLE.

See IMPROVEMENTS.

TRUSTS.

1. *Trust funds may be followed, etc.*

If a trustee invests the trust fund, or its proceeds, in other property, the *cestui ques trust* may follow the fund into the new investment so long as he can identify the purchase as made with the trust property or its proceeds, although the trustee may have taken the title in his own name or the name of any other person. Dyer et al. v. Jacoway et al. 186

2. *Fraud: Administrator investing funds in improvements on wife's land: Relief.*

If an administrator invests funds of the estate in inprovements on his wife's land with her consent and connivance, equity will hold the property by receiver or injunction against alienation, for the security of creditors, distributees or sureties of the administrator, until final settlement of his account, and then apply it to their claims if he is in default. Ib.

3. *Declaration of.*

Where one purchases land with his own money, no contemporaneous or subsequent parol declaration of trust can affect his title. There would be neither a resulting nor an implied trust. It would be within the statute of frauds, and not within the saving of section 2963 of Gantt's Digest. Gainus v. Cannon et al. 503

4. SAME: *Purchase by one with funds of another.*

Where land is purchased by a husband with funds of his wife, there is a resulting trust in her, although the deed be taken in his name; and in a contest between him, or his heirs, and her, in the absence of all claims of creditors, his declarations, then, or afterward made, are admissible, not to prove an express trust, but to prove that the funds were hers, and raise a resulting trust. Ib.

5. *Purchase of tax certificate by agent of owner of the land.*
Where one acting as agent of the owner purchases a tax certificate for land sold at tax sale, and afterward receives the tax deed in his own name, he will be held a trustee for the owner and compelled to account for net rents and profits received, and the deed will be canceled on payment of his outlay. Collins v. Rainey. 531

USURPATION OF OFFICE.

See SHERIFFS, 4.

USURY.

1. PRINCIPAL AND SURETY: *Usury, etc.*
In a suit by a surety to foreclose a mortgage given by the principal to indemnify him against the note, the principal can not plead usury in the note as a defense to the mortgage, where the surety was not privy to the usurious agreement. Turman v. Looper. 500

VENDOR AND VENDEE.

See ACTION, 2.

VENUE.

See CRIMINAL PRACTICE, 1.

1. CRIMINAL LAW: *Venue: Proof of.*
If the State fail to prove the venue in a criminal case, but it is proven by the defendant in the progress of the trial, this will be sufficient. Scott v. The State. 73

WAREHOUSEMAN.

See RAILROADS, 5.

WITNESSES.

See FEES, 1.

1. *Wife of co-defendant in same indictment.*

When several defendants are jointly indicted and put on trial together for a crime alleged to have been jointly committed, the wife of one is not a competent witness for any of them; but if the trials are separate the wife of one not on trial is a competent witness for the others unless her testimony will tend directly to the acquittal of her husband. Carr et al. v. The State. 204

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