REPORTS

OF

CASES AT LAW AND IN EQUITY

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF THE

STATE OF ARKANSAS,

CONTAINING THE CASES DECIDED AT THE NOVEMBER TERM, 1884, AND NOT REPORTED IN VOLUME 43.

By B. D. TURNER,
REPORTER.

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OFFICERS

OF THE

Supreme Court of the State of Arkansas

DURING THE PERIOD OF THIS VOLUME.

HON. STERLING R. COCKRILL.....CHIEF JUSTICE.

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

DAN. W. JONES..... .....ATTORNEY GENERAL.

LUKE E. BARBER.....CLERK.

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

CHANCELLOR:

HON. DAVID W. CARROLL.

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DURING THE PERIOD OF THIS VOLUME.

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2d Circuit.....Hon. W. F. CATE.
3d Circuit.....Hon. R. H. POWELL.
4th Circuit.....Hon. J. M. PITTMAN.
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13th Circuit.....Hon. B. F. ASKEW.

PROSECUTING ATTORNEYS

OF THE

SEVERAL JUDICIAL CIRCUITS

DURING THE PERIOD OF THIS VOLUME.

1st Circuit	GREENFIELD QUARLES.
2d Circuit	W. B. EDRINGTON.
3d Circuit	M. N. DYER.
4th Circuit	J. F. WILSON.
5th Circuit	J. G. WALLACE.
6th Circuit	ROBERT J. LEA.
7th Circuit	J. P. HENDERSON.
8th Circuit	H. M. GREEN.
9th Circuit	T. E. WEBBER.
10th Circuit	C. D. WOOD.
11th Circuit	JOHN M. ELLIOTT.
12th Circuit	C. A. LEWERS.
13th Circuit	H. P. SMEAD.

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RULES

OF THE

Supreme Court of the State of Arkansas,

ADOPTED ON THE SEVENTH DAY OF MARCH, 1885.

NOTE.—In printing the rules in Forty-Third Arkansas Reports, several mistakes occurred. They are here printed as corrected.

RULE I.

MOTIONS MUST BE WRITTEN.

All motions shall be submitted in writing, and such as are not of course shall be supported by affidavit, unless the facts are of record.

RULE II.

MOTION TO ADVANCE CAUSES.

Every motion to advance a cause shall contain a brief statement of the matter involved, with the reason of the application.

RULE III.

PETITIONS FOR RE-HEARING.

All petitions for re-hearing must be presented within fifteen judicial days from the time the decision is rendered, and must briefly and distinctly state

the grounds, and be supported by certificate of counsel; and in no case will such petition be granted when based on any fact thought to be overlooked by the court, unless reference has been clearly made to the same in the abstract of the transcript prescribed by rule IX.

RULE IV.

SUMMONS AND WARNING ORDER ON WRITS OF ERROR AND APPEALS GRANTED BY THE CLERK.

When a writ of error is issued, or an appeal granted by the clerk of this court, a summons shall be issued, commanding the appellee to appear at the trial term and defend. If the summons be returned not executed an alias may issue at any time, or when it shall appear that the appellee is a non-resident, notice shall be given by a warning order that he appear by a day to be fixed; which order shall be published weekly for at least four weeks in some newspaper published at the seat of government, the first of which publications shall be at least thirty days before the appearance day fixed as aforesaid, and an affidavit of such publication shall be filed with the clerk. The cause shall stand for hearing in the same manner as if a notice against such appellee had been returned executed.

RULE V.

MANDATES, CERTIFIED COPIES OF DECISIONS, ETC.

No transcript of any judgment, decision or opinion of this court shall be certified by the clerk, or mandate issued, within fifteen judicial days after the judgment is rendered, without the special leave of the court; and no leave will be given therefor before the expiration of fifteen judicial days from the date of the judgment or decision, unless by consent of both parties, or for good cause shown.

RULE VI.

ORAL ARGUMENTS.

Only two counsel shall be heard for each party on the argument of a cause.

Two hours on each side shall be allowed to the argument and no more, without special leave of the court granted before the argument begins. The time thus allowed may be apportioned between the counsel on the same side, at their discretion; provided, always, that a fair opening of the case shall be made by the party having the opening and closing arguments.

The appellant shall be entitled to open and conclude the argument. But

when there are cross appeals they shall be argued together as one case, and the plaintiff in the court below shall be entitled to open and conclude the argument.

RULE VII.

APPELLEE MAY FILE TRANSCRIPT AND MOVE TO AFFIRM OR DISMISS, WHEN.

In all civil cases when the appeal has been taken more than ninety days, and a supersedeas bond filed, and the appellant has not filed in the office of the clerk an authenticated copy of the record, the appellee may, at any time, file in this court a certified transcript of the judgment, order or decree appealed from, the order granting the appeal and the supersedeas bond, with his motion to dismiss the appeal or affirm the judgment; and the appeal shall be dismissed or the judgment affirmed by the court at the cost of the appellant, unless good cause be shown against it; *provided*, a notice of ten days of such intended motion be given the appellant or his attorney of record.

RULE VIII.

BRIEFS.

Each party shall prepare for the use of the court three copies of an argument or brief of the points and authorities relied on.

RULE IX.

ABSTRACTS OF THE TRANSCRIPT AND BRIEFS TO BE FILED.

In all cases except felonies, the appellant shall file with the clerk of this court, when his case is called for submission, an abstract or abridgment of the transcript setting forth the material parts of the pleadings, proceedings, facts and documents upon which he relies, together with such other statements from the record as are necessary to a full understanding of all questions presented to this court for decision. The abstract, if in writing, shall be in a legible hand, on one side only of legal cap paper, and shall contain full references to the pages of the transcript. He shall also deliver a copy of said abstract and of his brief to the attorney for the opposite party, or deposit them with the clerk of this court for his use, at least thirty days before his case is subject to be called for submission; and the attorney for the appellee shall, at least one week before the case is subject to call for submission, deliver to the attorney for the appellant, or deposit with the

clerk of this court for his use, a copy of his brief and such further abstract as he may deem necessary to a fair determination of the case, and shall on or before the calling the case for submission, file with the clerk of this court a copy of the same; and the evidence of the service of the abstracts and briefs as above required, shall be filed by each party at the time of filing said copies with the clerk.

RULE X.

FAILURE TO COMPLY WITH RULE IX BY APPELLANT.

Where no abstract and briefs have been filed by the appellant, in accordance with Rule IX, when the case is called for trial, the appellee may have the writ of error or appeal dismissed, or the judgment affirmed as of course.

RULE XI.

FAILURE TO COMPLY WITH RULE IX BY APPELLEE.

Where the appellee fails to appear and file his briefs, when the case is called for trial, the court may proceed to hear argument on the part of the appellant, and give judgment according to the right of the case, or upon his motion may continue the same.

RULE XII.

FAILURE TO COMPLY WITH RULE IX BY BOTH PARTIES.

Where a case is reached in the regular call of the docket, and there is no compliance with Rule IX by either party, the case shall be dismissed at the cost of the appellant.

RULE XIII.

BILLS OF EXCEPTIONS.

Bills of exceptions, except in cases of felony, shall be so prepared as only to present to the Supreme Court the rulings of the court below upon some matter of law; and shall contain only such statement of facts as may be necessary to explain the bearing of the rulings upon the issue or questions involved; and if the facts are undisputed, they shall be stated as facts, and not the evidence from which they are deduced; and if disputed, it shall be sufficient to state that evidence was adduced tending to prove them, instead

of setting out the evidence in detail; but if a defect of proof be the ground of ruling or exception, then the particulars in which the proof is supposed to be defective shall be briefly stated, and all the evidence offered in anywise connected with such supposed defect, shall be set out in the bill of exceptions.

In no bill of exceptions shall any patent, deed, will or other documentary evidence be inserted at length, but shall only be briefly stated, according to its import and effect, unless the nature of the question raised and decided renders it necessary that it should be inserted *in extenso;* nor shall any document be more than once inserted at large in any transcript to be sent to the Supreme Court. And it shall be the duty of the judges of the courts below to require exceptions to be prepared in accordance with this rule. Either party, however, shall have the right to have any or all of the testimony in any case, or all of such documentary proof inserted at length, it being stated at whose instance the same is so inserted, that costs may be awarded by this court as the matter so incorporated may be deemed proper or not, to have been set out in full.

RULE XIV.

TRANSCRIPT—HOW TO BE MADE OUT.

GENERAL RULE FOR ALL CASES.

All transcripts shall commence with the style of the court in which the controversy was decided, and the name of the judge presiding when the decree, judgment or order in the cause was rendered, to reverse which the appeal is prayed, or a writ of error intended to be prosecuted, and its date, as: "Pleas before A. B., judge [or special judge] of the————Circuit Court, on the———day of————, 18——;" the names of all the parties litigant, as they stood when the controversy was decided, with the nature of the suit or motion, as—

J. K., Plaintiff,
Against
L. M., Defendant. } *Action on promissory note.*

When an order of court is mentioned, the date must be distinctly stated, and not by reference to the day and year aforesaid.

Depositions offered as evidence and rejected by the court, shall not be inserted, unless by exceptions.

No paper shall be more than once copied; when it occurs a second time, let it be referred to by the page in the preceding part of the record.

When depositions are taken on interrogatories, in making up the transcript, the answer must follow immediately after the questions to which they are responsive.

When a cause has once been before this court, and a transcript is again called for to have error, which occurred after its return, corrected, the second transcript shall begin where the former ended; that is, with the judgment of this court, which should be entered of record in the Circuit Court, omitting the opinion of the Appellate Court—the appeal or supersedeas bond to be the last paper copied.

At the beginning of every transcript there must be prefixed an index or table of contents, referring to the pages of the record where the matter referred to is copied, as

Complaint.....page 1
Exhibit A, (note of J. B. to C. F.)..... " 3
Answer..... " 4
Exhibit B, (deed from A. to B.)..... " 5
Decree (or judgment)..... " 6
Appeal..... " 7

and so on to the end referring to the material points of the whole record. There should also be marginal notes on each page indicating the subject matter thereof.

Clerks may add to their fee for the transcript a reasonable charge for these items.

The fee for the transcript must in all cases be certified; also the cost in the Circuit Court, where a supersedeas bond has been filed, specifying by whom paid.

The transcript must be made out in *plain handwriting*, on legal cap paper, *written on one side only*, fastened at the top of the page, and must be transmitted to the clerk of this court without being folded and creased. When surveys form a part of the record it is preferable to send up a copy without fastening it to the transcript.

RULE XV.

SAME, CONTINUED.

IMMATERIAL MATTER SHALL BE OMITTED, WHEN.

The clerks of the several Circuit and Chancery Courts in making up transcripts of records to be transmitted to this court, *shall not*, where the defendant has appeared, set out any summons or other writ or process for appearance, or the return thereof; but in lieu thereof shall say (*e. g.*) "Summons issued January 2, 1885, served January 3, 1885," and if any pleading be amended, the clerk shall treat the last amended pleading as the only one of that order in the cause, and he must refrain from copying any pleading that is withdrawn, waived, or superseded by amendment, into the transcript, unless it be called for by the bill of exceptions, or by written in-

structions in cases in equity as hereinafter specified; and no clerk shall insert in any transcript any matter touching the organization or adjournment of the court, or the impannelling or swearing of the jury, or names of jurors; or any mention of any motion or affidavit, or order or ruling in reference thereto; or any continuance or commission to take testimony or the return thereto, or notice to take depositions, or the caption or certificate of the officer before whom taken, or any other merely incidental matter, unless the same be specially called for by the bill of exceptions; or, in cases in equity, by written instructions to the clerk from either party; such instructions shall be filed by the clerk and copied in the transcript.

RULE XVI.

TRANSCRIPTS IN CIVIL CASES AT LAW.

In civil cases at law, after the caption as in Rule XIV, copy the complaint, exhibit, if any, then the statement as to the summons as in Rule XV, then the answer, exhibit, if any, then the orders and papers referred to therein, in immediate succession up to and including the final judgment—omitting such matters as are proscribed by Rule XV, then the record entry of filing motions for new trial and in arrest of judgment and the order of court thereon, the prayer and grant of appeal, the filing of the bill of exceptions, the bill of exceptions with the papers therein referred to, the supersedeas bond, if any, then the certificate duly signed and sealed.

RULE XVII.

TRANSCRIPTS IN CHANCERY CASES.

In chancery causes, after the statement as to the court, judge and parties, the complaint should be copied, unless an order of the court properly precedes it, then the exhibits referred to, then the statement as to summons as in Rule XV, then the order of the court previous to the filing of the answer, then the answer and the exhibits referred to therein.

In all such cases the whole of the evidence shall be embodied in the transcript unless the parties shall agree upon an abbreviated statement thereof.

The depositions will be introduced by the clerk in this manner:

"Depositions read on the part of the plaintiff.

"Depositions of A. B. taken for plaintiff at———, on the——day of———, 188—. (Here copy the deposition, observing the directions in Rules XIV and XV.)

"Depositions read for defendant.

"Depositions of C. D. taken for defendant at——, on the——day of ———, 18—. (Here copy the deposition.)

"Decree. Appeal and supersedeas bond if any. Opinion of the court."

RULE XVIII.

TRANSCRIPTS IN CRIMINAL CASES.

On appeal in criminal causes, after the caption as in Rule XIV, the transcript shall begin with the return of the indictment into court, unless a motion shall have been made to set aside the indictment, in which case the proceedings impannelling the grand jury shall also be copied in the transcript. Then follow the indictment, the pleadings by the defendant and subsequent proceedings as in civil causes and in accordance with the statute. *Provided*, That so much of Rule XV as relates to the impannelling and swearing of the jury shall not be applicable to felony cases.

RULE XIX.

COSTS TO BE PAID BEFORE MANDATE ISSUED.

In all cases reversed or affirmed by this court, the clerk is not required to issue the mandate but may retain the same until all his costs in the case are paid, except when it is required on the part of the State.

RULE XX.

PRACTICE, WHEN NO SPECIFIC RULE.

In cases where no provision is made by statute, or by these rules, proceedings in this court shall be in accordance with the practice heretofore existing.

RULE XXI.

WHEN RULES TO TAKE EFFECT.

These rules shall take effect on the first day of the next term—25th May, 1885. And thereupon all formal rules of practice in this court, heretofore adopted, shall cease to be in force. But rules of practice established in the decisions of the court, not inconsistent with these rules, shall remain in force as heretofore.

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF ARKANSAS,

AT THE

NOVEMBER TERM, 1884.

[Continued from Volume 43.]

ARKANSAS MIDLAND R. R. CO. v. BERRY, GOVERNOR, ET AL.

1. TAXATION: *Exemption from, lost by transfer, etc.*
   Exemption from taxation granted to a railroad corporation is a personal privilege, incapable of transfer, and does not pass to the purchaser of the road under a mortgage.

2. SAME: *Exemption from, to railroad, lost by consolidation.*
   The exemption from taxation granted by charter to the Arkansas Midland Railroad Company, was lost by the subsequent consolidation of that company with the Little Rock and Helena Railroad Company, and forming the Central Railroad Company.

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

Tappan & Hornor for appellant.

Oliver v. Memphis & Little Rock Railroad Company, 30 Ark., 128, fully settles the right of the plaintiff to the exemption claimed under section 2, act of January 20, 1855, unless it be shown to have been forfeited by a foreclosure sale. If the allegations of the first paragraph of the answer be true, the immunity from taxation is lost, as held in *Memphis & Little Rock Railroad Company v. Berry, 41 Ark., 436*, affirmed on error by United States Supreme Court. This then is purely a question of fact, to be determined from the testimony, and the *burden of proof* is on the appellees.

Review the evidence, and contend that the appellees have failed to prove by competent evidence that the Midland ever became the Central Railway Company, or ever executed the mortgage to the Union Trust Company, or that the rights, franchises, etc., of the Midland were ever sold under the foreclosure proceedings, or that it ever consolidated with the Little Rock and Helena Railroad Company, and became the Central, thereby losing its immunity from taxation.

James P. Clark for appellees.

If the matters alleged in the first paragraph of the answer are true, appellant lost its immunity from taxation. *Morgan v. Louisiana, 93 U. S., 221; R. Co. v. Palmes, 109 U. S., 244; M. & L. R. R. Co. v. Berry, 41 Ark.*

Reviews the testimony and claims that it shows, beyond controversy, that the Midland adopted the name of Central, and as such executed the mortgage, which was foreclosed, and the road sold, whereby the immunity from taxation was lost.

SMITH, J. The appellant filed a bill in the Phillips Circuit Court, alleging an incorporation under an act of the

General Assembly, approved January 20, 1855, and claimed, under section 2 of said act, to be exempt from taxation until from its legitimate profits a dividend of ten per cent. on the amount of its capital stock was earned; that no such dividend, nor any profits which could properly be so applied, had been earned; that its property was assessed for taxation, and the proper officers were demanding said taxes, and would proceed in a summary way to collect the same, if not restrained. Pending a hearing, a restraining order was asked for, with a prayer that the same be made perpetual after a final hearing of the cause. An injunction was granted, and a bond executed by appellant.

In the first paragraph of the answer it was admitted to be true that by an act of the General Assembly, approved January 20, 1855, the Arkansas Midland Railroad Company was chartered, and that an organization under said charter had been effected, and that by section 2 of said act the property and capital stock of said railroad company was to be exempt from taxation until its legitimate profits would enable it to pay a dividend of ten per cent. on the capital stock thereof. But it was alleged that by the action of the board of directors on August 31, 1870, and of the stockholders on September 21, 1870, the name of the said Arkansas Midland Railroad Company was changed to that of the Arkansas Central Railway Company, and that thenceforth, under its adopted name, the said Arkansas Midland Railroad Company proceeded to carry out the purposes contemplated by its charter; that under said adopted name it applied for and collected large subscriptions made to its capital stock, under its original and true name; applied to the State for aid under the act supposed to authorize the same to be granted, and actually constructed the line of railroad now sought to be relieved from the taxes levied thereon; that by section 10 of said act, approved January 20, 1855,

the said Arkansas Midland Railroad Company was empowered, through its president and directory, to borrow money for certain purposes, on the credit of said corporation, and to secure any bonds issued for sums thus borrowed, a conveyance by mortgage or trust deed of "their" corporate franchises and property, was authorized; that on the first day of July, 1871, the power to mortgage, as aforesaid, was exercised by said Arkansas Midland Railroad Company under its said adopted name; that on the eighteenth day of May, 1873, the power to incumber by mortgage was further exercised, in a manner and for a purpose fully set forth in the complaint; that said railroad company made default in the performance of the conditions of said conveyances; that foreclosure proceedings followed, and a sale of the property and franchises of said company was made thereunder; that the present owners of said property and franchises are holders under the purchasers at said sale; that the immunity from taxation was not acquired by virtue of the purchase at the foreclosure sale, and the same became extinguished thereby, and it was submitted that the assessment and levy were correct, and the complaint should be dismissed.

The second paragraph of the answer alleged a consolidation of the Arkansas Midland Railroad Company with the Little Rock and Helena Railroad Company in September, 1870.

The Circuit Court found the facts to be as follows: "That prior to 1870 there was effected a lawful organization under the charter of the Arkansas Midland Railroad Company granted by an act of the General Assembly of the State of Arkansas, approved January 20, 1855; that on the thirty-first day of August, 1870, the board of directors of said Arkansas Midland Railroad Company adopted a resolution declaring said Arkansas Midland Railroad Company to be

thereby consolidated with the Helena and Little Rock Railroad Company, and that said consolidated company be thereafter known as the Arkansas Central Railway Company; that this action of the directory was, on the twenty-first day of September, 1870, reported to a meeting of the stockholders of said Arkansas Midland Railroad Company, and the same was, to the extent of changing the name of said company to that of the Arkansas Central Railway Company, ratified and confirmed; that thereafter said Arkansas Midland Railroad Company carried on its business and was known as the Arkansas Central Railway Company; that under said name it applied for and received bonds in payment of subscription to the capital stock of the Arkansas Midland Railroad Company by the city of Helena, Phillips and Monroe counties, and aid from the State of Arkansas; that on the thirteenth day of April, 1871, its board of directors authorized the execution of a conveyance, by mortgage or trust deed, of its property and franchises to secure an issue of bonds to be made in furtherance of the construction of its line of railroad; that on July 3, 1871, the stipulations to be incorporated in the mortgage or trust deed were modified by the board of directors, and in accordance therewith on said third day of July, 1871, there was executed and delivered by said Arkansas Central Railway Company a mortgage or trust deed whereby was conveyed to the Union Trust Company, of New York, as trustee, all of the property and franchises of said railway company to secure said issue of bonds amounting to $1,200,000; that on April, 1873, another mortgage or trust deed was, by said Arkansas Central Railway Company, executed to the same trustee to secure an issue of bonds amounting to $480,000, alleged to be made in substitution of the same amount of the issue under the former mortgage; that default of the pay-

ment of interest on the bonds aforesaid having taken place in 1877, there was instituted in the United States District Court for the Eastern District of Arkansas, sitting at Helena with Circuit Court powers, a suit to foreclose the lien of said trust deeds; that a decree of foreclosure was in due course entered, and a sale in pursuance thereof made by the Master of said court; that at said sale S. H. Hornor was the purchaser for the sum of forty thousand dollars, and by said purchase became the owner of all the property and franchises of the Arkansas Midland Railroad Company doing business and operating under the name of the Arkansas Central Railway Company; that said sale was confirmed by the court under whose decree it was made on August 9, 1877; that the plaintiff is the owner of the franchises and property of the Arkansas Midland Railroad Company under the purchase of said Hornor, at the foreclosure sale aforesaid."

1. TAXATION: Exemption to railroad lost by transfer.

The bill was accordingly dismissed, and the correctness of that decree depends rather upon questions of fact than upon controverted propositions of law. If the old Midland Company, which owed its existence to a special charter, is in substance and legal contemplation the same corporation which executed the deed of trust to the Union Trust Company, and that deed has been foreclosed and the plaintiff occupies the position of a purchaser at the foreclosure sale, then the immunity from taxation is lost, upon the principle that it was a mere personal privilege and incapable of transfer. (*M. & L. R. R. Co. v. Berry, 41 Ark., 436*, affirmed on error, *112 U. S., 609; Morgan v. Louisiana, 93 U. S., 221.*)

2. SAME: Exemption lost by consolidation.

If, again, the Midland Company, to which the exemption was granted, subsequently became consolidated with another company, thus forming a new corporation, then the Midland Company is dead, and the exemption is

also extinguished. *St. L., I. M. & S. Ry. Co. v. Berry, 41 Ark., 509.*

On the twentieth day of January, 1855, the Legislature chartered the Arkansas Midland Railroad Company, for the purpose of constructing, operating and maintaining a railroad from the town of Helena to the city of Little Rock. The second section of this charter enacts that the capital stock of the company, together with its rolling stock, fixtures and other property, both real and personal, shall be exempt from taxation until the company, from its legitimate profits, shall pay a dividend of ten per cent. on its capital stock. An organization was effected under this charter, but nothing practically had been done towards the building of the road prior to the year 1870. Meantime a rival corporation, the Little Rock and Helena Railroad Company, had been formed, under the railroad incorporation act of July 23, 1868, having the same termini and the same general direction. At a meeting of the directors of the Midland Company, held August 31, 1870, it was resolved to consolidate with the Little Rock and Helena Company, and that the new company should be known as the Arkansas Central Railway Company. The action of the directors, in changing the name of the corporation, was ratified and confirmed at a meeting of the stockholders on the twenty-first day of September, 1870. Similar action was taken on the twentieth day of January, 1871, by the Little Rock and Helena Company, and its president was authorized to convey to the Arkansas Central all its rights, etc., and thereafter its existence as a separate company was to cease and determine. After these steps had been taken subscriptions to the capital stock of the Midland were collected by the Arkansas Central. On the third day of July, 1871, the Arkansas Central conveyed all of its property, and its chartered rights, privileges

and franchises, to the Union Trust Company, of New York, in trust, to secure a large issue of bonds. This deed of trust was foreclosed in 1877, by decree of the Federal Court; the road, with its rolling stock, fixtures and appurtenances, was sold to S. H. Hornor for $40,000; and the sale and conveyance by the Master in Chancery were approved. And the present plaintiff purchased the same property from S. H. Hornor.

Now, it is apparent that the plaintiff must take one of the two horns of the dilemma, on either of which it is impaled. If the proceedings of the directors and stockholders of the old Midland Company amounted merely to a change of name to that of the Arkansas Central, its corporate identity was not lost, and it was the company which, under an adopted name, executed the mortgage which was afterwards foreclosed. And although it may have been exempt from taxation until a certain condition of its circumstances existed, yet plainly, such an exemption would not pass to a purchaser of its property.

The same result would follow if there was a consolidation of the two companies. Both would then pass out of existence, and the new company would be liable to pay taxes, since the Constitution of 1868, then in force, subjects the property of all corporations to taxation the same as the property of individuals. *Article 5, section 48.*

Lewis v. Clarendon, 5 Dillon, 329, was an action on interest coupons cut from negotiable bonds issued by the town to the Arkansas Central Railway Company, in payment of a stock subscription. A recovery was resisted upon the ground of want of authority in the town to subscribe. There was no statute conferring such power, unless it was in the charter of the Midland. The testimony was the same, substantially, as in this record, and it was determined that the Midland and the Little Rock &

Helena Companies had been legally consolidated under the name of the Arkansas Central.

If S. H. Hornor had remained the owner of this road, it would never have been supposed that the property in his hands was free from taxation. It is preposterous to conclude that by conveying it to a corporation bearing the same name as that to which a special charter was once granted, he can revive an extinguished privilege. There is no magical potency in a name; none, at least, in a court of equity, which regards the substance of things and not mere shadows.

Affirmed.

TURNER V. TURNER ET AL.

1. PRACTICE IN CHANCERY: *Allowing interest in trust settlements.*
It is within the discretion of the Chancellor to allow or refuse interest to a trustee on money advanced for the *cestui que trust*, according to the particular facts of each case.

2. PRACTICE IN SUPREME COURT: *Appeal necessary to correct errors.*
The appellee cannot have errors against him corrected in the Supreme Court without a cross-appeal either from the Circuit or Supreme Court.

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

John C. Palmer for appellant.

Interest should have been allowed appellant on his advances. When one party pays money the benefit of which is claimed by another party, interest should be allowed to the party who pays the money. *2 Story on Contracts, section 1025.*

Thweatt & Quarles for appellees.

This case is similar in several respects to *Sutton v. Myrick, 39 Ark.* A trustee cannot improve his *cestui que trust* out of his land.

Contends that the Master's report fails to charge appellant with sufficient rents; that the rental was placed too low; that appellant should have been charged with $480 difference in value of the mules and wagon and the debt assumed, etc.

DUVAL, Special Judge. The appellees, as the widow and heirs at law of N. S. Turner, filed a complaint in equity against the appellant to have a deed to him set aside as fraudulent as to them, or that he be declared to hold the title in trust for them, for an account of rents and profits and for partition.

It is not necessary for the disposition of the case here to enter into a detail of the pleadings, as there was a reference to a Master, and the controversy is upon the exceptions to his report.

Counsel, in their brief, say "the only question presented by the appellant's exceptions to the report of the Master is as to the allowance of interest in his favor on money paid out by him for the benefit of appellees and their ancestor." The Master refused to allow him interest, and the court below overruled the exception and confirmed the action of the Master.

The court below found, upon the hearing, "that the said defendant, B. Y. Turner, and the said N. S. Turner were the devisees and executors of Edmond Turner deceased; that as such they came into the possession of the west fractional half of section one, the northeast fractional quarter of section two, and the north half and southeast quarter of the southeast quarter of section two,

in township two, south, range two, east. That they afterwards made an agreement with B. F. Wallace and Palmer & Sanders by which said B. F. Wallace became entitled to one-fourth and Palmer & Sanders one-fourth thereof, making them tenants in common of one undivided fourth each; that afterwards said B. Y. Turner purchased the interest of B. F. Wallace for the sum of one thousand dollars, and of Palmer & Sanders for twelve hundred dollars; that the same was at various times occupied by N. S. Turner, Sr., and B. Y. Turner; that after the death of N. S. Turner the premises were principally occupied by B. Y. Turner, who placed valuable and lasting improvements thereon; that the said N. S. Turner departed this life leaving him surviving the plaintiffs, his widow and heirs at law, and that said B. Y. Turner, on the purchase of the interests of said B. F. Wallace and said Palmer & Sanders, was the trustee of said N. S. Turner's heirs, as to the half thereof." And upon the facts so found the court decreed to the plaintiffs one undivided half of said land, subject to a lien in favor of the defendant for the purchase money and other *accounts* found against them by the Master, and that partition be made, and refused to allow compensation to defendant for improvements made by him, but that the land upon which he had made improvements should be assigned to him by the commissioners appointed (to make partition) as far as practicable. The court also declared the sum of twenty-three hundred and eighteen 13-100 dollars found by the Master in favor of the appellant, B. Y. Turner, to be a lien upon the land, to be set apart to the appellees.

We have set out the findings of the court as the easiest means of presenting such of the facts as are necessary to be referred to in deciding the case.

1. PRACTICE IN CHANCERY: Allowing interest in trust settlements.

The only error complained of by the appellant was the refusal of the court to allow him interest upon advances made by him for the benefit of the appellees. It is clearly within the discretion of the Chancellor to allow or refuse interest in cases like this, where an account is taken between *trustee* and *cestui que trust.* The courts of chancery in such cases are governed by the facts in each case.

We are not prepared to hold that the court below erred in the exercise of that discretion in this case, in refusing to allow interest to the appellant upon advances made by him under the circumstances.

This is the only error assigned by the appellant, and upon a most careful examination of the record we are unable to find any error against him.

2. Appeal necessary to correct errors.

The appellees also filed exceptions to the Master's report, which were overruled by the court below. Their counsel insist here that their exceptions to the Master's report should have been sustained. We have looked through the evidence carefully, and examined the account stated by the Master. The final statement of the Master, which was adopted by the court below, is incorrect as to the credits of the appellees, which are stated in the aggregate to be $841, which, deducted from the debits, $3.159.13, left a balance due defendant of $2,318.13, the amount which the court below declared to be a lien on the plaintiff's part of the land.

The credits to which the appellees were entitled according to our finding amounted to $1,213.75, without allowing them two hundred and eighty dollars for the difference in the proven value of mules and the debt for which the defendant appropriated them.

Among the items of the account allowed to the defendant were some not connected with the purchase, or improvement of the land or taxes paid thereon, but were

purely personal. It was error to declare the amount of these to be a lien upon the plaintiff's interest on the lands.

The appellees did not appeal from the decree of the court below or take a cross-appeal here.

Section 1093 Gantt's Digest provides that "no written assignment of error shall be necessary, but the judgment may be reversed or modified for any error appearing in the record to the prejudice of appellant or cross-appellant."

Section 1092 says "the appellee at any time before trial, by an entry upon the records of the Supreme Court, may pray and obtain a cross-appeal against the appellant or any co-appellee in whose favor any question is decided prejudicial to such party."

Finding no error in the record to the prejudice of the appellant, we are compelled to affirm the decree of the court below notwithstanding the existence of errors to the prejudice of the appellees. This court cannot correct errors unless brought before it in the mode prescribed by law.

PICKENS V. SPARKS.

STATUTE OF LIMITATIONS: *Replevin.*

The statute of limitations in actions of replevin is three years, and begins at the date of the defendant's possession of the property, and not at the time of the plaintiff's demand for it.

APPEAL from *Arkansas* Circuit Court.
HON. J. A. WILLIAMS, Circuit Judge.

Gibson & Holt for appellant.

Three years' adverse possession of personal property,

with or without the knowledge of the plaintiff, vests the absolute title in the defendant. *Gantt's Digest, sec. 4120; 18 Ark., 384; 21 Ib., 463; 22 Ib., 134.*

EAKIN, J. Replevin for a mare, begun on the twenty-ninth of September, 1881, by Sparks against Pickens. Judgment for plaintiff, bill of exceptions and appeal by Pickens.

The evidence showed that she had belonged to Sparks as a colt; that he had lost her on the prairie, in the year 1877, and in 1881, a short time before the commencement of the suit, had found her in possession of defendant, using and claiming her as his own. The defendant had bought the mare from a third party in July or August, 1877, and had since then held and used her as his property.

Statute of limitations three years.

The questions arise on instructions regarding the statute of limitations, which had been pleaded. Against objections of defendant the court instructed for plaintiff that the right of action in replevin accrues upon the refusal of the defendant to surrender the property on demand, or when the defendant, *with the knowledge of the plaintiff*, exercises over it rights of ownership. Such an instruction might be proper in case of a bailment, understanding rights of ownership to mean such acts and claims as might be inconsistent with a recognition of the owner's title and right of possession; but it does not apply to one not in privity with the owner, obtaining possession without the owner's consent or authority, and claiming the property as his own. The statute begins to run with the possession. Even in case of a bailee the knowledge by the owner of such adverse holding need not be actual. It may be presumed as a fact from open and notorious claim and use, evidenced by acts utterly inconsistent with the owner's

claim. (See, among many other cases in our Reports, *Spencer v. McDonald et al., 22 Ark., 466.*) In such cases no demand is necessary to a suit. The instruction was erroneous. Proper instructions were also refused for defendant, but they involve the same point.

The statute of limitation was three years. More than that time, before suit, had elapsed since the purchase by defendant.

Reverse and remand for a new trial.

STALCUP V. GREENWOOD DISTRICT OF SEBASTIAN COUNTY.

44 31
57 215
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e73 603

COUNTY: *Liability for cost in misdemeanors.*

A county is not liable for the cost in a misdemeanor case, except when the defendant is acquitted and there is no judgment against the prosecutor for the cost. But a dismissal by *nolle prosequi* is not an acquittal.

APPEAL from *Sebastian* Circuit Court—Greenwood District.

Hon. R. B. RUTHERFORD, Circuit Judge.

Clendenning & Sandels for appellant.

A *nolle prosequi* is not an acquittal in the sense that a future prosecution is barred by it; but as between the State and the individual indicted it is an acquittal. So far as that indictment is concerned, the defendant goes without day.

B. J. H. Gaines, County Judge, *contra.*

The county is liable *only* where there is an *acquittal.* *Bradley County v. Bond, 37 Ark., 226.*

A *nolle prosequi* is not an acquittal. *State v. Branum, 23 Ark., 540; Taylor et al. v. The State, 39 Ark., 291.*

SMITH, J. The clerk of the Circuit Court presented to the County Court his account of official services rendered by him in certain criminal cases. His claim was rejected there and also by the Circuit Court, to which he appealed. In the last named court the cause was tried upon the following agreed statement of facts:

That the services charged for were actually performed, and the amounts charged for such services are the legal fees in cases where the county is liable, and that the account herein is properly verified, and that the cases in which the services were rendered were cases of misdemeanors pending in the Circuit Court on indictments, and that all of said cases were dismissed in the Circuit Court upon *nolle prosequi.*

The court declared the law arising upon these facts to be:

That the county is liable for costs in misdemeanor cases pending on indictments *only* in cases of *acquittal;* and that the dismissal of such cases *by nolle prosequi* is not *an acquittal*, and the county is therefore not liable for costs in such cases; and refused to give the declarations of law asked for by the plaintiff, which declarations are in words and figures following, to wit:

"That the dismissal of a misdemeanor by *nol. pros.* pending on indictment is in the sense and meaning of the statute as between the State and defendant such an acquittal as would render the county liable for costs in such cases."

The liability of counties for costs in criminal prosecutions rests alone upon statute. And the statutory provisions bearing upon the subject are these:

Mansfield's Digest, section 2343: "In all criminal or penal cases, if the defendant shall be acquitted, except in cases where the prosecutor shall be adjudged to pay the

costs, or in cases of felony, if convicted, shall not have property to pay the costs, the same shall be paid by the county."

Section 1414: "The County Court is hereby prohibited from auditing and allowing to any officer any fee or allowance not specifically allowed such officer by law, and in no case shall constructive fees be allowed to or paid officers by any county of this State."

Liability of county for cost in misdemeanors.

It will thus be seen that in misdemeanors there is only one contingency upon which the county is responsible, viz., where the defendant is acquitted and there is no judgment against the prosecutor. *County of Ouachita v. Sanders, 10 Ark., 467; Bradley County v. Bond, 37 Ib., 226.*

Now, an election not to prosecute is not an acquittal in any sense, nor equivalent thereto, even as affecting the matter of costs. *State v. Branum, 23 Ark., 540; Taylor v. The State, 39 Ib., 291.*

Officers are frequently called upon to render services for which no specific compensation has been provided by law. This is especially true of services rendered to the State or a county. It is an incident of the office. *Qui sentit commodum, sentire debet et onus.* If there is hardship in this it is for the the Legislature to remedy. The courts can only administer the law as it is written. Compare *Crittenden County v. Crump, 25 Ark., 235; Cole v. White County, 32 Ib., 45.*

Affirmed.

HALL v. SANNONER.

1. PARTNERS: *Their agreements for management of their business.*
Partners may make any agreements they see proper for the management of their joint affairs; but the provisions of such agreements are liable, at least in a court of equity, to be controlled or qualified, or to be held altogether waived, when the assent of all the partners may be fairly inferred from their acts and declarations in the conduct of the firm affairs.

2. SAME: *Liability to each other for mistakes.*
One partner is not liable to another for an honest mistake of judgment as to what will be most beneficial to the common interest.

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

Ratcliffe & Fletcher for appellant.

The August contract is plain and unambiguous; there is no room for construction; it means just what it says; no latitude or discretion is given to either party in the matter of making new accounts or giving credit, and if either partner sold or gave credit without the knowledge and consent of the other, he did so at his own peril, whether he thought or had reason to believe the customers were solvent and prompt paying or not.

Blackwood & Williams for appellee.

A partner is not liable to his copartner for a loss caused by an honest mistake of judgment, unless it amounts to *gross* negligence or ignorance. *Parsons on Part., section 224; 13 Ark., 621;* or breach of good faith amounting to *fraud. 2 Murp. (N. C.), 127; 7 Paige, 494.*

It would be inequitable to charge appellee personally, and hold him to strict account according to the letter of

the agreement. He should only be held liable in case of negligence on his part in giving credit to an insolvent and non-paying customer. Hall had access to the books, looked over the balance sheets, and must have known and acquiesced in the mode of conducting the business, and because appellee may have made a mistake of judgment in crediting parties who had hitherto paid, it is not just that he should bear the burden, while appellant participates in all the profits.

COCKRILL, C. J. Sannoner and Hall were partners in a general wholesale and retail grocery business. In August, 1880, they entered into arrangements looking to a dissolution of the copartnership on the first of the following January. In the meantime the business was to continue as before, except that a limit was placed on the mode of giving credit to customers; and it was arranged that Sannoner should buy Hall's interest in the firm in January. When the time for dissolution came, the parties disagreed about the terms of settlement, and Sannoner brought an equitable action against Hall to settle their rights as to the distribution of the notes and accounts belonging to the firm, to wind up the affairs of the concern and to effect a dissolution. Hall answered, and also set up, by way of counter-claim, that a large part of the notes and accounts due the firm was for goods sold by Sannoner to insolvent purchasers in violation of the August agreement, and prayed that the loss as to these be charged to Sannoner in the settlement. A Master was appointed to take testimony and state the account. On consideration of the exceptions to his report the Chancellor charged Sannoner individually with some of the accounts, and refused to charge him with others. Hall was dissatisfied and appealed.

The clause in the agreement under which it is alleged Sannoner is chargeable in the settlement with all unpaid accounts made after the month of August, is as follows: "There are to be no new accounts opened or goods sold on credit to any customers after this date, except to well known prompt paying solvent parties, and not to them except on short time, and with the knowledge and consent of both parties" to the agreement.

1. PARTNERS: Their agreements

It cannot be doubted that the law permits partners to enter into any agreement between themselves for the management of their joint affairs that they may deem proper. The same rules of construction apply to agreements between them as in ordinary cases, and when the intention is ascertained, effect will be given it in equity as at law. But the provisions of such agreements are liable, in a court of equity at least, to be controlled or qualified, or to be held altogether waived, when the assent of all the partners may be fairly inferred from the acts and declarations of the partners in the conduct of the firm affairs. *Haller v. Willamowicz, 23 Ark., 566; Story on Part., secs. 190–2.*

Parties may make constant variations in the terms of their agreement, which may be evidenced by conduct as well as writing. *England v. Cushing, 8 Beav., 129.*

In *Const v. Harris, Turner & Russell's Chancery Rep., 523,* Lord Eldon said: "In ordinary partnerships nothing is more clear than this, that although partners enter into a written agreement stating the terms on which the joint concern is to be carried on, yet if there be a long course of dealing, or a course of dealing not long, but still so long as to demonstrate that they have all agreed to change the terms of the written agreement, they may be held to have changed those agreements by conduct. For instance, if in a common partnership the parties agree that no one of them shall draw or accept a bill of exchange in his own

name without the concurrence of all the others, yet if they afterwards slide into a habit of permitting one of them to draw or accept bills without the concurrence of the others, this court will hold that they have varied the terms of the original agreement in that respect."

So in this case, if it has been shown that the partners, by mutual consent, continued the operation of their business after the adoption of the August agreement the same as before, they must be taken to have altered that agreement, and it cannot at the last be revived to give either party an advantage in the final settlement.

The partnership was launched May 7, and from that date until August 31, the date of the agreement above mentioned, the sales were, cash $13,178.48, credit $30,250.56. From August 31 to January 1, when the business of the firm closed, the sales were, cash $22,907.85, credit $28,781.12. The firm was dissolved by mutual consent March 2, following, and there were then $4,439.83 in notes and accounts outstanding, of which the sum of $1,512.08 was contracted after August 31, on which about the sum of $400 was afterwards paid.

Both partners devoted their personal attention to the business of the firm, though Sannoner appears to have devoted more time to the details of business in the house, while Hall did the purchasing for the firm, looked after certain cotton interest and from time to time attended to the correspondence. There was no agreement restraining sales on credit prior to August 31, and the duty of determining who should be credited and who not in the main devolved on Sannoner, aided at times by one of the salesmen who had a more general acquaintance than the others. After August 31 the credit sales were not so great as before, but a very considerable credit business was done, and apparently in the same manner as before. Hall says he does

not recollect that he was ever consulted about any of these sales, and claims to have been in the main ignorant that the business was being so conducted. He was, however, in the house daily, except during an absence of some three weeks. He had constant access to the books. Monthly balances were made out, and these showed, among other things, the amount of credit given and to whom given. Hall admits that he was in the habit of examining these balance sheets, though not for the purpose of ascertaining about credits, but only to see the totals, etc. When Hall was absent in October he wrote to Sannoner: "Hold down the credit buyers. Don't sell on time to any but first-class parties." He says he had previously told Sannoner that he had nothing to add to the agreement—that he did not want his money out in the hands of *irresponsible* parties on first of January. Sannoner says that Hall was in the habit of examining the ledger balances, which showed the names of the parties credited; that he made no protest about the credit sales to him, but always told him, when applied to about crediting any individual, that if he knew the parties were good to credit them. The last of February the parties disagreed about other matters in their renewed attempt at a settlement, and then, for the first time, Hall seems to have claimed a violation of the agreement not to sell on credit without his consent. It was too late after his conduct, and after having reaped all the benefit to be derived from the sales on credit, to claim that no sale on credit was binding on him. His declarations, both oral and written, were sufficient warrant to Sannoner, for the time at least, to believe that he waived the August agreement to the extent of getting his consent to the sales; and after standing by blindly and refusing to see what his duty prompted him to know, he can not be heard to say he did not know. It was his own fault that

he did not know all about the transactions as they occurred, and we must presume that he knew and acquiesced.

We do not think the testimony discloses fraud or wanton misconduct on the part of Sannoner in making sales on credit. He seems to have acted throughout with reasonable discretion, and the loss entailed upon the firm is not greater than might at any time be anticipated. One partner is never held answerable to another for an honest mistake of judgment as to what will be most beneficial to the common interest. *Caldwell v. Leiber, 7 Paige, 483; Story on Part., sec. 169.*

It must be presumed when Sannoner was permitted to sell on credit, that a reasonable discretion was intended to be given him, and he is not answerable for losses by insolvency of customers unless he abused his trust. *Roberts v. Totten, 13 Ark., 609.*

The decree is as favorable to appellant as it should have been, and it is affirmed.

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SHEPHERD V. THE STATE.

1. FELONY: *Larceny of a cow.*

The act of February 12, 1883, makes the larceny of a cow a felony, without regard to its value; and by section 1631 Mansfield's Digest, one who receives a stolen cow, knowing it to be stolen, may be punished as is prescrbed for stealing the cow.

2. LARCENY: *Possession as evidence of.*

Possession of stolen property is a fact from which the possessor's complicity in the larceny may be inferred; but possession alone is not sufficient to sustain a conviction. It must appear that the property was recently stolen; the possession must be unexplained, and in some form involve an assertion of property in the possessor.

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

Sanders & Husbands for appellant.

1. There was no proof of value at all. Defendant was not indicted under the acts of 1883, page 10. *Bishop, Cr. Pro., vol. 1, secs. 442, 360, 366; 13 Ark., 66.*

2. The evidence was totally insufficient to sustain the verdict. There was no proof that Shepherd was present or participated in the theft, or knew that the cow was stolen. The *corpus delicti* was not proven. There is no proof that the cow was stolen. *Bishop Crim. Pro., vol 1, secs. 499 to 502.*

Dan. W. Jones, Attorney General, *contra.*

Facts were proved showing that the cow was of some value. (*13 Ark., 66.*) But under the act of February 12, 1883, page 10, the stealing of cattle of any kind was made a felony, without regard to value. The allegation of value in the indictment was surplusage. (*Bishop on Stat. Cr., secs. 426, 427.*) Stealing cattle being grand larceny, the defendant was properly charged with that offense, instead of with the general indefinite term "felony." *34 Ark., 277; 36 Ark., 242.*

There was some evidence to support the verdict, and this court will not reverse upon the mere weight of testimony.

COCKRILL, C. J. The indictment was in two counts. One charged appellant with the larceny of a cow, and the other with receiving the cow, knowing it to be stolen. There was a verdict of guilty, and punishment was assessed at two years in the penitentiary. The sufficiency of the evidence to sustain the verdict is questioned.

1. FELONY: Larceny of a cow: Value.

There were circumstances proved from which the inference may be drawn, that the animal alleged to have been stolen was of some value, under the rule established in *Houston v. State, 13 Ark., 66.* It was not necessary to prove more than this under either count. The act of February 12, 1883, makes the larceny of a cow a felony, without regard to value, just as the larceny of a horse, etc., was felony prior to that act. By virtue of the act of February 20, 1883, *Mansfield's Digest, sec. 1631*, amending section 1360 Gantt's Digest, one receiving a stolen cow, knowing it is stolen, may be punished as is prescribed for stealing the cow.

2. Possession as evidence of larceny.

There is no direct proof that appellant committed the larceny. He was convicted upon the presumption that the possession of the property alleged to have been stolen, raised against him. But the testimony does not show when the cow was taken from the owner's possession, nor even how long she had been missed before coming to appellant's hands.

The possession by a party of stolen goods is a fact from which his complicity in the larceny may be inferred, but this fact, standing alone, is not sufficient to sustain a conviction. It must be made to appear that the property was recently stolen; the possession must be unexplained, and in some form involve an assertion of property in the possessor. *Boykin v. State, 34 Ark., 443; Davis v. State, 50 Miss., 86; Wharton, Cr. Ev., sec. 758.*

With this defect in the proof it could not be inferred that appellant was the thief. Beyond this the record does not show that the cow was taken without the consent of the owner. It has never been held that the mere possession of property alleged to be stolen, is evidence of the caption and asportation without the owner's consent. Taking without consent is an essential ingredient of the

offense. Without this there is no stolen property and no larceny. *Bailey v. State, 52 Ind., 462; Garcia v. State, 26 Texas, 209; State v. Patterson, 78 N. C., 470.*

It would not be safe to sustain a conviction on the meagre proof presented in this record.

Reverse and remand for a new trial.

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NEWTON ET AL. V. SNYDER, ADMINISTRATRIX.

1. GIFTS CAUSA MORTIS: *Essentials.*

To establish a gift *causa mortis,* the evidence must show not only that the person *in extremis* designated with proper distinctness the thing given and the donee, but it must also show that the property was presently to pass, and that the intention was carried into effect by an actual or effective delivery.

2. SAME. *Delivery.*

Delivery to a third person for a donee, is as effective as delivery to the donee; but delivery to an agent as agent for the giver to perform the act or make delivery only after the giver's death, would amount to nothing,

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

Martin & Taylor for appellants.

The attempted disposition of his property by O. P. Snyder, was at best only testamentary, and possessed none of the elements of a gift *causa mortis.* If it was testamentary, it was of no validity. A gift *causa mortis,* to be effectual, must be consummated prior to the death of the donor, subject to be defeated by reclamation or recovery, but must be as effectual as a gift *inter vivos.* That is, must be ac-

companied by delivery and change of dominion over the property granted. *48 Md., 559; 54 Ib., 475; 116 Mass., 566; 74 Mo., 195; Schouler's Personal Prop., 164-5; 24 Pick., 261.*

McCain & Crawford for appellee.

The facts and circumstances of this case clearly show a gift *causa mortis.* The delivery to a third party for the wife, is the same as a delivery to the wife. The *fact of delivery* is clear in this case. The particular words used are immaterial; it is the intention and accompanying circumstances that must be considered. See cases cited in brief of appellant in *107 U. S., p. 604; Nolen v. Harden, 43 Ark.; 49 N. Y., 17; 38 Am. Rep., Caradine v. Caradine, and cases cited; 53 Wis., 23; Redfield on Wills, vol. 3, title, "Gifts Causa Mortis."*

COCKRILL, C. J. O. P. Snyder died intestate. His widow, the appellee, became administratrix of his estate, and filed an inventory thereof in the Probate Court. The heirs of Snyder and distributees of his estate filed exceptions to the inventory, and charged that it did not include all of the assets. The omission of the property named was admitted by the administratrix, and was claimed by her in her own right. The Probate Court sustained the exceptions, and on appeal to the Circuit Court this judgment was affirmed, excepting as to an item of $953.50 in currency, which the court found had been delivered to the appellee by her deceased husband as a gift *mortis causa.* The correctness of this finding is the controversy here. The facts are these:

At the time of Snyder's illness and death his wife was absent from home. Being informed of the near approach of death, he told his attendants that he had $1,600 in bank,

$950 under his pillow and in his coat pocket, and several hundred dollars in the hands of different persons; that he desired $200 of this to go to a niece, and $100 to an old servant, and wanted his wife to have the residue of his money. There are three witnesses to the point of his directions as to the disposition of the money. He talked with them severally and collectively about his affairs a short time before his death. To Dr. Brunson he said the money was a part of his estate, and that he expected his wife to get his estate. Brunson called Tannehill into the room, expecting him to draw a will. Snyder told Tannehill that he wanted his wife to have all his property except the money that was to go to his niece and servant; that he wanted his wife to have the money and wanted it put where it would do the most good. He told John M. Clayton where his money was, and said he wanted it to go to his wife. A paroxysm of pain prevented him from finishing his conversation with Clayton, and it was never resumed. After this the money *de quo agitur* was found and counted, and Snyder was apprised of the fact, but gave no other direction in regard to it. Brunson, who had the money in hand, turned it over to Clayton for safe keeping, as he was a friend of Snyder, and the sheriff of the county. Tannehill drew up a memorandum of Snyder's wants as to the disposition of his property, but it was never signed or attested as a will. It is not known whether Snyder knew that the money was turned over to Clayton. He gave no specific direction in regard to it. The witnesses were all of the impression, at the time, that the money would go to Mrs. Snyder. Afterwards, Clayton paid the money to Mrs. Snyder, as administratrix of the estate of her deceased husband, taking a receipt from her in her official capacity.

1. GIFTS CAUSA MORTIS: Essentials.

To establish a gift *mortis causa* the evidence must be sufficient to show, not only that the person *in extremis* designated with proper distinctness the thing to be given and the person who is to receive it, but it must establish also that the property was presently to pass, and that the intention was carried into effect by an actual or effective delivery. In this respect there is no difference between gifts *inter vivos* and *causa mortis*. *Basket v. Hassell, 107 U. S., 602; Coleman v. Parker, 114 Mass., 30.*

In the case of *Nolen v. Harden, 43 Ark., 307*, the question was as to a gift *inter vivos*, and the court held that if the gift is intended to operate *in presenti*, and is accompanied by delivery it operates at once; but if there is only an intention to give and no delivery is made, it will be inchoate and incomplete however strong the expression of intention may be. See, too, *Hynson v. Terry, 1 Ark., 83.*

2. SAME: Delivery.

The proof here shows an earnest desire on the part of the dying man that Mrs. Snyder should have the benefit of his money, and he doubtless thought that his friends, who heard his wish, would see it executed, not only as to the money then in his room, but that in the bank and elsewhere as well. His directions to them however, in this regard, were testamentary in character, and cannot be effective, because not made and proved as a will. It does not appear that he intended that the property in the fund should presently pass to his wife. Delivery to a third person for a donee is as effective as delivery to the donee, but delivery to an agent in the character of an agent for the giver, to perform the act or make the delivery only after the giver's death, would amount to nothing. (*2 Redf. Wills, chapter 12, secs. 42, 45.*) It is evident that Brunson, who gathered the money, and Clayton, who held it, were acting for Snyder, and on the testimony presented here could not

have been acting in any other capacity. They thought the testamentary disposition of the money was good, and intended to carry it out. Clayton in the end did right, however, in turning the money over to Mrs. Snyder as administratrix of the estate of Snyder, and not as legatee or donee.

Reversed and remanded for a new trial.

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GLENN v. GLENN.

1. APPEAL: *Final decree: Alimony pendente lite.*

A decree for alimony *pendente lite* is final and subject to appeal.

2. DIVORCE: *Alimony pendente lite.*

In a suit for divorce, a Chancellor has power to award alimony *pendente lite* to the wife, whether as plaintiff or defendant, out of the husband's property, upon affidavits upon her part showing his ability; and in the absence of any proof of separate property in the wife, it is but just and reasonable to compel the husband to furnish the means for her to prosecute or defend the suit, and with necessaries suitable to her station in society and his means.

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

EAKIN, J. This is an appeal in a divorce suit, by the husband, from an order allowing the wife alimony for maintenance and counsel fees, *pendente lite.* The cause below is still pending. A supersedeas bond has been filed.

Counsel upon both sides have declined to aid us with briefs, and the pressure of business upon the court is too great to justify us in patient microscopic searches after error, through the whole transcript.

1. APPEAL: Final decree.

If it be thought that the decree for alimony *pendente lite* is not final, and therefore not subject to appeal, counsel are referred to the case of *Hecht v. Hecht*, *28 Ark.*, *92*, where the point is settled affirmatively on the soundest reasoning.

2. DIVORCE: Alimony *pendente lite.*

If appellant doubts the power of a Chancellor to award alimony to the wife, whether as plaintiff or defendant, out of the husband's property, the same case may be taken as settling that also. It may be added that it is the universal and unquestioned practice of the English ecclesiastical courts to do so. (See *Cooke v. Cooke*, *2d Philimon*, *40*; *Otway v. Otway*, *Ib.*, *109*; *Brisco v. Brisco*, *2 Hag. C. R.*, *199*; *Stone v. Stone*, *3 Curtis*, *341*.) It was not proper to do so, however, except upon what was called in ecclesiastical parlance an "allegation of faculties" made in her behalf, and some showing of the husband's ability. *Butler v. Butler*, *1 Lee*, *38*.

Under our practice, affidavits in support of a motion on the wife's part, may take the place of "allegations of faculties" in showing the husband's ability; and then the matter is in the sound discretion of the Chancellor.

In the absence of any proof of separate property in a wife, it is just and reasonable to compel the husband to furnish the wife with means to defend a suit by him for a divorce. Otherwise she would be at his mercy. And for the same reason he would be secure against the best founded suit for a divorce on her part, if she were bound helpless to prosecute. He is compelled to furnish her with necessaries suitable to her station in society, and to his means. Alimony, *pendente lite*, may be a greater necessity than anything else. It may be safe to say that no well-balanced man, regardful of public opinion, would desire to put himself in the position of prosecuting or defending a suit against a wife deprived, meanwhile, of counsel, and

in danger of starving, whatever her guilt may be eventually proved to have been.

We find no abuse of discretion in the court.

Affirm.

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MARCHBANKS v. BANKS ET AL.

1. BONA FIDE PURCHASER: *Purchase pendente lite.*

To subject a purchaser to the notice of *lis pendens*, in the absence of actual notice, the purchase must be made from one who was a party to the suit at the time.

2. SAME: *Payment of part consideration: Lien for part paid.*

A purchaser, though without notice of outstanding equities, is not an innocent purchaser unless he has paid the whole consideration. Payment of part and securing the residue to be paid are not sufficient. But he has an equity to reclaim out of the property the part innocently paid.

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

Tappan & Hornor for appellee.

1. Before the Burford notes were paid by foreclosure and sale, the original suit was pending, and appellant thus had full notice of appellee's claim. To claim the benefit of a *bona fide* purchaser without notice for value, it is necessary to aver that the vendor was seized in fee and in possession, should state consideration, and deny notice previous to and down to the time of paying the money and delivery of the deed. (*29 Ark., 568; 27 Ib., 102.*) The appellant succeeded to no better rights than Burford had, by her purchase at the foreclosure sale.

2. The tax deeds were void, and gave no right except for taxes paid.

EAKIN, J. This appeal brings back a branch of the case of *Banks et al. v. Green et al.*, reported in *35 Ark., p. 84*, to which report reference is made for further explanation of the nature of the controversy.

On the remand of the cause the bill was amended, and all proper parties seem to have been brought in. It was also shown that J. C. Green, the second husband of Mrs. Yarborough (incorrectly named in the former report as P. C. Green) had left a will upon his death in 1875. He thereby devised to his second wife, Alicia N. Green, one-half of all his real estate; and the other half to his two grand children, J. D. and George A. Boykin, nominating Dr. D. H. Stayton as his executor, who qualified.

These grand children were descendants of his first wife, formerly Mrs. Yarborough. The issue of that marriage had been an only daughter, who had intermarried with one Boykin and died, leaving these children. They, it seems, have elected to claim their share of the whole property as heirs of the grandmother, in opposition to the second wife, and the vendees of the grandfather, and consequently appear as complainants.

The lands originally bought by Mrs. Yarborough *dum sola*, and to which her second husband had obtained the legal title, in his own name, by giving up the title bond, had been much divided up, having been included within the bounds of the town of Marianna. Many of the lots had been sold by Green.

All the purchasers were brought in by the amended bill, and their rights in the progress of the suit were determined. Some were conceded, or clearly shown to have been

innocent purchasers. Others effected compromises, which were confirmed by decree of court. As to the rest it was held that Mrs. Yarborough had purchased the lands as alleged, and was the equitable owner, subject to the curtesy of Green, and that the legal title was in him, his heirs and vendees with notice, clothed with a trust, after his death, in favor of the heirs of his first wife.

Amongst those lands thus held to be affected with the trust, were two lots or parts of lots claimed by Julia C. Marchbanks, formerly Freeman. She made a separate defense, and she alone appeals. All the others acquiesce. It will not be necessary to consider any part of the case not affecting her interest.

The lots she claims are numbered 16 and 17 in block "A," which constituted the family residence and grounds of said Green. In his devise of a half interest in his real estate to his widow Alicia, he had provided that upon any division to be made of the lands between her and his two grand children, the house and grounds should be assigned to her. In effect, by the will, if Green could devise the lands at all, she was to have the dwelling and so much more of land as would make her share equal to that of the two grand children. Such, at least, would be the effect if a partition in value could be made consistently with that object.

The amended bill, filed after remand of the cause, alleges that after the death of Green, the widow Alicia N. sold and conveyed said lots 16 and 17 to J. S. Burford, who had since died, and that they were then in possession of Lowenthal, one of the defendants; alleging further, that they were purchased with full notice that the complainants claimed title to the same through their ancestor, Mary M. Yarborough. This amended complaint was filed on the twenty-sixth day of October, 1880, and on the

twenty-first day of May, 1881, Mrs. Julia C. Freeman (the appellant) was by order of court made defendant. The complaint was then further amended, alleging that she was in possession of lots 16 and 17, by her tenant Elder, also made defendant. It charges that she has no title, and that if she purchased from any one, the purchase was made pending this suit, and that she is not an innocent purchaser for valuable consideration. She was duly served with notice of the complaint, and answered, saying:

That by virtue of the seizin of J. C. Green, and his devise of the property, his widow, Alicia, was the legal owner; that in 1876 she sold and conveyed the lots to Burford for $1,200, of which $200 was paid in cash, and the balance secured by note. These notes she assigned for value to Sullivan, who afterwards sold them to W. D. Freeman. After Freeman's death, his administrator, by bill in equity, obtained a foreclosure of the vendor's lien. Defendant purchased the lots at the commissioner's sale, on the twenty-eighth day of July, 1879, paid for them and obtained a deed, which was approved by the court. She states further, that Mrs. Green was in possession when she sold to Burford; that Burford made inquiry and found the title to be clear; that both he and defendant in good faith paid the purchase money recited in their deeds, without any notice of complainant's equity, or any knowledge of or reason to suspect the fraud which had been committed by Green, down to the time of paying the money and taking the deeds.

She defends, further, upon tax titles, which she exhibits, and alleges that before summons herein, the complainants did not file the affidavit of tender required by statute; also, the statute of limitations of two years.

The court, upon hearing, held that the lots were the property of complainants, and that Mrs. Marchbanks was

not an innocent purchaser for value; and further, that the deeds under which she also claimed title were void, because there had been no valid or legal assessment of the property for taxation. They were held entitled to recover possession and to costs, and a reference was made to a Master to take proof of the rents and profits for which she was chargeable, and report at the next term.

This decree, so far as it declares the lands subject to the trust is final, and therefore subject to appeal and correction here, as to all errors or omissions which may not be mere matters of account to be adjusted on the coming in of the report.

The counsel prosecuting the appeal have not favored us with any brief, or assignment of errors, intimating the points for which they contend. In pursuance of our statutory duty we have spent some time in an endeavor to find them out, by going through the somewhat voluminous transcripts brought up on the former appeal and on this one, in search of "any error appearing in the record to the prejudice of appellant." (*Gantt's Digest, sec. 1033.*) This has been the more difficult as all the interests of all the parties have been litigated together, and the orders, proceedings and proof applicable to these lots, required to be sifted out and separated.

We may fairly presume that the appellant relies upon two points:

First—That she was an innocent purchaser for value, without notice; and,

Second—The tax deeds.

That Mrs. Yarborough was the equitable owner is well established. After her death the lands remained in the hands of her husband Green, subject to a trust for her heirs, after the determination of his curtesy. The trust attached to the lands, after Green's devise to his second wife, regardless of notice.

She sold to Burford, who does not appear to have had notice, actual or constructive. He paid $200, as she alleges, and made his unnegotiable notes for the remainder, although this amount may be a clerical error. The deed exhibited from Mrs. Green to Burford acknowledges the payment of $400, and recites that he executed two notes for $400 each, bearing date the first day of January, 1877, and due on the first days of January, 1878 and 1879, respectively. Burford died leaving the notes unpaid. They passed into the hands of W. D. Freeman, who died also. The appellant, Julia C. Freeman (now Marchbanks), was his administratrix, and foreclosed as such, for the two notes of $400 each, making the heirs and administrator of Burford parties. She herself purchased in the lots, at the sale, on the twenty-eighth day of July, 1879, for the sum of seven hundred dollars, and took the deed of the commissioner in her own name. The sale was confirmed by the court, on the twenty-sixth day of October, 1880. Notice.

This suit was begun in 1877, on the 19th of October, and was not pending when Burford bought, which was on the twenty-second day of December 1876. It was pending when the foreclosure was made, and Mrs. Freeman purchased, but we fail to find that either Burford or any one representing his estate had then been made a party to this suit. To subject one to the peculiar notice of *lis pendens*, in the absence of actual notice, the purchase must have been made from one who was a party to the suit at the time. It is not enough if he be brought in afterwards. The pendency of this suit then cannot affect either the purchase by Burford or Mrs. Freeman. *Lis pendens.*

But Burford having never paid the greater part of the consideration could not, before the foreclosure sale, be considered an innocent purchaser at all; except that he would have an equity to reclaim out of the property the money

innocently paid. It is not enough that the money should have been secured to be paid. (*Hardingham v. Nichols, 3 Atk., 304; Jewett v. Palmer, 7 John. Ch., 65.*) See also *Kitteridge v. Chapman* and authorities there cited by Mr. Justice Miller, *36 Iowa, 348.*

Mrs. Freeman, as administratrix, was complainant in the foreclosure suit, and as such entitled to the proceeds of the sale. It was her duty to purchase in the property as administratrix, for the benefit of the estate, if she bought at all, and not in her own right. Bidding individually, her interests conflicted with her duty. No one, it is true, can complain of that, save creditors or distributees of the estate. But if she had bought in as creditor, it is well settled that she would only have taken just such interest as Burford had, subject to all equities against him. She could not place herself in a better attitude by buying as a stranger in violation of her own trust, even if a stranger were entitled to be considered a *bona fide* purchaser.

It follows that Mrs. Marchbanks holds in trust for the heirs of Mrs. Yarborough, with the right to repayment out of the land of all sums which Burford had paid upon it, with interest from time of payment. This is the American doctrine applicable to cases of part payment made *bona fide.* See notes to *Bassett v. Noseworthy, in Leading Cases in Equity, vol. 2, p. 79, et seq., 4th Am. ed.*

Although we deem the tax title void under which she claims, we do not deem it important to discuss that point. Evidently the purchase was made for Freeman to protect his interest in the property upon which he held the incumbrance, and to strengthen his title. The result will be the same, whether the deed be void or good. It will inure to the benefit of all interested in the property, and give only a lien for actual amounts expended.

There was no error in holding the property subject to

the trust in the hands of Mrs. Marchbanks, and that it belonged to complainants. In so far the decree will be affirmed.

But there was an error in the order of reference, in this that it did not provide for so complete an account as her equities required. There should be proof of the actual amount paid by Burford, and of the actual expenditure, by cash valuation for all taxes paid by Mrs. Marchbanks or in her behalf, to be placed to her credit against rents and profits. If the rents and profits do not absorb her credits, she might, on her application for the purpose, have a lien fixed upon the land for payment of balance, and an order upon plaintiffs to pay in the amount by a day to be fixed, or, in default, that the lands be sold for the purpose. Upon the other hand if, upon the coming in of the Master's report, it may appear that the rents and profits exceed the amount of her credits, the complainants will be entitled to a personal decree.

We think it better, also, not to affirm so much of the decree as fixes all the costs upon the appellant, not on account of any error therein, for they were in the sound discretion of the Chancellor. The defense was not litigious, and the Chancellor may, upon being better advised, be desirous himself of modifying that portion of the decree, so that, upon the final determination of the matter below, all the costs may be readjusted according to his views of right and equity, in the aspect of the case then presented.

Affirm so much of the decree as declares complainants entitled to the property and possession of said lots 16 and 17, in block A. Reverse as to the rest, and remand the cause, with directions to make an order of reference as herein directed, and to take such other and further proceedings as may be necessary, according to the principles

and practice in equity and consistent with this opinion. The whole costs of the cause below, as between the complainants and this appellant, will be in the discretion of the Chancellor.

The costs of this court to be divided.

Hon. W. W. SMITH, J., did not sit in this case.

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BENTON v. HOLLIDAY.

1. PRACTICE IN SUPREME COURT: *Appeal from default decree.*
The only question for the consideration of the Supreme Court, upon a defendant's appeal from a default decree duly rendered against him, is, whether the allegations of the complaint are sufficient to authorize the relief granted by the decree.

2. ATTORNEY'S FEE: *Agreement to pay by assignor of note for collection.*
B owed H a debt, and as collateral security for its payment, assigned to him a note and mortgage on land to secure it, executed to B by P, authorizing H in the assignment indorsed upon the note, to foreclose the mortgage against P, and to pay his debt and the solicitor's fee for foreclosing, out of the proceeds of the sale of the land. In a contention that the agreement for payment of the attorney's fee was in the nature of a penalty, and without consideration and void: *Held, aliter:* that by the assignment B made H his agent to foreclose the mortgage and collect the mortgage debt for their mutual benefit, and the duty and responsibility assumed by H were a sufficient consideration for the agreement.

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

Clark & Williams for appellant.

1. The Greens had a right to make the contract discharging the note and mortgage. They had no knowledge

that either the note or mortgage had been assigned. In such case the assignee takes subject to all equities, before the assignment and up to the time the maker had notice of the assignment. *Wade on Notice, secs. 431–3; 3 N. H., 359; 19 John., 341; 18 Ib., 493; 16 Ib., 226; 8 Me., 77;* and especially *2 John. Ch., 441, 479; 9 S. & R., 137; 3 H. L. Cas., 703; 5 Jur. N. S., 129; 36 Penn. St., 108; 2 Mass., 96; 10 Me., 244.*

2. It was an error to render a judgment against the Greens and foreclose the mortgage, on a note made by Benton to Holliday for $700.

3. The agreement in the assignment to pay attorney's fees was *nudum factum* and void. *Boozer v. Anderson, 42 Ark.* The court erred in rendering a personal judgment against Benton for $250 attorney's fees. Moreover, such fees were only to be paid as expenses out of the proceeds of sale. There was no contract for fees upon which a general judgment could be rendered.

U. M. & G. B. Rose and *F. W. Compton* for appellee.

Benton certainly had notice of the assignment of the mortgage, and the Greens have not appealed. The argument that the assignee of overdue paper takes subject to all equities, etc., has no foundation to stand upon.

In *Boozer v. Anderson, 42 Ark., 167,* this court held a stipulation in a note to pay attorney's fees for collecting it, if collected by suit, void. But this is a different proposition. In a mortgage or deed of trust, a reasonable fee for the expense of foreclosing may be contracted for, and will be enforced. (*1 Jones on Mortg., sec. 359; 2 Ib., sec. 1606.*) When Benton assigned the note and mortgage to Holliday, he, in effect, made the latter his agent for the purpose of collecting the amount due on the mortgage to pay the debt due to himself out of the proceeds, and to pay the remainder, if any, to Benton.

The appellant did not object to the decree in the court below. *Gantt's Digest, sec. 1100.*

SMITH, J. In March, 1874, John T. and Peter E. Green made to the appellant, Benton, their two several promissory notes, one for $3,300 and the other for $2,600, due in one year. And to secure payment of the same they executed two mortgages on eighty acres of land in Garland county, embracing the Mountain Valley Springs, in which mortgages the wives joined, relinquishing dower. In August, 1877, Benton made to Holliday his note for $700, due six months after date, and as collateral security transferred to Holliday the note first above mentioned, with the mortgage made to secure it. The assignment indorsed on the note authorized Holliday to institute suit for the foreclosure of the mortgage, and stipulated that all expenses and attorney's fee connected with said foreclosure should be paid out of the proceeds of sale. And the note and mortgage of the Greens were delivered to Holliday, in whose hands they remained.

After this transfer, Benton brought one or more suits, in his own name, in the Garland Circuit Court, to foreclose these mortgages. The proceedings were without the knowledge of Holliday, and he was not a party. But as soon as he found out that such proceedings were pending, he applied to be made a party. In the meantime the Greens and Benton had adjusted their differences, and had entered into an arrangement by which the mortgages were to be canceled, and the property converted into a joint stock company, the Greens to have $10,000 of the capital stock and Benton the remainder, $35,000. And the suit or suits were accordingly dismissed. Holliday's debt not being provided for in this arrangement, he, in March, 1879, filed his bill against the Greens and their wives and Ben-

ton, praying for a foreclosure of the mortgage for $3,300, which had been assigned to him as collateral security for his debt of $700. The Greens defended on the ground that they had no notice of the assignment to plaintiff, and that by the arrangement agreed upon between themselves and the mortgagee, the mortgage debt and security became extinguished. Benton was served with process, but not having appeared the bill was taken as confessed by him. And at the hearing the court rendered a decree against the Greens and Benton upon the $700 note, with the interest accrued, and for a foreclosure and sale of the mortgaged property, and also a personal judgment against Benton for $250, solicitor's fee. From this decree Benton alone has appealed. And it is argued that the granting of any relief to the plaintiff was erroneous; that the Greens, having no knowledge of the assignment of the note and mortgage to Holliday, had a perfect right to discharge the same, and that Holliday, as the holder of past-due paper for collateral security, took subject not only to all equities existing between the original parties to the paper at the date of assignment, but also subject to all that came into existence down to the time that the maker of the paper had notice of the transfer.

Whether this argument has any foundation in law or reason to stand upon, we have no occasion to decide. It is our settled practice not to disturb decrees for errors committed against parties who have submitted to them. *Dooley v. Dooley, 14 Ark., 125; Ringgold v. Stone, 20 Ib., 526; Clark v. Barnett, 24 Ib., 30.*

Of one thing we are quite sure: An assignor can never be heard to say that he has had no notice of an assignment which he has himself made. Moreover, it is hard to understand how it was, so long as Holliday had the note and mortgage in his possession, that Benton and the

Greens could make any agreement between themselves which could bind him.

1. PRACTICE IN SUPREME COURT. Appeal from default decree.

But these things are not in the case. The decree against Benton being for want of an answer, the only question for the consideration of this court on his appeal is, whether the allegations of the bill are sufficient to authorize the relief which the Circuit Court granted. *Masterson v. Howard, 18 Wall., 99.*

2. ATTORNEY'S FEE. Agreement by assignor of note to pay.

There can be no doubt of the correctness of the decree granting foreclosure. And as to the judgment against Benton for the solicitor's fee, there is no objection in principle to enforcing an agreement made by the pledgor of a chose in action to pay the expense incurred in prosecuting it to judgment. In *Boozer v. Anderson, 42 Ark., 167*, we held that a stipulation in a promissory note to pay the attorney's fee for collecting it, was in the nature of a penalty invoked by the maker upon himself in case of his own default. A doubt was also expressed whether there was any consideration for such a promise. But a different proposition is involved in the present case. When Benton assigned the note and mortgage to Holliday, he, in effect, made Holliday his agent for the purpose of collecting the amount due on the mortgage, to pay the debt due to himself out of the proceeds, and the residue, if any, to Benton. The foreclosure proceedings would be as much for the benefit of Benton as of Holliday. Thus, Holliday took upon himself a certain burden and responsibility, which was a sufficient consideration for the promise to pay the solicitor's fee that might be incurred by him. True, Benton agreed that payment might be made out of the proceeds of the sale of the mortgaged property, and the judgment is against him personally. But this agreement must refer to what should be coming to him out of those proceeds, not to any surplus that might remain for the

mortgagors after satisfaction of the mortgage debt. And as these proceeds barely sufficed, after the payment of costs of suit and expenses of sale, to discharge Holliday's debt with the interest, for which also there was a judgment against Benton, it is immaterial to Benton how the proceeds are applied. For in either case a judgment *in personam* for $250 will remain against him.

Decree affirmed.

JACKS, ADMR., ET AL. V. THE STATE, USE PHILLIPS COUNTY.

1. AGENTS: *Of county commissioner: Liability to county.*

Where the agent of a commissioner for the sale of county property delivers the commissioner's deed to the purchaser without receiving the purchase money, he thereby assumes the payment of it himself, and will be liable to the county for it.

2. TRUSTEE: *Purchaser from: Application of trust funds.*

Robinson, as Commissioner of Phillips County, sold to Moore, on a credit of three months, certain lots in Helena belonging to the county. At different times before the payment became due Robinson drew drafts on Moore, which he paid, believing that such payments would be good in satisfaction of his purchase; and in his settlement for the lots at maturity of the debt, he was credited by Robinson with these payments, and paid him the balance in cash, but Robinson never paid the money over to the county. There was no evidence of any fraud on Moore's part, or connivance at the misapplication of the money. In a suit by the county to hold Moore as a trustee and liable for misapplication of the purchase money: *Held*, that he was not bound to see that Robinsen paid the money to the county, and his payments before the money became due were not sufficient to charge him as trustee, or to make him liable to the county for the purchase money.

APPEAL from *Phillips* Circuit Court in Chancery.
Hon. G. S. SANDERS, Special Judge.

Tappan & Hornor for appellants.

All the allegations in the complaint which charge liability upon the defendants, or either of them, are positively denied under oath, and the burden is upon plaintiff. The only evidence produced to establish the liability of the defendants, rests upon the declaration of defendant Jacks. Verbal admissions ought to be received with great caution. (*1 Gr. Ev., sec. 200.*) These admissions were made under the impression that Jacks was liable on Robinson's bond for the money paid for these lots.

Review the testimony in detail, and contend that Jacks & Co. never held the money as a trust fund for the county, but that it was simply deposited for safe keeping, and credited to Robinson's account as collector, and that on settlement these amounts were paid over, leaving Robinson in debt to the firm.

As to Moore, there is nothing in the evidence to make him a trustee. He bought the lots on his own account and paid Robinson, who had the right to receive the money, and took his deed.

James P. Clarke, for appellee.

In a conflict of evidence on the question of payment of a written instrument, possession thereof by the debtor raises a presumption of payment. (*Abbott's Trial Evidence, page 809, section 19.*) The Chancellor, weighing all the evidence, found that Ellison had made the last payment, and as his finding is in accordance with the preponderance of evidence, it will not be disturbed. *42 Ark., 246 and 521.*

The evidence conclusively showed that Jacks & Co. received the purchase money for these lots, and it is a universal rule that if one takes or purchases property from a trustee, with notice of the trust, he shall be charged with the same trust in respect to the property as the trustee

from whom he took. *1 Perry on Trusts, sec. 217; 2 Ib., 814; 15 Wall., 165; 100 Mass., 382.*

2. As to John P. Moore: His conduct amounted to open and flagrant encouragement of a breach of duty on the part of Robinson, and operated to charge him with the obligation of doing what Robinson should have done. He permitted Robinson to become indebted to him with the express intention of obtaining satisfaction out of what he was owing Robinson as a trustee. A constructive trust arises whenever one party has obtained money which does not equitably belong to him, and which he cannot in good conscience retain or withhold from another who is entitled to it, as where it has been acquired through a breach of trust or violation of fiduciary duty. *2 Pomeroy Eq. Jur., secs. 1047, 1048.*

Hon. SOL. F. CLARK, Special Judge. In this case there was an original complaint filed in the Phillips Circuit Court, on the second day of May, 1882, by Phillips County, in the name of the State for her use, against Thomas M. Jacks individually, and Jacks filed his answer thereto.

Subsequently, on the ninth of June, in the same year, the county filed an amended complaint, in which John P. Moore and L. A Fitzpatrick were made additional parties.

The allegations of the original and amended complaint are, in substance, that the county, on the twentieth day of May, 1878, being the owner of lots 64 and 65, in that part of the city of Helena known as Old Helena, by an order of her County Court, directed them to be sold at public auction, and appointed H. H. Robinson, then sheriff of the county, as commissioner, to sell the same. That Robinson, on the fifth day of August, 1878, having previously subdivided the lots in eight parcels, sold four of the parcels to defendant, John P. Moore, for sums amounting in the

aggregate to $1,200, and the other four parcels to various parties, amounting in the aggregate to $2,021, making the total proceeds of the sale $3,221. The sale was upon a credit of three months, and was duly reported to and confirmed by the court, and the commissioner was authorized to collect the money, make deeds to the purchasers and pay the money into court.

The orders of the court and report of the commissioner are duly exhibited with the original petition. By the commissioner's report it appears that of the eight parcels into which the lots were so divided by the commissioner, the defendant, Moore, became the purchaser of the first, second, third and seventh, at the aggregate sum of $1,200. That F. M. Ellison became the purchaser of the fourth parcel, at the sum of $875; S. A. Robinson of the fifth parcel, at $375; J. R. Cooledge of the sixth parcel, at the sum of $621; and J. E. Bennett of the eighth parcel, at the sum of $150.

It is further alleged that at the time of this sale and for some time afterwards the defendants, Jacks, Moore and Fitzgerald, were partners, doing business as merchants and bankers at Helena, under the firm name of Jacks & Co. That Moore and Jacks were sureties on the bonds of Robinson as sheriff, and also as collector of taxes. That said firm in reality managed the fiscal affairs of said office of sheriff and collector, themselves collecting the taxes and other funds due to said office, and receipting for the same in the name of said Robinson, making his settlements with the State and county officers for him, and not permitting any considerable sums of money to pass through his hands. That Robinson was in debt to the defendants at the time, and continued so indebted to the end of his life, and was accordingly much in their power and entirely subject to their influence and control.

It is further alleged that said John P. Moore never did pay his said bid of $1,200, otherwise than by crediting the account of said Robinson with the same on the books of said firm; or if the same was paid to him, it was immediately deposited with said firm and credited to his account; and that the remainder of said purchase money, to wit, $2,021, was either paid directly to the defendants, or was paid to Robinson, and by him immediately deposited with them, and they gave him credit therefor upon their books, well knowing that the funds did not belong to him, but to Phillips County. It is charged that the defendants fraudulently connived at and encouraged this misapplication of trust funds, because it reduced *pro tanto* the amount of his indebtedness to them. That Robinson never paid over any part of the purchase money for said lots to the county, and died some time in the summer of 1881, leaving no estate sufficient to satisfy the plaintiff's demands. It is further alleged that the funds were used by the firm in making settlement with the county for revenues collected and due by him to the county, and thereby to the extent of said funds relieving themselves from liability as security on his bonds as collector. It is further alleged as to Moore's purchase, aggregating $1,200, that Moore never paid the same to Robinson, otherwise than by offsetting the same against amounts due him by Robinson for loans and advances made by him to Robinson before that time on his individual account; that at the time of making such advances and loans, Moore well knew that such advances were not used as payment for said lots, and he also well knew at the time of making settlement with him, and making such set-off, that the same was a conversion of the fund of the county to the payment of his own private debt against Robinson. The prayer of the complaint is, that the defendants, Jacks

& Co., be held to account to plaintiff as trustee for the $2,021 received by them with interest, and that defendant, Moore, be held in like manner to account as trustee for the sum of $1,200 and interest, and that judgments may be rendered against them for the amounts.

The defendants, admitting the ownership and sale of the said lots by the county, in the manner and for the amounts, and to the persons alleged, and that at the time they were partners doing business as merchants and bankers, and that said Moore and Jacks were sureties on the bonds of said Robinson as sheriff and collector, deny that either of them collected the taxes themselves, or that they receipted for the same in Robinson's name. They admit that Jacks did usually assist Robinson in making settlements with State and county officers for the revenues collected, and admit that at the time of the payment of the purchase money for said lots, Robinson was indebted to the firm of Jacks & Co., and continued to owe them to the end of his life, but they deny that he was subject to their control. Deny that John P. Moore paid for the lots bought by him, by crediting his account for the amount on the books of the company, or that any part of said sum of $1,200 was ever credited on the books of the firm. They allege that if that $1,200 was ever paid it was paid to Robinson, and never went on the books of Jacks & Co. in any manner. They admit that there was paid to them either by the purchasers of the property or by Robinson the sum of $1,433.50 and no more, and that this amount was by direction of Robinson, credited to his account as collector, and was all subsequently paid out to him on his order. They deny that the credit so given was to procure any advantage to themselves, because at the time and until after the death of Robinson they believed that his bondsmen were as much liable for this fund as for any

other money collected in his official capacity. They deny that they suggested, encouraged or permitted any misappropriation of said fund, or exerted any influence in procuring the money to be paid over in settlement of Robinson's account for revenue collected, for the reason that they were apprehensive as to their liability on his own bonds, or with the view of lessening their liability; and deny intermeddling with the fund any further than to receive it for safe keeping as any other banker, and to turn it over to him upon his order. Deny that they knew or had any reason to believe, when they paid the money to him, that he was not going to pay the same over to the county on account of the sale of the lots, or that either of them diverted or procured the diversion of said fund, or that they expected to procure any advantage by reason of his paying the same on account of revenues collected.

Upon these pleadings and a considerable amount of evidence, which will be further referred to, the court below, in its decree, stated the facts to be: That on the eighth day of January, 1879, defendants received of the proceeds of sale of lots 64 and 65, the sum of $621, and on the twenty-fifth day of February, same year, they received the sum of $437.50; that, at the time of receiving the same, they had full knowledge that the money belonged to Phillips County, and was in the hands of Robinson as commissioner for the sale of said lots; that defendants were sureties on the bonds of said Robinson as sheriff and collector, and they had charge and control of the collector's office by virtue of a contract with said Robinson, and made settlement of the business of the same with the proper officers for and in his name; that the sum of $1,871 of the proceeds of the said sale was by defendants used and appropriated in discharging his liability as collector,

and to that extent relieved themselves from liability upon his bond.

Further, the court found that John P. Moore, in his individual capacity, purchased four of the eight parcels of lots 64 and 65, and was to pay therefor the sum of $1,200 three months after the date of the sale; that before the said bids became due, he *paid* and *advanced* to Robinson various sums of money, so that at the time the payment of the lots became due he had advanced to Robinson an amount in money nearly equal in value to $1,200 in Phillips County scrip, the kind of funds in which the purchase money for said lots could be paid; that when said purchase money became due it was paid by offsetting such loans and advances against the $1,200 due, and no money whatever was paid, nor did Robinson ever pay to the county any moneys on account of said sale, and that Moore knew at the time such advances were made, as well as at the time the offset was made, that such advances were not and would not be paid over to the county.

The court thereupon decreed the defendants, Thomas M. Jacks, John P. Moore and L. A. Fitzgerald as trustees of the county to account for and pay over to the county the said sum of $1,871 with interest at six per cent., amounting to the sum of $2,325.66 in twenty days, or that execution should issue as upon judgments at law.

Also, that John P. Moore be declared a trustee for the county for the payment of the said $1,200, and that unless the same should be paid in twenty days that execution should issue as upon a judgment at law.

The defendants appealed from the decree against them, and Moore also appealed from the decree against him.

The first question is as to what amount of this fund was ever paid, or came to the hands of Jacks & Co.

It is alleged that the proceeds of all the sales, except the

$1,200 by Moore, was received by them, amounting to $2,021. They fully admit receiving $1,433.50, and allege that Ellison, who purchased the fourth parcel for $875, never did pay but half that amount, $437.50.

Upon this issue evidence was taken on both sides. Ellison himself testifies that several months subsequent to his purchase, he received a note from Mr. Moore, who, together with George Walker, was managing the collector's office for Robinson, informing him that his deed for the property was ready, and unless he came forward and paid the money, the deed would be returned to the county court for cancellation. Some time afterwards he went to the office of Jacks & Co., and paid Mr. Moore $437.50 in county scrip, and gave him his due bill for $437.50 balance, and Moore delivered him the deed to the property. He gave him no other receipt for the scrip payment than the deed. That the balance represented by the due bill, he, Ellison, afterwards paid to Mr. Lacy, the book-keeper of Jacks & Co., and the due bill was turned over to him. He exhibits what he thus calls a due bill, but it is a check upon Jacks & Co., directing them to pay to John P. Moore $437.50 in county scrip, and charge to his private account.

Lacy testifies on the other side, admitting that he was book-keeper for Jacks & Co. at the time, but he denies that Ellison paid him the draft for $437.50 at any time, and says that no such item of debit appears on the books of Jacks & Co.; that he had examined the books of Jacks & Co., since 1878, and finds charged against Ellison no such item, nor anything like it, and he is positive no such amount was ever paid to him. He says that the books show that of the moneys paid by the purchasers of lots 64 and 65, Ellison paid $437.50 only. As to the check or draft which witness, Ellison, exhibits, he recognizes it on

account of the figures on the back of it, which appear to be in his handwriting, and says that the written parts of it are in the handwriting of John P. Moore, but he does not know how Ellison got possession of the draft, or whether it ever was in the possession of Jacks & Co. He does not know whether the amount represented by the draft was ever paid to Moore by Jacks & Co., or whether he, Moore, ever received credit therefor on their books. It was never charged to Ellison on his account, and if it had been paid it would have been so charged, nor was it credited in Robinson's collector's account. At the date of the check Ellison had cash deposited to his credit with Jacks & Co., but no scrip.

John P. Moore testifies that the draft by Ellison was never indorsed by him. That it was never paid to him by Jacks & Co., the drawees. He does not recollect of ever presenting the draft to Jacks & Co. for payment. He says, however, that the body of the draft is in his handwriting, but does not know how Ellison came in possession of it, nor has he any recollection of the transaction in which Ellison gave him the draft. This is all the evidence concerning the draft.

This draft was evidently not merely simulated by Ellison. It had been actually drawn on Jacks & Co., for it was in Moore's handwriting. It had been in Jacks & Co.'s possession, for the book-keeper, Lacy, recognized his own figuring upon the back of it.

1. AGENT OF COUNTY: Liability.

It is urged by the plaintiff that the possession of this draft by Ellison, the drawer, is evidence of his alleged subsequent payment to Lacy, and contradicts Lacy's denial of such payment. But the view we take of this matter renders this question wholly immaterial. It is fairly inferable from the testimony that Moore received from Ellison the first payment of half the purchase money for the prop-

erty and delivered Ellison his deed—the deed of Robinson, the commissioner for whom Moore was acting as agent, as well as agent of Jacks & Co. By delivering the deed to Ellison, Jacks & Co. assumed the payment of the balance themselves and looked to Ellison for it. Whether they took the draft on themselves for it or gave him time to pay, it is immaterial. They made the debt their own, and the proof is they had his money in their hands at the time to pay it. If they have not collected it, it is their own loss, and the Chancellor did not err in charging them with it.

The question then is, were the defendants, Jacks & Co., liable for the fund which had come to their hands? They contend that they only received the fund on deposit as bankers, and paid the money over on the orders of Robinson.

But the evidence shows that Robinson was indebted to them on private account, which he never paid—that he was behind in funds to settle with the state and county for taxes collected, and that this money was used in making up such balances, or was reserved by Jacks & Co. to meet advances by them for that purpose. That Jacks and Moore, two members of the firm, were sureties on Robinson's bond as collector, and it is proved that, by their contract with Robinson, they were, in consideration of such suretyship, to share in the profits of the office. Moreover, there is evidence, which can not be overlooked, conducing to show that Jacks & Co. not only managed and controlled Robinson's settlement with the State and county as collector of the taxes, but that they acted for him in the collection of the money from the purchasers of these lots, and in making the deeds to them. It is in proof that Jacks, who was generally the actor of the concern in the settlement of Robinson's accounts with the county and State,

frequently admitted, after this fund had, as they admit, been so appropriated, and after the death of Robinson, that the purchase money was in their possession, and they were only waiting to ascertain whether the title to the lots was good, when he would pay the money over to the county. Jacks himself, in his testimony, says: "We had to make large advances to Robinson to enable him to make his settlement with the State and county, and it was stipulated that we were to have all the money that came into his hands as sheriff or collector to make good our advances. I don't remember whether this exact money was paid over to the county in discharge of his liability as collector, or whether it was reserved to make good the advances we had made to him; but I do remember it took all the funds, and more than we had to his credit as collector to make his settlement."

We are of the opinion, therefore, that Jacks & Co. made the fund their own. They converted it to their own use, knowing the character of the fund, with the design of being responsible to the county for it, and whether they paid it over to make up balances due by Robinson on his settlement, or paid their own money, to make up such balances, and retained this fund, is wholly immaterial. Nor are the equities of the case in any way changed because they did so under the belief that they were liable for the fund upon their collector's bond. They are in receipt of the benefit of the fund and should account for it, and the Chancellor did not err in charging them with it.

2. Purchaser from trustee.

The question as to the separate decree against John P. Moore for the amount of his purchases, $1,200, and interest, is of a different character. Moore himself testifies that after the purchase by him, and before the money became due, Robinson drew drafts on him for money, which he paid, believing that such payments would be good in satis-

faction of his indebtedness for the property, and in his settlement for the lots, when the money became due, he was credited with the same, and he paid the balance in money. The balance he does not recollect, but it was very small. The question seems to turn upon whether these acceptances were made as payment for the property. Whether the drafts were drawn against this fund or some other fund of Robinson in Moore's hands, does not appear from Moore's testimony, further than his statement that he paid them, believing that such advances would be good in payment for the property; and Robinson being dead, there is no other evidence on the subject.

May pay before debt due.

That a purchaser from a trustee in such case may make payment before the debt is due, if made in good faith, we have no doubt. See *Hill on Trustees, pages 504, 506, 507; Perry on Trusts, secs. 793, 797, and cases cited; Bispham's Equity, secs. 277, 278, 279.*

Application of payments.

But here the transaction is wrapped in much obscurity. All the defendants testify that Moore's purchases of these lots were private transactions of his, and had no connection with the business of Jacks & Co. But there is no evidence as to how Robinson disposed of the purchase money. All we know is, he did not pay it over to the county. There is nothing to implicate Moore, however, in any fraud, or to connect him with the misapplication of the purchase money; and the burden was on the plaintiff to prove this. Moore was not bound to see that Robinson paid the money to the county. We think the evidence goes to no further extent than to prove that Moore paid the purchase money, or the greater part of it, before it was due, and this is not sufficient to charge him as trustee, or hold him responsible to the county for the payment of the purchase money.

The Chancellor, therefore, erred in his separate decree

against the defendant Moore, and the same will be reversed, and the separate complaint as to him dismissed for want of equity, and the decree against Jacks & Co. will be in all things affirmed.

Judge SMITH did not sit in this case.

McKINNEY v. DEMBY.

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1. PRACTICE IN SUPREME COURT: *Bill of exceptions: Instructions.*

Unless the bill of exceptions shows that it contains all the evidence, the Supreme Court can not consider the objection that the verdict is not supported by the evidence; and an instruction which would be correct on proper evidence will be presumed to have had evidence to support it.

2. SAME: *Same: Presumption.*

Where the bill of exceptions fails to show that it contains all the evidence adduced at the trial, every intendment is indulged in favor of the action of the trial court; and this court will presume that every fact susceptible of proof which could have aided the appellee's case was fully established.

3. SAME: *Same.*

Where an instruction is given purporting to be predicated on the evidence and upon the hypothesis that certain facts have been proved, and it is not repugnant to, nor inconsistent with a case that might have been proved under the pleadings, the appellate court ought to presume in favor of the court below, that such evidence though not set out in the bill of exceptions, had been adduced at the trial, and the correctness of the instruction should be inquired into.

4. TRESPASS ON LAND: *Possession of plaintiff.*

To maintain the action of trespass *quare clausum fregit,* the plaintiff must either show that at the time of the trespass he was in actual possession, or must prove such a state of facts and title as would imply possession.

5. SUNDAY CONTRACT: *May be ratified.*

A contract of sale made on Sunday is void; but the parties to it may, on a subsequent week day, affirm or adopt its terms, and so become bound by them; and a receipt of the purchase money by the vendor on a week day, would be an affirmance of it and make it good, at least from that time. And a demand of payment on a week day would have the same effect as to the vendor, and would compel the purchaser to elect either to adopt the Sunday terms or to insist on their invalidity.

APPEAL from *Montgomery* Circuit Court.
Hon. H. B. STUART, Circuit Judge.

R. G. Davies and *Joel Johnson* for appellant.

McKinney was in possession, and not wrongfully, inasmuch as Demby had failed to pay the three dollars on the day agreed upon, which was a condition precedent to delivery of possession. Both parties claimed under Maberry; plaintiff under a contract to sell and defendant under an actual sale completed by payment and delivery of possession. In every contract it is a settled rule that there must be a mutual assent to the same thing, in the same sense, or there is no contract. (*Parsons on Cont., p. 399; 4 Minor, part 1, p. 17; Chitty on Cont., pp. 9 to 11; Smith Cont., p. 126.*) There being no contract between Maberry and Demby, appellee had neither possession nor right of possession, and could not maintain trespass.

Geo. G. Latta for appellee.

Either actual or constructive possession is sufficient to maintain trespass. The injury is to the possession and not to the property. (*Greenleaf Ev., vol. 2, sec. 613.*) Possession alone is sufficient against a wrong doer, without regard to title. *1 Ark., 448.*

A trespasser can not show property in a stranger in justification. (*8 Ark., 406.*) This is such an action as the

appellee had a right to institute. *Washburn on Real Estate, vol. 1, 384, 397.*

COCKRILL, C. J. The action disclosed here is in the old form of *trespass quare clausum fregit.*

1. PRACTICE IN SUPREME COURT: Bill of exceptions.

The bill of exceptions does not show that it contains all the evidence adduced at the trial. We can not, therefore, consider the objection made by the motion for a new trial as to the sufficiency of the evidence to support the verdict.

2. SAME: Presumption.

The second ground upon which the new trial is asked is that "the court erred in instructing the jury that the plaintiff could recover in case of his being in constructive possession of the premises in question, inasmuch as there was no evidence of legal title to the lands in the plaintiff."

This objection fails because we must presume that there was such testimony or else the instruction would not have been given. In the absence of a showing that there was no other testimony heard at the trial, every intendment is indulged in favor of the action of the trial court, and this court will presume that every fact susceptible of proof that could have aided appellee's case was fully established. The salutary rule of law is that every judgment of a court of competent jurisdiction is presumed to be right unless the party aggrieved will make it appear affirmatively that it is erroneous.

3. SAME: Same.

We are not, however, precluded from all consideration of the instructions. Where an instruction is given purporting to be predicated on the evidence and upon the hypothesis that certain facts have been proved, and it is not repugnant to nor inconsistent with a case that might have been made by proof under the pleadings, the appel-

late court ought to presume in favor of the court below, that such evidence, though not set out in the bill of exceptions, had been adduced at the trial, and the correctness of the instruction should be inquired into. This rule was announced in *Duggins v. Watson*, *15 Ark.*, *118*, and is applicable to the practice now, subject, however, to the modifications made by the abolition of the forms of action and the innovation that the pleadings may, in a proper case, be considered amended to conform to the proof. It is not necessary to invoke the aid of these restrictions to sustain the judgment in this case. It is apparent from the whole record that the case was treated throughout as one involving a trespass on real estate; and while the forms of actions are abolished, the same facts are essential now as at common law to sustain this action. The gist of the action is damage to the possession. *2 Greenl. Ev.*, *sec. 613*.

4. TRESPASS QUARE CLAUSUM FREGIT. Proof necessary—possession.

Hence, the plaintiff must show possession or fail in his suit. This may be done by showing actual possession or by proving a state of facts and title that would imply possession. This the court, in effect, told the jury, by instructing them that the plaintiff must prove actual or constructive possession of the premises in himself, at the time the trespass was committed, to entitle him to recover; and it was not error to refuse to instruct the jury, as the appellee desired, that actual possession was necessary to warrant a recovery.

5. SUNDAY CONTRACT: May be ratified.

The court also instructed the jury that if they found that a parol sale of the right of pasturage on a part of the land was made by one Maberry to plaintiff on Sunday, and that Maberry, on a subsequent week day, went to plaintiff or his agent and demanded the purchase money for the same in pursuance of the agreement, this would be a ratification of the Sunday sale.

A contract of sale made on Sunday is void, but the parties to the contract may on a subsequent week day, affirm or adopt the terms of the previously inoperative contract and so become bound to perform them. *Tucker v. West, 29 Ark., 386; Stebins v. Peck, 8 Gray, 553; Bishop on Cont., sec. 484, and cases cited.*

The receipt of the purchase money by Maberry on a week day would have been an affirmance of the terms of the previous agreement and would have made the contract good, at least from that time. *Tucker v. West, supra.*

A demand of payment, in pursuance of the terms of the agreement, would have the same effect, as far as the vendor is concerned, and it would put the purchaser to his election to determine whether he would adopt the Sunday terms or insist upon the invalidity of the contract. (*Adams v. Gay, 19 Vt., 370*) It is an undisputed fact, so far as we know, that the appellee, who was the purchaser, always insisted on the performance of the contract of purchase. We must presume, in the absence of a good bill of exceptions, that the agent mentioned in the instruction did the same at the time of the demand and was fully authorized to act in the premises, as that is the hypothesis upon which the instruction was given. It was immaterial to the appellant whether the action of the parties to the Sunday contract worked a technical ratification of it, making it good from the first, or made a new contract, and we are unable to see that he was prejudiced by the instruction.

Under the liberal presumption of proven facts that we must indulge in favor of the action of the court below, there is no room for the appellant to question the correctness of the other instructions given by the court. Those prayed by the appellant and refused by the court related only to the possession of the lands. One was substantially given by

the court, and the other, as we have seen, was correctly refused. The question of the purchase from Maberry was one of fact, and was fairly submitted to the jury. The verdict was against appellant and the judgment must be affirmed.

HAINES v. MCGLONE ET AL.

1. STATUTE OF FRAUDS: *Sale between tenants in common: Part performance.*

The doctrine of part performance to take a parol contract for the sale of land out of the operation of the statute of frauds, does not apply to contracts between tenants in common for the sale of one tenant's interest to the other. Each tenant is already in possession, and one cannot assume exclusive possession under and in pursuance of the contract. Their contracts with each other must be in writing duly signed.

2. TENANTS IN COMMON: *Contracts: Equities.*

Where one tenant in common by parol contract sells his moiety of the land to his co-tenant, and afterwards repudiates the contract and conveys his interest to another purchaser with notice of the facts, the latter cannot recover it in equity from the co-tenant purchaser except upon return to him of his purchase money and half of all taxes and cost of improvements paid by him, and interest from the time of their payment.

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

E. A. Bolton for appellant.

Haines was entitled to all the equities that Puckett was. *6 John. Ch., 403; 49 N. H., 444; 33 N. Y. (6 Tiff.), 658.*

The proof fails to show any agreement on the part of Puckett to sell to McGlone. There was no "meeting of minds" nor "consideration," two essentials to every con-

tract. The findings of the Chancellor as to matters of fact, will be reversed unless sustained by the evidence. (*41 Ark., 292; 42 Ib., 249; 13 Ib., 350; 15 Ib., 209; 23 Ib., 341.*) The matter was merely talked over, and no perfect agreement ever entered into. *1 Story Eq. Jur., sec. 222, p. 253, 6th ed.*

The only consideration attempted to be shown was that McGlone paid for Puckett's interest in the land by selling him the house. But the house belonged to Puckett notwithstanding the joint ownership of the land. (*33 Ark., 376.*) He bought the lumber and paid the hands for building it.

But if the *parol* agreement claimed was made, it was within the statute of frauds and void. Courts of equity decree specific performance of parol agreements for the sale of the land, on the ground that it would be a fraud upon the party if the agreement be not enforced. (*6 Rand., 605; 1 Har., 421, 430, 532, 540; 1 Baily Eq., 118; 6 Barb., S. C., 99; 21 Mo., 331; 14 Ga., 683; 20 Mo., 81; 1 Ark., 391; 32 Ark., 478.*) But there could be no fraud upon McGlone, for he never paid Puckett anything for the land; nor did he improve or expend money on the land, so that he could not be remunerated. It must be shown that McGlone is in *actual possession* of the land, and that he took *that possession in pursuance of and in execution of this particular agreement. 9 Watts, 106; 6 Watts, 464; 9 N. H., 386; 1 Watts & S., 383; 3 Md. Ch., 119; 14 Ill., 42; 9 Mo., 769; 23 Ib., 423; 23 Ala., 649; 3 Penn., 364, 332; 22 Gratt., 374; 1 John. Ch., 131; 3 Rand., 238, 247, 277; 7 Harris, 461; 2 Casey, 375; 39 Ark., 424; Lester v. Faxcroft, Leading Cases in Equity, vol. 1, pt. 2, and notes.*

J. H. Harrod for appellees.

Reviews the evidence in detail, and contends that it

shows both an agreement executed and a valuable consideration.

The parol agreement was *certain* and *definite;* the part performance *resulted from* and *was in pursuance of* the agreement, and the agreement was so far executed that a refusal of full execution would operate as a fraud on McGlone. All the requisites are found to take the case out of the statute of frauds. (*22 Gratt., 374.*) It was not necessary that McGlone should live on the land. Clearing and cultivation, building houses, etc., constitute possession; paying the purchase money and taking possession under a parol agreement entitles the vendee to specific performance. *21 Ark., 137; 42 Ark., 246.*

The decision of cases like this rests to a certain extent in the sound discretion of the Chancellor (*34 Ark., 663*), and if there is merely a doubt, or a preponderance of testimony one way or the other, this court will sustain the findings of the Chancellor. *24 Ark., 431.*

Haines had notice of the entire matter between Puckett and McGlone, and he must come into court with clean hands. The circumstances tend to show that he is attempting to perpetrate a fraud. *33 Ark., 294.*

This court will always sustain the findings of the Chancellor, unless the preponderance of testimony is clearly and decidedly against them. *42 Ark., 521.*

SMITH, J. In the year 1878 McGlone and his son-in-law Puckett bought eighty acres of land for $300, payable one-fourth in cash and the remainder in three equal annual installments. McGlone advanced the money for the cash payment, and the two made their joint promissory notes for the deferred payments. They received a bond conditioned that the legal title should be conveyed to them when the notes were paid, took possession of the land, and built

a small house upon it, which was intended for Puckett's residence. Puckett bought the lumber and hired the carpenters; McGlone furnished the team to haul the lumber to the land, worked himself in getting out boards for the roof, boarded the carpenters and supplied the means to pay them off. When the first of the purchase notes fell due, Puckett paid $65 and McGlone the residue. After this and before any further payments had been made, domestic trouble arose between Puckett and his wife, which resulted in their final separation. And it was agreed between Puckett and McGlone that the latter should complete the payment of the land and take a conveyance of the whole to himself, while the former should have the privilege of removing and selling the house, which it was supposed would reimburse him for his outlay in the purchase of the premises. This agreement was intended to be, but never was in fact reduced to writing. Puckett removed the house and sold it to the appellant, Haines, for $75. McGlone assumed entire control over the land, paid off the purchase debt, took the title in his own name, made improvements of the value of $125, and has paid the taxes ever since. Puckett afterwards, for twenty dollars, quitclaimed his interest in the land to Haines, who filed the present bill, the object of which is to declare McGlone a trustee, holding the legal title as to one half of the land in trust for him. But the Circuit Court, after a hearing upon the proofs, dismissed the bill.

1. STATUTE OF FRAUDS: Tenants in common. Part performance.

The chief difficulty springs out of the relation of the parties. By the purchase under the bond for title McGlone and Puckett became tenants in common of an equitable estate. If they had been strangers the case would have been taken out of the operation of the statute of frauds by the doctrine of part performance. *Kellums v. Richardson, 21 Ark., 137; Pledger v. Garrison, 42 Ib., 246.*

But possession, to have this effect, must be exclusive, evincing the birth of a new estate, as distinguished from the continuation of an old one; and must not be referable to an antecedent right.

Now the possession of one tenant in common is the possession of all; and an entry by one has no tendency to substantiate a sale to him by the others. McGlone, having already possession in common with Puckett, could not assume exclusive possession under and in pursuance of the contract. This is only another mode of saying that one tenant in common of land cannot make a valid sale by parol to his co-tenant. Their contracts with each other must be manifested by a writing duly signed. (*1 Leading Cases in Equity, 4th Am. ed., 1049; American notes to case of Lester v. Foxcraft; Pomeroy on Specific Performance of Contracts, sec. 121; Workman v. Guthrie, 29 Pa. St., 495.*) Consequently the evidence fails to show that the interest of Puckett was divested.

2. TENANTS IN COMMON: Contracts: Equities.

But Haines, who purchased that interest with full notice of the situation of matters, can have no relief only upon terms. He must restore the consideration received by Puckett—that is, one-half of the value of the house which was removed from the land and which belonged to McGlone as much as it did to Puckett; he must pay Puckett's due proportion of the original purchase debt; he must refund one-half of the taxes paid by McGlone on the land, and he must pay one-half the value of all improvements made by McGlone. Upon the payment into court within a reasonable time, to be fixed by the court below, of these several sums, with lawful interest from the time the same should have been paid, let a decree be entered for the plaintiff. In case he elects not to pay let his bill be dismissed.

Decree reversed, and cause remanded for further proceedings.

LANAGIN v. NOWLAND.

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1. BANKRUPTCY: *New promise to pay debt.*

A promise by a bankrupt to pay a debt provable in bankruptcy, made after adjudication, is binding upon him, whether made before or after his discharge, and need not be in writing.

2. SAME: *Same: Statute of frauds.*

A promise to pay a debt without specifying time of payment is a promise *in presenti*, and not void under the statute of frauds, as a promise "not to be performed within one year from the making thereof."

3. PRACTICE: *Special verdicts: Finding of facts.*

In finding specially whether a defendant promised to pay a debt, the jury should not be required to find, and should not find the language used by the defendant, but only the fact whether the promise was made or not. The language is mere evidence of the fact, and if stated in their verdict should be disregarded. Whether the language imports a promise is a question of fact for the jury, and not of law for the court.

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

Clendenning & Sandels for appellant.

The weight of authority and better reason are that a promise to pay after the adjudication but before the discharge in bankruptcy, will not revive the debt. *79 Kentucky, 532; 80 Ib., 241.*

The court erred in giving the instructions on its own motion. The first did not limit the time of the promise, and was otherwise objectionable. The court also erred in refusing the instructions asked by defendant. *18 Wal., 1; 85 N. C., 151; 71 Ind., 288; 90 Ill., 82.*

The language used amounts at most to the mere expression of an intention to do that which morally he was bound to do. The expression of an intention is not suffi-

cient. *71 Ind., 288; 90 Ill., 82; 136 Mass., Elwell v. Cammer, 18 Wal., 1; 27 Ark., 619.*

Collins & Balch for appellee.

1. A promise made after adjudication and before discharge to pay a debt due by a bankrupt is binding. *57 Iowa, 591; 42 Am. Rep., 59.*

2. To determine whether there was a promise to pay, we must look to not only what was said, but to all other surroundings as suggested by the *res gestæ*, and whether the bankrupt meant to bind himself, is a question for the jury. *86 N. C., 331; 40 Am. Rep., 461; 7 Pick. Man. Rep., 462.*

Sections 4678–9 do not authorize the second question propounded to the jury, and their answer should be treated as surplusage. They should not have been required to give the *language*, but only to find the *fact* whether or not the new promise was given.

A new promise, in case of a discharge in bankruptcy, need not be in writing, nor to be performed within a given time. *Apperson v. Stewart, 27 Ark.; McWillie v. Kirkpatrick, 6 C. (Miss.), 802.*

EAKIN, J. Appellee sued Lanagin on a promissory note for thirty-two hundred and seventy-one 80-100 dollars, dated August 1, 1872, and due at six months; with divers credits indorsed, which, with the note, are set forth.

The complaint further shows that in March, 1878, defendant Lanagin was adjudged a bankrupt, and afterwards promised plaintiff to pay the debt. The defendant denied the promise.

There was a trial by jury upon the issue, who found for the plaintiff in the sum of $3,794.86, upon which judgment was rendered. After motion for a new trial overruled, and a bill of exceptions taken, the defendant appealed.

The objections to the verdict concern evidence and instructions. The evidence was substantially this, that Lanagin had borrowed the money from plaintiff. Before filing his petition in bankruptcy, he told her he might be forced to do so, but that it would not affect her debt, as he intended to pay it. She relied upon that, and did not prove her debt in bankruptcy. After he had been adjudicated a bankrupt, and before his discharge, she sent for him and had another conversation in which he said, "You remember what I told you before my bankruptcy. You need have no uneasiness. I intend to pay your debt. I have always intended to pay your debt." After his discharge she called upon him, in company with her sister, and asked him to pay her something. He answered that he could not. That she need give herself no uneasiness about it; that he intended to pay her debt. Afterwards he furnished her with some lumber at her request, which she placed as a credit on the note. Nothing was said about giving it to her. She is corroborated, as to the conversation with defendant, by her sister, who testified that defendant expressed regret that he could do nothing then, but told plaintiff not to be uneasy, he intended to pay it.

Defendant's statement in evidence is that he told plaintiff before petitioning that although he would be discharged from legal obligations by bankruptcy, he would always feel a moral obligation to pay when able to do so. Remembers no conversation with her after the adjudication and before discharge. Remembers that one, after the discharge, when she and her sister were together. He says he confessed to her that he still felt the moral obligation to pay, but denies making a promise to do so. Says he did not let her have the lumber on the note, but told her she must pay for hauling it. The plaintiff and her sister, being recalled, denied that he said anything about moral obligations.

The discharge in bankruptcy was filed with the answer and put in evidence. It recites that defendant had been adjudged a bankrupt, and discharges him from all debts which were provable, and which existed on the sixteenth of March, 1878, the date of his petition, with the proper legal exceptions.

With the general verdict, the jury being thereto required by the court, found specially, as to particular matters of fact stated in writing, that defendant, after his adjudication in bankruptcy, made to her a distinct, direct and unequivocal promise to pay this debt, in this language: "You need give yourself no uneasiness, I intend to pay the debt," or words to that effect. Further finding that defendant did, at his residence, say more, in the way of making such promise, than that he intended to pay plaintiff.

The court had instructed the jury against objections of defendant, that they should find for the plaintiff, if they were satisfied the evidence preponderated to show that defendant, after he was adjudged a bankrupt, made a clear, distinct and unequivocal promise to pay the note; and also instructed that the expression of an intention to pay was not sufficient. Nor would the payment of interest be so, nor of part of the principal. Nothing would suffice but a clear and distinct promise.

The court refused to charge them, for defendant, that the promise must be made after discharge; or that no action could be brought upon any contract not to be performed in one year from the making thereof, which might not be evidenced by writing; or that there must be a clear and distinct promise to pay the debt, either at a day certain or on the happening of a certain contingency set up in the pleadings; or that the discharge in bankruptcy was a complete discharge of this debt finally and forever.

1. BANKRUPTCY: New promise to pay debt.

The principal argument made for appellant is that a promise to pay a debt provable in bankruptcy, made after adjudication, does not operate to continue it, if made before the discharge. It is difficult to apprehend the reason of such a rule under the bankrupt system. The discharge has relation to the time of filing the petition, and touches no subsequent liability. After adjudication the bankrupt cannot be sued. Therefore a new promise would remain in force, and if sustained by good moral obligation should continue binding notwithstanding its precedence in time of the discharge. It seems there is some conflict of authority on this point. The doctrine as above stated is announced in the case of *Knapp v. Hoyt, 57 Iowa, 591*, which cites the cases relied on. It is supported by the greater weight of authority as well as by the better reason. See notes to same case in *42 Am. Rep., p. 59.*

2. SAME: Statute of frauds.

The statute of frauds has no application to the case. The legal obligation to pay, if assumed at all, was immediate. It was not a promise "not to be performed within one year from the making thereof." The provision against a verbal promise renewing a debt, contained in the statute of limitations, does not apply to bankruptcy. The instructions were carefully framed, well guarded, and as rigidly in favor of the defendant as the law required.

3. SPECIAL VERDICTS: Finding facts.

The real difficulty in the case arises from the special verdict, and what seems to have been with the court and attorneys, a misconception of the duty of the jury in returning special verdicts. They were required to give the language of the defendant in making the promise. The law does not authorize that. There was no contest as to the exact words used. The question was one of intention and of the effect of the conference. The *fact* was the *promise*, and they might have been required to find specially as to that, together with the general verdict. A special

verdict "must present the facts, as established *by* the evidence, and *not* the evidence to prove them." (*Gantt's Digest, sec. 4678.*) Language is evidentiary. So much of the special verdict as sets it forth is to be disregarded. It was not for the Circuit Judge, nor is it for us to determine, as a question of law, whether the language was a promise or not. The question is, does the evidence altogether support the verdict as to the special fact of the promise? To determine that was the province of the jury. (*Shaw v. Burney, 86 N. C., 331.*) The case of *Allen v. Ferguson, 18 Wall., p. 1*, arose on demurrer, and involved the construction of language in a letter, which contained no expression of intention to pay the particular debt.

If there was in this case any promise about it, it depended on no contingency of time, circumstance, or future ability. It was an absolute promise, or none at all. The jury were advised that a mere expression of intention would not support a promise. Upon the other hand it will not be seriously contended that the word "promise" should be used, or that there is any other word technical or otherwise that is necessary. It is not easy to define the difference between a promise and an expression of intention. Perhaps it lies in this, that the latter is merely an evidence of the condition of the mind with regard to future action, which concerns only the individual entertaining it, and which no one has the right to require him to execute, while the former is intended to give some third person an assurance which they will be expected to rely on, that the act will actually be done, or refrained from. One of Mr. Webster's definitions of a promise is, "a declaration which gives to the person to whom it is made a right to expect, or to claim the performance of the act." Such a declaration of an intent to fulfill a moral obligation, addressed to one entitled to receive it, and expected

or induced to rely upon it, might be quite as potent to convert a moral obligation into a legal one, as to say positively, "I will." To say that it would not, would be to destroy all distinctions in substance, and make rights depend on forms of speech.

Under all the circumstances, the nature of the debt, the previous conversations, and the urgency of the plaintiff's pressure, the jury might well have believed that the defendant, by the language used, meant to inspire her with confidence that the debt would be paid, and to relieve her anxiety by inducing her to rely upon it. This would be a promise, upon which the law would attach the obligation, whether the defendant was aware that he incurred it or not. If he had not meant to give the plaintiff a reasonable right to suppose that he was binding himself, he might easily have been more open and clear, and said in more intelligible fashion, than by reproaching her for a doubt, that whilst he would not incur a legal obligation, he was disposed, and intended when able, to restore her money voluntarily. We think the jury justified by the evidence in finding the promise, and that there was no reversible error in refusing the motion for a new trial.

Affirm.

GATES BROS. ET AL. V. BURKETT.

1. LABORER'S LIEN: *None without writing.*

There can be no statutory laborer's lien without writing.

2. APPROPRIATION OF PAYMENTS: *Right of creditor.*

The right of a creditor to make application of payments to one of several debts owing from his debtor, applies only to those debts then due; and does not apply at all where the debtor himself makes the appropriation.

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

Clark & Williams, for appellant.

Burkett having no written contract had no laborer's lien. Nor had he any lien as a pledgee—he was merely the servant of Hurt, and as such hauled the cotton to the gin. But if he was a pledgee, he lost his lien by leaving the cotton with the ginner, and Gates' trustee came into peaceable possession, and lawfully. Retention of possession is as essential to a pledgee as to get possession. (*8 Jones, N. C., 453; 38 Ga., 391; 19 La. Ann., 17; 22 N. H, 196.*) And the lien created by the pledge can be maintained only by a *continuous* possession. (*63 Me., 459; 2 Pick., 610.*) As pledgee of Hurt, he could have no greater right than his pledgor, and Hurt's rights could not avail against his trust deed to Gates.

The mortgage expressly provided that the entire mortgage debt should become due whenever Hurt should sell or dispose of any of the property, so that by the act of pledging Hurt forfeited all right, even that to time upon the debt not then due. It was optional with the trustee to take possession on the first default both as to debts due and to become due. (*Jones' Ch. Mort., sec. 374.*) In the absence of stipulation to the contrary, the mortgagee has the right of possession from the date of the mortgage. (*Ib., secs. 426, 453.*)

All the debts due had not been paid, and the court's finding of facts is contrary to the evidence.

The appeal bond is not such as is provided for in *section 321 Gantt's Digest*, and no judgment could be rendered upon it.

George Sibley, for appellee.

Gates having been paid all that was due them by Hurt, had no right whatever to the cotton, and it having been put in Burkett's possession by Hurt to secure his debt, the judgment is right.

EAKIN, J. On the twenty-fourth day of February, 1882, S. T. Hurt and wife conveyed, in trust, to G. O. Littlejohn, 285 acres of land lying in separate parcels, "as well as all crops that may be grown on said lands, of any description whatever, by the parties of the first part, for the years 1882, 1883 and 1884, and all interest they may have in crops grown by tenants, and all liens they may have upon crops grown upon said lands, or any portion thereof for said years." There was also included in the conveyance a lot of mules, two wagons, and other farming utensils. Also, "all crops grown by the parties of the first part upon land bought from Isaac Gates & Bro., known as the John W. Gates land, for the years 1882, 1883 and 1884, and also all the interest that the parties of the first part may have in, and all liens that they may have upon the crops grown on said place for said years."

The conveyance sets forth an indebtedness of said Hurts to the firm of Isaac Gates & Bro., in the sum of $4,902.94, evidenced by three notes of that date, two for $1,634.31 each, due respectively on the thirty-first day of December, 1882 and 1883, the third being for $1,634.32, due the thirty-first day of December, 1884, all bearing interest at the rate of 10 per cent. per annum from date till paid.

Also, a further debt to said firm of $255.45, evidenced by note of same date, due October 1, 1882, with ten per cent. interest from date till paid.

It further recited that the parties had contracted together that said firm should furnish the Hurts during the year 1882, merchandise and farm supplies not to exceed the sum of $944.55, to be furnished by said firm at their option, and to become due on the thirty-first day of December, 1882. After that to bear 10 per cent. interest till paid.

The conveyance was to be void in case of the payment of said debts according to their tenor and effect; but in case of failure, as each became due, it was made the duty of the trustee, upon request of the firm, to take possession of the property, or any part of it, as he might be directed by the firm, advertise and sell, as therein directed, to the highest bidder for cash, to pay off the costs and expenses of the trust; then to pay said debts, and the remainder to the grantors. It was further provided, that if the parties grantor should, without the consent of the trustee, sell or attempt to sell, or dispose of any of said property, all of said debts were to become due by virtue thereof, and the trustee was authorized to take possession and sell as if the whole were due.

It was further agreed between the Hurts and the firm, which was made party of the third part, that if said notes were paid as they severally became due, the firm would advance to the grantors for the years 1883 and 1884, a sufficient amount of supplies to make the crops, not to exceed the sum of $800 per year, to be advanced only at the option of the firm. Provision was made for the substitution of a trustee in case Littlejohn should decline, or be unable to act, to be named by the firm or any one having charge of the business.

This deed was signed by Hurt and wife, Littlejohn and Isaac Gates, acknowledged on the twenty-eighth day of March, 1882, and filed for record on the twenty-third day of May.

On the thirtieth day of December, 1882, the appellee sued out, from a justice of the peace, an attachment, showing by his affidavit that it was for a claim of $146 against I. Gates & Bro., and Hudspeth as administrator of Hurt, for work and labor performed for Hurt, then deceased, stating that there were then four bales of cotton standing loaded on a flat car on the Memphis and Little Rock Railroad; also a lot of seed cotton, and about two hundred bushels of corn, raised by plaintiff on the place formerly owned by Hurt. He prayed for judgment and an attachment bond was given. The attachment issued, and the property was seized.

Max Mayer appeared as trustee, was substituted for Gates & Bro., and defended against the claim for a specific lien, denying the same, and claiming to be owner under the deed of trust. The administrator of Hurt answered, acknowledging the debt claimed by Burkett as just, and his willingness that he should be paid out of the cotton seized. Judgment was entered for the debt against the administrator on his confession. The attachment issue was tried by a jury who returned a verdict for plaintiff, and judgment was thereupon rendered that the property be sold for plaintiff's debt.

Mayer, as trustee, appealed. Isaac Gates made the affidavit for appeal, and gave bond, with surety, conditioned that Mayer would have the property which had been attached, subject to the order and judgment of the Circuit Court on appeal, and should pay whatever judgment should be rendered against *the cotton* attached, together with any costs which might be adjudged against him in favor of the plaintiff.

In the Circuit Court the cause was, by consent, tried by the judge as to the facts and the law, or, as the transcript expresses it, sitting as a jury. He found for the plaintiff

in the sum of $140, and judgment was entered that he recover that sum with costs, from the said firm, and the administrator and the surety on the appeal bond. The defendants moved for a new trial, and that being overruled, filed a bill of exceptions and appealed.

Burkett, the plaintiff, testified that he worked for Hurt during the year 1882, under a verbal contract for $165 and his board, and made for him a crop of cotton and corn upon the place, sufficiently identified with the mortgaged property. The sum of $146 remained unpaid. In December Hurt told him to haul the four bales of cotton, afterwards attached, to the gin, and to hold on to it until he was paid the balance of his debt. He did so, but made no arrangement with the ginner about ginning it. Max Mayer, after Hurt's death, came out to Hazen where the cotton was, to take charge of all Hurt's cotton, corn and stock, as trustee for the firm. He took the four bales of cotton from the gin against the objection of plaintiff, and hauled it to the depot, telling plaintiff to come to Devalls Bluff, and Mr. Gates would pay him, or that he should be paid. He went and saw Gates, who declined paying, but offered him fifty dollars to drop the matter. Whereupon he attached. The cotton was worth thirty-five or forty dollars per bale; the seed cotton fifty or sixty dollars.

With regard to the promise by Mayer, the testimony of plaintiff was sustained by several others, and it was further shown that it was "generally understood" at Devalls Bluff that Mayer was a partner in the firm.

The defendants offered in evidence the trust deed, which has several marginal notes, showing that several portions of the land had been, from time to time, released. Isaac Gates testified that he had released a portion in October, 1882, at Hurt's request, and upon condition that the proceeds of the sale should be applied to the notes falling

due in 1883 and 1884. Of these proceeds he received $1,570 and retained $1,470, after letting Hurt have $100. Of the proceeds of another portion, early in December, sold under the same condition, he received $1,200. Afterwards he agreed that Hurt should sell another portion "as before," for $220, and a pair of mules worth $250, which he did. The vendee turned over to the firm the money and mules after Hurt's death. These sums, amounting to $3,140, were in the absence of witness allowed to Hurt before his death, by the book-keeper of the firm, who gave up the note for $1,634.31, due in 1882; also, the note for $255.45, due at the same time, and another note for $152.08, placing the remainder as a credit on the note due in 1884.

During 1882 he testifies that the book account of Hurt amounted to $2.440.40, to which must be added the sum of $300, due the firm for rent of the land upon which the cotton was raised, making $2,540.40. Against that the firm had received during Hurt's life, and since his death, before the beginning of this suit, $2,273.66, the proceeds of cotton and corn. This was applied to the current account, leaving a balance of $166.77. They received, also, after Hurt's death, mules, covered by the mortgage, worth $750, which they applied to the notes due in 1883 and 1884. He denies that Max Mayer was a partner, or authorized to contract for the firm, although he says Mayer had been appointed trustee in place of Littlejohn.

Max Mayer himself testified that when he took the cotton he paid the ginner $4.40 per bale for ginning. He denies that he promised plaintiff that Gates & Bro. would pay him for the cotton; told him that he supposed they would do so if they found it all right.

1. LABORER'S LIEN: None without writing.

The court refused to make any declarations of law regarding the validity of plaintiff's claim as a laborer's lien, holding them inapplicable. This was correct. There

could be no statutory laborer's lien without writing. (*Sec. 2 of act of 1875, p. 230, Pamphlet Acts.*) The claim of plaintiff stood upon the footing of an ordinary debt, to be probated after Hurt's death against his estate. If he were pledgee of the four bales of cotton, he would be entitled to rely only upon such rights as that might have given to any other creditor of Hurt.

2. Application of payments.

It refused also to declare that Gates & Bro. had the right, as against the plaintiff, to apply the funds received to the notes of 1883 and 1884. This was correct. The right of a creditor to make application of payments to one of several debts owing from the debtor, applies only to those that are then due, and does not apply at all when the debtor himself makes the appropriation.

The court, of its own motion, declared that Mayer, not being trustee, or agent of the trustee, was not authorized in law, or by the terms of the trust deed, to take the cotton from the possession of plaintiff against his will. This would be correct upon one view of the facts which the court might find; that is, that the possession of plaintiff, as pledgee, was proven, and there was a failure of sufficient proof to show that Mayer had been substituted as trustee. The declaration was not erroneous in law upon the facts assumed, and there being no jury, it cannot be objectionable as misleading.

He also declared that neither the trustee nor *cestui que trust* had authority to take possession of, or sell any more of the trust property than was necessary to pay the debts due in 1882. This is a fair construction of the contract so far as regards the *crops* (which is all that is here concerned), upon the hypothesis which the court was authorized to determine, that the debts of 1882 secured by the mortgage had been met without default. It is not so clear that even upon default of payment of any one note the whole was to

become due. It is not so expressly provided. But certainly the parties could not have contemplated that after payment each year, of all the debts falling due that year, the balance of the crops should either go in advance upon the future notes, or be held, subject to waste, and useless in the hands of Hurt. The court added that when all the debts of 1882 had been paid up, the power of the trustee was *pro tanto* exhausted. This is not objectionable as applicable to the facts.

As facts the court found that Burkett had possession of the four bales, and of the cotton in the seed, which had been attached, holding by Hurt's permission as a security for his claim for wages. That there was due him on that account $146. Further, that the notes for 1882, secured by the mortgage, had all been taken up as paid, by the proceeds of land sales. This finding as to payment was correct. They had been delivered up by the book-keeper of the firm. Gates says only it was in his absence. That would not affect the legal consequence of the act. Some other member of the firm may well have authorized it. It was in the general scope of the book-keeper's authority. Gates does not say he made any effort to regain the notes, or correct the mistake, if it were one.

The finding as to plaintiff's possession, as pledgee, was erroneous, save as to the four bales of cotton, worth from thirty-five to forty dollars per bale, or as found by the court, $150 altogether. There was no evidence that the seed cotton in pens, or corn, or anything else was ever in his possession, save as a laborer on the place. This was the possession of Hurt, and of his administrator after his death. There was evidence to support plaintiff's possession of the four bales of cotton. The court found the whole of their value to be $150, from which it deducted eighteen dollars charges. So far it was correct, but the

court erred in estimating the value of the seed cotton at all as the basis of a judgment against the firm.

After reciting that no question had been made nor issue raised as to the validity of the attachment or seizure of the cotton or corn, nor any objection made by defendants to any of the proceedings except as set forth in the bill of exceptions, the court found for the plaintiff, as aforesaid, in the sum of $140, and directed judgment to be entered against defendants for that amount.

The motion for a new trial is based on want of evidence and error in findings, and in declarations of law.

The proceedings have been very loose and irregular. The appeal bond was anomalous, but no objection was made to it at the time, and it was intended and taken to be such as would authorize a judgment against the surety in the Circuit Court. The judgment against the administrator of Hurt was proper for the whole amount due. That much is affirmed without qualification. Indeed, although he is included as "defendants" in the appeal, he evidently did not intend it. So much of the debt as may not be satisfied out of the cotton may be probated against the estate.

Gates & Bro. did not owe plaintiff anything. There is no proof of his possession of any other property than the four bales of cotton. To that extent, or the sum of $132, the firm and its sureties on appeal are liable. On remittitur of the excess, upon the usual conditions, the judgment must be affirmed as to them also. Otherwise to be reversed and the cause remanded for a new trial.

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LITTLE ROCK, MISSISSIPPI RIVER & TEXAS RY. v. MANEES.

JUSTICE OF THE PEACE: *Jurisdiction ex delicto: Criterion of damages.*

A justice of the peace has no jurisdiction of an action for damages exceeding one hundred dollars; and the damages claimed by the plaintiff furnish the criterion of jurisdiction.

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

J. M. Moore for appellant.

The parties had no jurisdiction of the action. The Constitution expressly limits the jurisdiction in such actions to cases involving one hundred dollars or less. *Art. 7, sec. 40, subdiv. 2.*

SMITH, J. This was an action for $125, for the value of a horse alleged to have been killed by the appellant's train. The action was begun before a justice of the peace. The plaintiff recovered $125. The defendant appealed to the Circuit Court, where a judgment was rendered against it in the sum of $100, and this appeal taken.

By *section 40, of article 7, Constitution of 1874*, the jurisdiction of justices of the peace in all matters of damage to personal property is expressly limited to cases where the amount in controversy does not exceed $100.

In actions sounding in damages, the damages that are claimed by the plaintiff furnish the criterion of jurisdiction. *Murphy v. Howard, Hempst., 205; Lafferty v. Day, 7 Ark., 258; State v. Scoggin, 10 Ib., 326; Culver v. Crawford County, 4 Dillon, 239; Lee v. Watson, 1 Wallace, 337; Burr v. Bayne, 10 Watts, 299; Howell v. Milligan, 13 Ark., 40.*

It follows that the justice of the peace had no jurisdiction of the plaintiff's demand, and the Circuit Court acquired none by appeal. *Latham v. Jones, 6 Ark., 371; Pendleton v. Fowler, Ib., 41; Levy v. Shurman, Ib., 182; Collins v. Woodruff, 9 Ib., 463.*

The judgment below is vacated, and the cause is dismissed.

VAUGHAN V. NORWOOD ET AL.

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STATUTE OF LIMITATIONS: *On sealed instruments.*

The provision in the Constitution of 1874, applying the statute of limitations of ten years to sealed instruments executed after the adoption of the Constitution of 1868, extends as well to sealed instruments executed since the adoption of the Constitution of 1874.

APPEAL from *Sevier* Circuit Court.
Hon. W. T. CAMPBELL, Special Judge Circuit Court.

B. B. Battle for appellant.

The writing obligatory under seal was executed after the adoption of the Constitution of 1868, and was not barred until the expiration of ten years. *Schedule to Const. 1874, sec. 1; Dyer v. Gill, 32 Ark., 410.*

SMITH, J. These were actions on writings obligatory or promissory notes, under seal, made in the year 1876, and falling due on the first of November in that year. The actions were begun February 10, 1883, and the pleas were, the statute of limitations of five years. To these pleas the plaintiff demurred; his demurrers were overruled; and the plaintiff, electing to stand upon his demurrers, final judgment was entered discharging the defendants.

The sole question is, whether the notes sued on were barred at the commencement of the actions. More than five years had elapsed between the maturity of the notes and the institution of suit. The limitation, at the time the Constitution of 1868 went into force, was, upon sealed instruments, ten years, and upon unsealed instruments, five years. By that Constitution, private seals were abolished. But the proviso to *section 1 of the Schedule to the Constitution of 1874*, enacts that the statute of limitations, with regard to sealed and unsealed instruments, in force at the time of the adoption of the Constitution of 1868, shall continue to apply to all instruments afterwards executed, until altered or repealed.

The convention probably intended their provision to apply only to instruments executed between 1868 and 1874, when the idea had not yet become familiar that the holder of paper with a seal to it had no longer time to bring his action than if it bore no seal. And in the cases that have heretofore come before the court, involving the construction of this provision (*Dyer v. Gill, 32 Ark., 410; Stephens v. Shannon, 43 Ark., 464*), the paper was made in that interval. But the language of the proviso plainly extends as well to instruments executed since the adoption of the Constitution of 1874. Its effect is to revive a senseless distinction between sealed and unsealed instruments. For no good reason can be given for allowing the holder of a note ten years to sue, provided the maker has affixed a scrawl to his signature; whereas, if there is no scrawl, he has but five. But the law is so written, and we shall not attempt to construe it away.

Judgment reversed and cause remanded, with directions to sustain the plaintiff's demurrers to the answers.

TEXAS AND ST. LOUIS RAILWAY v. KIRBY.

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1. PRACTICE IN SUPREME COURT: *Errors of Circuit Court must be excepted to.*

The Supreme Court will not review the rulings of the Circuit Court in excluding evidence from the jury, unless the rulings be excepted to at the time.

2. RAILROADS: *Value of right of way: How proved.*

In testifying of the damages for the right of way for a railroad, the witnesses may give their opinion either of the difference in value of the tract of land before and after the location of the road, or directly, of the amount of damages accruing from taking the land.

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

L. A. Byrne for appellant.

1. The offer to compromise and confess judgment, under sections 4752, 4758–9 Gantt's Digest, the acceptance by defendant, and the judgment rendered thereon for eighty-five dollars, and payment by the clerk as ordered by the court, was a full disposition of the case, and should have been final.

2. The Kirbys had no cause of complaint. They were not subrogated to the rights of the owner of the land. Damages for right of way belong to the person owning the land *at the time of the taking*, and do not, without an express stipulation, pass to a purchaser. *Pierce on Railroads, p. 185; Mills on Em. Domain, sec. 66; 34 Tex., 723; 91 Ill., 312.*

3. Evidence as to the market value of the land at or about the date of the appropriation, and just after, and as to the price set upon the land by the owner, and his offer to sell just before the taking, clearly admissible. (*Pierce*

on Railroads, 210; 39 Ark., 169; 42 Ark., 265.) It was also error to exclude evidence of what lands similar in quality and in the immediate vicinity of this tract were selling for. *Pierce on Railroads, 224, and cases cited.*

Paul Jones for appellees.

The offer to compromise was not served on defendants or their attorneys, and no acceptance was filed as provided by *section 4752 Gantt's Digest*, and was not binding on either party. Nor was the offer to confess judgment accepted in full satisfaction of defendant's demands. The judgment affirmatively shows that it was not a final determination of the issues. But even if the court erred in rendering judgment on this offer, it was not made ground of the motion for new trial (*33 Ark., 114; 23 Ib., 19*), nor, unless the damages assessed by the jury at $250 are excessive, has appellant suffered any injury. When substantial justice has been done, this court will not reverse for errors in form or practice. *34 Ark., 94; 23 Ib., 121; 20 Ib., 109, 216.*

Appellant alleged that the Kirbys had succeeded to all the rights of the original owner, and brought them in as parties, and no proof that they were subrogated to Arlidge's rights was necessary. It was confessed. It was not necessary to have it formally produced to the jury as evidence. *41 Ark., 56.*

The inquiry as to the value of the land properly confined to its value at the time of appropriation (*42 Ark., 528*), and it would have availed nothing to have proved the value of land of similar character in the vicinity at or near the date of the appropriation; besides, it was not a proper inquiry. (*Mills' Em. Domain, 170; 81 Pa., 414; 35 Cal., 247.*) But appellant did not except to the ruling of the court in excluding this testimony. *39 Ark., 224.*

The price put on the land by defendants, or what they offered to sell it for at a particular time, is not the true criterion, as motives may have actuated them to sell at less than its real value. *Mills' Em. Domain, sec. 170.*

Taking into consideration all the elements of damages (*42 Ark., 527, 528*), the verdict is not excessive according to the testimony.

COCKRILL, C. J. The railroad instituted proceedings under the statute to condemn the right of way through forty acres of land near Texarkana, and under an order from the circuit judge for that purpose, deposited the sum of $250 in court to pay the damages to be assessed. After the land owner had been brought into court the railroad filed a motion to compromise and confess judgment for eighty-five dollars, provided this should be taken in full of all damages, and about the same time filed a motion to have the Kirbys, who are appellees here, made parties, because, as the motion alleged, they had become the owners of the land and had succeeded to the first owner's right to receive whatever damages might be awarded in the proceeding. The offer to compromise was not accepted. The court, however, looking only to the offer to confess judgment, and disregarding the condition that the amount named should be taken, if at all, in full satisfaction of the claim for damages, rendered judgment against the company for $85, directed the clerk to pay it out of the fund deposited in court, and continued the case for further proceedings. The clerk paid the amount as ordered to the land owner. At the next term the Kirbys were brought in by service of process and took up the litigation in the place of the original owner, one Arlidge. There was a trial by jury, and a verdict and judgment in their favor for $250. The

railroad moved for a new trial, took a bill of exceptions and appealed.

1. ERRORS OF CIRCUIT COURT: Must be excepted to.

Several questions upon the exclusion of testimony offered by appellant are pressed upon the court as error at the trial, but as no exceptions were saved to the rulings of the Circuit Court in that regard, the presumption is that the appellant acquiesced therein. If it was desired to make any point on the exclusion of this testimony, the ruling of the court should have been objected to at the time.

DAMAGES FOR RIGHT OF WAY: How proved.

Witnesses who had personal knowledge of the character and location of the land, and of the facts in regard to building the railroad over it, were permitted to give their opinions as to the amount of damage sustained thereby, against appellant's objection. The difference in value before and after the location would be a valid test of the damage done, and it would seem to be immaterial whether the testimony was admitted in this form or in answer to a direct question as to the amount of the damage. The latter follows as a mathematical deduction from the first. In either case, it must come as an opinion, and opinions as to the value of the land before and after location, were held admissible by this court in the similar case of *St. Louis & Texas Ry. v. Anderson, 39 Ark., 167.* Both methods seem to be sustained by the authorities. *Pierce on Railways, 227 and cases; Snow v. B. & M. Ry., 65 Me., 230; Shattuck v. Stoneham, etc., Ry., 6 Allen, 115; Sherman v. St. P., Minn. & Man. R. R. Co., 30 Minn., 227; T. & St. L. Ry. v. Eddy, 42 Ark., 527.*

Whether a witness has such knowledge of the facts as to make his opinion of value, is in a great measure at the discretion of the circuit judge. It is true that such evidence, like all oral testimony, may at times prove unreliable, but its value can be readily and satisfactorily tested by cross-examination.

It is urged that there is no evidence to show that the Kirbys succeeded to the rights of Arlidge, the original owner of the land. The fact was admitted and no proof was necessary. Arlidge was a party to the proceeding, and the Kirbys were brought in on appellant's showing that they were the real parties in interest. and the truth of this was not disputed by any one.

In the outset the court below seems to have misapprehended appellant's offer to submit to a judgment for $85, in way of compromise. The offer was made in substantial compliance with the statute, and, as it was not accepted by the party entitled to recover, it should have been held in abeyance by the court merely for the purpose of putting the costs on the party refusing, in case no more than $85 was recovered by him. (*Mansf. Dig., sec. 5221.*) It was clearly error in the court to take the offer as an admission that $85 should be recovered in any event. *Mansf. Digest, sec. 5222.*

On the trial of the case the court seems to have conformed to the rule that an offer of this kind should not be given in evidence, and, upon the whole, substantial justice would have been done if the appellees had been compelled to enter a remittitur for the sum previously recovered by Arlidge. The Kirbys were purchasers *pendente lite*, and were bound by the proceedings had prior to their coming into the case.

The verdict of the jury was for $250. One of the errors assigned in the motion for a new trial was that the damages were excessive. The evidence may be said to sustain the verdict. Some of the witnesses estimated the damage at more than $250, but none of them placed the amount at as much as $85 more than that sum. The result is that upon what might otherwise be deemed a proper judgment for $250, the appellant is mulcted in damages to the

extent of $335. As a remittitur will cure the only error complained of, if the appellees will enter a remittitur of $85, the judgment will be affirmed upon the terms prescribed in *Fowler v. Johnson, 11 Ark., 280;* otherwise it must be reversed and a new trial granted.

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ANDERSON & CO. v. BOWLES.

1. ACTION: *By landlord against purchaser of tenant's crop.*
   An action for money had and received, cannot be maintained by a landlord against one who has received and sold his tenant's crop.
2. SAME: *Same: Statute limitations.*
   An action in equity by a landlord to recover his rent from one who has purchased and sold his tenant's crop, must be brought within six months after the rent becomes due.
3. TROVER: *Pleading and proof.*
   A complaint in trover against a defendant for the conversion of goods deposited with him for the plaintiff, must aver that he agreed to accept the goods for the plaintiff, or to act as his agent in regard to them; and to maintain the action the plaintiff must prove property in himself, and a right of possession at the time of conversion. It cannot be maintained by a landlord against the purchaser of a tenant's crop to enforce the landlord's lien for rent.

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

Gibson & Holt for appellants.

1. The complaint is deficient in not stating that defendants consented to accept the cotton as bailees, or to act as plaintiff's agent in the matter. (*Chitty Pl., 10th Am. ed., vol. 1, p. 384.*) Nor does it contain sufficient averments to

constitute a cause of action for money had and received. (*36 Ark., 575.*) Before there can be a bailment, there must be title and right to possession. Plaintiffs had no title to the cotton, they only had a lien as landlords for the amount due from the sub-lessee to the original lessee.

2. No agency or bailment having been proven, and six months having expired since the rent was due, plaintiffs' lien was gone, and they were barred even in equity. *37 Ark., 715; 31 Ark., 291.*

SMITH, J. The complaint stated that the plaintiffs had leased to one Jack Crater, the Pleasants plantation, containing 150 acres, for the year 1881, the rent reserved being $950; that their said tenant sub-let a part of the premises to Richard Crater, and thirty-one acres of the same to the defendants, J. S. Anderson & Co., for $7 per acre; that their said tenant turned out and delivered to them six bales of cotton, of the value of $307.50, in payment of the rent, and they gave directions to him and his sub-lessee, Richard, to haul the cotton over to the defendants' store, and directions to the defendants not to remove or dispose of the same until further orders; that the said Jack did not deliver to the defendants the cotton as per instructions, but Richard did deliver three bales to them subject to the plaintiffs' orders, and likewise the defendants received three other bales from one Coil, who cultivated eleven acres of the thirty-one which the defendants had sub-rented from the original lessee; and that the defendants had shipped and sold the six bales and converted the same to their own use.

After a general demurrer to the complaint had been overruled, the defendants answered, denying any agreement with the plaintiffs to hold for their benefit, or that they had received from the plaintiffs any instructions as to

the disposition of the cotton; and denying that Richard Crater and Coil had ever delivered any cotton to them for the plaintiffs. They alleged that they had received Richard Crater's cotton and had paid to the plaintiffs his rent, which amounted to $85. And further, that they had purchased Coil's cotton, and had paid the rent for the thirty-one acres to Jack Crater, their immediate lessor. And they pleaded that the lien of the plaintiffs as landlords was gone, more than six months having intervened between the maturity of the rent and the commencement of the action.

A trial before a jury resulted in a verdict and judgment of $267.62 for the plaintiffs.

1. ACTION: By landlord against purchaser of tenant's crop.

The appellee has not favored us with an argument, and we are puzzled to know upon what theory the action was prosecuted. The court below and the jury treated it as an action for money had and received for the plaintiffs' use against one who had acquired the tenant's crop, with notice of the landlord's lien. For the verdict was reached by deducting what the plaintiffs admitted they had received from the amount of rent which Jack Crater had agreed to pay. Yet *Reavis v. Barnes, 36 Ark., 575*, is authority for saying that no such action can be maintained at law. And if the suit had been in equity, it must have been brought within six months after maturity of the rent. (*Gantt's Digest, section 4098; Valentine v. Hamlett, 35 Ark., 538; King & Clopton v. Blount, 37 Ib., 115.*) Here the rent fell due on November 15, 1881, and the action was not begun until June 5, 1882. If, therefore, it is to be sustained at all, it must be as an action of trover against a bailee for the conversion of chattels intrusted to his care. And in this view the complaint is deficient in certainty for not averring that the defendants consented to accept the cotton as bailees, or to act as the plaintiffs' agents in the premises.

2. Statute of limitations on.

3. TROVER: Pleading.

In *1 Chitty's Pl., 11th Am. ed., *384*, the law is thus stated: "In an action on the case, founded on an express or implied contract, as against an attorney, agent, carrier, inn keeper or other bailee, for negligence, etc., the declaration must correctly state the contract, or the particular duty or consideration from which the liability results, and on which it is founded; and a variance in the description of a contract, though in an action *ex delicto*, may be as fatal as in an action in form *ex contractu*. The declaration in such case usually begins with a statement of the particular profession or situation of the defendant and his retainer, and consequent duty or liability. The declaration will be defective if it do not show that by express contract, or by implication of law in respect to the defendant's particular character or situation, etc., stated by the plaintiff, the defendant was bound to do or omit the act in reference to which he is charged."

But since the introduction of the Code, pleadings have lost somewhat in precision. And we should not be in a hurry to reverse a judgment, if it can be upheld upon any theory consistent with the pleadings and proofs. Considering this as a cause of action defectively stated, and that the plaintiffs meant to declare in trover against the defendants as depositaries of the cotton, is the verdict supported by the testimony? To succeed in trover the plaintiff must prove property in himself and a right of possession at the time of the conversion. *2 Gr. Ev., sec. 636.*

Proof necessary.

Now, a landlord has only a lien upon the crop raised upon the demised premises—no title to the crop itself, or any portion of it. (*Upham v. Dodd, 24 Ark., 545; Bell v. Matheny, 36 Ib., 572.*) And the only way in which he can acquire title is by a purchase and delivery to him.

Now, the evidence conclusively shows that the rent for that portion of the land cultivated by Richard Crater was $85, and that the same was paid to the plaintiffs by the

defendants. Consequently the plaintiffs have no just demand against the defendants for any of Richard's cotton that came to their hands. And of Coil's cotton the plaintiffs never were in possession, nor had any title thereto, or right of possession by virtue of any arrangement with him, or with the defendants, or with Jack Crater. Nor is it shown that any cotton was ever in fact delivered to the defendants for the plaintiffs.

The result is that the evidence is not sufficient to sustain the verdict. And this was one of the assignments in the motion for a new trial.

Reversed and remanded for a trial *de novo*, with leave to the parties to reform their pleadings, if they shall be so advised.

MILWEE V. MILWEE.

1. MARRIED WOMAN: *Not bound by title bond.*

   A married woman's executory contract to convey land, if not a mere nullity, is voidable at her election.

2. SAME: *Her deed: Joinder of husband.*

   It is not necessary that a husband join in his wife's deed of her land. It is good without him.

3. HUSBAND AND WIFE: *His interest in her land.*

   Milwee, in consideration of marriage, conveyed to his intended wife certain town lots in Locksburg, "to her, her heirs and assigns forever, to her and their own use, benefit and behoof, with full power to her to grant, bargain, sell and devise the same at will, in as full and complete a manner as if she were sole." The marriage occurred in 1872. In 1878 they separated, and she sold him the lots on time and executed bond to convey upon payment of the purchase money. Afterwards, upon his failure to pay, she sold and conveyed to another party, who had notice of the prior sale to her husband. In an action of ejectment by the last purchaser, *held*, that her bond for title, if not a mere nullity, was voidable at her election, and whatever interest the husband acquired in the premises by the intermarriage, was swept away by the deed to the plaintiff.

APPEAL from *Sevier* Circuit Court.
Hon. H. B. STUART, Circuit Judge.

B. B. Battle for appellant.

A bond for title by a married woman is void. (*Felkner v. Tighe, 39 Ark., 357.*) The deed is good and valid, although the husband did not join in the execution thereof. (*Roberts v. Wilcoxson, 36 Ark., 355.*) The statute and Constitution does not limit a married woman's power to convey her real estate to any particular purpose or consideration. (She need not acknowledge a consideration.) *35 Ark., 480.*

Although appellee was in possession of the land at the time his wife conveyed, she could convey as she could have done if she had been in possession. *Gantt's Digest, sec. 834.*

SMITH, J. In the year 1872, the appellee, in consideration of a marriage thereafter to be celebrated between himself and a Mrs. Dixon, conveyed to her parts of certain lots in the town of Locksburg. The deed expresses that the lots are to be held to her, her heirs and assigns forever, to her and their own use, benefit and behoof, with full power and authority to her to grant, bargain, sell and devise the same, at any time she may think proper, in as full and complete a manner as if she were a single woman. The marriage took place in 1872, and the parties resided on the lots until 1878, when they separated. Arbitrators were called in to divide the property between the husband and wife, and their award was, as to the particular property now in controversy, that the husband should make his two promissory notes, each for $100, payable to his wife on the first day of January, 1879, and 1880, respectively, the same to

be liens on the premises until payment. The notes were accordingly made, and Mrs. Milwee executed a bond obliging herself to reconvey the lots to her husband when the notes were paid. In July, 1880, the notes remaining unpaid, Mrs. Milwee sold and conveyed the land to the appellant, who brought ejectment.

The answer set up that the husband had been in possession of the property all the time, and that he did not join in the execution of the deed to appellant. Furthermore, that he held the obligation in writing of his wife to convey the lots to him, and that, independently of contract, he was entitled to the possession and control of his wife's real estate.

The cause was transferred to equity. The Circuit Court found that the purchase of the lots by the husband at the time of the separation, was valid and obligatory upon the wife, and that the purchase notes were binding upon the husband and collectable by process of law. It therefore decreed that the plaintiff, having notice of the defendant's rights, acquired no estate by his purchase.

1. MARRIED WOMAN: Not bound by title bond.

We decided, in *Felkner v. Tighe*, *39 Ark.*, *357*, that a married woman could not bind herself by an executory contract to convey her land. If this is true, with regard to contracts entered into with strangers, *a fortiori*, it applies to those made with her husband. Mrs. Milwee's bond for title, if not a mere nullity, was voidable at her election.

2. Husband need not join in her deed.

It was no objection to Mrs. Milwee's deed to the appellant, that her husband did not join in the execution thereof. *Roberts v. Wilcoxson*, *36 Ark.*, *355*.

3. His interest in her land.

There is no question of curtesy initiate in this case, because there is no proof that any child has been born of this marriage. And whatever interest the husband acquired in the premises by the intermarriage, was swept away by the wife's conveyance.

The decree below is reversed, and a judgment will be entered here in favor of the appellant for the recovery of the land and rents from the twenty-eighth of July, 1880, at the rate of fifty dollars per year.

MACLIN v. THE STATE.

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1. CRIMINAL PRACTICE: *Impannelling a jury. Discretion of judge.*
The presiding judge at a criminal trial must of necessity have a large measure of judicial discretion in passing upon the qualifications of jurors, and the erroneous rejection of one summoned as a juror affords no sufficient ground for a new trial.

2. CRIMINAL PRACTICE: *New Trial: Separation of jury.*
The separation of a juror from his fellows pending the trial, casts upon the State the burden of proving that no improper influence was brought to bear upon the juror during his absence. In other words, the mere fact that a juror separates from his fellows without the order of the court, is *prima facie* ground for a new trial, unless it affirmatively appears that the separating juror was not subject to any noxious influence during his absence.

3. EVIDENCE: *Of defendant's good character.*
In prosecutions for homicide on circumstantial evidence, the good moral character of the defendant is admissible as evidence in his behalf; but the court cannot instruct the jury as to the weight to be given to such evidence.

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

Mark Valentine and *C. H. Carlton* for appellant.

Proof of good character as a man of peace, creates a reasonable doubt of guilt. The court erred in refusing the eleventh instruction for defendant. *28 Ark., 164; Carlton on Homicide, 311; Burrell on Cir. Ev., 531.*

When a witness for the State is recalled, defendant has the right to cross-examine on the whole case. *Gr. Ev., sec. 447.*

The testimony of Hughes should have been excluded, the survey not having been made as required by law. *Gantt's Digest, p. 287.*

The whole skeleton should have been introduced or accounted for. The part not introduced might show injuries which would totally negative the guilt of accused.

Nothing was shown on the examination on *voir dire* of jurors Lee and Lawson, which warranted the court in excusing them, and it was error to excuse them for causes known only to the court.

The separation of the juror Johnson from his fellows, without the consent of the court, vitiated the verdict, unless the State had shown, which she did not, affirmatively, that he was not tampered with. *10 Yerg., 241; 9 Sm. & M., 465; 12 Ark., 810; 13 Ib., 320; 20 Ib., 46, 60; 29 Ark., 255; 13 Texas, 168, 181, 182; 26 Miss., 78; 2 Swan Tenn., 378.*

Review the testimony in detail, and contend that the verdict was contrary to the law and the evidence.

Dan. W. Jones, Attorney General, for the State.

The eleventh instruction properly overruled. (*28 Ark., 164; 34 Ib., 740.*) The court did allow evidence of the good character of defendant to go to the jury, but properly refused to charge them as to the weight or degree of credit to be attached to it.

Hughes' evidence properly admitted. It related only to a question of jurisdiction and appellant did not dispute the jurisdiction of the court.

It was not necessary to produce the entire skeleton, for the object was to show that deceased came to his death

by violence, and those parts which indicated this were shown.

Defendant had no right to any particular juror. *35 Ark., 639, 640; 29 Ib., 21.*

The separation of the juror Johnson was not hurtful to appellant, nor ground for new trial. *29 Ark., 253; 35 Ib., 118, 220; 40 Ib., 463.*

SMITH, J. Maclin was convicted of murder in the first degree, upon an indictment which charged him with the willful, malicious, deliberate and premeditated killing of one Griffin.

1. IMPANNELLING JURY.

In impannelling the petit jury, two persons who had been summoned on the regular panel, were excused by the court, and exceptions were reserved. They stated upon their *voir dire* that they had heard a portion of the testimony on a previous application of the prisoner for bail, but that such testimony had left no permanent impression on their minds. In explanation of their rejection as jurors, the circuit judge has incorporated in the bill of exceptions a statement that it was officially known to him that one of these persons was bail for the appearance of the defendant, and that the other was under indictment for manslaughter, and that for these reasons, as well as their previous acquaintance with the facts of the case, he considered it improper for them to sit.

Discretion of judge.

Without attaching any great importance to knowledge that was in the breast of the court and not developed in the examination, we remark that the presiding judge, who has an opportunity to observe the appearance and demeanor of jurors, must of necessity be invested with a large measure of judicial discretion in passing upon their qualifications. And the erroneous rejection of one who is

summoned for jury service lays no sufficient foundation for a new trial. *Hurley v. State, 29 Ark., 17; Benton v. State, 30 Ib., 343; Lavender v. Hudgens, 32 Ib., 763; Wright v. State, 35 Ib., 639.*

3. Separation of jury.

Several of the assignments in the motion for a new trial relate to alleged misconduct of members of the jury. Only five jurors were obtained out of the regular panel. These were sworn and duly admonished concerning their duties by the court, and it was ordered that they be kept together. One of these five, Frank Johnson, was granted permission to go to the house of Mr. William B. Street, who was sworn as a special bailiff to take charge of him. He slept for several nights in a house within Mr. Street's yard, but detached from the family residence, in company with Mr. Street's sons. Affidavits were made by Street and one of his sons, going to show that the juror who had been accepted by the parties and sworn, was not exposed to any improper influences by reason of this permission from the court. The same juror had also, before the trial began, visited one Gatewood at his room in the hotel; but he was accompanied by an officer, who heard all of the conversation and none of it had any relation to Maclin's trial.

Another juror was also permitted by the court to retire from the court room for a short time on account of indisposition and obedience to the calls of nature, leaving the rest of the jury in the box. But he was attended by an officer.

Furthermore, an affidavit was attached to the motion for new trial, that two of the jury, Ernest Daniels and Frank Johnson, did, during the progress of the cause, separate from their fellows and go, in the custody of an officer, into a saloon for the purpose of taking a drink of liquor. And that on another and different occasion the said Frank Johnson, during the trial of said cause, did, in the absence

of the remainder of the jury, go with an officer into a drinking saloon and remain there some time in the hearing of comments on the case that was on trial. The State filed a counter-affidavit of Daniels to the effect that, while he was in the saloon he heard no conversation by any one in reference to Maclin's case. But there is nothing in the bill of exceptions to rebut the presumption against the integrity of the verdict, raised by the affidavit in relation to Johnson's last visit to the saloon.

It is within the discretion of the Circuit Court to permit the separation of jurors who have been selected, while the trial panel is being made up. And no error is assignable for this cause, unless it be shown that injury has resulted to the prisoner. So for a necessary purpose, even while the trial is proceeding, a juror may be granted temporary leave of absence from his fellows and the court room, under the care of an officer. *Gantt's Digest, sections 1938, 1941; 1 Bishop Cr. Pro., 3d ed., sec. 994.*

When ground for new trial.

But it has long been the rule of this court in case of felony, that the separation of a juror from his fellows pending the trial, casts upon the State the burden of showing that no improper influence was brought to bear upon the juror during his absence. In other words the mere fact that a juror separates from his fellows, without the order of court, is *prima facie* ground for a new trial, unless it affirmatively appears that the separating juror was not subjected to any noxious influence. The earliest case in our reports which we remember in which this rule was announced is *Cornelius v. State, 12 Ark., 782.* And it was followed in *Stanton v. State, 33 Ib., 317;* in *Collier v. State, 20 Ib., 36;* and *Coker v. State, Ib., 53;* in *Thompson v. State, 26 Ib., 323;* in *Kee v. State, 28 Ib., 155;* in *Wood v. State, 34 Ib., 341;* and in *Binns v. State, 35 Ib., 118.*

The result of the cases is fairly stated by Mr. Justice Harrison in *Thompson v. State, supra:*

"The conclusion to be derived from the former decisions of this court, and which seems to be well supported by the authorities as to the consequences of the misconduct of the jury, in cases of mere exposure to improper influences, we understand to be this: Where evidence is adduced and shows that the jury were not in any way influenced, biased or prejudiced by the exposure, the verdict will not be disturbed; but unless it is proved that it failed of an effect, the presumption will be against the purity of the trial and the verdict will be set aside."

This seems to be the general rule where the separation has been without the consent of the court. See a great number of cases cited to this point in *20 Cent. Law Jour., 85;* though the Supreme Court of Pennsylvania, in the case of *Moss v. Commonwealth*, not yet reported in the regular series, take a distinction between capital and other felonies, in respect to the burden of proof, giving the prisoner the benefit of the rule only when he has been convicted of a capital crime.

Here no effort was made to deny, exculpate or explain the misconduct of this juror, or to show that it was not hurtful to the appellant, although it was in the power of the State to produce him and the officer, under whose eye he was, if the facts were otherwise than as stated in the affidavit. Nor can we presume, from the mere presence of the officer, that no harm could have resulted; for no presumptions can be indulged in favor of the conduct of an officer who has been guilty of so gross a breach of official duty as is here disclosed. Consequently it must be taken as an uncontroverted fact that the juror, Frank Johnson, without the sanction of the court, and in disregard of its admonition, did separate from his fellows, and in company

with an officer, enter a saloon, where he remained for some time within hearing of the conversation of persons who were discussing the case then on trial. This vitiates the verdict.

The court was moved to exclude from the jury the testimony of the county surveyor of Ashley County, who had surveyed the boundary line between Ashley and Chicot, after Griffin had been killed and in the absence of Maclin, apparently to enable himself to testify in which county the spot was where the dead body had been found. There was no error in admitting the testimony. Griffin was killed near the boundary of two counties. The objection, if it had any force, related to the jurisdiction of the court; and the appellant has not questioned that jurisdiction. His presence was not necessary to ascertain any fact connected with the killing, although it might indirectly affect him by determining in which county he should be tried.

A part of the skeleton of the dead man was exhibited to the jury, with a view to show the nature and location of the wounds. The appellant contends that the whole of it should have been produced. But it was proved by medical experts, who examined the body shortly after its discovery, that the bones exhibited were the only ones that were injured.

Upon the testimony contained in this record, we should not think of reversing the judgment of conviction. It was a case of circumstantial evidence. And it being the province of the jury to weigh the circumstances proved before them and to pass upon the guilt or innocence of the accused, their verdict should stand, unless some link in the chain of evidence tending to connect the defendant with the commission of the offense was entirely wanting. (*Harris v. The State, 31 Ark., 196.*) But as there must be a retrial, we refrain from comments on the testimony.

The appellant has no cause to complain of the charge of the court, which was unusually full and accurate. Ten special directions were given at the instance of the State. Exceptions were taken to but two of these; and these exceptions have been abandoned here. Twenty were moved on the part of the defendant, and only two were refused. Of the rejected prayers, counsel for appellant only insist upon this one:

3. Proof of good character.

"If defendant be proved of good moral character as a man of peace, the law says that such good character may be sufficient to create a reasonable doubt of his guilt, although no such doubt would have existed but for such good character."

The court properly allowed Maclin to prove his character, and properly refused to instruct the jury what weight should be given to such evidence. Even before the adoption of the present Constitution, instructions as to the value or degree of credit to be attached to a particular species of evidence were erroneous. *Worthington v. Curd, 15 Ark., 492; Ingram v. Marshall, 23 Ib., 115; Jenkins v. Tobin, 31 Ib., 307; Thompson on Charging the Jury, section 57.*

And now judges are forbidden to charge juries with regard to matters of fact.

For the misconduct of the juror, Frank Johnson, the judgment is reversed and a new trial awarded.

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WERNER v. THE STATE.

1. MOTION FOR NEW TRIAL: *Office of.*

It is not the province of a motion for new trial to bring upon the record irregularities that occurred at the trial. The facts constituting the error complained of and the exceptions to the ruling of the court, must be shown by bill of exceptions: and the motion for new trial can serve no other purpose than to assign the ruling or action of the court as error.

2. WITNESSES: *Disqualification of convicts: Restoration by pardon.*
Section 2859 Mansfield's Digest disqualifying convicted criminals as witnesses, applies only in *civil* and not in *criminal* trials. But such parties as were disqualified by the common law rule are still disqualified, the statute not affecting the rule; but their disqualification is removed by the pardon of the Governor, though their conviction may still be urged against their credibility.

3. CONVICTS: COUNTY PRISONERS: *Corporal punishment.*
Corporal punishment by the lash can be lawfully inflicted by contractors upon county prisoners for refusal to work, or upon convicts in the penitentiary, only under rule or regulation made by the State board of prison commissioners for the discipline of convicts in the penitentiary; and if the commissioners have not authorized the use of the lash in the latter class, it cannot be used in either.

4. MOTION FOR NEW TRIAL: *Prejudice of juror discovered after trial.*
When a juror states upon his *voir dire* that he has formed and expressed an opinion of the prisoner's guilt, but has no prejudice against him and can give him an impartial trial, and is accepted by the prisoner without examination as to his feelings and statements, the prisoner cannot afterward urge after-discovered statements of the juror showing strong bias and belief of his guilt as a ground for new trial.

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

W. P. & A. B. Grace for appellant.

1. The court erred in admitting the testimony of Ike Harris. One convicted of petit larceny, even after pardon, cannot testify in a criminal case. *Digest, 2482; 35 Ark., 449; 39 Ib., 229; Greenleaf Ev., 12th ed., sec. 378 and note.*

2. One of the jurors, though on examination on his *voir dire*, he stated that he had formed an opinion from rumor, etc., but could give the accused a fair and impartial trial, was prejudiced, and had made statements that appellant ought to be hung, etc. This was ground for new trial. *2 Whar. Am. Cr. L., 5th ed., sec. 3152, and authorities cited; 1 Whart. St. T., 606; 40 Ark., 515.*

3. As contractor to safely keep prisoners, etc., appel-

lant had the right and it was lawful for him to enforce discipline by inflicting corporal punishment. (*Acts 1881, p. 149, sec. 4; p. 121, secs. 1 and 9; Rules and Regulations Board Pen. Comrs., secs. 4, 5, 7, etc.*) The necessities of the case require it. The right existed at common law in this and other cases. *2 Whar. Am. Cr. Law, secs. 1259–60; Ib., sec. 2863–4.*

4. It was error to exclude testimony that the whipping was done by Bess. The indictment charged that it was done by Freeman, and if it was proven to have been done by another, without appellant's aiding or abetting, this would have acquitted him. *1 Chitty Cr. L, *p. 556; 4 Bish. Cr. Pro., sec. 496; 1 Whar. Cr. L., sec. 593; 1 Phillips Ev., 824, 844 and note 237.*

5. Appellant and Freeman should have been allowed to elect the order of their trial. *Gantt's Digest, sec. 1891.*

6. Review the evidence and contend that the verdict was contrary to the evidence. (*34 Ark., 639.*) The evidence fairly shows a case of death by *misadventure*, unless it should be held that the act of whipping was unlawful *per se*, in which case the homicide was involuntary manslaughter. (*2 Whar. Cr. L., sec. 977; Gantt's Digest, secs. 1266, 1292; 1 East. P. C., 261; Whart. on Hom., secs. 128, 130.*) If there be no malice in the master the crime is manslaughter only. (*2 Wh. C. L., sec. 1014 and note h; 4 Mason, C. C., 505; Whart. on Hom., secs. 93, 97, 113, 130, 150.*)

Dan W. Jones, Attorney General, *contra.*

1. The "rules and regulations of the board of commissioners" were not introduced in evidence, they constitute no part of the public law of this State, and the courts could not take judicial cognizance of them. But if they had been, appellant did not comply with them in any respect. The whipping was cruel and unusual, contrary to all law and the dictates of humanity. *Const., art. 2, sec.*

91; State v. Hoover, Dev. & Bat., 365; Mansfield's Digest, sec. 1527.

2. The record fails to show that appellant and Dan Freeman elected the order in which they should be tried. It is only set up in the motion for new trial, and cannot be considered. *Mansfield's Digest, secs. 2301, 2306; 39 Ark., 225; 40 Ib., 459.*

3. Harris was a competent witness, having been pardoned by the Governor. *Mansfield's Digest, sec. 2858*, applies to *civil* and not to *criminal* cases. The incompetency in criminal cases not being created by statute, but by the common law, a pardon restores competency. *Greenl. Ev., 12th ed., sec. 378 and notes; 12 Ark., 122; 10 Ib., 284; 15 Ib., 431; 10 Johns., 232, 483; 4 Bl. Com., 402; 6 Bac. Ab., Title Pardon; Hawk. P. C., B. 2 Ch., 37; sec. 48, vot 4, 7th ed., p. 354; 1 Bish. Cr. L., sec. 917; 4 Wall., 380.*

4. The record does not show that the court *excluded* the depositions to show that the whipping was done by another than Freeman. Appellant should have offered to read his depositions; then, if excluded, or if improper testimony was admitted in rebuttal, he might complain. Appellant has not brought himself within the rule. *Mansfield's Digest, 2146, 2149, 2304, 2306; 39 Ark., 225; 40 Ib., 459.*

5. As to the disqualification of the juror King, he was properly examined on his *voir dire*, and stated that he could give appellant a fair and impartial trial, etc. Appellant did not question him as to his previous declarations, but accepted him on the panel. The court heard the examination, the affidavits, etc., and the granting of a new trial was within its discretion, and this court will not infer that it abused such discretion. *40 Ark., 515, 516; 15 Georgia, 223; 19 Ark., 164.*

COCKRILL, C. J. Appellant and one Dan Freeman were jointly indicted for the murder of William Sharpe. The facts, as far as it is necessary to state them, are as follows: Appellant was the lessee of the county prisoners of Desha county. Sharpe was convicted of a misdemeanor in July, 1883, and was placed in appellant's custody to work out his fine. He was a mechanic and unused to farm labor, but he was stout and apparently in good health, and appellant put him to hoeing cotton with other prisoners. Five or six days afterwards, near the close of the day's labor, Sharpe quit work, leaned upon his hoe for support, and refused to move on. The negro guard, Dan Freeman, called appellant from another part of the field. After he came up, and under his direction, four or five men stretched Sharpe on the ground, face down, and stripped off his clothing so as to leave his back and thighs bare. His back showed the marks of former whippings. Dan Freeman stood over him and laid on twenty-five or thirty blows with an instrument made of a piece of gin belting as wide or wider than a man's hand, about eighteen inches long, fastened to a wooden handle. It is useless to recount the sickening details of the whipping as given by the witnesses. It is enough to say that Sharpe died a few hours thereafter, and that there was no lack of testimony that appellant stood by all the while directing the beating, and that it was the cause of the death. There was also evidence that appellant had previously threatened to put Sharpe out of the way, because he had complained of the manner of his treatment. The witnesses, except those who testified as to the condition of the body after it was exhumed, and some medical experts, were either ex-prisoners from the county farm or the negro employés and mistress of appellant; the

former testifying for the State and the latter for appellant. Their statements were contradictory upon some of the material facts at issue, but the jury found appellant guilty of murder in the second degree, and assessed his punishment at twenty-one years in the penitentiary. The trial was in Jefferson county on change of venue from Desha, appellant electing to be tried alone.

1. MOTION FOR NEW TRIAL: Office of.

It is urged that a new trial should be granted because, as is alleged, the court refused to permit the appellant and Freeman, who was jointly indicted with him, to determine for themselves the order in which they should be tried. We find nothing in the record on this subject, outside of the statement contained in the motion for a new trial. It is not the province of such a motion to bring upon the record irregularities that occur in the course of a trial. The facts constituting the error complained of, together with the exceptions to the ruling of the court, should be made to appear by bill of exceptions, and the motion for a new trial can serve no other purpose than to assign the ruling or action of the court as error. There are several other causes for a new trial alleged in the motion here that are in the same category, and we can not consider them. They were doubtless intended only as persuasive to the Circuit Court to set aside the verdict.

2. WITNESSES: Disqualification of convicts: Effect of pardon.

Ike Harris was sworn as a witness on the part of the State, but before he was permitted to testify, it was regularly shown that he had been convicted of petit larceny in this State. The prosecution produced a full and unconditional pardon by the Governor of the offense of which the witness had been convicted, but appellant still insisted upon his disqualification to testify.

At common law, a person convicted of larceny, whether grand or petit larceny, was excluded from being a witness, and the disqualification of infamy which arose from such

conviction has not been removed by statute in this State. In civil cases the disqualification is removed by *sections 2858–9 Mansfield's Digest*, as to all of the infamous crimes known to the common law, excepting those specially named in the statute.

The authorities, with one voice, assert that the common law disability by infamy may be removed by a pardon from the person or body authorized to act in that behalf. It is held, however, by some of the courts that where a *statute* prescribes that persons who have been convicted of certain offenses shall thereafter be incompetent to testify in any case, a pardon by the Governor will not restore the competency to be a witness. The question does not arise in this case. There is no inhibition in our statute against persons giving testimony in criminal cases. The only provision in that regard has already been referred to, and is as follows:

Section 2858 Mansfield's Digest: "All persons except those enumerated in the next section, shall be competent to testify in a civil action."

Section 2859: "The following persons shall be incompetent to testify: First. Persons convicted of a capital offense, or of perjury, subornation of perjury, burglary, robbery, larceny, receiving stolen goods, forgery or counterfeiting, except by consent of the parties. Second. Infants under the age of ten years, etc."

If argument were needed beyond the language of these provisions that the statutory restrictions contained in them are made for civil cases only, it is found in the following facts: They were enacted as a part of the civil code, which purports from its name and provisions to regulate the mode of procedure in civil cases. The act is entitled "A Code of Practice in Civil Cases." The "Code of Practice in Criminal Cases," enacted at the same time,

in terms, makes the provisions of the Civil Code apply to and govern the manner of summoning and coercing the attendance of witnesses and compelling them to testify, but nothing is said about their competency.

In *Warner v. State, 25 Ark., 447*, it was ruled that the statute under consideration did not apply in criminal proceedings. See, too, *Perry v. People, 86 N. Y., 353.*

In *Walker v. State, 39 Ark., 229*, the court cite this statute in a criminal case, but the question is not discussed, and the proposition of law announced by the court in that connection is correct, independent of any statute. The common law rule as to disqualification by reason of infamy in criminal cases, is in nowise affected by the statute, and the appellant can not invoke its aid to raise an argument against the Governor's power by pardon to restore a convict to his former capacity as a witness. After pardon the fact of conviction can still be used to affect his credibility. The jury were instructed that they might consider it for that purpose in this case.

Appellant offered to read to the jury certain depositions tending to show that the whipping charged was done by one Bess and not by Freeman, when the court admonished him that if the depositions were put in evidence the State would be permitted to show that Bess had maltreated the deceased man on occasions prior to the last whipping. The appellant declined to offer his depositions in evidence, and now assigns the action of the court as error. His depositions were not excluded by the court. They were never offered as evidence. If he had offered to read them, and the court had rejected them; or if they had been read and improper evidence had been admitted for the State in rebuttal, the questions argued here now could then have been considered. As it is, there is nothing before us except the admonition of the court. This deprived appellant of no

right, and we fail to discover in what manner he was prejudiced by it.

3. Corporal punishment.

No exception was taken to the charge of the court except as to two points. The first related to the appellant's right to inflict moderate corporal punishment upon the prisoners in his custody. The court instructed the jury that appellant could not lawfully do this himself or authorize any one else to do it.

The statute under which the appellant obtained his contract provides as follows: "It shall be the duty of said contractor to safely keep said prisoners, and he shall provide them with sufficient wholesome food and clothing and medicine and medical attention, and may work the said prisoners on a farm or at any other lawful labor, under the same rules and regulations as convicts are worked by the lessees of the State penitentiary." *Section 1233 Mansfield's Digest.*

The "rules and regulations" that control the lessees of the penitentiary are prescribed by a board of prison commissioners, composed of the Governor, Secretary of State and Attorney General, by virtue of this section of the statute: "The said board of commissioners *shall* prescribe such rules for the regulation of such penitentiary, and for the management thereof, as in their judgment will prevent the inhuman treatment and preserve the discipline of the convicts and protect the interests of the State." *Section 4876 Mansfield's Digest.*

The chief purpose of the act under which appellant held his contract, was to reduce the expense of enforcing the criminal laws. To accomplish this end certain classes of prisoners who had before been punished generally by imprisonment only, were made liable to an additional punishment of hard labor; they were to be removed from the supervision of the officers whose sworn duty it was to

see to their welfare and be intrusted to the care of persons who would hire them for gain, and who, it was no violence to assume, would not be over-nice in the means adopted to force them to labor to the greatest profit. The act, therefore, seeks jealously to guard against the danger of the prisoner being subjected to harsh or inhuman treatment, by placing the whole question of discipline in the hands of the chief executive officers of the State, to be defined and regulated at their will. No regulations by the board were put in evidence, and we can not know the import of any that may have been adopted by them. *Boone v. State, 8 Lea (Tenn.), 739.*

Corporal punishment by the lash can be inflicted lawfully upon the convicts in the penitentiary for refusal to work, only under a rule or regulation made for that purpose by the board of commissioners; for all questions of discipline are deferred to their discretion by the Legislature, and it follows that the manner of punishment to be inflicted by way of correction must be prescribed by them. If they have prohibited the lash, or failed to authorize its use, this mode of punishment can not be inflicted upon the felons in the State prison, and it would be strange if, under the same circumstances, a harder measure of punishment could be meted out to the county prisoners, whose term of imprisonment is often due more to their inability to pay the costs of prosecution in inferior courts than to any serious offense against the public; or who are merely awaiting trial, and have elected to labor with the convicted prisoners, and afterwards have the benefit of their labor, rather than lie idle in jail.

The common law undoubtedly recognized the right of personal chastisement in several classes of individuals, but our penitentiary and county prison systems are modern institutions, and the common law authorities have but

little bearing on the subject. Moreover, "this form of punishment has fallen under the ban of modern civilization as tending to degrade the individual and destroy the sense of personal honor. It has been banished from the army and navy, and is no longer treated as an ordinary mode of punishment even for high crimes." *Cornell v. State, 6 Lea (Tenn.), 624.*

But it is immaterial what authority the common law would have given appellant, as we hold the statute has vested in the board of commissioners the exclusive right to say what the discipline shall be in such cases. If one in appellant's position had the right to whip the prisoners in his custody, in the absence of the statute, the provisions we have referred to took it from him and made it discretionary with the board as to whether the power should be conferred upon him. We can not infer that they have granted this power, and the court did not err in its instruction in this regard.

The appellant prayed for one other instruction which was refused. The purport of it was that if Sharpe was "not a sound and able-bodied man," and that the whipping would not have been mortal to a well person, appellant should be acquitted, unless Sharpe's condition was "known or apparent to him."

No error is urged here on account of the rejection of this prayer for instruction. It is open to several objections, and we need say no more than that the most appellant could have asked upon this hypothesis was that the offense should be reduced to manslaughter. (*Commonwealth v. Fox, 7 Gray, 585.*) This he did not ask.

The court's charge to the jury was fair and full. Their attention was especially directed to the distinction between murder and manslaughter and the degrees of murder. The inference of intent and malice was left to them to be

drawn from all the circumstances of the case, under proper instructions prayed by the State, and no instruction on this subject was asked by appellant and refused by the court. There was evidence sufficient to every material point to sustain the verdict, and we can not disturb it on the idea of an insufficiency of proof.

3. MOTION FOR NEW TRIAL: Prejudice of juror discovered after trial.

The final argument for new trial is that it was discovered after verdict that one of the jurors was disqualified by reason of prejudice against appellant. The showing made is by affidavit to the effect that the juror had made statements about the case before he was selected as one of the panel, showing a strong bias against appellant, and a belief in his guilt. This juror, when examined on his *voir dire*, stated that he had learned from rumor and newspapers what purported to be the facts in this case, and that upon this he had formed and expressed an opinion about it; that he had no prejudice against appellant and could give him an impartial trial. He was accepted as a juror by the appellant, without being asked, as far as the record discloses, as to the character and nature of the statements which he admitted that he had made about the case. Appellant was put upon his guard by the juror himself, and having failed to avail himself of the privilege of examining him touching the statements he avowed on his *voir dire* he had previously made, it was too late after verdict to inquire of others what their purport was, and then insist upon a disqualification by reason of them. *Casat v. State, 40 Ark., 515; Meyer v. State, 19 Ib., 156.*

Finding no error in the record the judgment is affirmed.

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BAKER v. THE STATE.

1. TAXES: *On callings and pursuits.*

There is no restraint upon the power of the Legislature to authorize counties and towns to regulate or tax callings and pursuits, but the Legislature cannot tax them for the purpose of raising State revenue.

2. SAME: *On sewing machine companies.*

The provision in section 4 of the revenue act of 1883, for taxing sewing machine companies and their agents, applies only to companies incorporated under the laws of this or some other State, and doing business in this State, and to the general agents of such companies; and a party cannot be convicted of the offense of selling without license under that act unless he sells as the general agent of such incorporated company, or as the agent of such agent.

APPEAL from *Carroll* Circuit Court.
Hon. J. M. PITTMAN, Circuit Judge.

O. W. Watkins for appellant.

Appellant was neither a *sewing machine company* nor a *general agent* of a sewing machine company, nor the *sub-agent* or *employe* of a general agent, and hence not liable to pay the license imposed by section 4, act of March 31, 1883, page 211.

The indictment simply charges that appellant was "engaged in the business of selling sewing machines as agent without license." But only two classes are prohibited, *i. e.* a general agent and his agents or employes. Appellant was neither, but only the salesman for a *general dealer* who *bought* his machines and sold them as other merchandise.

W. F. Hill also for appellant.

The only material difference between *section 2, article 7, Constitution 1836, and section 5, article 16, Constitution 1874,* is that the latter drops the word "merchant" and

substitutes "ferries" and "exhibitions." Compare also *section 1, article 2, Constitution of 1836* with *section 2, article 2, Constitution 1874.*

Under the Constitution of 1836 acts were passed to tax the *privilege* of keeping a stallion, billiard tables, ten pin alleys, etc. (*Acts 1836, p. 188, sec. 3; sec. 5, p. 674, Rev. Stat. of 1838; sec. 14, p. 368 English's Digest.*) Compare these with *sec. 4, Acts of 1883; revenue act, p. 211,* and it will be plain that the tax is levied as upon a *privilege.* Now the Legislature has *no* right to pass a sweeping occupation tax for *State purposes.* But selling sewing machines is no more a *privilege* than selling plows, groceries, dry goods or anything else.

These various acts on the subject of taxing "privileges" for State purposes were held unconstitutional. *2 Ark , 291; 13 Ib., 752; 21 Ark., 50, 51; 5 Ark., 204, 412; 8 Ib., 222.*

There is no difference between the present and former statutes, and it only need be said *stare decisis.*

Dan W. Jones, Attorney General, for appellee.

This case involves the question of the constitutionality of *section 4, Acts 1883, p. 211, under article 16, section 5, Constitution 1874.*

If the tax can only be sustained upon the ground that the selling is a *privilege* then it must fail. (*2 Ark., 291, 309; 13 Ib., 752; 21 Ib., 40.*) But it is not necessary that such selling must be a *privilege,* in order to sustain the tax. See *Cooley on Taxation, pages 124, 125, citing 19 Barb., 81; 10 Oh., N. S., 159, 165; 4 N. Y., 419; 4 W. Va., 11.* See also *5 Allen, 426, 436; 57 Penn. St., 433, 437; 16 Mass., 213; 32 Mich., 406; 42 Texas, 636; 62 Penn. St., 491, 494; 12 Nevada, 263.*

These authorities show that the act is not unconstitutional.

COCKRILL, C. J. Section 4 of the revenue law of 1883, contains the following among other provisions, viz.:

"There shall be levied and collected as a State tax, upon each and every sewing machine company, or general agent for the sale of sewing machines, doing business in this State for the term of one year or less, the sum of two hundred dollars; provided, that any sewing machine company or general sewing machine agent, who shall have paid said tax, may send his or their employes or sub-agents into any other county or counties than that in which his or their principal business may be carried on, upon payment of a county tax of five dollars for each employe or sub-agent in each of such additional counties wherein such employe or agent may be engaged in carrying on any part of his or their said business for the term of one year or less.

"Every person wishing to engage in * * business * * * as agent for the sale of sewing machines * * * * in this State, shall first pay for and take out a license for the privilege."

"Any person who shall engage in * * * business * * * as agent for the sale of sewing machines * * * without having paid the tax as provided in this act for said privilege, shall be guilty of a misdemeanor, and upon conviction shall be fined in double the amount of license he would be by the provisions of this act chargeable with." *Acts of 1883, p. 211.*

Appellant was indicted under this act for "unlawfully engaging in business as an agent for the sale of sewing machines" without a license.

Instruction approved.

On the trial he asked the court to instruct the jury that unless they found from the evidence that he sold machines as the general agent of a sewing machine company, or as the agent of a general agent for such a company, that he

should be acquitted. This the court refused and appellant was convicted and appealed.

1. Taxes on privileges.

The construction of the provision of the Constitution relating to the taxation of privileges involved the decisions of this court in some confusion at an early day, and in *Washington v. State, 13 Ark., 752*, in an attempt to extricate itself from this difficulty, the court held that there was no restraint upon the power of the Legislature to authorize counties and towns to regulate or tax callings and pursuits, but there was a restriction in that regard upon legislation for the purpose of raising a State revenue. This distinction has never been questioned by this court, but has been recognized and approved from time to time. *McGee v. Mathis, 21 Ark., 40; Straub v. Gordon, 27 Ib., 625; Barton v. City of Little Rock, 33 Ib., 442; City of Little Rock v. Board, etc, 42 Ib., 160.*

The framers of the present organic law, knowing the construction that had been put upon the provisions of the Constitution of 1836, bearing on this subject, adopted them without modification that can affect the question now presented here, and we must presume they intended to adopt with them the meaning the court had engrafted on them. This was recognized in *Barton v. City, sup.*, and we regard the question as closed against any other view we might be disposed to take of it.

All of the cases in this court before and since *Washington v. State, sup.*, concede that the Legislature can restrain or prohibit the use of any property or the exercise of any business or calling, if deemed to be against good policy or injurious to the public morals, but in the case last mentioned it was said that this restraint could not be exercised for the purpose of raising a State revenue by means of a license, because the act of licensing would admit that it was neither immoral nor injurious. The idea that the

State necessarily lends its countenance to everything that is licensed or taxed rests upon an apparent fallacy, for these are among the surest means of burdening recognized evils beyond existence, or by severe discipline, holding them within bounds, and the authority of the case in this respect has been disregarded by this court. We do not understand this case, reading it all together, to limit the power of legislation for State purposes to the taxation of such privileges as were technically known as such at the common law, notwithstanding an expression to that effect occurs in the opinion. We think the Legislature is not restrained by anything in the organic law from laying a tax on the franchise of a corporation, and the reasoning of the learned judge who delivered the opinion in Washington's case, *sup.*, leads to that conclusion. (See *Burrows' Taxation, sec. 55.*) The corporation owes its existence to the State, and the right to enjoy this privilege is the subject of taxation. *Burrows' Taxation, p. 166, sec. 85; Railroad Taxation, 92 U. S., 575; Danville Banking Co. v. Parks, 88 Ib., 170; City of New Orleans v. Salamander Ins. Co., 25 La. An., 650.*

In the case of a foreign corporation the tax or license is paid for the privilege of exercising its corporate powers in the State. *Burrows' Taxation, sec. 79; Ducat v. Chicago, 10 Wall., 410; Liverpool Ins. Co. v. Mass, Ib., 566; Doyle v. Continental Ins. Co., 94 U. S., 535.*

2. TAXES: On sewing machine companies.

The section of the act in question levies a State tax on sewing machine *companies*. The word company includes corporation in its meaning, but it means more than that. When this section is read, however, in connection with section 42 of the same act, where all companies are spoken of as incorporated, it may fairly be said to mean companies enjoying a corporate franchise under the laws of this or some other State. The words "general agent," in the

same connection, must be construed with reference to an incorporated sewing machine company. We are strengthened in this conclusion by the fact that under the decision *supra*, construing the right to tax a privilege, the Legislature could not lay a tax on the business of individuals associated as partners merely, because this is a common right in no way dependent on the legislative will for its existence, and we may presume that it was the legislative intent to do only what it may lawfully effect unless a contrary intention clearly appears.

The result is that the Legislature has imposed a State tax, as it had the authority to do, on every incorporated sewing machine company doing business in this State, or upon any general agent who acts for such a company, and it has also provided for a tax to be paid each county in which its sub-agents may do business. We have nothing to do with the wisdom or policy of the act. That is with the Legislature.

The court should have instructed the jury as the appellant asked, and the judgment must be reversed and the cause remanded for a new trial.

NEW HOME SEWING MACHINE CO. v. FLETCHER, SHERIFF AND COLLECTOR.

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1. TAXES: *License: Sewing machine companies.*

Sewing machine companies incorporated in other States, and doing business in this State, and their agents, are liable to the license tax imposed by section 4 of revenue act of 1883.

2. INJUNCTION: *None against criminal prosecutions.*

Chancery will not interfere by injunction to prevent anticipated criminal prosecutions.

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

Hill for appellant.
D. W. Jones, Attorney General, *contra.*

COCKRILL, C. J. The New Home Sewing Machine Company, a foreign corporation doing business in this State, sought to enjoin the sheriff and collector of Pulaski county from demanding of its agents the license tax imposed on sewing machine companies and their agents by section 4 of the revenue act of 1883, and from prosecuting them in the criminal courts for violating its provisions. M. W. Shaw joined in the complaint with the company, alleging that he was a merchant selling machines, not as agent but for profit, as other merchandise is sold. The Chancellor dismissed the complaint.

This was correct. The company is liable to the payment of the license tax (*Baker v. State, ante, 134*), and Shaw can make his defense at law, when he is proceeded against for a violation of the statute. Chancery courts will not interfere by way of injunction to prevent anticipated criminal prosecutions. *Waters Pierce Oil Co. v. Little Rock, 39 Ark., 412.*

Affirm.

HAMLETT v. SIMMS.

APPEAL: *Final order in chancery.*

An order in chancery overruling a motion for compulsory process against a commissioner of the court to compel him to pay money in his hands into court, is not a final order from which an appeal will lie.

APPEAL from *Chicot* Circuit Court.
Hon. MARK VALENTINE, Special Judge.

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

Whatever balance remained after paying the mortgage debt belonged to the mortgagors. (*2 Jones on Mort., sec. 1687.*) It was the Master's duty to collect the money and hold it subject to the order of the court. He had no right to execute a deed until he received the purchase money, and if he received anything but money, or took plaintiff's receipt, or any one else's, or otherwise failed in his duty, he became liable. *20 Ark., 661; 23 Ark., 41.*

The Master is the officer of the court. The proper order was made and served on him, and he refused to obey. It was the duty of the court to coerce him by attachment. *2 Dan. Chy. Pl. and Pr., Perkins' ed., 1047.*

D. H. Reynolds for appellee.

The order appealed from was not a *final order* from which an appeal would lie, and the cause should be dismissed.

A final decree having been entered at the previous term, the sale completed, reported and confirmed, no further orders could be made without setting aside the decree, which could not be done after the term passed.

EAKIN, J. This is an appeal from the action of the Chancellor below, in overruling a motion to take some proceedings to compel an officer of the court to pay in money in compliance with a previous order to that effect. The circumstances are as follows:

In a case of Richardson and May against Hamlett and others, a decree had been rendered foreclosing a mortgage, fixing the debt at $5,097.81, and directing a sale of the mortgaged property. Simms was appointed commissioner for the purpose. The sale was directed to be made on the thirteenth of March, 1880, one-half of the purchase money to be paid in cash and the other at eight months.

At the July term, 1880, Simms reported that he had sold the property for the sum of $5,450 to Dreyfus and Mayer, one-half of which, or $2,725, had been paid to the plaintiff's attorney, whose receipt was exhibited—the balance being due at eight months from the sale. Without action on the report, the cause was continued.

Afterwards, at the July term, 1881, the report was taken up, together with a deed which Simms had executed to the purchasers, and submitted for approval. Both were held to be regular and proper, and the acts of the commissioner, "in making said sale and in the execution and acknowledgment in open court of said deed, and in the deed itself," were confirmed, approved and ordered to be made of record. A sum, left blank in the record, was allowed the commissioner for his services.

At the same term the defendants in the suit, Hamlett & Abells, applied to the court by motion, showing that there had been paid for the lands the sum of $216.36 in excess of the amount required to satisfy complainants and the costs under the decree, and asking a rule on the commissioner to pay that sum into court for their benefit.

The rule probably issued to show cause, and at the Jan-

uary term, 1882, Simms responded, saying that the first payment for the lands had been made in his presence to the attorney for complainants; and that when the deferred payment became due, and he was called on to make a deed, he was informed by complainant's counsel, and by the purchaser, that the payment had been made, in New Orleans, to the complainants themselves; saying, further, that no part of it had come to his hands. Upon hearing of the motion, response and argument, the commissioner was ordered to produce the money in court on the first day of the next regular term.

A year afterwards, at an adjourned session of the January term 1883, a special judge being on the bench, the defendants reported that the commissioner had not complied with the order, and that they had not received said sum of $216.36. They prayed the court to force compliance with the order "by such action and process as is usual and lawful in such cases." The motion was overruled at the costs of defendants. They excepted and appealed.

Except as to the trivial costs of the particular motion, the order of the court in overruling it determines nothing finally. These special costs are commonly allowed in disposing of interlocutory matters, and do not make orders of an interlocutory nature final, so as to be subjects of appeal. *Powell on Appellate Proceedings, secs. 28–30.*

Leaving that out of view, there is nothing in the order which finally disposes of the fund in court, or determines the right of any party to it. That remains under the control of the court now as before. The court has to some extent a discretion as to the time and mode of compelling its officers to bring in money for which they may be chargeable, and the effect of the order overruling the motion, was simply to say that the Chancellor was not pre-

pared just then, and did not think it advisable to devise some measure to compel the commissioner to perform the previous order. It did not prejudice the defendant's *right* to the fund, nor preclude another motion at another time. We must not presume that the Chancellor intends to allow officers of the court to appropriate money of suitors. As it stands now, there has been no adjudication as to the rights of these appellants at all. The first order was not to pay *them* the sum of $216.36, but to pay it into court. How much of it will belong to them will depend upon a full estimate of costs and expenses, and the commissioner's fees, which are not yet determined. It might appear from aught that we can see, upon showing of the commissioner, or in response to a rule to show cause against an attachment, that the sum previously ordered to be paid in is too large. If it were too small, the appellants here might certainly, on show of mistake, or on subsequent developments, have an order for more; and, *per contra,* the court may, on proper showing, correct it for less. The whole thing is undetermined. The court below is still in the discharge of its own proper business yet unfinished, and if we were to concede that it seems to be tardy in this matter, we would not hasten it by an appeal.

If it should become apparent that the court persistently declines to act at all, there is no doubt of our power, on proper application, to set it in motion. It ought to proceed in reasonable time, get in all the fund, and determine what is properly due to the officers of the court and the parties to the suit. That goes without saying. But we can not allow an appeal from an interlocutory order to serve the purpose of a mandamus.

That this appeal is useless becomes apparent from considering its effect. If we were to entertain it and reverse the order overruling the motion, the case would go back

with the motion restored and pending. If we dismiss it, the appellants are not precluded from renewing the motion, which, by the way, should be more specific. The most usual and appropriate motion is for a rule to show cause why an attachment for contempt should not issue.

We think the appeal does not lie, and ought to be dismissed.

Rule accordingly.

RUDD v. SAVELLI.

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1. VENDOR AND VENDEE: *Suit for purchase money: Tender of deed.*

A vendor of land by title bond cannot have relief for the purchase money, where the payment of it and the making of title are to be concomitant acts, or where the execution of the conveyance is to precede the payment, unless before suit, or, at farthest, at the time of the decree, he shows himself able and willing to execute a warranty deed and tenders one.

2. SAME: *Bond for title: Character of title to be made.*

A bond for "a deed of conveyance in fee of the legal title," means a "good and sufficient" conveyance with the usual covenants of the vendor, and not of a stranger. Equity will not in contracts of this nature compel a vendee to pay money when his vendor cannot make him a title.

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

W. G. Whipple for appellants.

1. Lucchessi and Henry were purchasers *pendente lite*, and bound by the result of this suit.

2. The defense of want or failure of consideration has failed. Rudd & Andrews had already bought the block

of Edgerton, and on the following day procured Edgerton's bond for title. At the time of the final hearing they *tendered in open court* the absolute deed of Edgerton for the property. The consideration was *title to the block*, and this was tendered her. The foreclosure of Edgerton did not affect her, as she was not a party. She was charged with notice of the title by the public records. She had at least the *right to redeem*, which is a consideration. (*31 Ark., 98.*) A failure of consideration must be total. (*Parsons Cont., vol. 1, *p. 462, note.*) The instruments sued on being promissory notes, import a consideration, and the *burden* was on appellees to show want of consideration. (*33 Ark. 97.*) A promissory note founded on an agreement to convey land of another or *third* person, is not invalid for want of consideration. (*29 Pick., 105.*) See also *Johnson v. Sewell, 33 Ind.*

3. Argues elaborately and cites an array of authorities to show:

First—That the property was the separate estate of Mrs. Savelli.

Second—That the notes constitute a charge in equity upon it; and,

Third—That they are a charge upon after acquired property; but as the case turned on the tender of a *sufficient* deed they are not published.

Blackwood & Williams for Henry.

A married woman's note is *void* (*35 Ark., 372; 39 Ib., 242; Kelly on Mar. W. Cont., p. 87*), except she contract with reference to her separate estate, or for its benefit or protection, or where she contracts for *her own peculiar benefit.* (*29 Ark., 447, 351; 30 Ib., 773; 22 Ib., 451; 33 Ib., 267; 39 Ib., 242; 1 Bish. on Mar. W., sec. 870 et seq.; Wells, sec. 315; Kelly Ch., 6.*) Contend from the evidence that

she (Mrs. Savelli) does not fall within the exception. She had no separate estate, and there is nothing to show that the purchase was *for her own special benefit.* The facts contradict such a theory. *29 Ark., 447.*

The foreclosure by Edgerton, and sale, cut off the last vestige of title in appellants and Mrs. Savelli, and there was a *total failure* of consideration, *if there ever was any* in the beginning. Argue that at any rate, the notes were not a charge on after acquired property, and that Henry was an innocent purchaser, etc., etc.

M. W. Benjamin for appellee, Lucchesi and others.

Makes the same points as his co-counsel, citing many additional authorities.

Appellants sold this property before they had a shadow of title, and on the next day bought of Edgerton on a credit. *They never paid a cent.* Edgerton foreclosed and bought in the block, and a deed was made to him and approved before any trial of this cause. So, at the time of the trial there was a total failure of title, and an eviction, or its equivalent, which makes a failure of consideration. (*15 Ark., 487; Rawle on Cov. Title, p. 604.*

The deed tendered was a *conditional* one, whereas Mrs. Savelli was entitled to an *absolute* deed *with covenants of warranty from the vendors.* The tender was *worthless.*

EAKIN, J. On the thirtieth day of May, 1873, appellants, Rudd and Andrews, sold to N. Spinola and Mrs. M. T. Savelli, wife of L. Savelli, a block of ground in Little Rock, described as block 22, in the Capital Hill extension, for fifteen hundred dollars. Five hundred dollars were paid in cash, and the balance was secured by three notes of that date; one for $300, due at ninety days; one for $350, due in one year, and the last for $350, due in two

years. These notes were signed by Savelli and wife, and by Spinola, and expressed that they were executed as part payments on the block. They were to bear interest at the rate of 10 per cent. per annum until maturity, and 24 per cent. per annum afterwards until paid. It may be well to state here that Spinola afterwards conveyed all his interest to Mrs. Savelli, and then disappears from the contest.

Rudd and Andrews executed a title bond to the purchasers, conditioned, on payment of the notes, to make to them "a deed of conveyance in fee of the legal title of, in and to said tract of land and appurtenances." The sale was purely speculative. The vendors then had no title to the land, legal or equitable. That was outstanding in Edgerton. Mrs. Savelli then had no separate estate of any kind. Besides the $500 paid at the time of the purchase, she afterwards paid the note for $300, and upon the first note for $350, she paid at different times $258.25, making in all $1,058.25. She afterwards acquired other real estate in her own right, which, during the pendency of this suit, she sold and conveyed to third parties.

The next day, the vendors, Rudd and Andrews, purchased said block from Edgerton for the sum of six hundred and sixty-six dollars, secured to be paid by two notes, and took his title bond to themselves. Although it seems that they got the lot from Edgerton for less than half what they had sold it for the day before to Mrs. Savelli, and had then $500 of her money in hand, and afterwards received from her more than as much again, they never paid Edgerton a cent; but suffered him, before the decree in this case, to foreclose his lien and to re-purchase the property at the sale. He now holds the complete legal and equitable title. No party to this suit has any

right to it whatever, nor can get any save by Edgerton's favor.

On the twenty-third day of October, 1877, Rudd and Andrews filed this bill against Savelli and wife to enforce payment of the balance of the note for $350 due at one year, and all the last note. They charged that she was then the separate owner, not only of said block 22 (against which Edgerton's lien had not yet been foreclosed), but also of three lots in block 23, and a small tract of about 12 acres out of the city. They allege that the purchase by Mrs. Savelli was for the advantage of her separate estate, and that the notes were given and taken with the intention of binding it, and they pray that all the property which she then had be subjected to their payment.

In the course of the proceedings, Henry, who had purchased from Mrs. Savelli the twelve acre tract, and Lucchesi who had purchased the lots in block 23 were made defendants, and all answered. Mrs. Savelli set up no consideration, as did all, in effect. They urged in defense that, under the circumstances, the notes could not be made a lien on other separate estate acquired after the execution of the notes, and her vendees contended that they were innocent purchasers without notice. Meanwhile Edgerton's lien was foreclosed as above stated in a separate suit.

The proof and pleadings developed the facts as narrated. The deposition of Rudd was taken. As part of it he offered to Mrs. Savelli a deed for the block which he had procured Edgerton to execute, although he had never tendered one to her before suit, or in court. It reads, that in consideration of the sum of eleven hundred dollars *to be paid* by Mrs. L. Savelli, he does hereby convey, grant, bargain and sell unto her, her heirs, etc., the block in question, with this proviso in brackets: "It being distinctly

understood that this deed is not to take effect as a conveyance, or to be delivered to Mrs. Savelli until she shall have paid to Rudd and Andrews or their assigns the balance due them upon the sale of said block by them to Mrs. Savelli." Then follow covenants of warranty by Edgerton and his wife, who sign the deed.

Upon hearing the Chancellor found, in a written opinion, that the execution of the notes by Mrs. Savelli, expressing the particular purpose for which they were given did not disclose any intention on her part to bind any other separate property, if she then had any. In effect, that it gave the usual vendor's lien, which did not attach to the lots and land subsequently acquired; and that this contract did not come within the class which, under our laws, a married woman could make, to bind her separate estate generally.

Also, that it was apparently out of the power of complainants to make a title to Mrs. Savelli, inasmuch as they had allowed Edgerton to prosecute his suit against them for the purchase money due to him, and in place of paying the same, and putting themselves in condition to fulfill the obligations of their bond to Mrs. Savelli, had suffered the title to pass beyond their control. The relief prayed was refused, and the complainants appealed.

The view we take of this case renders it unnecessary to discuss several questions earnestly pressed in the briefs of the respective counsel. That is, whether the contract bound all the separate estate of Mrs. Savelli, or whether if it bound that which she had then, it could bind also that subsequently acquired.

1. VENDOR AND VENDEE: Suit for purchase money: Tender of deed.

A vendor who has sold by title bond cannot have relief against the purchaser for the purchase money, where the payment of it and the making of the title are to be concomitant acts; or where the execution of the conveyance

is to precede the payment; unless, before suit, or at farthest, at the time of the decree, he shows himself able and willing to execute a warranty deed, and tenders one. The defendant must be placed in position to pay the money and go out with a clear deed, in accordance with the bond. In such case if he should fail to pay the money, the court may proceed to foreclose. To have the effect of thus precluding all defense against the payment of the purchase money, it is obvious that the deed must be a clear and unconditional one, otherwise it cannot form a link in a clear chain of marketable title without inquiries (aliunde) as to whether its conditions and provisions have been fulfilled. As the court holds the deed when tendered until the purchase money is fully paid, it is plain that it should express that there is nothing due upon it, and that it is absolute, if such be the kind ot deed contracted to be made. Here was a deed found in the hands of Rudd from Edgerton, conveying the block to Mrs. L. Savelli for eleven hundred dollars, *to be paid*, and expressly providing that it should not be delivered to her until she had paid all she was due Rudd and Andrews. It is impossible to determine the meaning of such a deed as this, upon the face of it. Suppose she had paid Rudd and Andrews, and gone out of court with it, and offered the lot for sale. A prudent purchaser would not have taken a conveyance from her without being satisfied that she had paid Rudd and Andrews, and thus become entitled to the possession. This he might perhaps presume, but would also be put upon inquiry as to whether the eleven hundred dollars was a part of the sum to be paid Rudd and Andrews, or a separate claim of Edgerton's, which, if still unpaid would be a lien on the land. By grammatical construction of the deed itself it would be. If I execute a deed, reserving a lien for money to be paid, and provide in that deed that it

shall not take effect till the vendee does some act, and he does that act, and the deed takes effect, it does so according to its terms, and the land is subject to the lien. And even if that were not what was meant, and Mrs. Savelli could, by going back and showing all the transactions, make it manifest that the payment to Rudd and Andrews satisfied Edgerton also, she ought not to be burdened with that trouble. The deed is awkwardly drawn and obscure. It should, to be a valid tender, have been absolute, with no apparent lien about it. She should have been able to leave the court with full clearance of all charges. The court would see to it that she did not take the deed out till she had paid. That was sufficient protection to Rudd and Andrews, and to Edgerton also, if he made the deed in their interests alone. She ought not to have been required to take such a paper as this on payment of the money.

2. BOND FOR TITLE: Kind of title to be made.

Besides, the deed is not in accordance with the bond. By the use of the words "a deed of conveyance in fee of the legal title," we must presume, in the light of the fact that she gave not only full price, but what appears to be twice the value, that the parties intended a "good and sufficient" conveyance. Nothing else would vest in her the full legal title. In so far as it might not be good, nor sufficient, it would fail, of course. Such a title bond entitles the vendee to a deed with the usual covenants (*Watkins v. Rogers, 21 Ark., 298*), and that means the covenants of the vendor. A deed with the covenants of a stranger might be of small value.

It is conceded law now, that, in suits of this nature, a court of equity will not compel a vendee to pay his money where the vendor cannot make a title. (*Lewis v. Davis et al., 21 Ark., 235; McDermott v. Cabel et al., 23 Ib., 200; Anderson, Admr., v. Mills, 28 Ark., 175.*

There has never been a day when complainants could have made a title to Mrs. Savelli. They had none when they sold to her. They have none now. They have never, so far as appears, expended a cent even in an effort to get title. They have speculated upon her, by selling her lands of another man. They have charged her what was manifestly a high price, and taken notes providing for a shocking rate of interest. They have gotten from her over a thousand dollars in money, for which she got no value, and now seek the aid of a court of equity to pursue other property, subsequently acquired, to get the full measure of their anticipated gains, with interest at 24 per cent. per annum.

I cannot but doubt whether the annals of chancery jurisprudence can furnish a parallel to such an invocation of its powers. Ordinary men would be satisfied to be left unmolested with what they had got.

Putting our decision on cool and calm grounds, we think there was not a sufficient tender of deed to entitle complainants to relief, and if there had been, it is also shown that there was a failure of the consideration for the notes.

Affirm the decree.

Bagley v. Fletcher.

44 153
186 398

44 153
f90 312
f90 367

1. Infant: *May avoid deed after maturity.*

A deed executed by an infant may be avoided by him after maturity, by any act unequivocally manifesting an intention to avoid it; and a reconveyance to another not in privity with the first grantee, is conclusive evidence of such intention, and disaffirms the first deed; and this, whether the last be a quit-claim deed or a deed with covenants of warranty. (Eakin, Justice, dissenting as to the conclusive effect of a quit-claim deed; holding that it should depend on intention to be ascertained from the circumstances and nature of the second deed.)

2. SAME: *Same.*

The principle that the deed of an infant may be avoided by his deed of the same property after maturity to another party, is confined to absolute deeds inconsistent with one another, whereby it becomes manifest that it was the intention of the party to disaffirm the first deed.

3. SAME: *Same: Ratification: Temporary acquiescence.*

The mere fact that one for a few months after maturity recognizes a deed made in infancy as an existing fact, and acquiesces in it, and takes no active step to disaffirm it, will not amount to a ratification of it.

4. DEEDS: *Quit claim: Effect of.*

In this country a quit-claim deed is a substantive mode of conveyance, and is as effectual to carry all the right, title, interest, claim and estate of the grantor as a deed with full covenants; although the grantee has no possession of, or prior interest in the land. Covenants in a deed are no part of the conveyance. They are separate contracts, and the title passes independently of them.

5. INFANT: *His deed: Covenants in.*

The deed of an infant will pass his estate subject to disaffirmance after his maturity; but the covenants in his deed are absolutely void.

6. HUSBAND AND WIFE: *Effect of wife's conveyance of her land.*

Whatever interest the husband acquires in his wife's lands by marriage since the Constitution of 1874, is swept away by her subsequent conveyance of them; and so where a husband and wife during her infancy joined in a conveyance of her land, and after her maturity she disaffirmed and avoided the conveyance by conveying to another party, *held*, that the last conveyance swept from the first purchaser as well the husband's interest as the wife's.

APPEAL from *Saline* Circuit Court in Chancery.
Hon. J. M. SMITH, Circuit Judge.

Paul Bagley, pro se.

A purchaser by quit-claim deed is not entitled to protection as an innocent purchaser for value without notice; he takes only what the vendor can lawfully convey. (*3 How., 333; 12 Wall., 323; 34 Texas, 441; 18 Minn., 405.*) Fletcher's deed was a mere *release*, and the Rowlands had noth-

ing to release. Appellee purchased with full notice of appellant's title, *actual* notice, and it matters not whether his deed was recorded or not. The deed was good whether acknowledged *at all* or not, as under our laws married women can convey as *femmes sole.* (*Art. 9, sec. 7, Const.*) Appellant at least took all the interest of the husband in the land, *i. e.*, his marital rights, an estate for life and curtesy, etc.

John Fletcher for appellee.

At the time Mrs. Rowland conveyed to Bagley she was a minor, and she had a right to avoid the deed, which she did when she conveyed to Fletcher. *Harrod v. Meyers, 21 Ark., 592-600; Watson v. Billings, 38 Ib., 278.*

SMITH, J. Bagley filed this bill to quiet his title to a quarter section of land which he had acquired by purchase from Mrs. Rowland and her husband. The deed to Bagley is in the form of a bargain and sale, containing no covenants, however, except that the grantor was the owner of the land by virtue of a donation deed to her, as a married woman, by the State, and that she had never alienated or incumbered it. The bill stated that about eighteen months after the plaintiff had procured his title, the Rowlands, husband and wife, had conveyed the land by quit-claim to the defendant. And this was the cloud that was sought to be removed.

The answer set up that Mrs. Rowland was, at the date of the execution of her first deed, an infant. And the proofs showing that she was at that time only about seventeen years old, and that in six or seven months after attaining her majority she sold and conveyed the land to Fletcher, the Circuit Court dismissed the bill.

At the date of both conveyances the land was wild and

unoccupied, and, as we may infer, of but little value. The consideration expressed in Bagley's deed is $50. And this sum was made up of $3 in cash, $3.70 in taxes refunded to Mrs. Rowland and the remainder was the estimated value of Bagley's services in looking up the title to the land and procuring the donation to Mrs. Rowland. Fletcher paid $25 for his quit-claim, and he was advised that Mrs. Rowland had previously conveyed the land to Bagley. But he expressed his willingness to take his chances for getting the land and to protect Mrs. Rowland against all risks she might run by a second conveyance.

1. INFANT: May avoid deed after maturity.

Mrs. Rowland's deed to Bagley, having been made during her non-age, was voidable at her election. There were several ways in which she might avoid it; as, by entering on the land and taking possession of it; or by bringing ejectment for it against any one in possession (*Watson v. Billings, 38 Ark., 278; Lessee of Drake v. Ramsay, 5 Ohio, 152*); or by filing a bill to cancel the deed on account of her infancy, as was done in *Harrod v. Myers, 21 Ark., 592*, or by a re-sale to another after majority; or by any other act unequivocally manifesting an intention to avoid. All that was required was some positive and decided act of dissent adverse to the original act.

Now, there can not be a more decisive act of disaffirmance than the conveyance of the same land to another person, who is not in privity with the first grantee. It is conclusive evidence that the grantor does not intend to be bound by the deed made in infancy. *1 Am. Lead. Cas., 5th ed., 317; Cressinger v. Welch, 15 Ohio, 156; Jackson v. Carpenter, 11 John., 539; Jackson v. Burchin, 14 Ib., 124; Harris v. Cannon, 6 Ga., 382.*

The earliest case on this subject that we have examined is *Frost v. Wolverton, 1 Strange, 94.* An infant covenanted to levy a fine by a certain time to certain uses. He levied

the fine; but by another deed made at full age, he declared it be to other uses. And the court held that the last deed should be the one to lead the uses.

The deed to Bagley vested in him a defeasible estate in fee; but his title was defeated by the subsequent conveyance to Fletcher, which was a revocation of the former grant. The effect of this last-mentioned instrument was to render Bagley's deed as though it had never been; to extinguish any interest in law or equity that Bagley may have acquired under it, and to entitle Fletcher to hold the land free from any equity of Bagley. *Norcum v. Sheahan, 21 Mo., 25; Mustard v. Woolford's Heirs, 15 Grattan, 329.*

2. SAME: To disaffirm the deeds must be inconsistent.

The principle of one deed being avoided by another deed for the same property after age, must be understood of absolute deeds inconsistent with one another, whereby it becomes manifest that it was the intention of the party to disaffirm the former deed. Thus, in *Watkins v. Wassell, 15 Ark., 73*, a minor executed a deed of conveyance of real estate, and, upon arriving at age, jointly with his grantee, executed a mortgage upon the same premises to secure a debt of the grantee. This was held to be an affirmance of the previous conveyance, being done in conjunction with the grantee, at his instance, and for his benefit. But the court say that if he had executed the mortgage alone, this would have amounted to a disaffirmance, for that would have implied that he still considered himself the owner.

So a mortgage of lands during infancy is not avoided by a second mortgage of the same lands after full age. For the mortgagor still retains the equity of redemption, and a party may place several successive incumbrances upon the same property. Therefore the execution of the second mortgage does not necessarily indicate an intention to avoid the previous one. *McGan v. Marshall, 7 Humphreys, 121.*

In *Bozman v. Browning, 31 Ark., 364,* an infant whose domicile was in Alabama sold his lands in Arkansas to his brother. He died soon after attaining his majority, and by will devised all of his property, both real and personal, to his father for life, with remainders over. At the time of his death he owned land in Alabama. And the court confined the operation of the devise to that land; though it intimated that if he had expressly devised the Arkansas lands, it would have been a disaffirmance.

In *Eagle Fire Co. v. Lent, 6 Paige, 635,* an infant conveyed real estate to a party, who first mortgaged it to one person and then conveyed the premises in fee to another, subject to the mortgage. The last-mentioned grantee procured a quit-claim deed from the infant, who was now of age, and on bill filed to foreclose the mortgage, undertook to over-reach the mortgage, by claiming that the deed to him was a disaffirmance of the deed to the mortgagor, the original grantee of the infant. But the Chancellor held that the last deed was intended to operate as a mere confirmation of the former title, and not as a disaffirmance; and then laid down the rule that "to render a subsequent conveyance by an infant an act of dissent to his prior deed, it must be inconsistent therewith, so that both can not properly stand together."

Subject to this qualification, the rule is a cast-iron one that a re-sale after majority avoids the sale before. The law conclusively presumes that Mrs. Rowland meant something by executing the second deed. And yet, if she intended the previous deed to stand, she could not have intended anything. There is no pretense of any ratification of the deed to Bagley. Indeed, ever since that deed was made, she has been under such disabilities that no binding ratification could be made except by deed.

3. RATIFICATION. Temporary acquiescence.

It will not do to say that, because Mrs. Rowland recognized the previous conveyance to Bagley as an existing fact, and acquiesced in it for a few months after coming of age, so that she took no active step to disaffirm it, amounts to a ratification. This point was fully considered in *Tucker v. Moreland*, *10 Peters*, *59*. The Circuit Court had been requested in that case to charge that "if the jury shall believe, from the evidence, that said Richard was under age at the time of the execution of said deed; that he, after his arrival at age, voluntarily and deliberately recognized the same as an actual conveyance of his right, or during a period of several months acquiesced in the same without objection, then the said deed can not now be impeached on account of the minority of the grantor."

The prayer was rejected, and Mr. Justice Story, in delivering the opinion of the court, says: "The instruction is objectionable on several accounts. In the first place it assumes as a matter of law that a voluntary and deliberate recognition by a person after his arrival at age, of an actual conveyance of his right during his nonage, amounts to a confirmation of such conveyance. In the next place that mere acquiescence in the same conveyance, without objection, for several months after his arrival at age, is also a confirmation of it. In our judgment neither proposition is maintainable. The mere recognition of the fact that such a conveyance has been made, is not, *per se*, proof of a confirmation of it. * * * Admitting that acts *in pais* may amount to a confirmation of a deed, still * * * these acts should be of such a solemn and unequivocal nature as to establish a clear intention to confirm the deed, after a full knowledge that it was voidable. A *fortiori*, mere acquiescence, uncoupled with any acts demonstrative of any

attempt to confirm it, would be insufficient for the purpose."

4. DEEDS: Quit-claim: Effect of.

Nor can any solid distinction, grounded on the form of Mrs. Rowland's deed to Fletcher, be taken as to the efficacy of that deed, considered as an act of disaffirmance. In England we understand the law to be that a deed of release can never operate technically as a conveyance *per se*, but only by way of enlargement of a previous estate. Consequently if the releasee was not in possession and had not some other interest in the land, he had no estate to be enlarged. But in this country a quit-claim deed is a substantive mode of conveyance, and is as effectual to carry all the right, title, interest, claim and estate of the grantor, as a deed with full covenants, although the grantee has no possession of or prior interest in the land. It is almost the only mode in practice where the vendor does not wish to warrant the title. See article on the nature and effect of a quit-claim deed, in *12 Cent. Law Jour.*, *127*, and cases cited; among others, *Brown v. Jackson*, *3 Wheaton*, *448*; *Kyle v. Kavanaugh*, *103 Mass.*, *359*; *Pray v. Pierce*, *7 Mass.*, *381*; *Jackson v. Fish*, *10 Johns.*, *456*; *Hall v. Ashby*, *9 Ohio*, *96*.

Covenants no part of deed.

In fact, the covenants in a deed constitute no part of the conveyance, but are separate contracts. The title passes independently of them.

To say, then, that an infant can not disaffirm a previous contract of sale by executing a quit-claim deed after he comes of age, is equivalent to saying that he cannot disaffirm except on condition of warranting the title of the second grantee. None of the text-books or cases that we have consulted mention any such exception to the general rule, and we are unwilling to take so novel a position.

5. INFANT'S DEED: Covenants in void.

Bearing in mind that Mrs. Rowland was, at the date of the execution of the first deed, an infant and a married woman, and that she was not bound by the covenants contained in her deed (*1 Bishop on Married Women, sec. 603; Benton County v. Rutherford, 33 Ark., 640*), the two deeds were not essentially dissimilar. By the first the estate simply flowed from her, provided she did no act to defeat it after full age. But her covenants of seizin and against incumbrances were void.

6. HUSBAND AND WIFE: Effect of her deed.

In *Harrod v. Myers, 21 Ark., 592*, this court decided that where a husband and his infant wife unite in a conveyance of the wife's land, although she may avoid it so far as it affects her interest and that of her heirs, yet it is good to carry the husband's interest during their joint lives; that is, his right to the possession and to take the rents and profits, and his rights by curtesy if he survives her. And this decision was correct as the law then stood. But under our present Constitution and married woman's law, and the construction that has been placed upon them, whatever interest Rowland acquired in the land by marriage was swept away by his wife's subsequent conveyance. *Constitution of 1874, art. 9, sec. 7; Roberts v. Wilcoxson, 36 Ark., 355; Milwee v. Milwee, ante, 112.*

Decree affirmed.

Mr. Chief Justice COCKRILL concurred.

EAKIN, J., dissenting. When Fletcher took from Mrs. Rowland his quit-claim deed, he was in negotiation with Bagley for the purchase of the land. When his agent proposed to buy of her, she told him she had sold to Bagley, and expressed no dissatisfaction with the sale. The agent told her that Fletcher only desired her quit claim, and would take the risk and save her harmless. She then executed it for twenty-five dollars.

I do not concur in the opinion of the court in holding this a disaffirmance. The only sound principle upon which it has been held that the deed of an infant, executed after maturity, is a disaffirmance of a former deed of the same lands, made during infancy, to another grantee, is this: that by the second deed the grantor assumes to have title remaining in him, which is incompatible with the idea that he is willing to affirm the preceding conveyance. The second deed is held to be a disaffirmance by implication, because it can not consist with any other intention—not a direct disaffirmance by force of its terms. This is manifest from the application of the rule at common law, and still, in those States where alienations of lands adversely held are not permissible. There, if the infant is not in possession, the disaffirmance must be by entry or something equivalent, which is the operative act. The quondam infant, being then reclothed with his estate, may convey. In other States, as here, where lands adversely held may be transferred by the owners, the entry is dispensed with as an overt and solemn act of disaffirmance, and the deed if incompatible with any supposed recognition of the outstanding title, is taken as a manifestation of an intention to do what would, under the common law, have been actually necessary. It doubtless *is* the general rule that in this State and others where lands not in possession may be conveyed, a deed after maturity operates as a disaffirmance of one made to another person during minority.

But this manifestation of intention being, as I think, the foundation of the rule, it should not be carried beyond where the reason ceases—and, consequently, not to all such conveyances as, by their nature and circumstances, come short of showing such intention to disaffirm. This qualification of the rule has been recognized and applied

by a number of the most respectable authorities, including this court, where subsequent deeds have been held *not* to amount to such disaffirmance. Although, in each of the cases, circumstances were different, yet the same key-note pervades all, and the same qualification of the general rule is marked. It is this: that the conveyance after maturity will not be a disaffirmance if it is compatible with any reasonable supposition that the grantor did not intend to recall the former right. This was the express ground of the decisions in *Watkins & Trapnall v. Wassell*, *15 Ark.*, *73*, and in *Bozeman v. Browning*, *31 Ib.*, *364*. True, those cases are not in point as to facts, but they exemplify the principle. So, also, in the Missouri case of *Leitendorfer v. Hempstead*, *18 Mo.*, *269*, there is a very strong recognition of it. And in *McGann v. Marshall*, *7 Humph.*, *121*, it is clearly announced that the well-settled rule of disaffirmance by a deed, after full age, must be understood of absolute deeds, inconsistent with each other, *thereby* making it manifest that it was the *intention* of the party to disaffirm the first deed. That is a strong case. An infant had made a mortgage, and after full age he executed an absolute deed of trust of the same property to another person, without any reference to the mortgage. One would think that a tolerably clear manifestation of an intention to disregard the mortgage and give the trustee the full control of the property. It was in the grantor's power to do so. Yet it was held not to be clear enough, and that the trustee took only the equity of redemption.

I think, therefore, the question now in judgment can not be decided by the application of any cast-iron rule to the two simple facts, that Mrs. Rowland, as an infant, sold to Bagley, and then, as an adult, conveyed the same lands by quit claim to Fletcher. We must look deeper, and consider the circumstances of Fletcher's purchase

and the nature of his conveyance, and find its solution in determining whether or not the quit claim to Fletcher is so wholly incompatible with the former sale to Bagley as to clearly manifest an intention on Mrs. Rowland's part to disaffirm Bagley's title.

It was effective to pass only the title Mrs. Rowland then had. (*Witter v. Briscoe et al., 13 Ark., 426.*) It charged Fletcher with full notice of all imperfections of the vendor's title and all equities against it, inasmuch as he did not pay full price for the land as the evidence plainly shows. (*Miller v. Fraley et al., 23 Ark., 735.*) It did not serve the ordinary purpose of a good and sufficient conveyance. *Watkins v. Rogers, 21 Ark., 298.*

It is not necessary that such deeds should have anything to operate on in order to make them sufficiently desirable to be worth getting at some trouble and expense. They do not imply, necessarily, that the grantor has any title. Operating innocently as to all other claimants, they only estop him. They quiet apprehensions and fortify against defects and irregularities, or lost instruments or lack of registration. They are frequently given and taken for peace. They can not be incompatible with any former alienations. It is common in some of the States to announce the general rule to be that a deed *with covenants of warranty* will be a disaffirmance of a conveyance made in infancy. That idea enters into the leading case on the general rule. (*Tucker v. Moreland, 10 Peters, 58*) Mr. Justice Story, speaking of the deed made after full age, says: "The deed to Mrs. Moreland contains a conveyance of the very land in controversy, with a warranty of the title against all persons claiming under him, and a covenant that he had a good right and title to convey the same, and *therefore* is a positive disaffirmance of the former deed."

After a rather industrious search and inquiry, I have been unable to find a single case in which it has been held that a quit-claim deed, by its own force, will avoid a conveyance made in infancy. The opinion of the court seems to make it conclusively a disaffirmance. I think it should depend on intention, to be ascertained from the circumstances and nature of the second deed. It is enough for the protection of infants that they are *allowed* after age to disaffirm their conveyances. They are not bound to do so, and I fear it will work injustice to make their acts have that effect, when they may not have intended it. In this case, I do not clearly see that Mrs. Rowland did so intend.

BAGLEY v. ROWLAND.

RES JUDICATA: *Same matter but not same parties.*

Mrs. Rowland during her infancy conveyed a tract of land to Bagley, and after her maturity resold and conveyed it to Fletcher, who had notice of the prior sale to Bagley. Bagley filed his bill against Fletcher to cancel Fletcher's deed and quiet his own title. His bill was dismissed on the ground that the last deed was a disaffirmance of, and avoided Bagley's. Afterwards Bagley filed his bill against Mrs. Rowland concerning the same land, and substantially renewing the same litigation. Its object was to obtain a reformation of her acknowledgment: *Held*, That the matter of the bill was *res judicata;* his right to the land was the matter involved in the former case.

APPEAL from *Saline* Circuit Court in Chancery.
Hon. T. C. PEEK, Circuit Judge.

Paul Bagley, pro se.

1. The judgment is void for uncertainty.

2. The court erred in sustaining a general demurrer to the bill.

3. The court erred in deciding the cause *res judicata.*

John Fletcher for appellee.

1. Courts of equity do not reform married women's deeds. *39 Ark., 120; 1 Bish. on Married Women, sec. 599; 32 Ark., 450.*

2. The matter was *res judicata. 38 Ark., 457; 10 Ib., 186; 13 Ib., 103; 14 Ib., 304; 11 Ib., 151; 22 Ib., 176; 24 Minn., 4; 49 Texas, 243.*

EAKIN, J. This suit was begun in the Saline Circuit Court in chancery, after the decree there in the case of Bagley v. Fletcher, which has just been decided here. Reference is made to that case for the facts. It concerns the same land and substantially renews the same litigation. The object is to obtain a reformation of Mrs. Rowland's acknowledgment, but if that were done, it would not have bettered the complainant's case which had been decided adversely to him on other grounds. The matter in the court below was *res judicata,* and his right to the land was the matter involved in the appeal of the other case. This bill was properly dismissed.

Affirm.

KIRTEN v. SPEARS.

1. ARBITRATORS: *Legality of award.*

Unless the illegality of the decision of arbitrators appears upon the face of their award, the court will not set it aside on the ground merely that the arbitrators mistook the law, or decided contrary to the rules of established practice of courts of law and equity.

2. SAME: *Conclusiveness of award.*

In general, arbitrators have full power to decide upon questions of law and fact, which directly or incidentally arise in considering and determining the questions embraced in the submission, and their decision upon such matters is conclusive.

3. TRUSTEE: *What deed must make to cestui que trust.*

A trustee holding the naked legal title for his *cestui que trust* cannot be required to make any other deed to the *cestui que* than a deed of release with covenants against acts done or suffered by himself.

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

E. W. Kimball and *Robert A. Howard* for appellant.

1. The court had power to review the award. *Gantt's Digest, chapter 6, sections 251, 252, 253, 254, etc.*

2. The main contest was whether there was a partnership or not, and the arbitrators wholly failed to decide the point, but undertook to *compromise*, or do general equity. Nor was the award final, nor co-extensive with the submission, and the exceptions on these grounds should have been sustained. (*8 Ad. & El., 290; Morse on Arb. and Aw., 252; 9 Vesey Jr., 364; 3 East., 18; 7 Exch., 269.*) An award is void where it appears either *on its face* or from intrinsic proof that the arbitrators had notice of any matter covered by the submission which they failed to decide. (*4 Duer, 133; 20 Pick., 531*; *5 Cow., 197; 7 Barr., 134; 1 Caines R., 304.*) The award and submission must agree. (*Sup.*) See also, on this subject, *1 Miles, 21.* If they mistake the law, when undertaking to be governed by the law, the award is void. (*Morse on Arb. and Award, 300.*) It was necessary, if they found a partnership, to state its commencement, duration, etc., and to say what constituted the partnership effects, etc. (*5 Jones, Law, 298.*) See, also, *4 M. & Cr., 150; 9 Metc., 131 (168); 7 Metc., 486;*

2 Dowl., 38; 1 Cases in Ch., 186; 2 Ib., 279; 49 Pa. St., 371; 5 Allen, 566.

3. If Spears made and caused these conveyances, transfers and payments, etc., with a view of defeating his creditors, no suit is maintainable by him against Kirten for the recovery of either real or personal property. *7 Johns., 159; 1 A. K. Marsh., 208; 48 Ill., 228; 2 Barr., 67; 3 Paige, 154; 5 Binney, 112.*

John McClure and *S. R. Allen* for appellee.

No extrinsic evidence is brought forward against the award. Then if it is co-extensive with the issue it must stand, if it is definite and final enough for a judgment to be entered thereon. In other words it must be void on its face. The court certainly has power to set it aside for fraud, mistake and the like, but none is shown here.

The award certainly finds *there was no partnership.* The burden of proving this was on appellant. If he failed in this affirmative the issue was against him.

When parties refer their differences to arbitrators it is usually in a spirit of *compromise.*

As no evidence was introduced, and the arbitrators did not incorporate the evidence, books, accounts, etc., in these findings, the award must stand as correct and a full settlement of the matters submitted to them.

SMITH, J. Spears brought his action at law in the Pulaski Circuit Court to recover of Kirten $19,504.33, alleged to be due for money had and received to the plaintiff's use. On the same day he filed his bill in the Pulaski Chancery Court against the same defendant, stating that he had purchased and paid for certain lots in the city of Little Rock, but for private reasons did not take the title directly to himself; that he accordingly caused the conveyance to

be made to the defendant, a friend in whom he reposed confidence, and who accepted the trust, and agreed to convey to the plaintiff upon his request; that the plaintiff requested a conveyance, and was informed that the deed had been executed and was in the hands of the defendant's attorney, but upon applying for it, the plaintiff was met with a demand that he should first sign an acquittance of all demands against the defendant—a demand he refused to comply with, as the defendant was indebted to him in the sum of $19,504.33, being the same moneys that were sued for in the action first-above mentioned, and the deed was consequently withheld. And the prayer was for a conveyance of the lots according to the trust.

Kirten filed his answer to the action at law, setting up that the controversy arose out of a partnership existing between himself and the plaintiff; and he moved a transfer of the cause to the Pulaski Chancery Court, where matters of this nature are properly cognizable. By consent of parties the transfer was made and the two suits were consolidated. Kirten made his answer a cross-bill, and alleged that in the year 1876 he and Spears had entered into a copartnership for the manufacture and sale of bricks; that Kirten was to furnish the necessary capital for the prosecution of the enterprise, and to have control of the finances, while Spears was to give his personal attention to the business; that Kirten thereupon advanced $250, and other sums as needed; that the business grew and prospered, and, in short, that the moneys in his hands, of which an account is stated, represents the net profits of the firm, to only half of which the plaintiff is entitled. He further alleges that the lots were purchased with partnership funds and are the property of the firm. Moreover, he avers that there is a large brick-making "plant" now on hand, consisting of wagons, mules, tools and ma-

chinery, which is also the property of said firm, and which has not been divided. And he prays for a reference to a Master to take and state an account between the partners.

In answer to the cross-bill, Spears denied the existence of any copartnership, and of every fact stated by Kirten, from which a partnership might be inferred. His version of the dealings between himself and Kirten is in substance this: That he was, in 1876, in the decline of life and charged with the support of a family, including an invalid son; that he had formerly lived in the State of Ohio, in affluent circumstances, but had his property swept away from him for liabilities which he had incurred as surety for others: that some of these debts were still hanging over him; that having some skill in the art of manufacturing brick, he had removed to Arkansas and gone into that business; that he had accumulated property to the value of $5,000, but was apprehensive lest his present capital and future earnings would be melted away in satisfying these old claims, or in paying lawyers' fees to defend against them; that he was advised by counsel that the only way to escape molestation was to carry on his business under the name of some other party; that with this view he applied to Kirten, whom he had long known, and who was a man of means and commercial standing; that he succeeded in convincing Kirten that he would run no real risk by lending him the use of his name, and that no money would be required in the conduct of the business beyond what Spears could himself command; that the arrangement would, however, entail some labor on Kirten in the way of keeping accounts, collecting bills for sales made by Spears, paying drafts, etc.; and for this trouble Spears proposed to compensate him by allowing him to keep all interest that might be collected on credit sales, and by paying a portion of his clerk hire;

that the plaintiff was an uneducated man, unable to write, or to keep books of account; that the defendant gave his consent to the arrangement, the whole extent of which was a mere device and cover to enable the plaintiff to do business for himself; and that the title to the lots was taken in Kirten's name for the same reasons, and they constituted his homestead where he and his family resided.

It was further stated that under this arrangement it was the plaintiff's custom to turn over to the defendant, upon a sale of bricks, the account, draft, note or other evidence of indebtedness, for collection; and in the payment of his laborers and others, to draw upon the fund so deposited. But he denies that he ever overdrew his account, or that defendant ever advanced $250 or any other sum out of his own means.

After the issue had been thus made up, the parties, by written agreement, filed and noted on the record and made a rule of court, submitted their differences to arbitrators of their own selection. These arbitrators took the oath prescribed by statute (*Gantt's Digest, sec. 247*), before entering on their duties, and made the following award:

"Your arbitrators have, in consequence of the conflict of testimony, and the irregularity of the accounts between the parties, and the manner in which the business has been conducted—at the commencement—during the time the partnership is claimed to exist, or at the time this difficulty commenced, and a careful investigation of the testimony, and also a careful analysis of the accounts, we have failed to find sufficient facts to justify a positive or specific copartnership, but believing the name and energy of the defendant Kirten greatly benefited the business, we are compelled to make our findings in the case in a spirit of com-

promise. We have therefore decided upon the following basis of settlement:

"To divide the balance that is shown in the accompanying statement to be in the hands of the defendant, Kirten, on the twenty-third day of February, 1881, amounting to eleven thousand five hundred and sixty-six dollars and eighty-one cents ($11,566.81) equally between the parties, making the amount due from Kirten to Spears the sum of five thousand seven hundred and eighty-three dollars and forty cents ($5,783.40); Kirten to make a deed to Spears of lots five (5), six (6), seven (7) and eight (8), in block ten (10), Russell's addition to the city of Little Rock; Spears to be left in peaceable possession of the brick-yard, teams, tools and fixtures of whatsoever kind which were in his (Spears) possession on the twenty-fifth day of December, 1880, and the costs in this case to be equally divided between the parties.

"J. A. HENRY,
"J. G. FLETCHER, *Arbitrators.*
"JOHN E. REARDON, *Umpire.*"

Kirten moved to set aside the award on account of seventeen specified objections. These exceptions were all overruled, except one, which related to the propriety of charging Kirten with sundry sums of money, amounting to $1,900.90, which the arbitrators found to be in his hands, but which were not included in the plaintiff's bill of particulars. And the court proceeded to render judgment in favor of the plaintiff against the defendant for $4,832.95. And it further decreed that the defendant execute and deliver to the plaintiff a good and sufficient deed to the lots, and that in default thereof for the space of twenty days, the title to said lots be divested out of him and vested in the plaintiff. And that the plaintiff be left in the undisturbed possession of the brick-yard, teams, tools

and fixtures, the costs of suit to be equally divided between the parties. From this decree Kirten alone has appealed.

Some of these exceptions attack the award upon the ground that it does not decide the principal fact that was in controversy—partnership or no partnership. We have an impression that the arbitrators have very distinctly negatived the existence of a copartnership. As to the correctness of that finding, we are not in a situation to judge. For there is not a particle of evidence in the record; neither was any used before the Chancellor. The arbitrators, it seems, inspected books and accounts and examined witnesses; but the evidence has not been preserved. Let it be remembered that it was Kirten who alleged a partnership. It was therefore incumbent upon him to prove it. And nothing appearing to impugn the finding of the arbitrators, that branch of the cause would be legally adjudged against him.

Another exception was, that no judgment could be entered on the award. The Chancellor seems to have been at no loss to frame the proper decree. The award is clear, explicit and final. It settles the rights of the parties as to all matters that were in dispute and directs what each is to do or to pay.

1. ARBITRATORS: Legality of award.

Still another exception was that the arbitrators had erred in matters of law, and instead of determining the rights of the parties, had made a compromise. The illegality of the decision does not appear upon the face of the award, and unless it does so appear, the court will not interfere on the ground merely that the arbitrators have mistaken the law, or have advisedly decided contrary to the rules of established practice observed by courts of law and equity. *Caldwell on Arbitration, 147, and cases cited.*

2. Conclusiveness of award.

If the parties wanted exact justice administered according to the forms of law, they should have allowed their

case to take the usual course. But for reasons satisfactory to themselves, they have chosen to substitute for the courts of law a private forum, and there is no injustice in holding them bound by the result. In general, arbitrators have full power to decide upon questions of law and fact, which directly or incidentally arise in considering and determining the questions embraced in the submission. (*Boston Water Power v. Gray, 6 Metc., 131.*) And their decision upon such matters is conclusive.

The other exceptions relate to findings of facts by the arbitrators, about the correctness of which we can not, in the absence of testimony, form even a conjecture.

3. TRUSTEE: What deed must make to *cestui que trust.*

The decree directs that Kirten make a good and sufficient deed unto Spears. This language ordinarily implies a deed with covenants of general warranty, But Kirten is, upon the theory of the award, a mere trustee, holding the naked legal title for Spears. And such a trustee can only be required to execute a deed of release to his *cestui que trust*, with covenants against acts done or suffered by himself.

Affirmed.

ATKINSON ET AL. v. HEER & CO.

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SHERIFF: *Liability for failure to return execution: Defenses.*

In a proceeding by a judgment creditor against a sheriff and his securities for failure to return an execution, it is no defense that the defendant in the execution was insolvent, and the plaintiff was therefore not damaged; nor that the deputy sheriff indorsed a return upon the execution, and went to the clerk's office to file it, but the clerk was absent and he was afterwards prevented by his official duties from returning to the clerk's office, without further showing that the office remained closed beyond the life of the execution, and he returned it as soon afterwards as practicable.

APPEAL from *Boone* Circuit Court.
Hon. J. M. PITTMAN, Circuit Judge.

C. B. Moore for appellant.

Appellant had the right to show the insolvency of the judgment debtors, that nothing could be made, and hence appellant was not damaged. He should also have been allowed to show that it was impossible for him to return the execution, or that he used due diligence to do it, but was prevented by accident or unforeseen circumstances, etc.

Within the sixty days he made his return on the execution, but by the absence of the clerk, and his being called away on official business he had no opportunity to lodge it with the clerk until the sixty days were out. This is a harsh statute, but certainly not intended to punish *under any and all circumstances.* See *1 Littell, 354; 3 Metc., 184, 324; 2 La. An., 411; 2 Ib., 407, 370; 3 Ib., 622; 12 Ib., 174; 4 Zab. (N. J.), 627, 542; 16 Ohio St., 50; 10 Ohio, 47; 3 Ohio St., 522; 10 Ib., 28; Ib., 77; Herman on Ex., p. 630, sec. 414; 3 Seld., 550; Freeman on Ex., p. 369.*

J. Frank Wilson for appellee.

The law of this case was settled in *40 Ark., p. 377.* On the remand of the cause the court erroneously permitted appellant to set up certain defenses. *Bliss on Code Pl., 430.*

It is well settled by this court that when the statute prescribes a duty, prescribing a penalty for non-performance, the officer must *strictly* comply. *Gantt's Digest, sec. 3657; 40 Ark., 377, and cases cited; 45 Ala., 361; Binmore on Sheriffs, 271; Peters Ct. Ct., 241.*

L. Gregg also for appellees.

The cases cited from Ohio, Kentucky and Louisiana do

not sustain the position of counsel. Their statutes are materially different from ours. The Supreme Court of Louisiana say their statute is not penal in its nature, it is only a statutory mode of enforcing a right, etc. (*3 La. An., 622, and cases cited.*) Our statute is penal. (*25 Ark., 353.*) The officer is liable, whether or not diligence would have resulted in satisfaction of the execution.

The facts set up show no sufficient excuse.

COCKRILL, C. J. This is a continuation of the case reported in 40 Ark., 377. It is a summary proceeding under the statute by a judgment creditor for judgment against a sheriff and his sureties on his official bond for failure to return an execution. On the return of the case to the Circuit Court, Atkinson, the sheriff, was allowed to file an amended answer. It alleged that the defendants in the execution were insolvent when judgment was rendered and have continued so ever since, and that, before the return day of the execution, Atkinson's deputy indorsed a return in proper form on the execution, and Atkinson took it to the clerk's office to be deposited there as the law directs, but the office was closed, and he was called away on official business, and was detained on that account until the return day had passed. The sufficiency of this answer is questioned by demurrer.

SHERIFFS: Defenses for failing to return execution.

The object of this proceeding is not to make the sheriff liable for failure to make the money on the execution; but for a failure to return it as commanded. It was ruled, on the former determination of the case, that the statute is sufficient for that purpose. The plaintiffs' rights are purely statutory, and if they make a clear case under the statute, it is no defense to their claim that they have not been damaged. No discretion is left to the court as to the amount of the judgment to be recovered. In the language

of the statute judgment shall be rendered against a sheriff for failing to return an execution for "the amount of the judgment in which it was issued, including all the costs and ten per centum thereon." *Mansfield's Digest, sec. 3964.*

The fact of the insolvency of the defendants in the execution does not, of itself, afford the sheriff a sufficient excuse for a failure to return the execution. *Heer v. Atkinson, 40 Ark., 377; McGee v. Robins, 2 La. An., 411; Bassett v. Bowmar, 3 B. Mon., 325; Freeman Executions, secs. 368 and n. 7.*

The motive of the Legislature, no doubt, in denouncing this heavy penalty against a failure to return an execution, was to compel diligence and punctuality on the part of sheriffs and like officers; and although the act is unbending in its terms, still, when a delinquency is complained of, and the penalty claimed, and the circumstances show that the case comes within the letter but not within the spirit of the act, the familiar rule that a statute should be interpreted with reference to its actual scope and object, and the correction of the evil it was designed to remedy, will mitigate the rigor of the literal terms of the law, we should have no hesitation in refusing to enforce the penalty where the officer is without blame; but the answer does not make a showing that relieves the officer in this instance. In the original answer he alleged that he had indorsed his return on the writ, but had failed to lodge it in the clerk's office as required. This was held insufficient in the former determination of this case, and he has added to this an allegation that the return was not made because the clerk was absent from his office on one occasion when he went there for that purpose, and that his official duties thereafter prevented him from returning to the clerk's office. If it were shown that the clerk's office had been closed for such a time toward the close of the life of the

execution as absolutely to prevent the officer from making a return, that would be a sufficient excuse for not returning it within the sixty days, but the obligation would remain upon the sheriff of perfecting his return at as early a day as practicable thereafter. It does not appear that the execution in this case has ever been returned. There is no reason shown why the deputy who indorsed the return on the writ could not have returned it to the clerk within the sixty days.

The penalty in this case is severe for the omission of an act which probably has not prejudiced the plaintiffs at all, but the law is so written, and our duty is plain.

Affirm.

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STEPHENS v. SHANNON.

PRACTICE IN SUPREME COURT: *Judgment on supersedeas bond.*

A decree fixing a lien on land for payment of purchase money was appealed by defendant to the Supreme Court, and he gave supersedeas bond in the usual form for the payment of damages and cost, and to satisfy the decree if affirmed, or any other the Supreme Court should render against the defendant. No personal judgment was rendered against the defendant nor could have been under the facts stated: *Held*, that no judgment could be rendered in the Supreme Court against the appellant and his sureties in the supersedeas bond upon affirmance of the decree; and a judgment here against them is, on motion, set aside.

On motion to correct the decree heretofore entered in this case.

COCKRILL, C. J. A decree condemning 160 acres of land to be sold for the payment of the purchase money due thereon was appealed from and affirmed. The decree had been superseded, and on the affirmance here the clerk entered judg-

ment against the appellant and the sureties on the appeal bond for $250, this being the amount named in the bond beyond which the liability of the sureties should not extend, together with statutory penalty. The purchase money due was $456, and was declared a lien on the appellant's lands and others also. The amount for which appellant should give security was fixed arbitrarily by the court in the decree. There was no personal decree against the appellant for any sum, and there could be none on the showing made.

A motion is entered here to vacate the judgment on the bond.

The bond is in the usual form to pay damages and costs adjudged against the appellant, and to satisfy and perform the decree appealed from, or any decree entered or ordered to be entered in the cause. The decree that was affirmed simply declared a lien on the land and directed it to be sold. This in itself imposes no obligation on the appellant or his sureties to pay anything, for the decree acts on the land only. The supersedeas bond does not change the nature of the judgment or decree on affirmance by this court, and where no judgment was rendered or could have been rendered against the appellant for the recovery of money in the court below, none can be rendered here. *Talbot v. Morton, 5 Litt., 327; Sumrall v. Reid, 2 Dan., 65; Graham v. Swigert, 12 B. Mon., 522.*

It would be premature to determine how far the liability of the sureties on the appeal bond in this case extends. That can be tested in an action at law on the bond after the decree has been executed. It is proper to say, however, that as judgment for costs is entered here against appellant, a like judgment may be entered against the sureties on the appeal bond, if that alone is desired. Otherwise the judgment must be vacated.

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CARMACK v. LOVETT.

1. FRAUDULENT CONVEYANCE: *Consideration expressed in deed conclusive.*

A party claiming under a deed which is attacked as fraudulent, can not support it by showing a different consideration from that expressed on its face.

2. FRAUDULENT CONVEYANCE: *Homestead.*

Lovett conveyed his lands, except forty acres on which he resided as the head of a family, to his children, in fraud of his creditors. In an action in equity by a creditor to set aside the conveyance and subject the land to his debt; *held*, that Lovett could hold 160 acres, including the forty on which he resided, as a homestead.

3. PRACTICE IN SUPREME COURT: *Reopening chancery causes.*

Although where a cause has been heard upon evidence, or after a fair opportunity to produce it, this court will not usually remand it solely to give either party an opportunity to produce other evidence; yet the rule is not imperative. This court has the power, in furtherance of justice, to remand any cause in equity to be opened.

APPEAL from *Boone* Circuit Court in Chancery.
Hon. J. P. PEEL, Special Judge.

O. W. Watkins for appellant.

Where consideration is impeached for fraud, party claiming under the deed cannot aver in its support considerations different from that expressed in the deed. (*Kerr on Fraud and Mistake, p. 191, and authorities.*) Where deed is assailed by creditors, no evidence is admissible which contradicts the deed or changes its character. *1 Bump on Fraud. Conv.* (*3d ed.*), *top pp. 596–598–9 and 42–43; Condensed Rep. La., vol. 2, 334; Ib., vol. 3, p. 102; 1 Johns., 139; 7 Johns. Chy., 341; 30 Ark., 417.*

As to who are such creditors, see *Bump, p. 502–3–4–5.* As to time liability accrues. *Ib., 507–8; Kerr on Fraud, etc., notes to p. 198.*

EAKIN, J. Appellant (Carmack) obtained judgment at law against John Lovett, as surety upon the bond of complainant's guardian, executed in 1871. There was execution and return of *nulla bona.*

He then filed this bill to set aside, as fraudulent, a conveyance of lands which Lovett, after having become bound on the bond, had executed to his children, alleging that it had been made "without any consideration of value." The grantees in the conveyance were the children of Lovett, some of whom were adults. The deed itself is copied in the transcript, and, although not marked so as to identify it with the paper which the complainant proposed to exhibit, seems to have been taken as such. For the purposes of this case, it cannot be taken as part of the pleadings. (*38 Ark., 134, in case of Sorrells v. McHenry.*) The foundation of this suit was the fraud alleged in its execution, and not the right to enforce any provisions of the deed itself.

John Lovett answered separately, and the other defendants, his children, answered together. All deny the fraud and claim that the conveyance was made in good faith and for valuable consideration, being in effect this: That several of the sons had remained with the father some time after arriving at age, and had worked for him upon the lands in support of the family; and had paid taxes, furnished means to carry on the labor at their own cost, and made valuable improvements equal in value to the land itself. That this had been done in accordance with an understanding with the father, to the effect that he would convey the property to them as a means of keeping up and supporting the family. As to the daughters, it is said that they have continued to render domestic services faithfully for the common use, and the brothers were willing that they should share in the property. Wherefore,

the conveyance was made of the tract, with the exception of forty acres, which the father reserved to himself.

John Lovett, in his answer, further sets up that he resides upon forty acres of his lands not conveyed to his children, and that he is a citizen and head of a family. He asks that if his deed to his children be held fraudulent under the circumstances, he be allowed to retain as a homestead 160 acres of the land, including the forty upon which he lives.

The complainant filed one joint demurrer to both answers, which was in effect a general demurrer; but stated, as one of the grounds upon which it should be sustained, that the answers set up a different consideration from that shown in the deed, and inconsistent with it.

At a subsequent term the demurrer to the answer was overruled, and, in the same order, it is recited that the cause was submitted upon the complaint and answer. The court rendered judgment for defendant for costs, and dismissed the complaint. The plaintiff appealed.

No evidence was introduced on either side. Not even the exhibits can be considered on demurrer, and the recital shows that the hearing was upon bill and answer. It was evidently not the intention of the parties to submit the case upon the final merits, as they might be found on proof under the issues made, but to bring up, on the demurrer, the point presented with regard to the consideration.

1. FRAUDULENT CONVEYANCE: Consideration expressed in deed conclusive.

The authorities are in conflict with regard to the right of a person claiming under a deed, which is attacked as fraudulent, to support it by showing a consideration different from that expressed on its face. It is useless to review them. It was deliberately decided by this court, upon careful examination of the authorities, that it could not be done. The answer of the children defendants confessed that the deed expressed upon its face that it was made

for the consideration of love and affection. There was also a consideration of a dollar paid by each grantee, but that is the usual form of conveyancing, and must, *prima facie*, be considered as nominal.

The ruling on the question of law raised by the demurrer was made in the case of *Galbreath, Stewart & Co. v. Cook and wife*, *30 Ark.*, *417*. We conceive that it is well supported by a great preponderance of authority, English and American. The answer of the children showed no valid defense which they could be allowed to maintain. The demurrer as to their answer should have been sustained.

2. SAME: Homestead.

The answer of the defendant, the father and grantor, sets up a valid claim to a homestead to the extent of 160 acres of the land, including the forty acres upon which he lived. He defines his claim by metes and bounds which render all the lands so claimed fairly contiguous, and asks in the alternative that if the conveyance be held void, he be allowed to hold that as his homestead. This he has a right to do.

It was held in *Turner v. Vaughan* that where, in an action by creditors, a deed is held fraudulent, the grantor may nevertheless, in that action, claim his homestead in the lands. (*33 Ark.*, *454*.) But conceding all that John Lovett claims in this regard, it would not preclude the complainant from proceeding against the land not included in the homestead claim.

3. PRACTICE IN SUPREME COURT. Reopening chancery cause.

Although where a cause has been once heard upon evidence, or a fair opportunity to produce it, this court will not usually remand a cause solely to give either party an opportunity to produce other evidence, yet the rule is not imperative. The court has the power, in furtherance of justice, to remand any cause in equity to be opened. In this case neither party introduced any. The cause being heard

immediately on overruling the demurrer and dismissed, none was required by defendant, and the complainant evidently meant to appeal from the order overruling the demurrer. We therefore decline to make a final decree here, but remand the cause, with instructions to the court below to sustain the demurrer to the joint answer of the grantees, and take further proceedings, in accordance with this opinion, and the pleadings and practice in equity.

For error in overruling the demurrer to the answer of the grantees, and in dismissing the complainant's bill, reverse the decree, and remand as above directed.

HUNTER v. MOORE.

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d88 332

FERRIES: *Infringement of franchise by private crossings.*

A ferry license under our statute does not give the grantee the right to enjoin citizens from using their own boats upon the stream for a mile above and below, in crossing themselves, their families, employes, guests, or occasionally a friend, at their will, or occasionally lending their boats to each other; but in using his banks for landings except at a public highway, and in crossing his land to reach their boats, they become liable at law as trespassers for injury to his land.

APPEAL from *Randolph* Circuit Court in Chancery. Hon. J. G. FRIERSON, Circuit Judge.

W. F. Henderson for appellant.

1. As to the exclusive rights of the owner of a ferry franchise, see *Gantt's Digest, section 2923.* While appellees did not pretend to keep a *public ferry*, they did keep a *private one*, which is within the spirit and policy of the statute.

Only bank owners have the right. *Sec. 2904 Gantt's Digest; 25 Ark., 28.*

Appellees had no right of entry or way on or over appellant's lands even in cases of absolute necessity. They were trespassers. Trespasses which from long continuance have grown into a nuisance may be enjoined. *6 Vesey, 107; 7 Ib., 305; High on Inj., secs. 466, 473, 475.*

The public can claim no easement by *prescription.* No grant can be presumed to *all mankind.* There is no common law right to make use of the banks of a stream in navigating it. *3 Tenn., 2; 5 Barn. & Ald., 268; 3 Kent's Com., 417; 6 Peters, 436; 20 Wend., 111; 14 Bab., 511; Washburn Eas. and Serv., p. 485; 1 Me., 111.*

On the application of a riparian owner the proprietor of a ferry will be enjoined from landing his boat on the lands of such owner. *18 Iowa, 367; 18 Ib., 327.*

See, also, *36 Ark., 466; 20 Ib., 561; 23 Ib., 514; 25 Ib., 28.*

EAKIN, J. Appellant, Hunter, having a ferry franchise over Black river, and owning the banks for a considerable distance above and below, filed this bill against Moore and about a dozen others, alleging:

That they had combined for the purpose of avoiding the payment of his proper fees, and to impair the value of his franchise; that they had bought, or leased a great many skiffs and other small water crafts, and were using them in crossing the river within a mile of his ferry, and in going to and from the skiff landings, were passing over complainant's lands; and were doing that so frequently and continuously that he could not have adequate compensation in damages at law. Further, that they were using said boats for their own profit, without any license, and

were daily diminishing the income of the ferry by diverting or preventing its receipt of proper tolls.

The object of the bill was to enjoin the defendants from the use of the skiffs, etc., within a mile of the ferry landing, and from committing any further trespass upon the lands, and from landing their crafts on complainant's banks, and for general relief. On the bill, supported by affidavits, an interlocutory injunction issued as prayed.

The defendants afterwards filed a demurrer and answer, with a motion to dissolve the injunction. They insist upon their right to navigate the river, which is a navigable stream, and to land upon the banks on either side; and deny that they have confederated together, or with other persons, for the purpose of transporting persons across the river, or that they procured the boats, etc., for that purpose. They admit that each of them has a skiff, or canoe, or "dug out" for his private use, and not held as common property, and that each one uses his own in navigating the water for his own benefit in fishing, hunting, recreation and attending to his own business. They deny transporting persons and property, save their own effects and themselves, their families, servants and household guests. They admit landing upon the banks on such occasions as it had been a custom for the citizens to do ever since Pocahontas, the neighboring town, was located. And they aver that it had been the custom during that time for citizens to land their boats at pleasure upon either bank of the river, of which custom complainant had thirty years' notice.

They also plead that the right of the citizens to navigate the river has been settled by a decree of that court at a former term, on a bill by the same complainant to enjoin them.

Depositions were taken, and upon hearing, the court found the complainant was entitled to his ferry franchise,

and that it was exclusive for a mile up and down. But that defendants and all other citizens have the right to cross themselves, property, families and any members thereof at all times, in their own crafts, and with their servants, either on their own business, or for their pleasure, recreation or sport, and to land their water crafts on either bank of the river, at any convenient point at will; provided, they should in no wise trespass upon, or pass through or over any of the premises of complainant, except in cases of absolute necessity. The injunction was accordingly modified so as to prohibit defendants from crossing any person or thing within the limits of the ferry franchise (to wit, one mile each way), except as above mentioned. From this complainant appealed.

Infringement of ferry franchise by private crossings.

We need not consider whether the injunction was right so far as it went. That concerns the defendants, who are content. The question is whether the defendants should have been prohibited from transporting *any* persons or property in their boats, and from landing upon the banks of complainant, and from passing over his lands, whether from necessity or not.

With regard to the last point, it may be disposed of in passing. All that this case determines is, that the court declines to enjoin defendants from passing over or entering upon the lands of complainant when they may be required to do so by absolute necessity. That goes far enough for a court of equity. If they have no right to do that at law, and under pressure of an absolute necessity commit a trespass, it is enough that he be left to the judgment he may be able to get at law. No irreparable damage is done to land by walking over it, or by tying a boat to the bank; nor is it *prima facie* a nuisance if oft repeated. It would be misleading to consider this case at all as one to prohibit nuisance to the land itself. It may be conceded that

no one has a right of way over the lands of another to reach a navigable stream, and that if he does so pass over, he may be mulcted in damages, real or nominal, as the proof may justify; but *non sequitur* that a court of equity should enjoin him from doing so, whatever may be his necessity.

The real grievance is not that the *lands* are injured, or that the complainant is incommoded in the enjoyment of them, but that his *franchise of ferriage* is impaired in value by the use of their own boats, by defendants, in crossing the stream to and fro. The real question is, whether the ferry license, under our statutes, gives the grantee the right to prohibit citizens from using their own boats upon the stream for a mile above and below, crossing themselves, their families, employes, guests, or occasionally a friend, at their will, or occasionally lending their boats to each other. This is all the evidence shows was done. There is no evidence of any confederation amongst them, nor of any compensation ever taken, nor of any offer to the public for free use in passage. Whether or not either or all of these things would be considered as impairing the franchise, may well be waived, as they need not be here decided.

A ferry franchise is a privilege to take tolls for transporting men, horses, cattle and vehicles, with or without their loading, across a lake or stream, or some other body of water. Except in the mode of transporting, it differs in no essential from a bridge franchise. Both are for the same purpose, that is to get men, cattle and vehicles across a stream.

Duties are imposed which are the consideration of these tolls. They are familiar—one being that of being always prepared to transport persons and property of any one, when called upon to do so, at reasonable times.

Our statute simply provides that where this franchise has been granted, a similar franchise shall not be granted to any one else within a mile along the stream. That is to say, no one else shall be authorized to take tolls, or exercise any power, or right depending upon such a grant. It cannot be said that the grant of this franchise to any one, takes away from a citizen within the prescribed limits any right which before that he had of common right.

The grant of a ferry license does not impose upon every other citizen or traveler the burden of using the ferry and paying the toll, if he would cross the stream at all within one mile of the ferry. The franchise has no affinity with such old rights as were sometimes given by custom in England, like that of an ancient mill, at which all the inhabitants of a particular district were compelled to have their corn ground for toll. The ferry must be kept open to the public, and those who use it must pay toll, but any one may nevertheless get across the stream as he pleases and as often as he pleases, whether the waters be high or low. It may not be said that, at low water, a man violated a ferry franchise by fording, or by showing others a ford. Still it would impair the income of the ferry. That would be "*damnum absque injuria.*"

Nothing partakes of the nature of a ferry franchise which is not for the accommodation of the public. In the case of the *Enfield Toll Bridge Co. v. The Hartford & New Haven Railroad Co., 17 Conn., p. 40*, the court, quoting *Hargrave's Law Tracts, ch. 2, p. 6*, says: "It is a well settled principle of common law, that no man may set up a ferry, for all passengers, without prescription time out of mind, or a charter from the king. He may make a ferry for his own use, or the use of his family, but not for the common use of all the king's subjects passing that way."

Then comes also into the case now in judgment the fact, that Black River is a navigable stream, and that all persons have the right to use it as such, for fishing, hunting, recreation or what not, and to keep upon it such boats as they may please, and at least to carry their own families, servants and property. This is as far as the injunction leaves open to them, but it is obvious, upon principle, that they would not be excluded from extending courtesies to guests and particular friends, provided they did not extend to the general public. To do this is not really to impede the exercise of a ferry franchise in another or impair its value. The value of the franchise depends upon the right to transport such of the general public as may use the convenience, and not upon any right to compel those to use it who do not require it. The court did not err in declining to enjoin defendants from transporting *any* persons or property whatever. They had never offered any facilities to the public for this purpose, and if the court erred on this point it was in granting any injunction at all.

It seems from the authorities that although in those States formed out of the former Louisiana Territory, a greater freedom is allowed in the use of the banks of a navigable stream than is recognized as permissible by the general law obtaining in other States, yet that it would not give those navigating the stream the absolute right to land at pleasure upon private property. The subject is considered with this result in *O'Fallon, exr. of Mullanphy, v. Daggett & Price, in 4 Mo., p. 343*. The right to touch the bank and make fast thereto, and to use it for repairing, etc., is confined to cases of reasonable necessity, and as incidental to the right of navigation by boats passing up and down the stream, and temporarily delayed. The public has no general right to use the property of the bank-owners for landing at will and for mooring boats.

We conclude then that the defendants in using the banks of the complainant, and in passing over his lands, were simple trespassers, but that they were in no sense interfering with his ferry franchise. The injury, if real, was simply to the land itself, and the case stands in no better attitude than if he had brought the action for that directly, without any reference to his ferry. The right of the defendants to cross and recross the river with their boats, and to land at the public highway, or upon any other lands than defendant's, is as to him clear and well settled.

If the damage done to the real estate by trespassers be not real, and of such a nature as to give some peculiar reason for equity interference, the parties should be left to their remedies at law. This case does not come within the purview of the principle that authorizes an injunction to prevent multiplicity of suits, any more than in a case where different persons, without combination to assert a common right, had committed, or were about to commit, distinct trespasses. It does not appear that the landing of the boats amounted to a nuisance. If he does not wish to extend that privilege to his neighbors, but desires to force them to choose between more inconvenient landings and the burden of his tolls, the machinery of the law courts seems ample. We think the Chancellor would not have abused his discretion in denying the injunction wholly, and did not do so to complainant's injury, in making it perpetual, as modified.

Affirm.

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ATKINSON, AS AD., ET AL. v. HUDSON, TRUSTEE.

VENDOR AND VENDEE: *Action for purchase money: Tender of title.*

Where the obligations of the vendor to make title and of the vendee to pay the purchase money for land are dependent, the vendor can not sue at law for the purchase price without first tendering to the purchaser a deed in conformity to the contract; but where the suit is in equity, tender before suit is not essential, but is sufficient if made with the bill. The Chancellor will then grant the proper relief to the plaintiff and relieve the defendant from cost which might not have been necessary if the tender had been made before suit.

APPEAL from *Lincoln* Circuit Court in Chancery.
Hon. J. A. WILLIAMS, Circuit Judge.

D. H. Rousseau for appellant.

Before a vendor by title bond can have a decree against his vendee for the purchase money, he must *at least* bring a deed into court and tender it, otherwise he must fail. *28 Ark., 27, 176; Dart. on Vendors, Waterman's ed., 519–20; Sugden on Vendors, 416; 5 Hare, 247; 1 Tur. & Russel, ch. 78.*

McCain & Crawford for appellee.

Review cases in *17 Ark., 279; 26 Ib., 506; 28 Ib., 27; 28 Ark., 179*, and contend that no tender of deed was necessary. If the court discovers that defendant is ready to pay, and that the suit is unnecessarily or vexatiously brought, the costs should be taxed on plaintiff, and he should be required to accept his money and deliver a deed. This is equity and common sense. The failure to tender a deed may affect *the terms of the decree*, but not the right to relief. The true doctrine is laid down in *Sorrells v. Mc-*

Henry, 38 Ark., 133. See, also, *Lewis v. Hawkins, 23 Wall., 127* (an Arkansas case).

2. The second plea was bad—it tendered no issue. *35 Ark., 109; 1 Ib., 95; Newman on Pl. and Pr., 676–7; Ib., 343, et seq.*

EAKIN, J. On the twenty-eighth of June, 1883, Hudson, as trustee for the heirs of Nancy J. Hudson, brought this suit in equity against the administrator and heirs of John A. Darrah, to enforce payment of certain notes given for the purchase of land, and to subject the property to the lien.

He alleges that on the eighteenth of September, 1869, the said heirs of Nancy J. being the owners and in possession of the lands, sold them, by their trustee, to said Darrah, and put him in possession. By their trustee and agent, Hudson, they executed a bond for title, and Darrah executed notes to the trustee for the purchase money. The title bond is not exhibited, nor is it in any manner described otherwise than as above. Darrah executed two notes, which are incorporated in the bill, and which express that they were given for the land in question. They are made payable to Hudson, as "trustee for the heirs of Nancy J. Hudson," for the sum of $850 each, due, one on the tenth of January, 1870, and the other on the first day of January, 1871, both to bear interest at the rate of ten per cent. after maturity. Divers credits had been, from time to time, indorsed on each, and there was claimed as due a balance on both of about $935, with some interest. A part of the land, it is alleged, was afterwards sold by Darrah to Milus Easter, who is joined as defendant. Darrah died in 1882. The prayer is for a foreclosure of the lien, a sale of the land, and general relief.

The defendants were duly served, some by publication and some personally. An attorney *ad litem* was appointed for the non-residents.

At the August term, 1883, the administrator of Darrah demurred to the bill, stating that it did not show facts sufficient to make a cause of action; and, also, that complainant had not exhibited with his complaint any good and sufficient deed from the *cestui que trust* to the lands. Further stating, for cause, that the complainant, as trustee, did not, *at or before* the commencement of the suit, nor at any time since, tender to the administrator any such deed.

With the demurrer he filed an answer in two paragraphs. In the first he admits the sale of the land to his intestate, and the execution of the notes; and that the trustee executed a title bond whereby he covenanted, "upon the payment of said notes, that plaintiff, as such trustee, would properly make, execute and deliver to his intestate a good and sufficient deed for the lands so sold;" and then alleges that complainant, as such trustee, had wholly failed to tender to the intestate, or to the administrator, any such deed before the commencement of the suit, and that he had made none since. Then he asserts, upon information and belief, that the complainant can not make any such deed.

The second paragraph sets up vaguely and indefinitely, upon information and belief, without stating any amounts, that the intestate had, in his lifetime, made other payments upon the notes which had not been credited—stating that the complainant, as trustee, had said to another person, a short time before intestate's death, that the greater part of the purchase money due from the intestate was paid, and that there was little, if anything, due on the land.

Respondent asks that complainant be required to establish the amount due him by the strictest proof, and that, to this end, a Master be appointed to take the account and report the amount really due.

Both these paragraphs were met by a general demurrer. The defendant's demurrer to the bill was overruled, and the complainant's demurrer to the answer was sustained. Whereupon, the administrator declined to plead further, and excepted to the ruling.

The court then decreed that the bill be taken for confessed as against all the defendants—found the amount due upon the notes, and declared that the same was a lien upon the land. It was ordered to be sold for the debt and costs, reserving the portion conveyed to Easter for the last—the surplus to be paid to the administrator of Darrah.

The defendants prayed and obtained an appeal from the clerk of this court.

The decree is too indefinite to be executed by the commissioner for sale. The lands sold to Easter are no where defined. He is one of the appellants, and it concerns him that too much of the lands should not be sold, as belonging to the estate before resorting to his. He is entitled to exoneration of all his tract to the extent of the full value of the lands remaining in the estate. If his lands are encroached upon and any part of them sold primarily, he would not only be deprived of that exoneration *pro tanto*, but might furnish the surplus to go to the administrator. On the other hand, if too little be sold and the rest be assigned to Easter, the estate will lose the benefit of a proper surplus. The commissioner has nothing to guide him in the execution of the decree, and *non constat* that he will be able to find out *aliunde* what lands to sell first. The court evidently intended to marshal the lands in Easter's favor, which was his right, although he did not

answer the bill. It resulted from the concessions of the complainant, but no decree should have been pronounced without some description of his lands, either in the decree or in the proof or pleadings. Practically, however, there may have been no embarrassment, and we presume the appeal was not upon that error. We have deemed it, nevertheless, proper for notice.

VENDOR AND VENDEE: Suit for purchase money: Tender of deed.

This case makes it expedient to define the principles and practice which should govern proceedings to foreclose such liens as arise in favor of the vendor when a title bond is given, which provides for the execution of a good and sufficient deed before, or contemporaneous with, the payment of the purchase money—leaving out of view that class of cases where the contract shows that the two things were not to be dependent.

A title bond, although it has become a common mode of making an equitable conveyance, is in fact but an executory contract in writing for the sale of real estate, to be afterwards consummated by further action when the conditions may be complied with. It has been assimilated to a conveyance from the vendor, followed by a reconveyance to him from the vendee, by way of mortgage to secure the purchase money. It does resemble that, and in effect has substantially the same consequences in most respects; yet, where the real justice of the case requires a distinction to be noticed, the general analogy has not been suffered to mislead. See case of *Scharff v. Dodge*, *33 Ark.*, *340*, in which it was held that, although a tender of the debt on the day by a mortgagor would reclothe him with the legal estate, and destroy the lien, yet that effect could not result from a tender by a vendee under a title bond, who never had a legal title at all.

In every respect a title bond is but an agreement to convey, from which a court of equity creates an equitable

estate in the vendee, holding the vendor as his trustee for the land and the purchaser as the vendor's trustee for the money. The notes are the evidences of the agreement, on the part of the purchaser. A suit by either against the other is a suit for specific performance, to have the contract carried out and made effectual, and the true principles which should govern such suits are to be sought in those established in cases of specific performance. I imagine that some confusion, as to practice, has resulted from losing sight of this, and assimilating a suit by the vendor who has made a title bond, to a suit by a mortgagee to foreclose. But they are essentially different. A mortgagee has no responsibility whatever concerning the title of the mortgagor. He is entitled to foreclose it, such as it is. Upon the other hand the vendor who has given a title bond comes himself clothed with obligations as to the title. He has a contract to perform regarding the land before he can demand payment. He must make, or offer to make, a title before he can put the vendee in default. If he were to sue the purchaser at law, without first having performed the conditions on his part, and tendered such title as he was bound to make, he would show no cause of action, and could not recover. *Lewis v. Davis, 21 Ark., 235; Thomas v. Lanier, 23 Ib., 639; Sorrells v. McHenry, 38 Ib., 127.*

It would be very strange if the rule in chancery were so substantially different that a complainant might enforce specific performance of a contract without any offer or showing of readiness on his own part to fulfill those conditions which formed the considerations for the undertaking which he seeks to enforce against the defendant. It would violate one of the fundamental maxims of equity "He who seeks equity must do equity" and he must show by his bill that he stands ready to do it. The rule at law has been relaxed in equity on account of the more flexible

nature of its proceedings, by which it can do justice by compensatory orders, and the imposition of conditions, and it is now the settled doctrine that a tender *before suit* is not essential to the remedy of a specific performance, for if a tender be made of a deed at the time of the suit, and in the suit, the Chancellor may give the complainant what he then shows to be just, and relieve the defendant of the costs of a suit which might not have been necessary if the tender had been properly made before. But this is a relaxation of practice, and no abandonment of a principle. I have never heard of a case anywhere, and I am sure there is not one in our reports, where a court of chancery has given a vendor by title bond a decree for his purchase money, and a lien upon the land, without any offer by him at any time to fulfill his own obligation by making a deed.

In *Turner, adm'r, v. Lassiter, 27 Ark., 662*, this court held that the holder of a note given for the purchase money of real estate, seeking to subject the property to its payment, must tender a deed with his bill—that is, when the payment of the money is dependent upon the execution of a deed.

In *McGehee v. Blackwell, et al., 28 Ark., 27*, in which it was held that the tender need not be made before suit, save as affecting costs, a deed was actually tendered in open court, after a demurrer to the complaint had been sustained for want of an allegation of a prior tender. That was held sufficient.

In *Anderson, Ad., v. Mills, 28 Ark., 175*, in which it was again repeated that a tender before suit was not essential to its maintenance, the complainant did offer to bring into court a deed for the lands, and actually brought it in, with exhibits of his title papers. The failure to tender the deed

before suit was only made an objection after appeal here, and was held not sustainable.

In *Coldcleugh v. Johnson, 34 Ark., 312*, where lands had been sold by a husband and wife by title bond, and the notes had been asigned, it was held that the assignee suing to enforce the lien should have made the husband and wife parties in order that their legal title might be divested, *or* should have tendered a sufficient deed executed by them to the purchaser. In this case the principle is that the holder of the note being unable himself to fulfill the conditions, was nevertheless under obligations to see to it that the vendors should be compelled to execute them, if they would not do so voluntarily, and that he must do so before he could obtain a decree for the money.

In *Price v. Sanders et al., 39 Ark., 307*, it was again held that the assignee of a note, given in purchase of lands sold by title bond, could not sustain an action to foreclose, without bringing in the heirs of the vendor and assignor; that their title might be divested for the benefit of defendants. This was a case where by the death of the vendor a tender was impossible, but the complainant was required to take equivalent steps to secure to defendants their title, before his bill could be maintained.

Throughout all our decisions there runs the same key note, that one who has contracted to convey lands for a consideration will not be heard to claim that consideration without, at least in reasonable time, offering and showing himself willing to perform his own part. He must not wait to be compelled to do so. As *Mr. Pomeroy* says in his work on *Equity*, he must show himself "ready, willing, desirous, prompt and eager." *Sec. 1407, n. 1.*

All the conflict of decisions with regard to tender have been regarding the time; none with regard to the necessity of the thing itself as a requisite for relief. Whether the

tender *must* be made before suit, or whether it *may* be made in the suit, is the mooted point. Arkansas has at different times been on both sides of this question, but has now become well settled upon the latter line. "According to one group of cases," says Mr. Pomeroy (*ubi supra*), "the strict legal rule is enforced. Where the stipulations are mutually dependent, the plaintiff must make an actual tender, and must demand performance *before bringing his suit.*" The other group, which appears to be larger, and which he thinks asserts the true equitable doctrine, holds an actual tender of the deed before suit not to be essential. "It is enough that he is ready and willing and offered at the time specified, and even that he is ready and willing at the time of bringing the suit." * * * "The plaintiff's performance will be provided for in the decree, and his previous neglect will only affect his right to costs."

I take this latter group to represent the result, in the main, of the more recently expressed opinions of this court, as well as the doctrine which prevailed aforetime under the old judges.

In the first decision rendered in this court in the fall of 1866, when Walker, Compton and Clendennin were restored to the bench (the same court which rendered the decision in the case of *Hawkins v. Filkins*), it was held that "a vendor who comes into a court of equity to enforce the execution of a contract for the sale of lands, should tender a perfect and unincumbered title; at all events, such a title as he covenanted to make." *Hodges, ex parte, 24 Ark., 194.*

It would be but empty sound to say this, if the complainant should wholly decline to make any tender before or at or during the suit, and the defendant could not be heard to object either by demurrer or by answer.

There would be strong authority for holding the complaint now in judgment demurrable if it had set forth the title bond and omitted to make the tender. As it is, it does not appear from the complaint whether the title bond was in such terms as to make a tender essential. It would have been better for the defendants to have moved to have it made more definite and certain.

Waiving that, however, the defendant did clearly make it appear by his answer, that the payment of the money and the execution of the deed were to be mutually dependent, and that no deed had been tendered before or after the beginning of the suit. That was a good and proper answer. The complainant might still have amended his bill, but preferred to demur. That did not indicate that he was ready, willing and prompt to do on his part what justice required. It is the party that moves the court who must first show readiness to do equity. He could not decline that and require the defendant whom he had forced into the tribunal to come forward first and offer to make payment.

The demurrer to the first paragraph of the answer should have been overruled. For error in sustaining it, the decree should be reversed and the cause remanded with directions to overrule the demurrer to the first paragraph of the answer, and for further proceedings. We perceive no error in sustaining the demurrer to the second paragraph. Reverse and remand as indicated.

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CHAPLINE v. ROBERTSON.

1. PLEADING: *To merits after demurrer overruled.*

By pleading to the merits after his demurrer to the complaint is overruled, the defendant waives all objections to the ruling except the want of jurisdiction over the subject of the action, and the failure of the complaint to disclose any cause of action.

2. ATTACHMENTS: *Remedy against sureties on delivery bond.*

The summary remedy provided by section 355, Mansfield's Digest, against sureties on a forthcoming attachment bond is cumulative, and at the option of the plaintiff. He may waive it and bring a separate action on the bond.

3. PRACTICE: *Waiving jury trials.*

Where parties appear and dispense with a jury, it is the better practice to require them to sign a stipulation to that effect, or that the record show an express waiver; but in the absence of an affirmative showing in the bill of exceptions that a jury was demanded and refused, a judgment will not be reversed because the trial was by the court. The early rulings of this court that a jury was indispensable in an action on a penal bond have been changed by statute.

4. EVIDENCE: *Return of officer on process.*

In an action against the sureties on an attachment delivery bond for failure to deliver the attached property to satisfy the judgment in the attachment suit, the officer's return of the failure to deliver, indorsed on the special execution, is conclusive, and cannot be controverted by the defendants.

5. ATTACHMENT: *Delivery bond: What is delivery.*

An attachment delivery bond can be satisfied only by delivery of the property, or by an offer to deliver it by bringing it forward, pointing it out and tendering it to the officer. To tell the officer where the property is and to go and get it, is not sufficient.

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

C. B. Moore for appellants.

This was a suit on a bond executed under *section 406 Gantt's Digest.*

1. The liability of appellants should have been settled and determined in the original suit. (*Act March 10, 1875, pages 7 and 8; Acts 1875, adj. sess.; 34 Ark., 707.*) The suit on the bond was unauthorized.

2. The court had no right to try the cause *without a jury.* (*Sec. 4641 Gantt's Digest; Ib., sec. 4685.*) There was no waiver of a jury trial. The record states "neither party requiring a jury." This was not sufficient. (*5 Ark., 105.*) A forthcoming bond is the same as the old *delivery bond* (*Drake on Attach., sec. 327, et seq.*), and in a common law action on a delivery bond a jury is indispensable. *8 Ark., 477; 34 Ib., 719.*

3. The return of an officer is conclusive only against parties and privies, and the return on the execution was in a suit to which appellants were neither. *Murfree on Sheriffs, sections 866, 867, 868, and cases; 33 Vermont, 565.*

4. There was no breach of the bond. There was no undertaking to *deliver* the property at any particular time or place. The sheriff was told where the property was and instructed to take it.

H. A. Parker and *Sanders & Husbands* for appellee.

The remedy given by the act of March 10, 1875, is *cumulative* only, and not exclusive. (*4 Porter, Ala., 116; 6 Burr's Rep., 14, 18; Drake on Attach., sec. 327; 31 Ark., 219; 34 Ib., 542; 32 Ark., 281.*) True in *34 Ark., 708*, it is intimated as *the better practice* to take judgment against all parties in the attachment suit. The language is "shall *upon demand of the plaintiff,*" etc. Hence the court could not render judgment against the sureties unless demanded or moved so to do.

2. The sheriff's return is *conclusive* of the facts therein stated, and cannot be contradicted. *24 Mo., 590; 10 Lea.*

(Tenn.), 170; 79 Ind., 164; 32 La. Ann., 43; Gwynn on Sheriffs, 474; 25 Ark., 313; 39 Ib., 73; 40 Ib., 142.

3. But admitting that evidence was admissible, all that appellants attempted to prove would not avail them. The bond bound them *to deliver* to the sheriff, etc. *58 Cal., 343; Freeman on Ex., sec. 264; 7 Ark., 463.*

SMITH, J. Robertson brought an action upon contract against one Wickham, and sued out an attachment, which was levied on certain personal property belonging to Wickham. For the retention of said property, appraised at $601, Wickham executed a forthcoming bond under section 327 of Mansfield's Digest, with Chapline and another as his sureties. Robertson recovered judgment against Wickham for $713.10, besides interest and costs; and the attached property was condemned to be sold for the satisfaction of the same. A special execution was issued and placed in the hands of the sheriff, who returned thereon that the sureties had failed and refused to produce the attached property, and that he was unable to find any other property of the defendant in the writ, out of which to make the money.

Robertson then brought the present action against the sureties for the value of the property, alleging the foregoing facts, and exhibiting the appraisement, the bond, the judgment, execution and return. He was met by a general demurrer, which was overruled. They then pleaded that they had offered to deliver the property to the sheriff, and averred their willingness still to do so. Both parties announcing their readiness to go to trial, and, as the record states, neither party requiring a jury, the issue was submitted to the court; and it found that the defendants had broken the covenants of their bond and gave judgment accordingly.

The first assignment in the motion for a new trial is for alleged error in overruling the demurrer to the complaint. As the defendants pleaded over to the merits, they waived all objections to the ruling, except the two radical ones of want of jurisdiction over the subject of the action and failure of the complaint to disclose any cause of action entitling the plaintiff to relief. (*Jones v. Terry, 43 Ark., 230.*)

1. Pleading to merits after demurrer overruled.

It is argued that the action is unauthorized and improper, because under the act of March 10, 1875 (*Mansfield's Digest, sec. 355*), it was competent to have had the value of the property assessed and a judgment rendered against the sureties in the original action. And that the plaintiff having neglected to so proceed, has lost all remedy upon the bond. But the summary remedy against the sureties, provided by this statute, is evidently cumulative. It simply enacts that the assessment shall be made and judgment rendered against the sureties for the assessed value, upon the demand of the plaintiff. If this is not done the plaintiff may still resort to his action upon the bond.

2. ATTACHMENTS: Remedy against sureties on delivery bond.

It is objected here for the first time that the court had no authority to try the cause without a jury, and that the language of the record entry—"neither party requiring a jury"—does not necessarily import a waiver of the right to a jury trial. Section 5148 of Mansfield's Digest enacts that a jury trial may be waived—

3. PRACTICE: Waiving jury trials.

First—By failing to appear at the trial.

Second—By written consent filed with the clerk.

Third—By oral consent in open court entered on the record.

Where the parties have appeared and dispensed with a jury, it is the more correct practice to require them to sign a stipulation in writing to that effect, or to let the record show an express waiver. But in the absence of an affirmative showing in the bill of exceptions that a jury was de-

manded and refused, a judgment will not be reversed for such a cause. (*Deadrick v. Harrington, Hempst., 50; Wilson v. Liyht, 4 Ark., 158.*) In *Wallace v. Henry, 5 Ark., 105*, this court held that similar language could not be construed to imply consent, the defendant not having appeared at all. But now by statute a default authorizes the court to assess the damages without calling a jury. So likewise the cases of *Jennings v. Ashley, 5 Ark., 128; Nelson v. Hubbard, 8 Ib., 477; McKisick v. Brodie, 6 Ib., 375;* and *Johnson v. Pierce, 12 Ib., 599*, holding that in actions on penal bonds, the intervention of a jury is indispensable, have been superseded by an alteration of the statute.

4. Return of officer on process conclusive

The remaining grounds of the motion for a new trial relate to the conclusiveness of the sheriff's return upon the execution. Evidence was given tending to show that the sheriff had made a demand upon Chapline for the property, and was told that it was at Chapline's mill, distant one-and-a-half miles from the county seat, and that the sheriff could go there and get it; but neither of the defendants had brought forward the property. And the court was moved to declare the law to be that, if from the evidence it was found that the defendants, at the time execution was issued and demand made, notified the sheriff that the attached property was at Chapline's place of business, one-and-a-half miles from Clarendon, and instructed him to take possession of the same, and he refused to accept the property so tendered, this was a substantial compliance with the condition of the bond. But the court disregarded the evidence, refused the declaration, and declared that the sheriff's return could not be controverted in this action. This was correct. The general rule undoubtedly is, that parties to a suit and their privies cannot falsify the record thereof, except in a direct proceeding to vacate and annul it, and the return of an officer,

either on mesne or final process, as to all the facts which the officer has authority to certify, becomes a part of the record and cannot be collaterally attacked by the parties." *Hutton v. Campbell, 10 Lea (Tenn.), 170; Gwynn on Sheriffs, 473; Murfree on Sheriffs, sec. 868, and cases there cited; Clark v. Shaw, 79 Ind., 164.*

The rule has been repeatedly recognized and applied by this court. *Ringgold v. Edwards, 7 Ark., 86; Stewart v. Houston, 25 Ib., 311; Hunt v. Weiner, 39 Ib., 70; St. L., I. M. & S. Ry. Co., ex parte, 40 Ib., 141.*

The appellants admit the rule, but say that its operation is restricted to the parties and their privies, apparently forgetting that, by executing the bond, they made themselves parties to the original action. *Fletcher v. Menken, 37 Ark., 206.*

5. ATTACHMENT: Delivery bond: Delivery.

But if parol evidence had been admissible to contradict the officer's return, the facts in proof show no performance of the conditions of the bond. The bond provided for by the statute and executed by the appellants, is nothing but the old-fashioned delivery bond, which figures so largely in our earlier reports. Such a bond can be satisfied only by actual delivery of the property, or by an offer to deliver; which offer can only be by bringing forward, pointing out and tendering the property to the officer. *Pogue use Calvert v. Joyner, 7 Ark., 462.*

By not paying off Robertson's judgment, and by their further failure to make an actual return of the attached property to the sheriff, the sureties, by the express terms of their undertaking, became liable to pay its value to the plaintiff. *Metrovich v. Zavorich, 58 Cal., 343.*

Affirmed.

LITTLE ROCK, MISSISSIPPI RIVER & TEXAS RAILWAY v. HARPER & WILSON.

RAILROADS: *Negligence: Loss by fire.*

When a carrier contracts for exemption from liability for losses occurring by fire, the owner of goods lost by fire cannot recover for them without affirmative proof that the fire was the result of negligence.

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

J. M. Moore for appellant.

The carrier, having stipulated for exemption from loss by fire, was only liable for negligence, and the burden of proving such was on plaintiffs (*39 Ark., 523*), and there was not a shadow of evidence to show that the fire originated or was caused or permitted by the negligence of appellant or its servants or employes.

McCain & Crawford.

The *extraordinary* circumstances of the burning call for some explanation on the part of appellant.

Argue upon the evidence, and contend that the instructions and verdict are in accord with the law as laid down in *11 Wallace, 134, and 3 Hurl. & Colt., 596.*

The circumstances show negligence, and it was a proper question for the jury to determine. *Thomp. on Neg., p. 1227, et seq.*

SMITH, J. This action was to recover the value of goods which the railway company had received and undertaken to transport over its line, but which were burned on the company's wharf-boat at Arkansas City. The bill of lading

stipulated for exemption from liability for loss by fire, but the complaint averred that the fire was a negligent one. The answer denied negligence, and upon this issue the parties went to the jury, who found for the plaintiffs.

One assignment in the motion for a new trial alleges that there is no legal evidence to support the verdict. The bill of lading is dated June 17, 1880, and the goods were to be conveyed from Memphis to Arkansas City on the steamer Vicksburg, and thence over the defendant's road to Monticello. On the 20th of June, about 6 a. m., the wharf-boat in which the goods were, and which was used as the defendant's depot or warehouse, was discovered to be afire, and the same, with its contents, was consumed. The origin of the fire is unknown, but all the evidence tends to prove it was accidental. The boat was in first-rate condition, and adapted to the purpose for which it was used, No fires were kept on it for cooking or other purposes, and it was manned with a mate and a watchman. The mate was absent at the time, having gone for his breakfast, but the watchman was aboard or on the stage plank. No houses or chimneys were nearer than two hundred and fifty yards, and no steamboats had passed on the river later than 4 a. m., when one which had called at the wharf-boat departed. The boat was worth $7,500 or $10,000, and was insured for $6,000.

Carrier's liability for loss by fire.

This was the substance of the evidence, and it was utterly insufficient to base a verdict upon. The carrier having contracted for exemption from responsibility for losses occurring by fire, the plaintiff could not recover without affirmative proof that the fire was the result of negligence. *L. R., M. R. & T. Ry. v. Talbot, 39 Ark., 523.*

The testimony has no tendency to prove the issue, and this is not a case where it can be said, *res ipsa loquitur.* For fires of whose cause no intelligent explanation can be

given, are not of such unusual occurrence that the jury might infer negligence in the defendant's servants from the mere happening of the accident.

Reversed and remanded for a new trial.

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McKinnis et al. v. Little Rock, Mississippi River & Texas Railway.

Replevin: *Timber converted into cross-ties.*

The owner of timber taken and converted by a willful trespasser into cross-ties, may recover the ties or their value in an action of replevin, from the trespasser or his vendee with or without notice.

APPEAL from *Jefferson* Circuit Court.
Hon. J. A. Williams, Circuit Judge.

W. E. Hemingway for appellants.

Plaintiff was entitled to a judgment in the alternative for the ties, if to be had; if not, their value. *Gantt's Digest, secs. 4682, 4718.*

The owner of land may recover timber cut and taken therefrom, when worked into rails, *cross-ties*, etc., by a trespasser, whether it be found in his possession or that of his vendee. *2 Rawle, 423; 8 Wendell, 505; 24 Am. Dec., 66-7-8, 71 and 75; 4 Dill. C. C., 464; 21 Minn., 491; 49 Miss., 236; 16 Otto, 432.*

J. M. Moore for appellee.

1. The evidence showed that the ties had been laid in the road-bed, and could not be delivered, and the court properly rendered a judgment for value.

2. Appellant was innocent purchaser and not liable for

the enhanced value. *50 Wis., 167; 74 N. C., 36; 49 Miss., 236; 22 Mich., 311; 41 Penn. St., 291.*

COCKRILL, C. J. The appellants replevied of the railway a number of cross-ties made from timber cut on school lands belonging to their school district. The ties were cut by contractors, who sold and delivered them to the company for use in constructing the road. The contractors appear to have been acting without claim of right and were willful trespassers in cutting and removing the ties. The company did not know this when they purchased them.

The suit was brought about the time of the purchase, and the ties were retained by the company on giving bond. The court, sitting as a jury, found for the plaintiffs, but refused their request to assess the value of the property at its enhanced value as cross-ties, and took the timber on the school land as the basis of estimation. The difference between these values is considerable, and the trustees appealed.

While there is much confusion in the authorities as to what change will destroy the identity of personal property so as to preclude the owner of the original material from retaking the property in replevin, it is conceded that the conversion of timber into cross-ties is not such a change. There is a marked discrimination, too, in the authorities, against one who, in working the change, is a willful wrong-doer. The rule is not without exception, but it is established by the weight of authority that a willful trespasser upon the land of another who converts timber into cross-ties, posts or rails, is not permitted to acquire a right to, or interest in, the material he has devoted his labor upon. The owner of the timber may take it in its improved state, or recover its improved value. If such a

wrong-doer sells the property to an honest purchaser having no notice of the manner in which it was acquired, the purchaser gets no title because the trespasser had none to give.

The recent case of *Wooden-ware Co. v. U. S*, *106 U. S. Rep.*, *432*, was an action in the nature of trover brought against the purchaser of logs under much the same circumstances we have here. Mr. Justice MILLER, for the court, says: "The timber at all stages of the conversion was the property of plaintiff. Its purchase by the defendants did not divert the title nor the right of possession. The recovery of any sum whatever is based upon that proposition. This right at the moment preceding the purchase by the defendant was perfect, with no right in any one to set up any claim for work and labor bestowed upon it by the wrong-doer. It is also plain that by purchase from the wrong-doer, defendant did not acquire any better right to the property than his vendor had. It is not a case where an innocent purchaser can defend himself under that plea. If it were he would be liable to no damage at all, and no recovery could be had. On the contrary, it is a case to which the doctrine of *caveat emptor* applies, and hence the right of recovery in plaintiff."

It is sufficient to refer only to some other of the leading cases supporting the conclusions above set forth. *Wetherbee v. Green*, *22 Mich.*, *311*; *Bly v. U. S.*, *4 Dill.*, *464*; *Nesbitt v. St. Paul Lumber Co.*, *21 Minn.*, *491*; *Heard v. James*, *49 Miss.*, *236*; *Potter v. Mardre*, *74 N. C.*, *36*. See, too, *1 Sutherland Dam.* (*ed. 1882*), *164*, *et seq.*, *and cases cited.*

Upon the finding of the court there should have been a judgment in the alternative for the possession of the property, if it could be had, or its value at the institution of the suit, and the judgment must be reversed and the case remanded for a new trial.

HOWCOTT V. KILBOURN.

1. AGENCY: *Declarations of agent as proof of.*
The declarations of a husband as to his agency in transacting business for his wife, are not sufficient evidence of his authority to act for her.

2. LEX LOCI: *Contracts.*
Matters bearing upon the execution, the interpretation and validity of a contract, are to be determined by the law of the place where it is made.

3. MOTION FOR NEW TRIAL: *Assignment of errors.*
The assignment in the motion for new trial, that "the judgment of the court is contrary to law," is too general to question in this court the correctness of the declarations of law made by the Circuit Court.

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

D. H. Reynolds for appellant.

COCKRILL, C. J. Howcott brought suit against the appellee on a note signed "L. A. Kilbourn, pr W. I. Kilbourn." There was an answer of *non est factum*, and the issue was as to W. I. Kilbourn's authority to execute the note. No attempt was made to show express authority for that purpose, but W. I. and L. A. Kilbourn were husband and wife, and the testimony tended to show that the wife was in business for herself, as planter and merchant, in Louisiana, and that the husband transacted most of the business. Mrs. Kilbourn bought supplies from the plaintiffs for her plantation and store; and her husband, to settle the account, signed her name to the note sued on. He stated, at the time, that he had full authority to make the settlement and execute the note. The court, by consent, tried the case without a jury, and declared the fact

to be that W. I. Kilbourn acted without authority in executing the note in his wife's name, and gave judgment for the appellee.

It may be admitted for the purpose of this appeal that the proof shows that Mrs. Kilbourn was a sole trader, within the meaning of the statute, and that proof of coverture could not avail her as a defense; for even if she could be held bound for her contracts in an action at law, we can not disturb the finding of the court on the question of the husband's want of authority to bind her.

1. AGENCY: Proof of.

The fact that W. I. Kilbourn was the husband of the defendant in the suit, did not dispense with the necessity of proving his authority to act as agent in the conduct of her business, or make his statements about his authority to act proof of that fact. *2 Whart. Ev., sec. 1214.*

His declaration could not be heard to prove the agency (*Flynn v. State, 43 Ark.*), and, aside from what he said about it, the proof is shadowy. It was not sufficient to satisfy the circuit judge, whom the parties elected to put in the place of a jury, either of a general or special agency. It was clearly insufficient to sustain the plaintiff's case, when we consider the bearing of the Louisiana statute on the subject. The parties all resided in Louisiana, and the note was purely a Louisiana contract. The question, then, whether there has been a contract made that is binding on the appellee, is to be governed by the law of that State.

2. LEX LOCI: Contracts.

The appellee proved on the trial by the introduction of the Civil Code of Louisiana, that a mandate to execute a promissory note for another in that State, must be "express and special." By a long line of decisions in that State, it is established that the authority to execute a promissory note for another cannot be implied from a power of general agency unless the execution of the note is absolutely necessary to carry out the purpose of the agent's appointment. The words "express" and "spe-

cial" are said to be used in the statute in contradistinction to "implied" and "general." *Nalle v. Higginbotham, 21 La. An., 477; Robertson v. Levy, 19 Ib., 327; Decongé v. Forgay, 15 Ib., 37; Nugent v. Hickey, 2 Ib., 358.*

Matters bearing upon the execution, the interpretation and validity of a contract, are to be determined by the law of the place where it is made. This is true as to the formal making of the contract. *Wharton Confl. Laws, secs. 401, 419; Story Confl. Laws, secs. 242 a, 267.*

If it be admitted that the proof shows that W. I. Kilbourn was the general manager of the appellee's business, it cannot be implied from that, under the Louisiana law, that he was authorized to execute a note for her, in settlement of an account due a commission merchant with whom she was no longer doing business.

3. MOTION FOR NEW TRIAL: Assignment of errors.

It would serve no useful purpose to consider the declarations of law made by the court, as there could not in any event have been a judgment for the appellant. The motion for a new trial does not assign error as to any declaration of law by the court, but alleges merely in this connection that "the judgment is contrary to law." This assignment is too general under the decisions of this court to raise the question of the correctness of the declarations of law made by the Circuit Court. *Ferguson v. Ehrenberg, 39 Ark., 420, and cases cited.*

We take it that it was intended to mean only that the finding of facts was inconsistent with the declarations of law. The appellant can take nothing by that in this case.

It is insisted that the court erred in refusing to continue the case for the appellant. The continuance was asked in order to enable the appellant to procure the attendance of one Weis as a witness. The petition states that the facts to be proved by him could not be *fully* established by any one else. The particular facts that could not be other-

wise established were not pointed out, and we are unable to determine whether they are material or not. The evidence the appellant wished to procure as to W. I. Kilbourn's agency would have been cumulative only of the testimony adduced at the trial for that purpose, and this was the question at issue. We cannot say that the court abused its discretion in refusing to continue the case.

Let the judgment be affirmed.

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GATY v. HOLCOMB.

1. PRACTICE IN SUPREME COURT: *Findings of a Chancellor.*

The Supreme Court will not give to the findings of a Chancellor upon the pleadings and depositions the same conclusive effect as to a verdict, or finding of a court on oral evidence, but will sustain them unless the preponderance against them be reasonably clear.

2. FRAUD. *False representations: Puffing.*

The rule that commendation or puffing of an article is permissible to a vendor, without subjecting him to the imputation of false representation, applies when the purchaser has a full and fair opportunity to inspect the article and judge for himself, and not to things which are not the subject of any visible test or examination.

3. SAME: *Same.*

Any untrue representations made by the seller of the right to make and sell a new invention, as to the capacity of the machine or its fitness for the purposes for which he knew it was intended, would be fraudulent, if they induced the purchase and were made under such circumstances as authorized the seller to rely upon them; and in the absence of proof it would be inferred that they did induce the purchase; and to repel this inference the seller must prove either that the buyer had knowledge of facts which showed the representations to be false, or that he expressly stated in terms, or showed by his conduct that he did not rely upon them, but acted upon his own judgment.

APPEAL from *Washington* Circuit Court.
Hon. J. M. PITTMAN, Circuit Judge.

W. F. Henderson for appellant.

In *executed* contracts to obtain a rescission the party must allege and prove *a distinct case of fraud*, where a fraud is relied on for relief. (*12 Bush., Ky., 293; 59 Ill., 375.*) Here there was no fraud. Appellant submitted the machine to a practical test; appellee saw it work, and accepted its performance as satisfactory. He cannot now object or demand rescission. *1 Sm & M., 443; 13 Peters, 26.*

He might have protected himself by a covenant, and had an adequate and complete remedy at law. *121 Mass., 227; 22 Ark., 198; 41 Miss., 712.*

Appellee did not rely upon the vendor's *representations*, but *upon what he saw the machine do.* It was simply a mistake of judgment.

In order to rescind the vendee must offer to restore the property, and put the vendor in *statu quo.* This was not done. *26 Ark., 309; 32 Iowa, 101; 78 Ill., 27.*

Courts of equity will protect parties from fraud and gross imposition, but cannot insure men against folly or want of prudence in business transactions. Appellee perhaps made a bad bargain, in his estimation, but the sale was fairly made, and the test of capacity satisfactorily executed.

Clark & Williams for appellee.

The decided preponderance of the testimony is that appellant's representations as to the power and weight of the "extractor" were false; that appellee relied on them, and that he had a right to rely on them. This court will not disturb the findings of a Chancellor where there is any

evidence to sustain them, any more than the verdict of a jury on the weight of evidence. *24 Ark., 431; 42 Ib., 521; 41 Ib., 292.*

False representations as to the character, quality and capacity of the thing sold amount to a warranty and vitiate the sale. *22 Ark., 517; 30 Ib., 362; 38 Ib., 334; Benjamin on Sales, sec. 613.*

EAKIN, J. This is a suit in equity to cancel a contract for the purchase of the right to make, sell and use in the State of Arkansas, an invention for pulling stumps, brought by appellant Holcomb against Gaty, the owner of the patent.

The right was transferred to Holcomb, in exchange for certain real estate yet in the hands of Gaty, and which Holcomb seeks to regain by rescission. The material charges of the bill are: That the specifications for constructing a particular size of the machine, the dimensions, mode of operating, etc., were set forth in a printed circular, which was furnished complainant, and that defendant falsely represented that a machine so constructed would not weigh over about five hundred pounds, and would have sufficient power to extract stumps from 12 to 15 inches in diameter, and could be made by any carpenter or blacksmith.

Complainant states that he relied upon those representations in making the purchase; that they turned out to be untrue upon trial, that he offered to rescind the contract and give up the patent, and that defendant refused to do so, whereby he was cheated and defrauded.

The answer made an issue upon all the material allegations as to false representations, and the efficiency of the machine; and the cause was heard upon the plead-

ings, and a considerable number of depositions on both sides.

The Chancellor found the facts for the complainant, and decreed a rescission of the contract. A Master was appointed to take an account of the rents and profits of the real estate, while the same was in the hands of defendant, and of the improvements he had made. At this stage defendant appealed.

1. Findings of Chancellor.

Nothing is presented to us by the transcript but a question of the preponderance of evidence, for or against the findings. Whilst this court does not accord to the findings of a Chancellor upon pleadings and depositions the same conclusive effect as is given to verdicts, and the findings of a court upon oral evidence, it is wont to sustain them unless the preponderance against them be reasonably clear. In no other case can we well say that there is manifest error, and appeals should not be encouraged except for the correction of error.

2. FRAUD: False representations: Puffing.

This is not a case for the application of the rule that mere commendation or puffing of an article is allowable to a vendor, without subjecting him to the imputation of false representations. That only applies where the purchaser has a full and fair opportunity of inspecting the article and judging for himself. The nature of the right purchased—the right to construct and sell a new invention—was not the subject of any visible test or examination. The purchaser was inexperienced. The vendor knew, or at least the purchaser had a right to presume that the vendor knew all about the powers of the machine to be constructed. The complainant had a right to rely upon the representations of the vendor in this case. He was compelled to do so, and the proof shows did so. Any untrue representations made then, with respect to the capacity of the machine, or its fitness for the purposes for

which it was known by the vendor to be intended, would be fraudulent if they induced the purchase. That they did so is apparent, and would indeed be presumed, if not shown. "In order to displace this inference the *seller* must prove, either that the buyer had knowledge of facts which showed the representations to be untrue, or that he expressly stated in terms, or showed by his conduct that he did *not* rely upon the representations but acted upon his own judgment. *Benjamin on Sales, section 453, 4th Am. ed.*

It is alleged in the answer, and there is evidence to show, that after the purchase the complainant had a machine constructed and defendant showed him how to use it, and that upon a practical test the complainant expressed himself satisfied with its working. Upon the other hand the evidence is just as positive that the test was a failure, that the machine broke down in the effort to extract stumps of much smaller dimensions, and that all the complainant said was that the machine would work if strong enough. We cannot say that the Chancellor erred in giving more credit to the latter view than the former one. The preponderance seems rather in favor of the finding, and against the idea that the complainant was satisfied with the result of the experiment. The evidence is conflicting with regard to the capacity of the machine generally. Several witnesses say that a machine of the same sort had been quite effective in other States and places. Upon the other hand others say that the one made for Holcomb, which was substantially after the plan, was comparatively worthless for its alleged purposes. To this conflict we must apply the same rule.

There is some evidence strongly indicating that the defendant was himself aware that the representations he made would not bear a full and fair test, and that he was

used to make exhibitions of the power of the machine in a way to be misleading.

Upon a review of the whole evidence taken together, with that deference to the view of the Chancellor which is due to the deliberate decree of a court where there is no more probability of error in it than would have been a contrary conclusion, we do not feel justified in saying that he erred in rescinding the contract.

Affirm and remand for such further proceedings as may be necessary to carry the decree into effect.

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SNODDY ET AL., *Ex Parte.*

JURISDICTION OF SUPREME COURT: *Mandamus.*

The Supreme Court has no jurisdiction to issue a mandamus to the clerk of the Circuit Court to compel him to perform a duty enjoined upon him by law, though the circuit judge, from interest in the cause, is disqualified to act.

PETITION for *Mandamus* to Clerk of Circuit Court of Crittenden County.

EAKIN J. This is an original application to this court for a writ of mandamus to the clerk of the Circuit Court of Craighead County, for the Jonesboro District. The petition shows, with reasonable certainty, that the regular circuit judge was disqualified to act in a great many cases in which petitioners were plaintiffs, and that, before a special judge, at the September term 1884, an order was obtained for a change of venue in all of them, to the Circuit Court of Greene County. An order was then made

upon the clerk to make out copies of the record entries, attach them to each case, and forward or deliver them to the clerk of the Greene County Circuit Court, as required by law in such cases. That plaintiffs in due time tendered the clerk the sum of $8.50 for his fees for such transmission, which was more than enough, at the rate of ten cents a mile, going to and returning from the county seat of Greene. That the clerk then refused and still refuses to make this transmission, and they now make this application here, because the circuit judge is interested in all the suits as defendant and a party to one of them, as also is the clerk. They pray that the clerk be compelled by mandamus and other appropriate proceedings in this court to do his duty.

Making no question of the validity of the order for removal, and the due tender of the proper fees, the question here is one of jurisdiction.

This court has a very limited original jurisdiction, confined strictly to writs of *quo warranto* to circuit judges and chancellors; and also officers of political corporations, (when the question involved is the legal existence of any such corporation.) (*Const., art. 7, sec. 5.*) In all other cases the jurisdiction is appellate only. (*Ib., sec. 4.*) It nevertheless has a general superintending control over all inferior *courts* of law and equity, and *in aid of* either its appellate jurisdiction upon the merits of a cause, or its supervisory control over inferior courts to compel them to perform their proper functions, and to restrain them within their proper jurisdictional limits, it may issue either in bank or by one of its judges, the writs of error, supersedeas, certiorari, habeas corpus, prohibition, mandamus, quo warranto or any remedial writs. (*Ib.*) These writs, however issued, to be nevertheless heard and determined by the court. *Ib.*

A statute of January 23, 1875, provides for a change of

venue in civil cases, and directs that the clerk of the Circuit Court, when such order may be made, "shall make and file with the papers a certified copy of all the orders in the case, and upon the payment of transmission fees hereinafter provided, shall transmit the papers in the case to the clerk of the court to which the venue is changed" by some safe and convenient mode. The cause will then stand for trial in the court to which the order has committed it, at the first term which commences more than ten days from the filing of the papers of the case in the office of the clerk of such court. This obviously is not a case of original jurisdiction, nor is it of an appellate nature. No action of the court is made subject of complaint, nor has the court done anything requiring this court to exercise its superintending control. It is the clerk individually who is represented as disobeying the order of his court, and refusing to perform a duty enjoined upon him by law, regardless of the order. It supervenes upon the order of changing the venue. There is nothing upon which we may lay hold to support jurisdiction. All courts, and especially the superior courts of original jurisdiction, have within their proper spheres the original control of the operation of their proceedings, and the discipline of their recusant officers, subject to correction for error or abuse of discretion, and subject to be set in motion when having no discretion as to acting, they refuse to act. This is said in reference to the superintending control. In aid of appellate proceedings we may send writs of certiorari and habeas corpus to officers and individuals, but our superintending control must be directed to the *courts* themselves.

In criminal cases where the provisions of the law with regard to the transmission of the papers are analogous to those in civil cases, it has been held that the jurisdiction

of the cause does not vest in the court to which it is removed on change of venue, until the transcript is lodged there. (*Burris v. State, 38 Ark., 222.*) The performance of the clerk's duty in criminal cases is well enough secured by a penalty not exceeding $500 in case of failure (*Gantt's Digest, sec. 1883*), to be recovered in a civil action for the use of the common school fund. No such provision is made touching civil cases, but the common law remedies for neglect of duty and upon the clerk's bond remain open.

It had already been held in *Haglin & Pope v. Rogers, Circuit Judge, 37 Ark., 491,* in construing the act for change of venue in civil cases, that the jurisdiction of the court to which the cause was sent depended not so much upon the payment of the fees, as upon the receipt by the clerk of the necessary papers and copies of the record, authenticated by the seal of the court from which they were sent. The exact point of time at which the jurisdiction attached was not however the direct point then in judgment, as the question was whether without payment of the fees in fifteen days, the jurisdiction could ever attach at all. The result of these decisions, however, seems to be this: that the substituted court acquires no jurisdiction to compel the clerk of the first court to fulfill his duty in transmitting the papers. Most properly the court making the order for change of venue should, upon proper showing, compel the performance of its own order or ministerial duty of its own officer which springs from the order.

This is the more obvious, as the failure of the clerk to transmit the papers, may involve an issue of fact, in case he should contend that the fees had not been paid in time and that the order was void. This would be a matter which the regular judge ought not to determine, being interested, but it would not follow that this court would

thereby acquire jurisdiction *ex necessitate.* We would by entertaining the application exercise original jurisdiction to try the fact in issue. The determination of the question whether the jurisdiction remains in the Circuit Court of Craighead for all purposes, the transfer having been abortive, is a question for that court itself in the first instance. If further proceedings there be necessary, a special judge may be again elected.

Application denied.

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SHAVER, COMMISSIONER, v. LAWRENCE COUNTY ET AL.

1. PARTIES: *Agents.*

An agent without interest, and against whom there is no charge of fraud connected with the transaction, ought not to be made a party to the suit.

2. JURISDICTION: *Action against other counties.*

The Circuit Court of Sharp County, which was carved out of Lawrence County, has no jurisdiction, either of Lawrence County or of the subject matter of the suit in an action by Sharp County against Lawrence County, for her *pro rata* of the internal improvement fund on hand in Lawrence County. The original jurisdiction is exclusive in the county court of Lawrence County to audit, settle and pay the claim.

3. SAME: *Same: Appeal: Change of venue.*

The county court of each county has exclusive original jurisdiction to audit, settle and order the payment of all demands against the county. If it refuses to act it will be compelled to by mandamus. If it rejects the claim or allows too small an amount, its action may be reviewed on appeal; and from the circuit court the claimant may take a change of venue to another county, if he believes he cannot get justice from a jury of the defendant county.

APPEAL from *Sharp* county in equity.

Hon. R. H. POWELL, Circuit Judge.

J. L. Abernethy for appellant.

The court had jurisdiction. Two of the appellees reside in Sharp County, and part of the subject matter exists in said county. The liability of Lawrence accrued prior to the act of 1879, repealing *secs. 937–8–9* and *4516 Gantt's Digest;* and a law which abrogates all remedy is inoperative, and is to that extent unconstitutional. (*1 Hempstead, 533.*) But, be that as it may, appellees entered their appearance by consenting to a postponement and by filing their demurrer. *4 Ark., 70; 14 Ark., 234, etc.*

The court had jurisdiction of appellees at the filing of the complaint. The county court of Lawrence County had no jurisdiction of the subject matter of the action. The commissioner had filed his final report and had been discharged. The powers of county courts are statutory and are strictly construed. The power to audit and settle claims for and against a county must be confined to such claims as the county had authority to contract. *English & Wilshire v. Chicot County, 26 Ark., 454.*

An internal improvement commissioner of Lawrence County is the only one vested by law with power and authority to audit and make settlement of said fund for and in behalf of the two counties. (*Gould's Digest, chap. 101, secs. 43, 711.*) Lawrence County had no such commissioner at the time of filing the complaint, and a large portion of said fund had been improperly paid into the treasury of said county. The remaining portion had been abandoned by that county.

A court of equity has jurisdiction. The statute fixes it. Circuit Courts have original jurisdiction of all actions and proceedings for the enforcement of civil rights or redress for civil wrongs, except when exclusive jurisdiction is given to other courts; and jurisdiction as courts of equity in all cases when adequate relief can not be had by ordi-

nary proceedings at law. (*Gantt's Digest, secs. 1182, 1183.*) Lawrence County, in equity, holds Sharp County's interest in said fund as a trust, which a court of equity alone can protect and enforce.

There is no commissioner to enforce the collection of the outstanding claims abandoned by appellee Lawrence County, and in the hands of appellees, Wilson and Huddleston. A court of equity alone can authorize and enforce the collection of the same, and then distribute the fund arising therefrom, according to the respective rights of the parties. It is necessary for an account to be taken; no settlement in this case can be had without a marshaling of assets.

It was improper to pay this fund into the Lawrence County treasury; it is there without authority of law, and in disregard of the purpose of the gift and the law of distribution. To say the very least, it was paid in there by mistake—a mistake against which a court of equity alone can grant relief.

SMITH, J. By act of Congress approved September 4, 1841, the United States granted to the State of Arkansas 500,000 acres of land for purposes of internal improvement—the building of roads, railways, bridges and canals, and the improvement of water-courses and drainage of swamps. By subsequent legislation of this State, the proceeds arising from the sale of these lands were directed to be divided among the several counties. And it was further provided that, when a new county was established and an internal improvement commissioner had been elected, the commissioner of the county or counties out of which the new county had been formed, should pay over, on demand, to the commissioner of the new county a proportional dividend of such fund as it or they had received, and

which remained unexpended at the time of the formation of the new county. *Gould's Digest, ch. 101, art. 3, secs. 27, 43.*

In 1868 the county of Sharp was created, being carved out of the territory of Lawrence.

The present bill was filed January 8, 1881, by the internal improvement commissioner of Sharp, who was appointed to the office by the county court of his county. It alleges that at the date of the creation of Sharp County there was an internal improvement fund belonging to the parent county, consisting of notes and bonds and amounting to several thousand dollars; that the records of Lawrence County show nothing in relation to this fund, after the establishment of the new county, until the year 1872, when a commissioner was appointed and the fund turned over to him; that in January, 1873, said commissioner filed his report, showing a balance in his hands of $2,857.96, to one-half of which Sharp is justly entitled; that said commissioner afterwards collected a part of said notes and bonds and paid the same into the treasury of Lawrence County, and the residue of said fund, consisting of notes against solvent parties residing in Sharp County, he had placed in the hands of the defendants, Huddleston and Wilson, as his agents, for collection, and that said claims had been prosecuted to judgment; but nothing had been realized and the judgments remained unpaid.

The bill further stated that in the year 1876 the internal improvement commissioner of Sharp had made demand upon the commissioner of Lawrence County for a settlement and division of said fund; but the demand was not complied with, and shortly thereafter the last-mentioned commissioner had made his final report and resigned; since which time the office had been vacant.

The purpose of the bill was to recover Sharp's due pro-

portion of this fund, and to this end there was a prayer for an account and for authority to enforce collection of the outstanding claims alleged to have been abandoned by Lawrence County.

This bill was dismissed upon a demurrer which challenged the jurisdiction of the court and the sufficiency of the bill to state a cause of action.

1. PARTIES: Agents:

Under the Code of Practice a transitory action may be brought in any county in which the defendant, or one of several defendants, resides, or is summoned. (*Gantt's Digest, sec. 4545.*) Here two other defendants were joined, whose residence was in Sharp County. But it is apparent, from an inspection of the bill, that Huddleston and Wilson had no interest in the suit. No relief was prayed against them, and no decree could have been rendered against them, not even for costs. They were mere agents of a former commissioner of Lawrence County; and an agent without interest against whom there is no charge of fraud connected with the transaction, ought not to be made a party. (*Gartland v. Dunn, 11 Ark., 721; Goodman v. Moore, 22 Ib., 192.*) The demurrer must then be determined as if Huddleston and Wilson were no parties to the record. For jurisdiction cannot be acquired in such cases by inserting a fictitious defendant, against whom the plaintiff is not entitled to a judgment. *Randall v. Shropshire, 4 Metc. (Ky.), 327.*

Considering Lawrence County as the sole defendant, it is obvious that the Circuit Court of Sharp had no more jurisdiction than the Circuit Court of any other county in the State where the suit might have been begun and a writ issued to Lawrence County. A county can not be sued alone in any other State court, except one which sits within its own borders, for nowhere else can it be served with process.

It follows that the Sharp Circuit Court had no jurisdiction over Lawrence County. And we are also of opinion that it had none over the subject-matter of the suit. The county court of each county has exclusive original jurisdiction to audit, settle and direct the payment of all demands against the county. (*Mansfield's Digest, sec. 1407.*) And by act of February 27, 1879, the Legislature expressly repealed all laws declaring counties to be corporations, and forbade suits against them except in the county court. Whatever may be the effect of this last-mentioned act upon the jurisdiction of the Circuit Court in actions upon liquidated demands, as in *Pulaski County v. Reeve, 42 Ark., 54*, where a county had issued its bonds, yet the claim must begin in the county court, where a liquidation, adjustment or apportionment of the demand, as in this case, must first be had, before any judgment can be rendered. If that tribunal declines to act at all upon the claim, it may be set in motion by a mandamus. If it rejects the claim or allows too small an amount, its action is subject to review on appeal. And when the case reaches the Circuit Court, if the claimant believes he cannot have a fair and impartial trial before a jury of the defendant county, doubtless he may change the venue, under *chapter 153 of Mansfield's Digest.*

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Decree affirmed.

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PARSONS OIL COMPANY v. BOYETT.

CONTRACTS: *Lawful where made, enforceable everywhere.*

A purchase in another State, by a citizen of this State, of articles to be sold in this State, the sale of which is prohibited by the law of this State, but not by the law of the State where purchased, is valid and binding upon the purchaser, and will be enforced in the courts of this State, unless the seller is to actively participate, or be interested in the unlawful sale in this State.

APPEAL from *Hempstead* Circuit Court.

A. B. & R. B. Williams, for appellant.

There was a complete sale and delivery in the city of St. Louis. The order was received by appellants, and goods delivered to the Iron Mountain Railroad, a common carrier, before the dispatch countermanding the order was received. Black & Reaves disclosed no authority to countermand the order, and even had the telegram reached appellants before delivery of the goods they would not have been bound to respect it. They could only have withdrawn their guaranty, which was not done. See *Benjamin on Sales, sec. 181; Ib., sec. 693.*

The contract of sale and delivery having been begun and completed in the State of Missouri, the laws of Arkansas could not affect the validity of the sale unless it had been shown that there was a corrupt combination on the part of the vendors with the vendees to enable the vendees to violate the laws of this State, which was not shown nor any attempt at it. *Hill v. Spear, Am. Law Reg., vol. 11, N. S., p. 497; State v. Carl & Tobey, 43 Ark.; 14 N. Y. (4 Kernan), 162; 12 How., U. S., 87; Chitty on Cont., top p. 92–3; 19 Alb. L. J., p. 387.*

Dan W. Jones for appellees.

Contracts founded on an act prohibited by statute under a penalty are void. *Tucker v. West et al., 29 Ark., 386.*

Where the consideration of a contract is either wicked in itself, or prohibited by law, it is void and incapable of ratification. *Ibid; Stewart v. Davis, 31 Ark., 518; Cox v. Donnelly, 34 Ib., 762.*

Where the intention of *one* of the parties is to enable the

other to violate the law, the contract is void. *Tatum et al. v. Kelly, 25 Ark., 209.*

If part of the entire consideration is illegal, either at common law or by statute, the whole agreement is void. *Chitty on Con., 692.*

As shown by the evidence, the contract in this case was made at Hope, in Hempstead County, State of Arkansas, and was a violation of the act. (*Acts 1881, p. 116.*) The contract was not perfected until delivery at Hope, Ark.

SMITH, J. The plaintiff in this action was a firm in St. Louis, Mo., dealing in oils. The defendants Boyett, Flowers & Co., and Black & Reaves, were merchants trading at Hope in this State. And the action was to recover a balance due on a car load of oil sold and delivered to Boyett, Flowers & Co., upon their written order, accompanied by a letter from Black & Reaves, guaranteeing payment within five days after the receipt of the goods.

The defenses were:

First—That the order had been countermanded before the oil was shipped.

Second—That the contract was made at Hope, with an accredited agent of the plaintiff for oils, some of which were below 130° test, after the act of March 21, 1881, had taken effect and it was unlawful to deal in such oils.

There was a trial by jury, with a verdict and judgment for the defendants.

The evidence showed the following state of facts:

In the month of March, or early part of April, 1881, a traveling salesman of the plaintiff had visited Hope, and had unsuccessfully solicited an order from Black & Reaves, leaving with them a card of prices. On the sixteenth day of April, Boyett, Flowers & Co., transmitted by mail an order to the plaintiff for 22 barrels and 35 cases of 115°

coal oil; 18 barrels of 150°, and 3 barrels of 175°, directing the same to be sent by the Iron Mountain Railroad, and promising payment in five days after the arrival of the oil. Black & Reaves also wrote by the same mail, undertaking that the money should be paid at the specified time. These letters were received at St. Louis on the seventeenth, and the order was filled on the eighteenth, two dray-loads having been delivered to the carrier designated by the defendants on that day, and the remaining load before 9 a. m. of the nineteenth. In the evening of the eighteenth Black & Reaves, having learned that the act of March 21, 1881, prohibiting under a penalty the sale of oils for illuminating purposes that ignite at a temperature less than 130 degrees Fahrenheit, was now in force, sent a night telegram to the plaintiff, requesting that the oil might not be shipped. This telegram was not delivered until 10 or 11 o'clock of the nineteenth, after the railroad company had received and receipted for the oil. A correspondence ensued between the parties, the defendants insisting that the plaintiff should take back the oil that was below 130° test, as they could not sell it to their customers in Arkansas; but the plaintiff declined to do this. The defendants had paid on account an amount sufficient to cover the oil above 130°.

It is manifest that the court below tried the case upon a false theory, namely, upon the theory that the act of March 21, 1881, and which went into force ten days after its passage, had any bearing upon the plaintiff's right to recover. Thus the plaintiff moved for a direction that if the jury should believe from the evidence that Boyett, Flowers & Co. purchased by their order, in writing, the oil mentioned in the plaintiff's bill of particulars within three years before action brought, and the same was shipped to and received by them, and they afterwards paid a part, the jury might

find for the plaintiff the balance proved to be due, notwithstanding a portion of said oil was below 130° fire test.

This the court qualified by requiring the jury to further find that the sale was not in violation of the laws of this State.

Again, the court told the jury that if they should find that any act necessary to complete the sale, was to be done in Arkansas, and that the contract was for the sale of articles prohibited by the laws of Arkansas, they should render a verdict for the defendants.

1. CONTRACTS: Valid where made, enforceable everywhere.

And the same vice pervades the entire charge of the court. Now, the laws of this State have nothing to do with the validity, nature, obligation and interpretation of this contract. It was a Missouri contract; for it was there that the plaintiff received the order; it was there they consented to fill it, and it was there the goods were actually delivered to a carrier of the defendant's own selection. Consequently, if the contract was valid by the law of Missouri (and no attempt is made to show the contrary), it was valid everywhere, and would be enforced in any jurisdiction to which the plaintiff was compelled to resort for a remedy for its violation. *State v. Carl & Tobey, 43 Ark., 353.*

It is true no nation or State is bound to recognize or enforce any contracts which are in fraud and violation of its own laws. It may also be admitted that a man is presumed to know and understand not only the laws of his own country, but also those of a foreign country or State in which he transacts business; although this particular law had been so recently enacted that the defendants themselves who were citizens of the State, seem not to have been aware of its provisions when they gave their order. Still the plaintiff's right to recover would not de-

pend on its knowledge or belief that the purchaser bought for the purpose of carrying the oil into Arkansas, to be there re-sold in violation of its law. But it would depend upon the circumstances whether the seller was to participate actively or be interested in the subsequent unlawful disposition of the oil.

An instructive case on this subject is *Hill v. Spear, 50 N. H., 253; S. C., 11 Am. Law Reg., N. S., 497.* The facts were these: E kept a saloon in Manchester, N. H., where he was accustomed to retail spirituous liquors contrary to law. S was a liquor dealer in New York, where such traffic was not prohibited, and had visited E's saloon, and on one occasion had solicited orders from E for liquors. Subsequently S sold E a quantity of spirituous liquor. The contract of sale was made and completed, and the goods were delivered in New York. S had no interest in the disposition of the liquors by E, and did not act beyond the sale to E, in furtherance of E's purpose to sell the liquors in New Hampshire; but there was evidence to show that S, when he solicited orders from E, and sold him the liquors, had reasonable cause to believe, and did believe that E intended to re-sell those liquors at his saloon.

The Supreme Judicial Court of New Hampshire ruled that the contract of sale being valid by the laws of New York, should be enforced.

Judgment reversed and a new trial awarded.

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VARNER v. RICE.

1. PLEADING: *Answer of guardian ad litem.*

It is not sufficient for the answer of a guardian *ad litem* to deny generally, such of the allegations of the complaint as may be important to controvert, and submit the minor's interest to the protection of the court. The answer should be a full defense, specifically denying the material allegations, without regard to the truth of the denials as to anything which may be prejudicial to the minor.

2. CONVEYANCES: *Repugnant provisions.*

A tenant by the curtesy conveyed his life-estate to his children, the remaindermen, reserving to himself the right to use, manage and control the property during his life for the education, maintenance and support of the grantees, notwithstanding their future marriage or majority. In a contention that the reservation was repugnant to the deed and void: *Held, aliter:* that the reservation was not of title or estate, but one of power: that the deed was the same, in effect, as if the father having the legal title, had covenanted to stand seized of it for the sole use of his children, and had reserved the power to exercise an active trust in their behalf for all the purposes expressed in it.

CROSS-APPEALS from *Lincoln* Circuit Court in Chancery.

Hon. JOHN A. WILLIAMS, Circuit Judge.

McCain & Crawford for appellants.

The court erred in divesting Wm. F. of his possession and control of the land, and in decreeing partition.

The instrument was good as a covenant to stand seized for the use and benefit of the children. The old rule that where the provisions of a deed are repugnant to, or inconsistent with each other, the first will prevail, and that conveyances will be construed most strongly against the grantor, has been much restricted in modern times. Equity takes the whole *instrument*, and construes it as a whole,

and gives effect to the *intention* of the parties, if not against public policy. The meaning and intent of the entire instrument is to create an estate trust by way of covenant to stand seized, by which the grantor should occupy toward the grantees a position perfectly analogous to that of a guardian toward his wards, with only this difference: that so long as the grantor lived the relation as to this property should remain unaffected by the marriage or majority of the grantees. See *6 Ark., 109, 119; 3 Ib., 56; 36 Me., 315; 38 N. H., 212; 3 Atkyns, 493, note; 2 Blackstone by Sharswood, 293; 2 Bos. & Peel, 26; Browning v. Wright, 8 Mass.; Story on Cont., note to sec. 659; 3 Story Rep., 162; 16 Johnson, 178; 3 Rand., Va., 487; 28 Vt., 10; 20 Johns., 84; 2 Saunders, 96; 2 Washburn R. P., ed. of 1868, 393, et seq.; Perry on Trusts, sec. 305; Parsons on Cont., vol. 2, p. 506; note to 507, etc.; 1 Kernan (N. Y.), 315; 12 Ill., 38, 56.*

If a guardian's account is improperly kept, the remedy is not to discharge him and turn the property over to the wards, but to force him to make a proper account. So in case of a trustee, and he may be discharged for fraud or other good cause, and a new one appointed. The words "Varner place," did not include the lands south of the railroad. They were known by other names and as separate places.

Where the plaintiffs are not in possession, there can be no partition. *27 Ark., 77; 40 Ark., 155.*

A remainderman can never have partition. *1 Wash. R. P., 3d ed., 584.*

A party cannot claim under a deed its benefits and repudiate its burdens. *Bisp. Eq., sec. 295; 30 Ark., 458, etc.*

J. M. Cunningham for appellees, Rice and wife.

Adverse possession bars partition—(*27 Ark., 77; 31 Ark.,*

345; 40 Ark., 155; Freeman Co-Ten. and Part., par. 447)—but in this case Wm. F. held as guardian and administrator, which is not *adverse. 28 Vt., 660; Freeman Co-T. & Part., par. 471, 41 N. H., 502; 2 Mass., 479.*

The first clause of the deed is an *absolute* grant, and carries *all* the estate of the grantor, and unless qualified by some *condition consistent* with the grant, the grantees are tenants in fee simple. (*1 Lomax Digest, Real P., 13, 12.*) This is an attempt to convey the land and withhold the use, management and control and dominion over it. This is impossible. The clauses are in restraint of alienation, against public policy, are repugnant to and inconsistent with each other and void, and the entire estate passed free from any restrictions or conditions. *1 Lomax Dig., 264; Coke Lett., 223 A.; 3 Vesey, 324; 4 Sim., 141; Jac., 415; 2 M. & K., 174; 5 Sim., 232; 10 B. & Cres., 433; 18 Ves., 429; 6 N.Y., 467; 4 Gray, 388; 18 Pick., 455; 21 Pick., 42; 11 Penn. St., 37; 19 Ib, 96; 20 Am. Law Reg., 180; 29 Mich., 78.*

Even if held to be a covenant to stand seized, etc., it would be immediately executed by the statute of uses. *27 Hen., 8 c. 10; 2 Lomax Digest, 136.*

It cannot be sustained us a trust. *2 Wash. R. P., 426; Perry on Trusts, 304, 298; 1 Sugd. on Vend., 309, 314.*

As to the meaning of the word "plantation" see *10 Iredell L., 431; Abbott's Law Dict., in verb; 2 Lomax Digest, 211.* It has a legal signification and needs no explanation. It is not the province of testimony to explain the words of a written instrument; it is a question of construction for the court. *9 Wheat, 565; 3 Pick., 348; 4 B. & Ad., 771; 1 Greenl. Ev., 277–8.*

Mrs. Rice not estopped by taking the deed to deny John A.'s title. *16 Pick., 457.*

It was error to give John A. a lien for expenses of

building gin house, etc. A guardian by his contract cannot bind the estate of his wards, nor improve them out of their estate. *5 Mass., 300; 1 Pick., 314.*

EAKIN, J. William F. Varner was tenant by curtesy of a large body of real estate near and partly composing the town of Varner, at Varner's Station, on the Little Rock, Mississippi River & Texas Railway. The fee simple, in remainder, was in his two children, Medora and William I. Varner, of whom he was guardian. Previous to the year 1877, acting under an order of the probate court, which was supposed to be valid, and acting for himself as well as in the character of guardian, he sold off, at private sale, to John A. Varner, two small tracts of the land at Varner's Station, which had been, or were to be, divided into lots. These sales were never reported to, nor confirmed by the probate court. It does not appear that he made any settlement as guardian, or that any property of his wards had come under his control, save their remainder interests in the lands of the mother, and the purchase money for the lands he had sold. It may be remarked in passing that these sales, having never been perfected by report and confirmation, divested no title or interests of his children, and it is unnecessary, therefore, to inquire whether the probate court has jurisdiction, or power to make such orders. They will be considered, with regard to his children, as if never made, except in so far as a question may arise as to the right of the purchaser to *bona fide* improvements.

On the third day of December, 1877, for the expressed consideration of love and affection, he, by deed, released, relinquished, aliened and conveyed to his said children his estate by curtesy in and to the Varner place, at Varner's Station, to hold to them and to their heirs and assigns

forever, subject to certain limitations and conditions; in other respects to be absolute.

These were then set forth as follows: He reserved to himself the right to use and rent or cultivate said plantation for the support and education of his children, and for their maintenance in a style suitable to their condition in life, and to raise such sums as might be necessary to pay taxes and keep the premises in repair; such control to continue, notwithstanding the marriage or maturity of either. He covenanted, nevertheless, that his management of the property should be solely for their benefit, and that as guardian, he would keep a correct account of the proceeds, and of the charges against them, and the plantation; and that such sums as might be due them at his death, should be paid out of his estate. He further reserved the power, if it should become necessary to lay off any portion of the land into town lots, to release his right to persons desirous of building upon or improving the lots, so as to make them more remunerative to the children, such power to be exercised, however, only in cases where the probate court or other court of competent jurisdiction, should refuse to authorize a sale of the fee simple interest in the children.

Finally, it was provided that in case either of the children should marry, or attain majority, such child should have the right at the end of each year to a settlement of the rents and profits for that year. Then follows this closing clause: "The true object of this conveyance being to settle the property aforesaid upon my said children fully and completely, but saving to myself, as their father and natural guardian, the right to control and manage the land for their use and benefit."

The deed was duly signed, acknowledged and filed for record.

The daughter afterwards married, but does not appear to have insisted, at any time, upon the annual account provided for in the deed, or to have recognized any attempted reservation of her father's right to control and manage the property. The marriage seems to have been without her father's consent, and to have produced an estrangement between them. On the thirty-first day of January, 1883, she with her husband, R. R. Rice, began this suit against her father and John A. Varner, who had purchased the parcels of land under the supposed authority of the probate court. Her brother, William I. Varner, still a minor, with interests identical with those of his sister, was made a defendant. As to him proper service was had. He was over the age of fourteen years, and service was made by leaving a copy at his usual place of residence, with a member of his family over the age of fifteen years. This is one of the prescribed modes of actual service, as distinct from constructive, and there is nothing in the statute to distinguish adults from infants as the subjects of such service.

The bill sets forth the lands composing the Varner plantation, embracing over 900 acres; admits that her father had been tenant by curtesy, and exhibits the deed to his children above described. It states that now a partition of the whole place between herself and her brother would be desirable, they being sole owners, but that the lands are in possession of her father Wm. F., and have been since her mother's death, without any account; and that he refuses to make any, or to allow her any share of the rents and profits. Alleging further, that he will continue to hold the land and take the profits, unless prevented, and that he is insolvent.

In a second paragraph, with regard to John A. Varner, the bill alleges that in 1880 he took possession of said

lands under a lease from Wm. F., for three years, agreeing to pay for said lease the gross sum of $7,000 on its determination; but that he had never paid anything upon it, or, if anything, very little.

In a third paragraph she charges that after the death of her mother, her father had been appointed guardian of herself and her brother, and had procured an order of the probate court, purporting to authorize him as such to sell off any portion of the land in town lots at private sale. Under this order he had, on the nineteenth day of June, 1876, attempted, by deed, to convey to John A. Varner about six acres of the land, described by metes and bounds, at Varner's Station. The consideration of the sale is charged to have been $5,000. Various reasons are assigned why the sale should be considered void, which it is unnecessary to discuss, as it was never consummated by the court. It is alleged that he made no account of the money received. She charges that John A. is in possession under said deed, and has been since its execution, asserting no other title, and that the yearly value of the land is $1,000. She claims half the rents, and that the deed is a cloud upon her title.

A fourth paragraph makes similar allegations of another sale of another portion of about five acres, sold to John A. Varner, under the same authority, for $250, on the twenty-sixth day of September, 1876. This paragraph stands in like attitude with the third.

Besides general relief, there were several specific reliefs in the prayer:

First—For partition.

Second—For a receiver of the property still in the hands of Wm. F. Varner.

Third—For an account with John A. Varner for the years 1880, 1881 and 1882, during which he held the

lease, and a decree against him for the amount found due.

Fourth—That the order of the probate court for the sale of the lands be held null, the deeds be canceled, and an account taken of the rents and profits.

Wm. F. Varner in his answer denied that the designation "Varner place" in his deed meant to include all the lands set forth in the complaint, but says it was then usually applied to that portion of the lands lying north of the railroad. He denies the right to partition of the lands, or to their possession by complainant. He says he has spent all the profits of the lands in educating, supporting and maintaining his children. He denies that she has a right to call for any account of rents and profits, saying that by the deed set up he never meant to surrender his right by curtesy. The explanation of the deed he makes is this: That he was then very much in debt, and was threatened with suits by creditors, and that he made the conveyance with intent to delay them, and obtain more favorable terms for a settlement, by placing his property beyond their reach.

He says that since the death of his wife he has made extensive and valuable improvements on the lands worth $5,000, besides expending annually large sums for his children, about $500 each, which is largely in excess of what he received.

He says further, that the lease to John A. Varner was for three years for $2,000 per annum, which has been paid and properly expended in the maintenance of his children. That the parcels of land sold to John A. lie south of the railroad, and are not part of the Varner place, and that the sales were made in good faith. That he had a life estate in those lands, and has expended for his children more of the purchase money received than would

properly have fallen to their share. With this answer a demurrer was filed.

John A. Varner, in his answer, sustains Wm. F. as to the terms of the three years' lease, and the payment of the rent. As to the parcels purchased and held by him, he contends that the sales were valid and made in good faith, and that he had spent about $5,000 in improving. He denies also that the lands south of the railroad were included in Wm. F. Varner's deed to his children, not being considered part of the "Varner place." It is understood that these parcels lie to the south. He makes his answer a cross-bill for improvements, and also demurs.

1. PLEADING: Answer of guardian *ad litem.*

The answer of the guardian *ad litem* denies generally such of the allegations as it may be important to controvert, and submits the rights of the minor Wm. I. Varner to the court. This pleading is not to be approved. It amounts to no answer at all, and is useless. If all that may be required is to simply file such a paper in a perfunctory way, the statute might just as well have declared the issue to be made in all cases by the allegations of the complaint, without any answer by a guardian, as allegations of new matter in an answer are put in issue without reply. It is the duty of a guardian *ad litem* to make a full defense without regard to the truth of the denials as to anything which may be prejudicial to the minor. That is illustrated in this case. One of the allegations is that a partition was desirable and might be fairly and justly made. It may not be true that it could be, at this time. It might be detrimental to the interest of the minor. The court made no inquiry as to that because no adverse pleading seemed to require it, and no proof on the subject was taken before partition was decreed. It is better that the answer of a guardian should specifically deny material allegations. It need not be verified by oath.

There was evidence to show that the plantation known as the Varner place included only those lands at Varner's which had belonged to Mrs. Wm. F. Varner, lying north of the railroad. Also that the father had paid out large sums of money annually in the support of his daughter, Medora, up to the year 1882, when she married. About fifty acres of additional lands have been brought into cultivation upon the plantation since 1876. Cabins and an expensive gin house have been erected, and other expenses incurred in the management of the place.

The first decree was rendered at the February term 1883, the case having been heard upon the pleadings, exhibits and depositions. The Chancellor held that the attempted conveyance of the two small tracts to John A. Varner under the supposed authority of the probate court, were void and of no effect upon the interests of the minors, but did convey the life interest of William F. In so far the title of John A. was confirmed, and in other respects the said deeds were canceled.

As to the rest of the lands it was ordered that partition be made equally between the said Medora and her brother William I. Varner, and commissioners were appointed for the purpose. It was ordered, however, that it was to be made without predjudice to the right of William F. Varner to keep in possession and control the portion assigned to William I. Varner, and without prejudice to the right of the latter to contest the right of his father to do so. To avoid the loss of a crop a receiver was appointed to take possession of the property and rent it for the current year.

The engine and gin stand upon the place were declared to be personal property, and leave was given to any other parties to the suit to contest John A. Varner's right to

the same, at the next term of court. Meanwhile those articles to remain in the hands of the receiver.

From this decree both parties, save William I. Varner, one of the defendants, appealed. The transcript of the case to this stage of the proceedings was brought up and filed. It claims our attention first amongst the consolidated cases.

The complainants contend, with regard to the eleven acres sold to John A. Varner, that William F. professed to act only as guardian, and to sell only the interests of his wards, under the supposed authority of the probate court. That nothing at all passed by the deeds, and that the curtesy of Wm. F., with regard to these portions, remained in him, until the deed of 1877, when it passed, with all the rest of the Varner place, to Medora and her brother.

What is meant by "the plantation called the Varner place" is matter which does not explain itself, and must be shown by evidence *aliunde*. When shown, it is that which the deed of 1877 carries to the children. The evidence on this point tends to show that at the time the deed of 1877 was executed, the lands north of the railroad were considered to make up the Varner place. Those parcels of land conveyed to John A. Varner lie to the south of the tract, and in this view they would not be included in the deed of 1877, whatever may be its effect. It appears, however, that before the lands were cut by the railroad, they lay in a solid body, and may be considered as all having then belonged to the Varner place; that, indeed, does not preclude the idea that under the changed circumstances they were not so spoken of nor regarded. But it is most probable that by Varner place, all the lands were meant.

As between William F. and John A. Varner, the former and those claiming under him afterwards, are estopped to

deny that his curtesy passed to the latter. The deeds recite that, as guardian, William F. had been empowered to sell and convey, and had so sold; and in conveying, he describes himself as guardian, acting under the power vested in him by the said court. Still he conveys the whole land, or the whole estate in the land, without qualification to indicate that he meant only to convey the remainder interest of the heirs. The lands were sold at a full price for the whole estate, and it seems that immediate possession was given. Besides, the order of the probate court, introduced by complainants as an exhibit to their bill, recites that said William F. had petitioned to sell the whole land *for himself, in his own right and as guardian*, and had set forth his estate by curtesy and the fee of the heirs subject to it, and alleged that it would promote the interests of the heirs to have the special lands sold to purchasers for improvement. The order itself was to the effect that the sale might be made for himself and as guardian, and that he might retain all the funds arising from the sale for his natural life. This is the order referred to in the deed, and it was obviously made with the understood condition that he must sell his own interest as well as that of his children. Otherwise, the object in authorizing the sale of the remainder interest would not be accomplished. It was to enhance the value of their remainder interest in other surrounding property, by the improvements expected to be put by purchasers upon that which was to be sold. The curtesy passed to John A. Varner by the deed, although, for want of confirmation, it had no effect upon the estate of the heirs, and the Chancellor did not err upon that point.

2. CONVEYANCES: Repugnant provisions.

With regard to the other lands of the plantation, the whole equity of the bill turns upon the construction of the deed to the children, made by William F. Varner, in

1877. The court held that it vested in them an absolute fee-simple, enjoyable *in presenti*, without restriction or qualification, and subject to immediate partition. This view is based upon the direct terms of the conveyance in the first clause, and the declarations of the grantor that he intended it to be absolute, without regard to the limitations and conditions of the gift by which he endeavored to retain in himself not any beneficial enjoyment of the property, but the management and control of it for their benefit during his life, with a power to sell his life estate in portions of it to others, for the purpose of having it improved and made more remunerative to his children in the future; this latter power to be exercised only in case of his failure to obtain the authority of some proper court to sell the whole estate. It was contended, and the Chancellor so ruled, that such conditions could not consist with the grant, and must be disregarded.

It is obvious, upon a very short reflection, that the view taken by the Chancellor is a technical one, based upon an old common law rule of construction, that, where clauses of a deed are inconsistent, the first must prevail, and that no estates of a novel nature can be created with restrictions upon their enjoyment and use, or in modes of devolution not appertaining ordinarily to other estates.

The deed, in *substance* and *effect*, violates no rule of public policy. It would be everywhere conceded that a man may do what he will with his own, if it violates no public policy and interferes with no previously vested rights of others. No one will doubt that the father might have conveyed this life estate to another, and invested him with an active trust to manage and control it for the benefit of his children, and to sell the life estate in such lots to be carved out of it as he might select, in order that improvements put upon them might enhance the value of the re-

mainder interests already owned by the children. This would be to some extent in restraint of alienation, but such restraints are permissible during a life or lives in being, and twenty-one years and a few months afterwards. If he might convey the lands to a third person in such trust, there is no principle in the way of his retaining the legal title and declaring such a trust in himself. It would be a valid gift in equity, according to its terms, which a Chancellor might take cognizance of and enforce by appropriate proceedings.

It were much to be regretted, indeed, if such a disposition of a curtesy could not be made by a father desirous of no private benefit to himself, and willing that the children of the mother should enter into the enjoyment of her property, without risking on his part a concealed hope in their hearts of his own speedy death. At the same time a very slight experience of the world would satisfy him that both life estate and fee might be soon squandered if it were put in their power to allienate both together on coming of age. By such means as are above indicated he might whilst he lived be enabled to some extent to guard them against improvidence and protect them from want, whilst enjoying the fruits of their mother's property. Misfortune might wrest it from him, if retained in his own hands. It may be noticed here that the father openly avows in his answer that he attempted to put the property out of the reach of his creditors. That of course he could not do with regard to existing debts, or perhaps those he then had it in view to contract, and when such creditors come into chancery, they will be heard upon their own equities. Meanwhile the conveyance now in judgment is to be construed without any reference to fraud upon creditors. There certainly would be no fraud if such conveyances in trust as I have supposed were made

with a view to the general chances of life, and in fraud of no existing creditors.

The reservation is of power, not of estate.

To reach the case here presented, we must go a step further. Here is no conveyance of a legal title clothed with a trust in the grantee; no declaration of a trust upon a dry legal title reserved. The reservation is not of title or estate, but only one of power, and the real question resolves itself in this: Can a grantor, reserving no title in himself, nor beneficial interest, be clothed with the authority, during his whole life, to manage and control the property of the grantee, who has both legal title and full beneficial interest, and is competent to act *sui juris*. This is the power which the grantor in this case attempted to reserve. The question is more difficult than practically important. I have not found any precedent precisely in point, and few like instances are apt to occur.

It is certainly a well settled rule of law that where property is conveyed with conditions as to its devolution, use or enjoyment which are repugnant to the nature of the estate or interest granted, the grant prevails untrammelled by the conditions. It becomes absolute. Public policy, too, certainly requires that all property in the hands of its owners should be governed by uniform laws, as to the powers of the owners over it. *Stukely v. Butler, 1 Hobart, 168; Bradly v. Peixoto, 3 Vesey Jr., *324; Greenleaf's Cruise, vol. 1, tit. 13, chap. 1, sec. 2, p. 466, 2d ed., and note.*

It is true, moreover, that powers in trust over the property of another to be exercised without the support of the legal title, although recognized and upheld in equity, are generally not of the nature of continuing active trusts, but in most of the cases of which we have precedents, are mere powers of appointment or of disposition. Still there is nothing in the policy of the law that precludes the creation of powers in trust to be exercised in the administration

and management of property for the benefit of the owners, especially where the owners derive all their rights from the will and bounty of those to whom the powers may be intrusted. After all it is but the exercise of a power which is committed to every trustee of an active trust, and it can make no substantial, but merely a technical difference, that such power may or may not be attended with a formal conveyance or reservation of the legal title. This deed is precisely in effect as if the father, having the legal title, had agreed to hold the same, to stand seized, as it is termed, for the sole use of his children, and had reserved the power to exercise an active trust in their behalf for all the purposes therein expressed. His meaning and intention would have been as accurately expressed in that way as by the terms he used.

Conditions repugnant to a grant are void, but conditions may be necessary to show what is granted and was intended to be granted. The conditions of this deed show plainly that the donor did not grant nor intend to grant the property with absolute control. The question really is not whether the conditions are repugnant to the grant, but whether the grant itself, with the conditions annexed, violate any rule of property, or create any kind of property or estate unknown to the law. The estate and interest purporting to be given are familiar to courts of equity, and also in cases of persons not *sui juris*, familiar in courts of law. It is the usual case of *cestuis que trustent* of an active trust, and of all classes of wards.

We do not think where the meaning is plain any court of equity can insist upon any set form of words. Courts of equity never did, and courts of law are fast ceasing to do so.

It is a maxim in equity that it looks to the intent and not to the form. It always looks at the substance of

things, and attempts to reach that, and to enforce the rights and duties which spring from that, and the real intent of the parties. As well said by Mr. Pomeroy: "It will never suffer the mere appearance and external form to conceal the true purposes, objects and consequences of a transaction. The principle of looking after the intent and giving it effect was fully recognized and distinctly formulated at an early day."

The rule that the exception of a thing granted is repugnant to the grant has no application to this case. An exception is something excluded from the operation of a granting clause, something outside of the thing granted —something which never passes at all. Here there is no exception, but an attempted reservation out of the thing granted—a power attached to it and growing out of it.

The case of *Colby v. Colby*, *28 Vt.*, *10*, is stronger than this. A father executed to his son a warranty deed for one hundred acres of land, in the usual form, with this condition: "Provided, nevertheless, and it is the expressed condition of the deed, that I am to have the use and improvement of the premises during my life, if I have occasion therefor and shall choose to do so." This deed was sustained. The court, by Mr. Chief Justice Redfield, said that the only sensible construction that could be put upon the deed was that it gave the fee to the son with a life estate in the father. Yet in terms it conveys the whole estate and not a remainder, and the reservation is quite as repugnant to the enjoyment of the property by the son for the father's lifetime as this. It is more so, for in this case the father reserves nothing for his own benefit. The true meaning of this is simply that the father agrees to give the children the substantial enjoyment of the property during his estate by curtesy, by managing and using it for their benefit. In so far it is the gift of a use and irre

vocable, but it seems to us too technical for modern times, and the present stage of judicial progress, to say that because he attempted to do that by the form of a grant with a reservation of power, he shall forfeit all control of the property, and place himself in an attitude never intended.

Jackson v. Swart, cited by counsel for appellant, is of like nature and quite as much in point. *20 Johnson, p. 84.*

In New York, where express trusts are regulated by statute, all express trusts not valid under the statute are sustained as powers in trust. *Pom. Eq. Jur., sec. 1002, note.*

We need not multiply authorities to show that courts of equity will give effect to the plain intention of all instruments, regardless of form, where it may be done without violation of any rule of public policy. It would be a reproach to the whole system if it did not. The age of technicality has passed away even at law, or is fast passing. They have ever been mere cobwebs with the enlightened Chancellors of England.

Construction of the deed.

This deed is to be construed and held as if it were a covenant to stand seized of the title of the curtesy to the uses of the children in active trust, and as not entitling them to the actual possession and management of the property during the time he may be allowed by the courts to exercise it. Of course, like all trustees, he will be held by courts of equity to strict fidelity to the self-imposed trust, or by the probate court to a settlement of the proceeds of the property whilst his guardianship lasted. No effort has been made to do that as yet in the court which has exclusive original jurisdiction. There are appropriate means of coercing that against him and his sureties as guardian. He may be called to account by the court of chancery for his administration after the maturity of the children. He is liable to all the duties, and subject to all

the supervision which other trustees are, and for flagrant abuse of the trust may be removed. The rights of the children are in all respects against him, as they would be against a stranger trustee who had never owned the property.

The court erred in holding that they were entitled to the possession, and in decreeing partition, and in all the subsequent proceedings to carry the partition into effect.

SECOND APPEAL.

After the first decree and the appointment of a receiver, John A. Varner filed a supplemental bill, showing a contract made with William F. Varner for building the gin on the Varner place, in which Wm. F. acted as administrator of his wife and guardian of his children. It expresses that in consideration that said John A. had expended money in purchasing a steam engine and gin-stand, and in the erection of a gin-house, the said Wm. F. agreed to furnish him with enough land to build the house upon and use it conveniently free from rent and costs, and that he, said John A., should have the full control and use of the same, and one-fifth of the net profits arising therefrom, the remaining four-fifths to be placed to the credit of the gin-house account, with power in said John A. at any time to remove any of said property without any claim to the same to be made by said Wm. F. Upon his part John A. agreed to give a bill of sale of the property and release all claims, upon payment of the full cost of the engine, gin-stand and house, with ten per cent.

He claims that the machinery and house are personal property, which cost him about $3,500, and that he has not been paid for the same, after allowing all just credits according to the contract—there being still due him about

$2,400. All of it was taken into the hands of the receiver, who has rented it out with the plantation for 1883, and had refused to recognize John A.'s rights. He alleges the proportional value of the gin, etc., to be $187.50 for the year, and now prays that said amount be paid him by the receiver, that his right to the property be declared, and that he be put in possession, with the right to retain it until the gin account be satisfied out of the rents and profits, or that he be allowed to remove it, or that it, with sufficient ground, be condemned and sold for the debt.

This was answered by Rice and by the receiver, and the application was heard upon the accounts and evidence. The Chancellor found that the building of the gin-house was beneficial to the property of the owners, and decreed that John A. was entitled to the rents and profits till his debt should be paid off, although the house and machinery should remain on the place as a part of the realty. The receiver was ordered to pay the sum of $187.50 to go as a credit on the debt, that being the proportion of the rent for 1883 accruing on account of the gin, and so on for succeeding years till the debt be paid. The gin account was referred, with directions, to a Master for restatement. It was provided, however, that the two owners, Medora and William I., within thirty days after the latter coming of age, might require John A. to remove the house and machinery. From this decree the plaintiffs appealed and file a continuation of the transcript after the first decree.

This decree was in response to the cross-relief prayed by John A. Varner. It has no connection with the partition proceedings, and so far as it gives him the right to be paid out of the proceeds of the property, seems just. So much of it as contemplates the continuance of a receiver and the right of the children to require him to remove the house and machinery, is inconsistent with this

opinion and erroneous. He had the right to have his claim against the property ascertained, under his contract with William F. Varner, and to the directions of the court to have it paid out of the rents and profits, which payment would inure as a credit to William F. in the administration of the property.

THIRD APPEAL.

The report of the commissioners to make partition was afterwards filed. They had allotted to William I. Varner the portion of the plantation upon which the gin-house and machinery was located. They had considered the gin-house as realty, and had estimated its value in the partition, not including the machinery, engine and boiler, etc., which they considered as personalty, and did not estimate. William I., by his guardian *ad litem*, excepted to this report because the gin-house was subject to a lien in favor of John A. Varner for an amount greater than its value, and that this lien was not considered in estimating the values of the separate parts. One of the commissioners testified that in estimating values they had made no allowance for the lien, but says that he is satisfied that the portions of land are of equal value, independent of the gin-house, and that William I. has the advantage to the extent of it. The court overruled the exception, confirmed the report and decreed the partition accordingly. The receiver was also ordered, after paying all the costs and expenses of litigation, to pay balance in his hands to the two heirs equally. From this decree William I. Varner appeals.

The receiver made a report which, without exceptions, was confirmed, showing a disposition of all funds on hand. The Master also, appointed to restate the gin account, made his report, showing the sum due John A. Varner. This, too, was approved without exceptions, and thereupon

the court decreed said sum to be a lien on the gin-house and machinery, to bear interest at ten per cent., and that the receiver should continue to rent the same from year to year, and pay the profits to John A. Varner till the debt should be extinguished, less the sum of $187.50 already paid. From this order, William F., John A. and William I. Varner all appealed.

So much of this decree as approves the report of the commissioners and confirms the partition, is erroneous and falls within the decision. There is no objection to so much of it as fixes definitely the lien of John A. on account of the gin and machinery. That seems proper, as well as the confirmation of the accounts of the receiver.

DIRECTIONS FOR A DECREE.

Order that so much of the decree as confirms and establishes the title of Medora Rice and William I. Varner to the remainder interest, after the death of the father, in the lands purchased by John A. Varner, be affirmed, as also so much as fixes the lien of the said John A. upon the gin-house and machinery for his money expended in that regard; and also the order confirming the report of the receiver up to the time it was made.

Reverse so much of the decree as holds the said Medora Rice and William I. Varner entitled to the immediate possession of the Varner place, and the decree for partition, and all subsequent proceedings to carry the partition into effect. Remand the cause, with directions to discharge the receiver after passing his accounts, and restore the possession and control of the premises to William F. Varner, with leave to apply again for a receiver, if it should be found necessary to secure what may be due to the beneficiaries on an account of the rents and profits since they

respectively became of age, and with leave to all parties to amend their pleadings, or file such supplementary pleadings as may be necessary to a full settlement of all matters of account, upon the basis of the rights herein declared, and for all further proceedings consistent with law and this opinion.

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SPRINGFIELD & MEMPHIS RAILWAY v. RHEA ET AL.

1. RAILROADS: *Right of way: Assessment of damages.*

Where the assessment of damages for right of way precedes the building of a road, the presumption is that it will be built with skill and proper precautions. But if the road has been completed through the land at the date of the trial, the jury may consider the state of facts then existing, and from the light of the actual construction determine what the damage has been, embracing all past, present and future damage which the location of the road may reasonably produce.

2. SAME: *Same: Elements of damages.*

The manner in which the railroad passing through land cuts it up, the amount and location of the land taken, the inconvenience to the owner in passing from one part of his field through which it runs to another, the absence of proper crossings, and the overflowing of the land caused by the road, are all proper elements of damages for taking the right of way.

3. SAME: *Same: Evidence.*

Evidence of damage for taking land for right of way should be directed first to the actual value of the land taken by the railroad, then to the damages resulting to the remainder.

4. SAME: *Same: Tax assessment.*

The tax assessment of land for the year succeeding the building of the road is not admissible as evidence in the assessment of damages for the right of way.

5. SAME: *Same: Trial: Opening and conclusion of argument.*

In proceedings by a railroad company to condemn land for right of way, the owner of the land is entitled to the opening and conclusion of the argument. The amount of the damage is the object of inquiry, and the burden of proof is upon the land owner.

6. SAME: *Same: Excessive damages.*

The Supreme Court will not set aside a verdict as excessive where it is not unsupported by proof, is not in disregard of the charge of the court, and there is no reason to suspect the influence of passion or prejudice in the jury.

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

N. & J. Erb for appellant.

1. In condemnation proceedings only those damages which are direct and peculiar to the property, resulting naturally and necessarily from its use when the road is skillfully and properly constructed, can be recovered. Damages from faulty construction or defective drainage must be recovered in another suit. *Pierce on Railroads, p. 179; 34 Iowa, 458; 14 Am. & E. R. R. Cases, 198; Mills on Em. Dom., sec. 220.*

2. The difference between the cash market value before the location of the road, and such value after its construction, is the measure of damage. The complex questions of defendant, setting forth the *elements* of damage, were improper. *51 Penn. St., 87, 90; 2 Iowa, 288, 310; 90 Ill., 514.*

3. The verdict was excessive.

4. The owner is entitled to, first, the actual value of the land taken; and second, damages necessarily resulting to the remainder. The instructions of the court lay down a different rule.

5. The assessor's evidence clearly admissible. *8 Nev., 165; 78 Pa., 464.*

6. It was error to exclude evidence of recent sales of similar lands in the vicinity. (*13 Metc., 316; 3 Allen, 142; 4 Ib., 168; 103 Mass., 165; 105 Ib., 535; 19 N. H., 372; 23 Ib., 227; 34 Iowa, 458.*) If the court rejects evidence of sales, which clearly ought to have been admitted, a new trial will be granted. *122 Mass., 305; 4 Allen, 169.*

7. Petitioner was entitled to open and close. It seeks the exercise of a constitutional and statutory privilege, and must show such right. It is the actor, the moving party. If no evidence were admitted on either side its petition would be dismissed.

Butler & Neill for appellee.

1. The offer to prove a listing of the lands for taxation rightfully denied. The law does not require one to affix a value to lands for the purpose of assessment. *42 Ark., 572, 527.*

2. The question asked Rhea related only to such damages as are allowable. *Pierce on Railroads, pp. 174-5; 41 Ark., 431; 39 Ib., 167.*

3. The opinions of witnesses of the reasonable and probable consequence of the construction of the embankment and ditches admissible. *Mills on Em. Dom., sec. 216; 41 Ark., 431; Pierce on R., 228; 39 Ark., 174.*

4. The road was completed when the cause was tried, and all damages then existing were proper matter of adjustment. *Pierce on R., 229, and note 8; Mills on Em. Dom., sec. 218.*

5. No evidence of sale of *similar* lands and *similarly* situated, so as to come within the rule, was offered. *Mills Em. Dom., sec. 170.*

6. The law means the *market* value, and not a price obtained at forced sale. *Mills Em. Dom., sec. 168.*

7. Damages to owner's remaining land are recoverable, though not specially alleged. *Pierce on R., p. 211, and note 2.*

8. Appellee, claimant for damages, had the opening and closing. *Pierce on R., p. 187; Mills Em. Dom., sec. 92.*

9. Sales of *similar* land are not the *best* evidence. Generally they are not admissible. *Mills Em. Dom., sec. 170.*

10. Compensation for insufficient drainage should be given. (*Ib., sec. 189.*) The railroad was completed at the time of verdict. *Ib., sec. 218; Pierce on R., p. 229.*

11. Verdicts will only be set aside when unsupported by proof, or when *so excessive* as to indicate passion or prejudice. *42 Ark., 529.*

SMITH, J. The railroad company filed its petition to condemn a right of way through the defendant's farm. The answer claimed $1,500 damages, and the jury awarded $1,000. The farm lay in the valley of Spring River, and contained 145 acres, of which eighty or eighty-five were under cultivation. The right of way, 100 feet wide, traversed the tract diagonally for a distance of 3,200 feet, cutting it into two parcels of inconvenient shape for purposes of tillage. The railroad embankment, from three to five feet high, increased the liability to overflow of the land lying between the railroad and the river by contracting the flow of the water and preventing it from spreading out over the bottom as it did before the road was built, and also exposed it to the danger of washing. The estimates of witnesses as to the value of the farm before and after the appropriation, were widely divergent, ranging from ten to fifty dollars per acre for the improved land, and from three to ten dollars for the unimproved. According to the testimony adduced for the company, Rhea's damages were not less than $250, and not more than $400;

while the testimony on the other side placed the damages all the way from $1,000 to $1,500. The area actually taken was between seven and nine acres, and this was nearly all fertile land in a state of cultivation. The railroad also interfered with the owner's private ways, rendering portions of the farm inaccessible except by taking a circuit to get to a crossing, and cut off his live stock from approaching the river, which was his dependence for stock water in summer.

At the institution of the condemnation proceeding the road had not been built through the farm, but it was finished before the trial. Evidence was received tending to show permanent injury to the land by the obstruction of the natural flow of surface water, and of back water from the river, and that the system of drainage that was substituted was insufficient. The company's contention was, that no damages were recoverable in this action on account of faulty construction or imperfect drainage, but that such damages, if there were any, must form the subject of an independent suit.

1. RIGHT OF WAY. Assessment of damages.

Where the assessment of damages precedes the building of the road, the presumption is that it will be built with skill and proper precautions. But if the road has been completed through the land at the date of trial, the jury may consider the state of facts then existing, and, with the light afforded by the actual construction, determine what the damage has been. The law does not favor the splitting up of causes of action, or the multiplication of suits for the same injury. The assessment embraces all past, present and future damages which the location of the road may reasonably produce. *Pierce on Railroads, 229; Mills on Eminent Domain, secs. 216, 218.*

After numerous details, showing the quality and situation of the land, and the manner in which it was

affected by the railroad, the defendant was asked this question:

2. Elements of damages.

"How much damage have you sustained by the location of the railroad through your land, considering the manner in which it cuts it up, the number of acres taken right out of the center of it, the inconvenience you will experience in passing from one part of your field to another, and the overflowing of your lands, and the absence of proper crossings, and everything else you have stated, estimating the difference in the value of the land before the building of the road and value after it was built?"

Similar questions were propounded to other witnesses who had shown a familiarity with Rhea's farm and its surrounding before and since the road was built.

3. Same: Evidence.

Testimony in such cases should be directed, first, to the actual value of the land taken by the railroad for its purposes, and then to the damage resulting to the remainder of the tract. The answer of a witness to such a question is necessarily a matter of opinion. But values rest largely in opinion. All of the matters mentioned in the question are proper elements of damage. *St. L., Ark. & Tex. R. v. Anderson, 39 Ark., 168; Pierce on Railroads, 174-5; L. R., Miss. R. & T. Ry. v. Allen, 41 Ark., 431.*

4. Assessment for taxes not admissible.

There was no error in excluding from the jury the assessment of Rhea's land for taxation in 1883, the year after the railroad was built. *Tex. & St. L. Ry. v. Eddy, 42 Ark., 527.*

Nor sales of other lands.

It is further complained that the court below rejected evidence of actual sales of similar lands in the vicinity. But this assignment is not borne out by the bill of exceptions. The rejected evidence related either to sales not recent in point of time, or not adjacent in place, or the lands were not similarly situated, or the witness was speaking from rumor. Great latitude is allowed the Circuit Court in admitting or rejecting such evidence.

An exception was also taken to all of the instructions, in mass, that were given at the instance of the defendant. We are not in the habit of examining very critically so general an exception which directs the attention of the Circuit Court to no specific defect. But the instructions appear to have been carefully framed, and to be unobjectionable.

5. Opening and conclusion.

To the defendant were justly accorded the opening and conclusion of the argument. The land owner is, in such cases, the real actor, no matter which party initiates the proceedings. No issue can be raised as to the right of the railroad corporation to condemnation, or as to his right to compensation. The law confers these rights, and the filing of the petition by the railroad company is an admission that he is entitled to some damages. The extent of the damage is the object of the inquiry. And here the burden of proof is upon him. *Mansfield's Dig., sec. 5131, clause 6; Pierce on Railroads, 187; Mills on Eminent Domain, sec. 92.*

6. Excessive damages.

Lastly, it is claimed that the damages were excessive. As we have already said, the testimony on this point is conflicting. The verdict is not unsupported by proof; it was not in disregard of the charge of the court; and there is no reason to suspect the influence of passion or prejudice. On the application of the petitioning company, the venue was changed from the county in which the land lay to a county through which the railroad did not pass, expressly to avoid any possible bias for or against the parties. The company is required to pay a pretty round sum for the privilege of crossing the land; yet to say it is too much is to usurp the function of the jury. *Tex. & St. L. Ry. Co. v. Eddy, 42 Ark., 527.*

Affirmed.

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THE STATE v. PIERSON.

1. CRIMINAL LAW; *Carnal knowledge of child under puberty.*
Twelve years is the age of puberty of a female child, and a party can not be convicted of "carnally knowing a female child under the age of puberty" if she be twelve years old.

2. STATUTES: *Construction of.*
It is a rule of construction that the common law in force at the time a statute is passed is to be taken into account in construing the statute.

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

Dan. W. Jones, Attorney General, for appellant.

The indictment is substantially in the language of the statute. (*Mansf. Digest, sec. 1571.*) Our statute does not fix a particular period as the precise time when a female is supposed capable of consenting, as was done by the statute *18 Eliz., sec. 7*, but places it at the *age of puberty;* thus changing the rule of the common law, if indeed any rule establishing a certain age for *puberty* existed at common law. *Charles v. State, 11 Ark., pp. 406, 407.*

COCKRILL, C. J. The appellee was indicted for carnally knowing "a female child of the age of twelve years and under the age of puberty." The court sustained a demurrer to the indictment and the State appealed. The statute upon which the indictment is based prescribes imprisonment in the penitentiary for a term of years for every one convicted of carnally knowing "a female child under the age of puberty." *Mans. Rev. St., sec. 1571.*

It would be sufficient under this statute to charge the offense in the language of the statute. *1 Bish. St. Cr., sec.*

486. The indictment, however, has gone a step further and has alleged that the girl upon whom the offense was committed was twelve years of age. Inasmuch as the question of consent or non-consent on the part of the child is immaterial in the consideration of offenses under this statute (*see Charles v. State, 11 Ark., 406*), it becomes necessary to ascertain whether there is a legal conclusion that a girl twelve years of age has arrived at the age of puberty. If so, the judgment of the court is correct.

Puberty, by the common law, for matrimonial purposes, is fixed at twelve years in females. This rule was derived from the civil and canon law, though the latter it seems did not regard the age as conclusive, but permitted the fact of puberty to be proved by actual inspection. The common law, however, preferred to prevent such indecent disclosures as tending to the corruption of public virtue, and so contented itself with the simple inquiry into the age of the party when the question of puberty arose. *1 Bish. Mar. and Div., secs. 144–7; 2 Bish. Cr. L., sec. 1117.*

Twelve years was also taken as the age of consent on the charge of rape, and the reason given, according to Lord Coke and sir Mathew Hale, was because that was her age of consent to marriage, or, as Bishop expresses it, the age of "legal puberty." *1 Hale P. C., 630; 2 Bish. Cr. Law, sec. 1118; 4 Blacks. Com., 212; 1 Russ. Cr., 693.*

The statute of *18 Eliz. C., 7*, made the offense we are considering upon a girl under ten a felony without benefit of clergy, but according to sir Mathew Hale this did not alter the age of consent.

It is a rule of construction that the common law in force at the time a statute is passed is to be taken into account in construing the statute. (*Bish. St. Cr., secs. 5, 6, 88.*) Coke says, "to know what the common law was before the making of the statute is the very lock and key to set open the windows of the statute."

We are unwilling to believe that the Legislature intended to yield to the indecently inquistive disposition of the canon law in the use of the term "puberty" in the statute, and must hold that it was intended in its legal common law acceptation.

Affirm.

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ADAMS ET AL. V. THOMAS ET AL.

1. ADMINISTRATION: *Order for sale of lands: Sufficiency of petition.*
The validity of an order of the probate court for the sale of lands to pay debts does not depend upon the sufficiency of the petition for the sale. The order is a judgment *in rem* of a court having exclusive original jurisdiction of the subject matter. The court passes upon the sufficiency of a petition in making the order, and if the petition be insufficient the judgment must be corrected by appeal or *certiorari*. It is not a nullity.

2. SAME: *Order to sell land procured by fraud.*
An administrator's sale cannot be avoided by showing that the administrator procured his license to sell by fraud and misrepresentation and with the design of sacrificing the property, unless the purchaser at the sale participated in or had notice of the fraud.

APPEAL from *Yell* Circuit Court in Chancery.
Hon. H. S. CARTER, Special Judge.

L. C. Hall for appellants.

The jurisdiction of a court of chancery to set aside sales made in pursuance of orders or judgments of probate courts for fraud, either before or after the administration is closed, is unquestioned. *34 Ark., 63; Dyer v. Jacoway, 42 Ark., 186.*

Probate courts are courts of limited jurisdiction, and have none over real estate except that given by statute, and before they can acquire jurisdiction the statute must be followed and complied with. The personal property must have been insufficient to pay the debts, notice must

be given as required by law, and the petition must contain an account of all debts and assets, etc. The petition must be heard on the day designated, etc. (*Freeman on Void Jud. Sales, secs. 13, 165; Gould's Digest, ch. 4; 8 Metc., 355; 6 Sm. & M., 259; 6 Porter, 219.*) The sale of real estate by order of the probate court is a distinct proceeding, in which the petition is the commencement, and the order the judgment and the jurisdiction depends on the sufficiency of the petition. *Freeman Void Jud. Sales, p. 32.*

The complaint shows nowhere that Holland died leaving a will, nor that any will was ever probated. The sale was void for want of jurisdiction in the court making the order.

W. N. May, W. D. Jacoway and *J. T. Harrison* for appellees.

The presumption is, the court having jurisdiction, that all its proceedings are regular, and they can only be attacked by appeal or for fraud. No specific acts of fraud are charged sufficient to authorize a court of chancery to set aside the sale after a lapse of seventeen years, and long after innocent purchasers have intervened. *19 Ark., 541; 11 Ib., 519; 12 Ib., 84; 13 Ib., 177; 19 Ib., 499; 25 Ib., 52; 26 Ib., 421; 31 Ib., 74; 33 Ib., 575; 34 Ib., 64; 40 Ib., 433; Freeman on Judg., 3d ed., secs. 116 to 136; Freeman on Void Jud. Sales, ch. 2 and 3.*

The probate court had jurisdiction, the matter was within its discretion, its order was a final judgment, and there being no appeal and no sufficient charges of fraud, its action is final. *Supra.*

COCKRILL, C. J. This was a suit in equity by the heirs or J. N. Holland, deceased, against the purchaser and those claiming an interest in certain lands which were

owned by Holland at the time of his death, and had been sold by the administrator of the estate in 1860, under an order of the probate court of Yell County. The complaint alleges that at the time the petition for the sale of the lands was presented to the court, the administrator had personal assets in his hands sufficient to pay off the debts of the estate and costs of administration, and that the petition did not pursue the statute governing such cases, but omitted to state that the personal estate was exhausted, or was insufficient to raise the funds necessary to pay off the probated claims.

A general demurrer to the complaint was sustained. Judgment was rendered against the plaintiffs upon their refusal to plead further, and they appealed.

It is pressed upon us by the counsel for the appellants, that a proceeding for sale of the real estate of a deceased person is in the nature of a distinct action; that the jurisdiction of the court depends on the sufficiency of the petition, and that in this case the court acquired no jurisdiction to make the order because the petition fails to state the material facts required by the statute.

The order of sale of the probate court now questioned, is in the nature of a judgment *in rem*. It is the judgment of a court having absolute and exclusive jurisdiction of the subject matter by virtue of the Constitution. It is immaterial whether the jurisdiction was put into actual exercise upon the granting of letters of administration, as has several times been held by this court—(See *Adamson v. Cummins, 10 Ark., 549; Sturdy v. Jacoway, 19 Ib., 515*)—or upon the filing of the petition to sell the land. In making the order of sale, the court passed upon the sufficiency of the petition, and any error committed in this should have been corrected by appeal or *certiorari*. To have rendered judgment for a sale of the lands with no facts before him

except those disclosed by the petition in this case was an error so glaring as to be a reproach to the upright character and good business education that a probate judge is, by the law, presumed to possess; but the judgment was that of a superior court having jurisdiction of the subject matter, and is not a nullity. This has been settled and often reiterated by this court. *Borden v. State, 11 Ark., 519; Marr, ex parte, 12 Ib., 87; Bennet v. Owen, 13 Ib., 177; Sturdy v. Jacoway, 19 Ib., 499; George v. Norris, 23 Ib., 121; Thorn v. Ingram, 25 Ib., 52; Fleming v. Johnson, 26 Ib., 421; Montgomery v. Johnson, 31 Ib., 74; West v. Waddill, 33 Ib., 575; Mock v. Pleasants, 34 Ib., 69; Hall v. Brewer, 40 Ib., 433.*

Titles have been acquired and valuable rights have grown up under these decisions, and it is too late now to inquire into their correctness, if we were even disposed to do so. To change the rule and declare the judgments of probate courts void in such cases, would be to remove a landmark in our jurisprudence, and this, to adopt the sentiment of Lord Bacon, is the foulest injustice.

It follows that the probate court, having exercised its discretion upon a subject within its jurisdiction, is presumed to have exercised it correctly, and the Circuit Court in this proceeding could not judge of the propriety or legality of its order. *George v. Norris, 23 Ark., 129.*

Probate sale procured by fraud.

While a court of equity must refuse its aid where its action would involve the usurpation of appellate jurisdiction, it has, nevertheless, an inherent power to set aside the judgments of these as of other courts when they have been obtained by fraud. This power of the court was invoked by the plaintiffs in this case, but their complaint does not show facts upon which the court can declare fraud as against the purchaser at the sale. It is alleged that the administrator and his attorney or legal adviser,

and others who are not named, conspired to bring about the sale of the lands for the purpose of defrauding the estate, but is not alleged that the purchaser was concerned in or knew of the intended fraud. An administrator's sale cannot be avoided by showing that the administrator procurred his license to sell by fraud and misrepresentations, and with the design of sacrificing the interests intrusted to his care, unless the purchaser at the sale participated in or had notice of the fraud. *McCown's Executors v. Foster, 33 Texas, 241; Staples v. Staples, 24 Grat., 225; Freeman Void Jud. Sales, sec. 39.*

There is no fact disclosed from which we can infer a guilty knowledge on the part of the purchaser. The allegations of fraud are confined to the administrator and his attorney, and are very general in their terms. The purchaser's bid may have aided them in their fraudulent design, but it is not disclosed in what way this was done or that he had any knowledge of their intent.

Affirm.

ADAMS ET AL. V. TOOMER, PITTMAN ET AL.

ADMINISTRATION: *Order to sell land procured by fraud.*

Where the order to sell land is procured by fraud, in which the purchaser participated, or has notice of it, the order and sale will be vacated in chancery, unless the title has passed to an innocent purchaser for value, and without notice of the fraud.

APPEAL from *Yell* Circuit Court in Chancery.
Hon. H. S. CARTER, Special Judge.

L. C. Hall for appellants.

W. M. May, *W. D. Jacoway*, and *J. T. Harrison*, for appellees.

Same briefs as in the preceding case.

COCKRILL, C. J. The heirs at law of J. N. Holland, deceased, sought to set side the sale of lots in the town of Dardanelle, which had been sold by the administrator of Holland's estate. The facts alleged are the same as in the case of these appellants against *Benjamin Thomas*, just decided, except as to the question of fraud and the parties defendant. The relief sought and the decree were the same as in that case. The plaintiffs appealed.

It is ruled in that case that the title of the purchaser at the administrator's sale cannot be avoided on account of the errors committed by the probate court in making the order of sale, and it is conclusive of this on that point. The charge of fraud in this case, however, is more specific. It is alleged that the administrator, his attorney and one Pittman, conspired to bring about the sale of the lands when the administrator had ample funds in his hands to pay off all the debts and expenses of the estate; that in pursuance of the plan agreed upon the order of sale was procured and Pittman became the purchaser; no lien was retained upon the land for the payment of the purchase money, and nothing has ever been paid on the purchase; that the design of all the parties throughout was to defraud the estate. A scheme of this sort is highly immoral, and, if proved, the sale should be vacated and the purchaser's title annulled. But the title of an innocent purchaser claiming through or under Pittman cannot be injuriously affected by proof of Pittman's fraud, for although he may have been guilty of fraudulent devices, and may have had notice of the fraudulent design of the administrator, he

could transmit an unimpeachable title to a vendee for value, in good faith and without notice of fraud. *Gwinn v. Williams, 30 Ind., 278; Robbins v. Bates, 4 Cush., 104; Blood v. Hayman, 13 Metc., 230.*

Other grounds of demurrer were urged against the complaint, and the court properly overruled them, but in sustaining a general demurrer thereto, the court erred and the decree must be reversed, and the case remanded for further proceedings.

FILES, AUDITOR, v. FULLER.

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1. STATUTES: *Repeal of: Effect on pending suits: Obligations of contracts: Attorney's fees.*

The act of February 17, 1883, repealing the over-due tax acts of 1881, did not affect suits then pending under those acts, nor deprive attorneys of any rights to compensation for services in such pending suits.

2. ATTORNEY'S FEES: *Not apportionable.*

An attorney's services can not be apportioned by time.

3. LEGISLATURE: *Power over courts and subsequent Legislatures.*

No Legislature has power to prescribe to the courts rules for interpretation, or to fix for future Legislatures any limits of power as to the effects of their action.

ERROR to *Pulaski* Circuit Court.
Hon. F. T. VAUGHAN, Circuit Judge.

C. B. Moore, Attorney General, for plaintiff in error.

R. T. Fuller for defendants in error.

This petition was for mandamus to compel the Auditor to

issue certificates for attorney's fees in a suit brought under *sec. 1, Acts 1881, p. 64*, and it is submitted:

1. All contracts, whoever the parties may be, are made with reference to existing laws, and all such laws become part of the contract. *18 Ark., 269; 21 Ib., 85; 40 Ark., 423; 1 Marr (Iowa), 204; 2 Chan. (Wis.), 182.*

2. The law in force when the suit was brought, not when the fees were allowed, govern the rights of the parties. *6 La. Ann., 770; Gantt's Dig., sec. 5624.*

3. The fees fixed by the Chancellor are not affected by subsequent legislation, because the Legislature could not divest vested rights. *5 Ark., 217.*

4. The fees being fixed by the Chancellor, it was the plain ministerial duty of the Auditor to issue certificates of indebtedness under *section 2779 Gantt's Dig., 42 Ark., 233.*

EAKIN, J. This writ of error brings up a peremptory mandamus of the Pulaski Circuit Court, commanding the Auditor to issue a certificate of indebtedness of the State.

The writ of mandamus was impetrated by certain counsel who had been employed and rendered services in procuring the condemnation of lands, under the over-due tax law, on the chancery side of the Dallas Circuit Court. Their petition shows that they commenced the suit for that purpose at the September term of the court in 1882 in the name of the State, on the relation of R. H. Deadman against certain lands, under the acts of March twelfth and twenty-second, 1881. That they prosecuted the suit to final hearing and decree at the March term, 1883. That it was determined by the court the taxes on 795 tracts of land were over-due and unpaid, and they were condemned to be sold for their payment and for costs, including the fees of attorneys. That, at the same term, the court allowed and fixed their fees at the rate of three

dollars and a half upon each tract. That the lands were sold by a commissioner on the twenty-eighth of March, 1883, and 679 of the tracts were struck off to the State, whereby petitioners claim they were entitled to receive from Files, as Auditor, a certificate of indebtedness for $2,376.50, the aggregate of fees allowed by the court. They admit they have received the sum of $443.29 out of the proceeds of the lands purchased by individuals, and which was paid over to them by a decree of the court, leaving still due the sum of $1,933.21, for which they are entitled to a warrant.

They then allege that on the twelfth of March, 1884, they presented to Files, as Auditor, a certified copy of the decree in said cause, and demanded a warrant or certificate for the last named sum, which he refused to issue, wherefore they pray for the writ, etc.

They exhibit the decrees of the Dallas court condemning the lands, ordering sales, confirming the report of the commissioner, fixing the amount of attorney's fees, and making disposition of the money in hands. A demurrer to this petition was overruled. The State rested, and the order for mandamus was made peremptory as prayed.

This case seems similar, in all material respects save one, to that of *Files, Auditor, v. Gatewood, 42 Ark., 233*, in which this court held, that upon presentation to the Auditor of certified copies of the decrees and orders of the court in a proceeding under the over-due tax law, which orders and decrees fixed the rights of the attorneys to their fees, with the amount to be paid by the State, it was the plain ministerial duty of the Auditor to issue the certificate of indebtedness. In that case, the order allowing the fees and fixing the lien was made before the repeal of the law in 1883. In this the proceedings had begun, a large portion of the services had been rendered, and the

suits were pending when the repealing act was passed. The order allowing the fees and fixing the amount was made afterwards. The question presented is simple and clear cut, and is this: Did the repealing act have such effect as to annul or modify the rights of attorneys and officers of the court in pending proceedings?

From the petition in the court below, it seems that the provisions of the act of March 12, 1881, had been substantially pursued. By the first section of the act it was provided that any *citizen*, giving security for cost, might file a complaint in equity, showing lands in the county upon which taxes were due, or lands which had not been assessed, and praying that a lien might be fixed on the same for taxes, and that they be sold for non-payment. A separate clause of the same section provided that the county court of any county might direct such a complaint to be filed in the name of the county, to be prosecuted by the attorney for the county or some attorney retained for the purpose.

Modes of procedure were prescribed, and provisions were made for ascertaining and assessing lands subject to the act, and for the admission of any parties desiring to defend, and for condemnation for sale. In the final decree it was required that the lien upon the lands should be fixed "for all taxes, penalties and costs due on the lands proceeded against, and *with the costs shall be taxed an attorney's fee for the plaintiff*, not to exceed ten dollars for each lot or forty acres of land."

The lands were to be sold to the bidder who for the least quantity would pay the taxes, penalty and costs due on each tract. If there should be no bidders they were to be struck off to the State. In such case the State was not required by the act to pay the amount decreed against each tract, *but the costs of the proceeding*, so far as

they related to the particular lands, were to be paid by the State; and it was directed that the court should *cause the amount of such costs to be certified to the Auditor*, that he might issue his warrant on the treasury for the amount. Other details of the act have no bearing on the question.

Whilst this act was in force the suit in which the petition below was filed was instituted by a citizen and prosecuted by the petitioners as attorneys. Pending the suit, on the seventeenth of February, 1883, the act, with a supplemental act passed March 22, 1881, was wholly repealed. On the tenth of April following, the Legislature passed an act for the adjustment of claims against the State for services rendered under the provisions of the two acts of 1881. It directed that the clerks of the counties in which suits had been brought, under the act of 1881, should certify to the Auditor a list of the lands sold to the State, the names of the attorneys, clerks, printers and commissioners entitled to compensation. The claims of all these were to be audited by the Auditor, who was required to grant certificates for amounts due, as *thereinafter provided.* These certificates were made receivable in payment of State taxes and State lands, in the same manner as Auditor's warrants and State scrip. The third section, proceeding to fix the fees for these past services, provided, that where suits were brought *by order of the county court*, the attorney's fees shall be twenty-five cents for each tract as it was described on the tax-book at the time of the forfeiture. No provision was made for attorney's fees in any other case.

1. STATUTES: Repeal of.

The case in judgment here is a proper one for a mandamus if the rights of the petitioners, acquired under the acts of 1881, have not been impaired by the acts of 1883, which were all passed pending the suit.

The act of April 10, 1883, has no application. The former acts of 1881 had been repealed in February. Under the act of April 10, the Auditor of the State was only authorized to certify such claims as were provided for by the third section thereof, and these claims are expressly confined to services rendered in suits *brought by order of the county courts.* Such suits had been authorized by a distinct clause of the act of 1881, which had, generally, authorized the suits to be brought, by any citizen, in the name of the State. Whatever we may suppose to have been the intention and policy of the Legislature in its reticence in the last act, concerning suits brought by citizens, of their own motion as relators, in the name of the State, it is plain that the first act constituted them a distinct class, which must have been patent to the next Legislature. There is no room to suspect verbal misprisions, nor grounds to believe that the Legislature meant to use words in any other than their ordinary sense. If they meant to include all suits in attempting to confer upon the Auditor the power to adjust fees, they did not say so nor afford on the face of the act any indication of such intention. By no legitimate rules of construction can the third section of this act April of 10, 1883, be made to include suits of the class now in question. As to them, the duties of the Auditor remain the same as left by the act of February 17.

It is not clear that the act of April, 1883, *meant* to take away any existing rights. There is nothing either in the repealing act or in the act of April, which declares that contracts for compensation, under authority of the acts of 1881, where services were being rendered in pending suits, should be annulled or repudiated. Even with regard to suits which had been brought by order of the county court, the Auditor was only allowed to issue certificates to those who were entitled to dues, who might be willing to

execute to the Auditor a receipt in full of all demands against the State for all services rendered or charged in relation to such services as had been then, or might thereafter be rendered under the operation of such suits. It was a compromise law recognizing existing and meritorious claims, and an option to retain them. We can not suppose that the State intended arbitrarily to compel her citizens who had rendered services under her authority, with a well grounded expectation of being paid according to law, to take whatever she might afterwards offer, on her own terms, or be forever barred.

The question narrows to this: Does the sweeping repealing act of February, 1883, affect the compensation of those who had brought suits as attorneys under the first acts, which suits were pending at the time of the repeal?

2. Attorney's fees not apportionable.

There can be no reliable apportionment of an attorney's services so as to estimate their value up to the time of the repeal. An attorney's services cannot be apportioned by *time*. It is well known that the most arduous and responsible services are often rendered before the suit is brought, after which the steps in the case may be mostly formal. Frequently the preparation of a complaint with its exhibits, the collection, estimation and array of evidence in the mind of the attorney, the anticipation of defenses, and the means of meeting them, all determine the result of a suit before a summons is issued, to say nothing of the careful examinations of authorities before the responsibilities are assumed. The petitioners are entitled to all their fees under the statute of 1881, or to nothing.

We have an old statute of 1837, which has passed unchallenged through the portals of all subsequent constitutions. It provides that "no action, plea, prosecution or proceeding, civil or criminal, pending at the time any statutory provision shall be repealed, shall be affected by

such repeal; but the same shall proceed in all respects as if such statutory provision had not been repealed." There is an exception not pertinent to this case. *Rev. Stat., ch. 129, sec. 31; Gantt's Digest, sec. 5694.*

3. LEGISLATURE: Power over courts and future Legislatures.

This statute has very little importance save in hermeneutics, and has been rarely invoked, for no Legislature has power to prescribe to the courts rules of interpretation, or to fix for future Legislatures any limits of power as to the effect of their action. Any subsequent Legislature might make its repealing action operate in pending suits, as effectually as if no such statute existed, and the courts are quite free yet to consider what the subsequent Legislature did in fact intend, or had power to do. Still it has kept its place on the statute books, and it is persuasive at least, that subsequent Legislatures meant to keep in harmony with it, and in their legislation supposed it would go without saying, that when a repeal was made, all rights in suits pending under the old statutes would be preserved.

Upon general principles it must be premised that the original act of 1881 gave to the attorneys an interest in each suit, a lien upon each tract of land condemned for an amount to be fixed by the court, and made it the duty of the court to fix the amount. Although not a formal party (as there were no formal parties, save the relator and the State, the proceedings being *in rem*), he acquired an interest in the subject matter. He was virtually as much a party *pro interesse suo* as any one would be who might be allowed to come in and claim the land. His right to compensation did not arise from any contract with reference to fees with the relator, but from an assurance given by the State, which was in the nature of a contract, that for his services in securing its revenue, the State would impose for him, upon each tract condemned, a lien for such

services, according to a rate to be fixed by the court; and would herself pay the fee for all tracts bought in by her. The act was an experimental one to glean lost revenues, and the proceedings were in the interests of the government. Even the relators could not be presumed to have any other interest than that of promoting the interest of the government, or at most lightening their own taxes by the augmentation of supplies from other legitimate sources.

At common law the repeal of a statute ended all pending suits, civil or criminal, prosecuted under it. It left all things, save as to rights acquired by suits prosecuted and ended, as if no such act had ever been in existence. Such is still the general rule as to criminal prosecutions, in which no judgment can be pronounced not authorized by some law in existence when the judgment may be rendered. But in civil actions the courts were soon impressed with the harsh and unjust nature of the rule, in its operation upon those who had formed their plans and regulated their business under faith in the statutes, and divers exceptions to the rule were made by the English courts. See *Sedgwick on Construction, etc., p. 113.*

One of the exceptions was, that where a right, in the nature of a contract, had arisen under the statute, the courts would not disturb it. It was held, for instance, in the case of *Gillmore v. Executors of Shorter*, in the time of Charles II (*sec. 2, Mod., 310*), that where one had a right of action it could not be taken away by the retroactive effect of the statute of frauds prohibiting such action except upon a written agreement. The statute of frauds was in effect a repeal of so much of the former law as allowed such actions on parol agreements.

So in *Couch qui tam v. Jeffries*, which was an action for non-payment of stamp duties; an act of Parliament passed pending the suit, but before judgment, gave further time

for payment. The defendant sought to avail himself of this, and then after verdict against him, moved to arrest judgment. The rule to show cause was discharged and the judgment entered. Lord Mansfield remarked: "Here is a *right vested*," meaning in the prosecutor of the *qui tam* action, "and it is not to be imagined that the Legislature could, by general words, mean to take it away from the person in whom it was so legally vested, and who had been at a great deal of cost and charge in prosecuting. They certainly meant future actions."

Construction of the repealing statute.

The remarks justly apply to the case in judgment here. Here was a right vested in the petitioning attorneys. The Legislature could not have meant by the general words of the repealing act to take it away. They certainly meant that no future actions should be begun under the act of 1881. The language of the English act was very strong in the last case. It provided that on payment of the duties "that the persons who have incurred any penalties by the omissions aforesaid shall be acquitted and discharged of and from the said penalties." Yet the court refused to believe it to have been the intention of Parliament to take away this vested right of the *qui tam* prosecutor, which originated solely from the commencement of the suit in the interest of the revenue, and punish with costs one who had been at a great deal of cost and charge in prosecuting. The principle there announced is precisely that here involved. *See 4 Burrows, 2460.*

The principle in America derives additional force from the Federal Constitution, which protects the obligation of contracts. In the case of *Fletcher v. Peck, 6 Cranch, p. 135*, Chief Justice Marshall laid it down that the Legislatures were amenable to the same obligations of justice and equity which apply to individuals in society. "When, then," he says, "a law is in its nature a contract, when absolute

rights have vested under that contract, a repeal of the law can not divest those rights, and the act of annulling them, if legitimate, is rendered so by a power applicable to the case of every individual in the community."

Would it be tolerated in an individual to induce one to enter upon a business for the benefit of the employer, with an assurance of a compensation, and then finding the business unprofitable, to repudiate it whilst the services were being performed, annul the whole engagement, and deprive the employe of all compensation for his thought, time and labor already expended. We cannot attribute to the State of Arkansas such an intention. The overdue tax was an experiment, not productive of beneficial results, and was abandoned; but we cannot think that the State of Arkansas would be willing to throw the burden of the experiment upon citizens who in her behalf had labored to carry out her policy, and make it a success; nor do we think the Legislature so intended.

We conclude then that the repealing act of February, 1883, deprived the petitioners of no rights in the pending suit, and that they are entitled to compensation under the act of 1881. That the court having exercised its judicial function in fixing the amount of fees for each tract or lot, and making them a lien upon the lands, had left only the ministerial duty of causing the same to be certified by the clerk, if upon request the clerk should refuse.

We have already recognized the clerk's official certificate to a transcript of the orders and decrees, showing the amount of fees, and that they should be paid, as a sufficient compliance with the law by the clerk, to authorize the Auditor to issue the certificate of indebtedness.

Affirm the judgment.

BASHAM v. CARROLL, CHANCELLOR.

MANDAMUS: *Essential of.*

The writ of mandamus will not properly lie except in case of necessity, where there is no other remedy.

PETITION for *Mandamus.*

Geo. L. Basham, pro se.

The act of April 10, 1883, page 326, does not repeal and abrogate that portion of the act of March 12, 1881, which provides the method of payment of fees in suits brought on the relation of private citizens. It applies only to suits brought *by order of the county court.* Statutes are not repealed by implication "unless there is such a manifest repugnance between them that both cannot be in force." *23 Ark., 304.*

Nor does the repeal of statutes affect pending suits.

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

EAKIN, J. The petitioner, an attorney, shows that, as such, on the seventh of October, 1882, he brought a suit in the Pulaski Chancery Court, in the name of the State, on the relation of R. W. Worthen, to subject certain lands to the payment of back taxes. A bond for costs was given as required by statute, and notice, made, by publication. That on the ninth of July, 1883, at a term begun more than forty days after said suit and notice a decree was rendered against the lands as delinquent, charging them with the taxes, which were set forth in kind, as taxes due the State, county and school districts. At the same time the court allowed him graded fees, in proportion to the value

of the tracts and lots, in no case exceeding ten dollars, which were taxed up, charged and entered against each tract, in addition to taxes and costs; that at a sale made afterwards, on the second day of November, by a commissioner under the decree, about 276 tracts and town lots were bid in by and stricken off to the State for taxes, penalties and costs due thereon, which sale was duly approved and confirmed by the court, and the amount of costs due petitioner as fees was, by the court, ascertained to be $1,243, as the same had been taxed up and entered in the decree; that he afterwards filed a petition in the Chancery Court to have his fees certified. It is copied and embodied in this petition. It sets forth the foregoing facts, and states further that there is, in court, the sum of $1,000 belonging to the State, being proceeds of State tax on lands redeemed by owners and purchased by individuals, pending the suit. It prayed that the clerk be directed to certify said sum claimed for fees to the Auditor of the State, as provided by statute, and for further relief. The Chancellor denied the petition for reasons assigned in a written opinion, and the petitioner claiming that the duty of the Chancellor is imperative to cause the certificate to be made, and that it involves no judicial discretion or determination of the right, comes now to the court and invokes its supervising power to compel the Chancellor to perform it.

This is an application to this court for the exercise of its original superviscry control, through a writ of mandamus, to compel the Chancellor to cause the clerk of his court to do a certain ministerial act, without which, as petitioner conceives, he will be cut off from all assertion of a right against the State.

This is based upon the idea that without the formal certificate of the clerk as to the amount of costs, as provided

by section ten of act of March 12, 1881, the Auditor would be under no obligation to issue the certificate of indebtedness. It is certainly true that a formal certificate of the clerk is the better mode, but this court has not insisted upon it in other cases.

In *Files v. Gatewood*, *42 Ark.*, *233*, and *Same v. Fuller et al.*, at the present term, it was held that the Auditor might act upon certified copies of the orders and proceedings, where the right was clearly shown. The Chancellor, it seems, declined to cause the certificate to be made by the clerk, upon the ground that the petitioner had lost the right to his fees by the repeal of the act of 1881. It has been since decided that this view is erroneous. See *Files, Auditor, v. Fuller et al.*, *ante.*

Mandamus: Essential.

It is of the essential nature of the writ of mandamus that it does not properly lie except in case of necessity, and there is no other remedy. The petitioner here is not dependent on the certificate of the clerk, but may proceed as was done in the cases of Gatewood and Fuller. It will probably be unnecessary, however, as his rights are settled by the principles announced in the latter case, and there will not probably be any delay or hesitation on the part of the clerk, Chancellor or Auditor in conforming to the law as ascertained.

A writ of mandamus is not necessary, and will be refused.

SMITH v. LEACH.

SURVEYS: *Evidence.*

A county surveyor's record of a survey made by him is only *prima facie* evidence of the correctness of the survey, and parol evidence of other surveys is admissible to prove it incorrect. Section 1182 Mansfield's Digest, providing that no survey made by any other than the county surveyor, or his deputy, shall be legal evidence in any court, means that the certificate of such survey shall not be admissible as documentary evidence of itself, without other proof.

APPEAL from *Benton* Circuit Court.
Hon. J. M. PITTMAN, Circuit Judge.

L. H. McGill for appellant.

No act or record of a county surveyor is conclusive, and appellant should have been allowed to show the incorrectness of the German survey, and the correctness of the Maxwell survey. *Gantt's Digest, sec. 988.*

Section 991, Ib., makes the surveys of the county surveyor the only *legal evidence*, in the same sense that other records are, *i. e.*, the *best* evidence to establish lines, boundaries, etc., but was not intended to make them *conclusive.* But if so, as both surveys were made by county surveyors, there is no way to disprove the correctness of any survey made by a county surveyor until he goes out of office. No person can be concluded by the *notice* provided for in *sec. 980, Ib.* No suggestion or objection he might make would be binding on the county surveyor; the parties scarcely ever could know at the time whether the surveyor was running a correct line or not. They would not know what objection to make or what to insist upon.

E. P. Watson for appellee.

The Legislature has the power to refer disputed boundaries to a statutory tribunal for settlement, and when legally made cannot be questioned in a collateral proceeding. Until attacked by bill in chancery, a line established thus is conclusive between the parties. *Pom. Eq., Title Boundaries; Gantt's Dig., sec 991, etc.*

The line having been run as prescribed by law, both parties being present, and no objection made, Smith is estopped from questioning this survey in a collateral proceeding. *Bigelow on Estoppel, p. 147.*

EAKIN, J. Leach complained, at law, of Smith for forcibly entering his close, and carrying away a log house worth $25, and a thousand rails worth $75, stating his damage to have been $100. Smith, in his answer, denied that plaintiff was in possession; that he had himself broken and entered the close of plaintiff, or that he had carried away the plaintiff's property as alleged, and generally the material allegations of the complaint. He says the house and rails were his own, being situated upon, and part of his own freehold, of which he had been a long time in possession. Upon trial by jury the plaintiff obtained a verdict for $22.50 damages, and judgment was rendered accordingly.

The evidence discloses that the plaintiff entered the eighty-acre tract as a homestead in 1882; that he afterwards notified the defendant who owned the adjacent lands on the south side, that the county surveyor would run the line between them on a given day; that this was done, the defendant being present for the purpose of finding corners and assisting, and expressing no dissatisfaction with the survey as made. When the line was run it was found that the fence of defendant was eight or ten feet

over upon the plaintiff's side, together with the site of about two-thirds of a log house, which had been built by defendant but removed after the homestead entry, but before the survey was made. The rails were removed afterwards. The values of the house and rails were shown.

1. SURVEYS: Evidence.

The county surveyor, German, was introduced, who testified that he did not have with him the field-notes when he run the line, and believed that he could do it accurately without them. He compared the field-notes with the survey, afterwards, and found it correct. He introduced the record of his survey, which was objected to by defendant as not in accordance with the statute.

The defendant testified that he was the owner and in possession of the house and rails at the time he removed them; that they were within his line, as established by another county surveyor, Maxwell, about fifteen years before.

He offered to prove by the oral testimony of Maxwell, that, as county surveyor, about fifteen years before, he had run and established the same line, but had made and preserved only a partial record of it; that the survey was regularly and lawfully made in his official capacity, and varied from that made by German by about eight feet. He had since resurveyed the line and found that his survey was correct and that of German incorrect. This evidence was not allowed.

Defendant then offered to prove by Robinson that he had been a practical engineer and land surveyor for twenty-five years, and was familiar with the lands, and had carefully run the line in question; that the line established by Maxwell was correct, and that established by German was incorrect; and further, that it was almost impossible for any surveyor to make an accurate survey of lands without the field-notes before him. This was not permitted.

He further offered, but was not allowed, to prove the true line by one of the chain-bearers in Maxwell's original survey, and that by that line the house and fence would be shown to be on the land of defendant.

This was all the evidence.

The court instructed the jury, properly, that the record of the survey made by German, the county surveyor, was *prima facie* evidence of the correct line, so far as it appeared from the survey; and that it was to be taken as the true line between the lands, unless they should find from the evidence that some other line is the true one. That is in accordance with the statute, which makes the surveyor's record *prima facie* but not conclusive evidence. It throws the onus upon the other party of showing what the true line is. If there was any error in the case it was in excluding the evidence offered, of Robinson, Maxwell, and the chain-bearer.

Boundaries, with regard to their directions, length, and the areas they inclose, are generally determined by statutes, deeds or some documentary evidence. This is not always the case, as they may sometimes be determined by consent, or by continuous occupation to a line. But whenever the relative position of a boundary line with regard to objects, the location of which are not included in the purposes of a survey is in issue, then that relative position is a fact which may and almost always, in the nature of things, must be proved by oral testimony. This is constantly done in criminal as well as civil cases. There is never a venue proven but the witness testifies in effect that the locus is upon this side or that of a county line, or a district or city boundary. In civil cases it is constantly the practice to prove collaterally the situation of a thing with regard to some boundary line. This includes oral proof of the boundary line itself.

The rejected testimony was that of the former surveyor, to the effect that he also, in his official character, had marked the same line, and that German's marking was not correct, supported by that of a chain bearer, who testified that the line marked by Maxwell did not take Smith's fence, and also by the testimony of an expert surveyor and engineer of long practice, familiar with the lands, to the effect that he had made an accurate survey and careful measurement of the same line, and that Maxwell's was correct and German's mistaken.

The question is, did the record of the survey preclude the introduction of parol evidence to show that the actual line marked by German was not the true line?

The county surveyor is required to keep in a well bound book, a record of *every survey* made by him, and it is provided that a certified copy of this record, under his hand, shall be admitted in any court, as *prima facie* evidence, but that no act of a county surveyor, nor record, shall be conclusive; but may be reviewed by any competent tribunal, in any case where the correctness of it may be disputed. (*Mansfield's Digest, secs. 1174, 1178, 1179.*) That means it may be collaterally attacked wherever it may form a material issue.

Only judgments and decrees of courts, and the agreements of parties, or acts of acquiescence which it would be fraudulent to gainsay, will create an estoppel to assert true boundaries. It would be anomalous if the mere act of a county surveyor, subject himself to no control, and perhaps incompetent to act in all cases skillfully, should be able to estop land owners from asserting their true boundaries, even by giving them notice to be present. They can make no issue with him when there.

The statute does not make it the county surveyor's business, nor invest him with any general powers to determine

boundaries between individuals. He is a public convevience, not a general arbiter, although his acts in the line of his duty may make a *prima facie* case against individuals. His authority is limited. His duty is, if called upon, to survey lands sold for taxes, to make surveys of lands in litigation under orders of court, to make surveys of roads when required by viewers and reviewers, and to survey and lay off lands for any person who may have purchased or entered them from the Government. In the last case he is required to notify all adjoining proprietors to be present, but no provision is made for their interference or objection. It is not like the old writ for perambulation, and binds nobody. His record is simply *prima facie* evidence of itself, with the authenticity given by his certificate, and only shifts the burden. It is taken as proof in the absence of better.

Construction of the statute.

Section 1182 of Mansfield's Digest provides that no survey made by any one else except the county surveyor or his deputy shall be considered as legal evidence in any court of law or equity, unless such surveys are made under any authority of the United States, or by the mutual consent of parties.

This is against common right and must be rejected as unconstitutional, under the doctrine of *Cairo & Fulton R. R. v. Parks*, *32 Ark.*, *131*, unless we may give it some other construction than that insisted upon here in support of the ruling of the Circuit Court. It purports to make the certificate of the surveyor conclusive against the fact. This is shocking, when we consider that the surveyor is absolutely uncontrolled in fixing boundaries, and may affect unwilling parties who are defenseless.

The true construction of this section is to be derived from observing the section which makes it the duty of the surveyor to record "every *survey* made by him," and the

subsequent section which makes a certified copy of this survey documentary evidence of itself. The same authority is forbidden to any one else; that is, they may not furnish such a certificate of a survey to be documentary evidence of itself, without other proof. That does not interfere with the general rule that the true locations of boundaries may be shown by sworn testimony of witnesses in court, and that may be strong enough, and command sufficient confidence to overcome with a jury the *prima facie* case made by a surveyor's certificate.

The jury should have been allowed to consider the evidence offered, and a new trial should have been awarded on the motion.

For error in refusing, reverse the judgment and remand.

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St. Louis, Iron Mountain & Southern Railway v. Higgins.

1. Pleading: *Answer: Reply: Issue.*

When an answer does not contain a counter-claim or set-off, no reply is admissible. The filing of the answer puts the cause at issue, and the circuit judges should not permit the record to be incumbered with useless and improper pleadings.

2. Infant: *Release: Disaffirmance.*

An infant's release of a demand is voidable at his election; and the bringing of suit upon the demand is an unequivocal disaffirmance of the release.

3. Same: *Same: Return of consideration.*

An infant may disaffirm his contract without restoring the consideration received for it.

4. Railroads: *Negligence: Contributory negligence.*

A railroad company in using in its trains an old car which is lower than the others, is not guilty of such negligence as to be liable to its servants who knowingly incur the risk, for an injury resulting from the coupling of such old car with another, though the danger be greater than with cars of equal height.

APPEAL from *Nevada* Circuit Court.
Hon. C. E. MITCHEL, Circuit Judge.

Dodge & Johnson for appellant.

1. The answer setting up no matter of set-off or counterclaim, the cause was at issue, and the replication was improper. *34 Ark., 613; Gantt's Digest, sec. 4579.*

2. The evidence discloses but one fact, that *plaintiff was alone responsible* for the accident. *Contributory negligence* is a defense to all actions, except where the negligence of the injured is in point of time prior to the negligence of defendant, and then, and only then, contributory ceases to be a defense after the defendant discovers the negligence of plaintiff and thereupon fails to observe reasonable care in trying to avoid the injury. *36 Ark., 54, 377; 41 Ib., 549.*

3. The contracts of a minor are not *void* but *voidable.* (*7 Ga., 568; 13 Mass., 237; 14 Ib., 460; 12 Pick., 425; 5 Yerg, 59; 1 Des., 596; 31 Ark., 264; 20 Ark., 608.*) And no one but the infant can avoid or disaffirm his acts while living, or his legal representatives if dead. (*6 Ark., 118; 1 Parsons Cont., 319; Tyler on Inf. and Cov., 59; 20 Ark., 608; 34 Ark., 625–6; 31 Ark., 376; 1 Ch. on Cont., 11th Am. ed., 222, note o; 13 Mass, 240.*) He must disaffirm within two years after becoming of age. (*Gantt's Digest, sec. 4130.*) And he must tender or pay back the money he received as the consideration. *1 N. H., 73; 6 N. H., 330; 5 Sm. & M., 222; 5 S. & R., 309; 2 Kent's Com., 240; 5 Hump., 70; 7 Cowen, 179; 15 Mass., 359; 6 Ark., 276; 12 Vt., 28; 1 Gray, 455; 31 Ark., 376; 58 Me., 254; 21 Ala., 675; 44 Mo., 125; 34 Me., 594; 8 Fost., N. H., 101; 7 Cowen, 183.*

4. Defendant being a corporation could act only by servants, and they were of course fellow servants, for

whose acts, even if negligent, the company is not liable. *36 Ark., 46*, and supra.

W. V. Tompkins for appellee.

1. The contracts of infants being voidable, can be avoided either before or after coming of age by any positive act of dissent. Bringing suit is sufficient. *10 Peters, 58; 38 Ark., 278; Tyler on Inf. and Cov., p. 70.*

2. It is not necessary for an infant to return or tender back the consideration received before he can rescind or avoid a contract. *69 N. Y., 233; 26 Minn., 248; 10 Pet., 58; Tyler on Inf. and Cov., 77, 78; 43 N. Y., 23; 2 Gr. Ev., sec. 367; 123 Mass, 27.*

3. It was the duty of the company to furnish suitable and safe cars, which it failed to do, and hence is liable. *41 Ark., 382; 36 Ib., 41; 35 Ib., 602; 80 N. Y., 746; 90 Ills., 470; 129 Mass., 268; 2 Am. and Eng. R. Cases, 545; 12 Fed. Rep., 392; 11 Ib., 564; 74 Ind., 440; 100 U. S., 213; Wharton on Neg., 211; 1 Redf. on R., 544.*

4. Where an injury is caused by the negligence of a railroad company the defense of contributory negligence will not avail, unless it exercised reasonable care and diligence to avoid the injury after the danger was known to them. (*36 Ark., 41; 3 Am. and Eng. R. Cas., 365; 71 Mo., 476; 36 Ark., 371 and 607.*) Nor where their conduct is such as to indicate a degree of indifference which may be characterized as recklessness. (*36 Ark., 41 and 371; Cooley on Torts, p. 674.*) In this case appellant was more than once notified of the defective condition of the caboose.

5. It is the duty of the master to explain the dangers of machinery, and especially to the young and inexperienced. *39 Ark., 17; 35 Ib., 602; Cooley on Torts, 553; 44 Ill., 482; Whart. on Neg., 216; Thomps. on Neg., 977–8.*

6. Appellee was a minor, and this a case of emergency. *7 Am and Eng. R. Cases, 414.*

1. PLEADINGS: Answer: Reply: Issue.

SMITH, J. A minor, suing by his next friend, brought this action against the railway company for personal injuries sustained in its service. The answer traversed the allegation of carelessness in the operation of the defendant's road, and averred contributory negligence, denied the plaintiff's minority and pleaded that for the sum of $125 paid to him, he had in writing released all right of action against the company. The plaintiff replied that he was a minor when he executed the release and was therefore not bound by it. Upon this issue the cause was tried and the jury gave a verdict for $4,000.

As the answer did not contain a set-off or counter-claim no reply was admissible. When the answer was filed, the cause was at issue; and the circuit judges should not permit the record to be incumbered with useless and improper pleadings. *Gantt's Dig., sec. 4579; George v. St. L., I. M. & S. Ry. Co., 34 Ark., 613.*

2. INFANT: Release: Disaffirmance.

The testimony shows that the plaintiff was only about nineteen years of age at the time of his injury, although he appeared to be older; and the release relied upon bears date some four months later, consequently he was not bound by it, if he has signified his election to disaffirm it. And the bringing of suit is an unequivocal act of disaffirmance. *Watson v. Billings, 38 Ark., 278; Sims v. Everhardt, 102 U. S., 300.*

3. Return of consideration.

But it is suggested that the plaintiff could not repudiate his contract made in infancy without restoring the consideration he had received. This doctrine was intimated in *Bozeman v. Browning, 31 Ark., 364;* and it cannot be denied that it has respectable authority to support it. Yet it seems to be founded upon a misconception of the ground upon which the right is founded, viz., the presumed incapacity of an infant to protect himself against the arts of designing persons and the consequence of his own indiscre-

tion. To require of him, then, to take such care of the consideration received as will enable him to restore it and thereby place the other party in *statu quo*, is to measure his capacity by the same standard that is applied to adults.

"The right to repudiate is based on the incapacity of the infant to contract, and that incapacity applies as well to the avails as to the property itself, and where the avails of the property are improvidently spent, or lost by speculation or otherwise, during minority, the infant should not be held responsible for an inability to restore them. To do so would operate as a serious restriction upon the right of an infant to avoid his contract, and in many cases would destroy the right altogether. * * * The right to rescind is a legal right established for the protection of the infant, and to make it dependent upon performing an impossibility, which impossibility has resulted from acts which the law presumes him incapable of performing, would tend to impair the right and withdraw the protection. Both upon authority and principle, we think a restoration of the consideration could not be exacted as a condition precedent to a rescission." *Green v. Green, 69 N. Y., 553; 25 Am. R., 233; Chandler v. Simmons, 97 Mass., 508; Walsh v. Young, 110 Ib., 396; Gibson v. Slopher, 72 Ib., 279; Buchizky v. DeHaven, 97 Pa. St., 202.*

There is no doubt that the plaintiff suffered severe and permanent injuries, such as to make of him a cripple and render the remainder of his life miserable. But can he recover of the railway company damages for those injuries?

The plaintiff's own deposition is wholly confined to the nature and extent of his injuries and his sufferings. He does not speak of the circumstances under which the accident took place, nor disclose any particulars from which it

can be inferred whose fault it was. And the same may be said of all the other testimony in the case, except that of one witness, which is given entire.

"I know George Higgins; I was conductor of the train when he was hurt. George was a brakeman. As we were going north from Texarkana, on defendant's railway, about one and a half miles south of Homan, the door to one of the box cars dropped off and two bales of cotton fell out. I told the men to set that car out on side track so that the cotton could be put back and brought on by the next train. George was brakeman on the rear end of the train (hind brakeman). He uncoupled the caboose from the train and left it standing on the main track just below the mouth of the switch. The box car was set out on the switch by a sudden kick back, and the train pulled back to couple on to the caboose. It was then George got hurt. He had to set the switch both ways. The caboose was a little old, and the floor had sagged a little; on this account the drawhead of the caboose was a little lower than that of the freight car, so that in coupling the drawheads would pass one over the other, unless the coupling was successfully made. They used a *crooked link* in coupling the caboose to the other cars. When the box car was set out, George left the *crooked link* in the rear end of the box car, and when the train pulled back on the main track to get the caboose there was a *straight link* on the rear end of the box car that was to be coupled to the caboose. Higgins attempted to make the coupling with this *straight link*, and was unsuccessful, whereupon the drawheads passed and locked, and caught Higgins and crushed him. I was about two car lengths of him at the time, and when he called me I knew what was the matter. It was George's business to make the coupling. *He had been advised of the condition by me, and I had always told him*

of it ever since he was with me, and that I had a crooked link with which to make the coupling, and for him to never attempt to make the coupling without this crooked link. I had had charge of this car for about three months. I made complaint twice to the master mechanic, Mr. Finley, about its condition. *He gave me no assurance* that he would give me another caboose. George hadn't been very long on the road, say about two weeks. I don't know that he had not been on the road before. The *crooked link* was on the hind end of the car that was set out. *Crooked links* are made to be used when one drawhead is higher than the other. I suppose George was in a hurry, as we were hurried about this sudden emergency, and tried to make the coupling with the *straight pin* in the rear end of the box car that was backing down to be coupled to the caboose. The accident was about 6 o'clock in the morning, about twilight—it was dusky.

"I had two brakemen on the train. George acted as hind brakeman. He acted as such in all my employment of him, about two weeks. *I had no other caboose except this all the time he was with me.* It was his business to couple and re-couple this car. *I had told him to use a crooked link* in making this coupling. He had made several couplings of this car. I would not have attempted to make this coupling myself, under any consideration, without a *crooked link*, but ninety-nine times out of one hundred the coupling could have been made with the crooked link. I took George to be from twenty to twenty-two years of age. He was the brightest of all his brothers. Two of his brothers, one older and one younger than himself, have been brakemen. He never told me how he got hurt. I told him *he ought to have used the crooked link, and if he had he would not have been hurt. I am not in the employ of defendant now.*

"When we make a switch it is the hind brakeman's duty to make the uncoupling, open the switch, close the switch, then re-couple the caboose. My train was fully equipped, two brakemen and myself. I was running a through freight. *I think I had sufficient men to do the work.* Two men can do all the work easily, except in case of emergency. Setting out this car was a case of emergency, but two men can do it. No extra pressure was put on Higgins because of no more men. When the switch was made the *crooked link* was left in the hind end of the box car set out. I was particular about keeping sufficient *crooked links* for this caboose, and there was one extra *crooked link* in the caboose when Higgins made the coupling at which he got hurt. As I told you before, *I had always told him to use a crooked link when he made a coupling with the caboose. It was his duty to have taken the straight link out of the rear end of the box car which was to be coupled on to the caboose, and to get a crooked link before making the coupling.* It is the hind brakeman's duty to make all the coupling and uncouplings of the caboose, and to clean it up."

4. Negligence.

A master owes it to his servant to provide suitable means, material, machinery and appliances to do his work. And this rule, in its application to the relations of a railway company to its train-hands, includes a safe track and sound and sufficient cars. Here the proximate cause of the injury was not the old and damaged condition of the caboose, but the attempt to make the coupling with a straight link, against the use of which he had been warned, instead of a crooked link which was furnished him for the purpose.

A railway company, in making use in its trains of an old car which is lower than the others, is not guilty of such negligence as to be liable to its servants, who know-

ingly incurred the risk, for an injury resulting from the coupling of such old car with another, though the danger be greater than with cars of equal height. (*Ft. W., J. & S. R. Co. v. Gildersleeve, 33 Mich., 134, per Cooley, Ch. J.*) And in *Hulett v. St. L., K. C. and N. Ry. Co., 67 Mo., 239*, it was held that a brakeman who undertook to couple together two cars of unequal heights without using the ordinary crooked link, adopted for preventing accidents in such cases, was not entitled to recover for injuries so sustained.

The judgment is reversed and a new trial ordered.

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DURR ET AL. V. HERVEY.

1. ATTACHMENT: *Removing property out of the State.*

The removal by a debtor of a material portion of his property beyond the limits of this State, not leaving a sufficiency to pay his debts, gives cause for attachment against his property, though he had no intention to cheat, hinder or delay his creditors by the removal.

2. DELIVERY: *Symbolical: Transfer of warehouse receipt.*

A warehouseman's receipt for cotton stored in his warehouse is such a document of title that its transfer, by indorsement or otherwise, clothes the transferree with the legal title and constructive possession of the cotton; and this without notice to the warehouseman of the transfer, or agreement by him to hold for the transferree. By executing the paper he consents to become the bailee of any one to whom it may be transferred, and becomes such bailee from the time of the transfer.

APPEAL from *Hempstead* Circuit Court.
Hon. C. E. MITCHEL, Circuit Judge.

Smoote & McRae for appellants.

1. To sustain the attachment under *section 388 Gantt's*

Digest, subd. 6, it is necessary to show actual fraud or fraudulent intent. (*40 Ark., 157; 18 La., 367.*) The clause, when construed according to its spirit and meaning, does not cover and include articles of commerce, purchased for market outside of the State, when transported in due and honest course of trade, without fraud or fraudulent intent. *Ib , supra.*

2. The cotton was held as a pledge by Hicks for his debt against Durr, for its purchase money, thus creating a lien superior to the attachment lien, and as a creditor Hicks could assert his claim by inter-plea. (*31 Ark., 34.*) The delivery of the warehouse receipt to Hicks put him in possession of the cotton, as pledgee, until his debt was paid. (*31 Ark., 163; Ib., 155; 37 Ib., 483; 35 Ib., 190;* and especially the notes in case last cited in *37 Am. Rep., 11.*) Any delivery which is sufficient in an absolute sale, is sufficient to create a pledge. *8 How. U. S., 384; 48 Mich., 118; 59 Cal., 154.*

B. B. Battle and A. B. & R. B. Williams for appellee.

1. It was not necessary to prove actual fraud or intent to defraud. The statute does not require it, nor is there anything from which it can be implied. (*Section 388 Gantt's Dig., subdivision 6.*) See decisions upon similar statute in *37 Miss., 454; 12 Iowa, 141; 2 McCrary, 198* (*upon our own statute*); *5 Cold.* (*Tenn.*), *490; 7 Humph., 210.*

2. There can be no valid pledge of chattels, as against creditors without delivery, and no verbal agreement is sufficient to create a lien without change of possession. *24 Ark., 28; Story on Bailments, sec. 297; 2 Kent's Com., marg. p. 581; 96 U. S., 467.*

In this case there was no delivery, actual or constructive. The bailee or warehouseman must accept the order

to deliver, or recognize it and consent to act in accordance with it; and until he does so he is the agent of the vendor. (*Benj. on Sales, 1st ed., secs. 174-5-6-7.*) The memorandum given to Whaley was not a receipt, or intended as such. The indorsement by Durr was a mere order on Hicks to pay Whaley for the cotton. It was never *delivered* by Durr to Hicks, nor was there any understanding that the cotton should be pledged.

1. ATTACHMENT: Removing property out of the State.

SMITH, J. Hervey recovered a judgment against Durr upon a promissory note. At the commencement of the action he sued out an attachment, which was levied upon eighteen bales of cotton as the property of the defendant in the writ. The ground of the attachment was that Durr was about to remove, or had removed his property, or a material part thereof, out of this State without leaving enough therein to satisfy his creditors. The Circuit Court sustained the attachment upon proof that Durr was a resident of this State, that he was insolvent, that he had frequently, in the course of his business, shipped cotton to St. Louis, in Missouri, and that he had given orders for the shipment of this particular lot of cotton to the same destination.

The affidavit for attachment follows, literally, the language of the sixth clause of section 388 of Gantt's Digest, which provides that a creditor may have attachment against his debtor, if he removes or proposes to remove, beyond the limits of the State, a material portion of his property, not leaving a sufficiency to pay his debts. And the judgment sustaining the attachment is clearly correct, unless the statute implies that such removal is with a fraudulent purpose. Durr's counsel contend that the clause should be construed as if it read, "with intent to cheat, hinder or delay creditors." This qualification does occur in sev-

eral clauses of that section, which specifies for what causes an attachment may issue, but it is absent in the sixth clause. The statute enumerates nine causes, and each of these causes is distinct and independent of any other cause. The courts have no power to interpolate terms in a statute, unless there is a necessary implication to that effect. And as an intention to defraud creditors is expressed in some of the grounds of attachment, and omitted in others, the natural inference is that the omission was designed. Hence we conclude that the principle upon which the sixth clause proceeds is the danger of loss of the debt by the removal of the defendant's property, and that it is not necessary to aver a fraudulent intent.

This is the construction that was placed on this clause by Caldwell, J., in *Mack & Co. v. McDaniel, 2 McCrary, 198.* And the same construction has been given to similar provisions elsewhere. *Montague v. Gaddis, 37 Miss., 454; Runyan v. Morgan, 7 Humphries, 210; Friedlander v. Pollock, 5 Cold. (Tenn.), 490; Branch Bank v. White, 12 Iowa, 141; Sherrill v. Fay, 14 Iowa, 292.*

This decision is not inconsistent with the judgment of this court in *Rice, Stix & Co. v. Pertuis, 40 Ark., 157.* For that was an attachment, before the debt was due, brought under section 437 of Gantt's Digest, which requires in terms the averment of fraud before the writ can issue.

A more difficult question arises upon the interest of Durr in the cotton, at the time of the levy. Hicks interpleaded for the cotton, claiming that it had been pledged to him as security for advances. But the court found that the property was subject to the attachment, and that Hicks had no lien upon it.

The testimony is not seriously in conflict, and the result reached is rather a conclusion of law than a finding of facts.

Durr was engaged in the business of buying cotton for speculation, but being without means of his own he obtained the money to pay for his purchases from Hicks, who was a banker at Hope. Durr usually shipped to his factors in St. Louis and drew upon them in favor of Hicks for the cost of the cotton, with one-half of one per cent. added for exchange. The premium on the exchange was all the interest that Hicks had in these transactions. He had none in Durr's purchases. The drafts were attached to the bills of lading. If Durr wished to resell in Hope he had to procure Hicks' permission, and in that case the proceeds were paid into Hicks' hands. The business had been thus carried on for months under the arrangement that existed between Durr, Hicks and the factors.

This particular lot of cotton was purchased of one Whaley, and at the time of the sale was stored in the warehouse of Boyette, Flowers & Co. Whaley held a receipt, or statement in writing, signed by the warehousemen and showing the number of bales, with the marks and weights of each bale. Upon this memorandum or certificate Durr indorsed, over his own signature, "$796.90, O. K." This was intended as a direction to Hicks to pay the specified sum of money. The paper was delivered to Hicks, who paid Whaley for the cotton. According to the course of the warehouse business, the holder of this paper is entitled to demand and receive the cotton described in it from the keepers of the warehouse. Its purpose was to enable customers, whose cotton was in the warehouse, to sell it in the local market. Durr afterwards offered to sell this same cotton, and he gave orders for its shipment to his factors in the usual way. The bill of lading was made out, but never signed or delivered. And the cotton was attached before it was loaded on the train. But Hicks

held the warehouse receipt all the time. The warehousemen testified that they held the cotton for Durr, after he bought it, until it was received by the sheriff.

2. DELIVERY: Symbolical: Transfer of warehouse receipt.

It is undoubtedly true that there can be no valid pledge of chattels, against creditors, without delivery. Hence the Circuit Court correctly declared the law to be, that no verbal agreement was sufficient to create a lien on personal property without a change in the possession. But in the case of ponderous or bulky articles, the law sometimes dispenses with manual delivery and substitutes symbolical delivery; such a delivery in pledge is good, whenever it would be good in case of a sale of the same property. Thus a bill of lading is such a document of title that its transfer by indorsement, or otherwise, puts the vendee or pledgee into possession. And warehouse receipts or wharfinger's certificates have by long usage been put upon the same footing, and have come to represent the property mentioned in them. To adopt the language of the editors of Smith's Leading Cases, in their note to Lickbarrow v. Mason, 8th Am. ed., vol. 1, pt. 2, 1223, "the exigencies of trade have called a class of instruments into being which are substantially acknowledgments by public or private agents that they have received merchandise, and from whom or for whose account, and usage has made the possession of such documents equivalent to the possession of the property itself."

Many of the cases on this subject are collected in *Jones on Pledges, secs. 37, 280, 298, et seq.;* among others *Gibson v. Stevens, 8 Howard, 384; McNeil v. Hill, 1 Woolworth, 96; Harris v. Bradley, 2 Dillon, 284; Yenni v. McNamee, 45 N. Y., 614; Broadwell v. Howard, 77 Ill., 305.*

But it is argued that the transfer of a warehouse receipt does not amount to a constructive delivery of the goods until the warehouseman is notified and agrees to hold for the transferree. This seems to have been the view taken by

the English courts until Parliament interfered, although it is criticised by Benjamin in his work on Sales, secs. 174-6, 815, et seq. And the same doctrine has been approved by the Supreme Court of Massachusetts, in the very recent case of *Hallgarten v. Oldham, 135 Mass., 1.* But this is certainly opposed to the weight of American authority. And, as observed by the Supreme Court of California, in *Davis v. Russell, 52 Cal., 611*, "no substantial reason is offered for giving the assignment of such an instrument an effect differing materially from that of an assignment of a bill of lading." In *Puckett v. Reed, 31 Ark., 131*, the same principle was applied in the anologous case of a ginner's receipt for cotton.

Our conclusion is that the delivery of the instrument made by Boyette, Flowers & Co. to Hicks transferred to him the legal title and constructive possession of the cotton, and was sufficient to sustain a pledge as against a subsequent attaching creditor of Durr. No importance is attached to the form, or want of form, in this paper. It was in writing, signed by warehousemen, who were known to the business community to be engaged in that business, and it acknowledges that they held eighteen bales of cotton, which are particularly described, belonging to Whaley. Nor does it matter that Boyette, Flowers & Co. considered that they were holding the cotton for Durr. By executing the paper they consented in advance to become the bailee of any one to whom it might be transferred, and from the time of transfer they became Hicks' bailees.

The attempt of Durr to sell, and also to ship the cotton, was entirely consistent with Hicks' relation to the property, and was in the usual course of their business. Hicks' only claim upon it was to be repaid his advances.

Reversed and remanded for a new trial.

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HAWES v. ROBINSON.

REPLEVIN: *Affidavit: Description of property.*

An affidavit in replevin must describe the property sued for in such manner as to identify it. But after trial and verdict on the merits it is too late to object to the insufficiency of the affidavit.

2. SAME: *Office of affidavit.*

In a justice of the peace's court the first office of the affidavit is to procure the order of delivery. When that is accomplished it has performed its office as an affidavit and thereafter serves as a complaint.

APPEAL from *Phillips* Circuit Court.

Hon. F. T. VAUGHAN, Circuit Judge, on exchange of circuits.

George Sibley for appellant.

The affidavit was fatally defective; it contained no description of the property. *Wells on Replevin, secs. 171 to 173; 664–5; 3 Blk. Com., s. p. 145; 1 Ch. Pl., 163; Gantt's Digest, sec. 5035, sub. 1.*

Appellant being in possession and claiming adversely was *prima facie* the owner. The onus was on appellee, to overcome this presumption by preponderance of proof. *Wells on Repl., sec. 696, et seq.*

The defective affidavit was not cured by verdict. Appellant resisted the action on that ground.

STATEMENT.

This was replevin before a justice of the peace, commenced by filing an affidavit in the usual form, but describing the property in general terms as "one sow worth five dollars, six pigs worth one dollar each, and two shoats worth five dollars each." The order of delivery described

the property as "one sow, black, with white feet and nose, and white spots on left shoulder; six pigs belonging to said sow, worth one dollar each; and two shoats about six months old, and weighing about fifty pounds each, and worth five dollars each."

For the rest the opinion sufficiently states the facts.

OPINION.

COCKRILL, C. J. It is essential to a proper affidavit in replevin that it describe the property sued for in such manner as to afford the means of identifying it. In a justice of the peace's court the first object of the affidavit is to procure the order of delivery. When that is accomplished it has performed its office as an affidavit and thereafter serves as a complaint. (*Hanner v. Bailey, 30 Ark., 681.*) After the order or writ is issued and served and there has been a defense to the action on the merits, and a verdict for the plaintiff, as in this case, it is too late to object that the affidavit does not contain a specific description of the property. (*Wells Replevin, sec. 657; Perkins v. Smith, 4 Blackf. (Ind.), 299; Kirkpatrick v. Cooper, 77 Ill., 565; Warner v. Aughenbaugh, 15 S. & R., 9.*) The affidavit in the case at bar did not contain a sufficient description of the property. The writ was specific enough in that respect. The appellant, who was defendant in the suit, made no objection to either in the justice's court, but tried the case on its merits and was defeated. In the Circuit Court, on appeal, he filed an answer claiming title in himself with great particularity and detail, alleging also that the affidavit in replevin was not such as it should be. He did not press his objection in any form for decision, but introduced testimony himself identifying and describing the property to establish title to it, manifesting no misapprehension as to what

property was sued for. The jury, upon what seems to us to be a preponderance of evidence, found against him. He made no objection to anything else. On this state of the record we are asked to reverse the judgment. To do this would be to hold that the practice in replevin under the Code is more technical than the practice in replevin at common law. This cannot be. Let the judgment be affirmed.

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FINK v. EHRMAN BROS.

1. MORTGAGE: *Of merchandise retained by mortgagor.*

Where possession of mortgaged merchandise is retained by the mortgagor or his agent, and sales continue and stock is replenished as before the mortgage, this is evidence of fraud as against attaching creditors, and conclusive if not explained; but there is no objection to the mortgagee in good faith retaining the salesman of the mortgagor for his own.

2. SAME: *Trustee is liable for sales of agent.*

The trustee in a trust mortgage is liable for the proceeds of sales made by his agent, and they will be credited on the mortgage debt whether he receives them or not.

APPEAL from *Phillips* Circuit Court.
Hon. M. T. SANDERS Circuit Judge.

Stephenson & Trieber for appellant.

The evidence shows that the appellant, immediately after the delivery of the trust deed, took possession and remained continually in possession until after the attachment. The employment of the mortgagor's clerk, or even the mortgagor himself, by the trustee, is not inconsistent with his possession, so that he accounts to the mortgagee for the proceeds, and has them applied to the extinguish-

ment of the mortgage debt. *1 Dill., 462; 24 N. Y., 359; 28 Ib., 360; 32 Ib., 293; 91 Ib., 214; Bump Fraud. Conv., p. 128; 2 Tenn. Ch., 746.*

The verdict is not only against the weight of evidence, but wholly unwarranted by it, and in such a case this court will reverse. *37 Ark., 413.*

STATEMENT.

Ehrman Bros. sued Longinetti before a justice of the peace, by attachment, which was levied upon the contents of a saloon. Isadore Fink interpleaded, claiming the property by virtue of a deed of trust executed to him by Longinetti, to secure a debt to Henry Fink. Upon appeal in the Circuit Court the verdict and judgment were against the interpleader, and he appealed to this court. No question was raised as to the fairness of the deed of trust upon its face. Its provisions and the evidence at the trial are stated in the opinion.

OPINION.

1. MORTGAGE: Of merchandise retained by mortgagor.

COCKRILL, C. J. The mortgage assailed by the attaching creditors was regularly acknowledged and recorded, and contains no provision which renders it void as a legal conclusion. Upon its face it is valid. The effort was to show by extrinsic evidence that it was a fraudulent device. It authorized the trustee to take immediate possession of the mortgaged stock, and sell it at retail to pay the secured debt. In point of fact there was no ostensible change of possession. The business was carried on by the agent of the mortgagor after the execution of the mortgage, just as it had been before. Goods were sold and the stock replenished in the usual way. This was evidence of fraud

as against the attaching creditors, and if unexplained it would be conclusive. *Martin v. Ogden, 41 Ark., 186; Lund v. Fletcher, 39 Ib., 325.*

To rebut this presumption the interpleader, who was the trustee under the mortgage, proved that on the day the instrument was executed he went to the mortgagor's saloon and informed the bartender, who was conducting the business, of the execution of the mortgage, and told him he must *account* to him for the proceeds of sales of the mortgaged stock. It is not shown that the bartender made any reply to this demand, but subsequently he turned over the proceeds of sales to the trustee. The trustee's place of business was near the saloon, and he was there occasionally to see how the saloon business went on. It is argued from this that the bartender was converted into the agent of the trustee. If such a change had been effected in good faith the presumption of fraud arising from the supposed possession of the mortgagor would have been overcome. There is no legal objection to the salesman of the mortgagor becoming the salesman of the mortgagee, even when the person who thus swaps masters is at the time standing in the place of the mortgagor. In such case, however, the mortgagee should manifest entire good faith in constituting him his agent to continue the business. An arrangement of this sort is regarded with the same suspicion that would follow the selection of the mortgagor for that purpose. Such an arrangement may not be infected with fraud in any sense. *Martin v. Ogden, supra; Bracket v. Harvey, 91 N. Y., 214; Pierce Mort. Merchandise, sections 137, 140.* But it may be merely colorable and devised only to protect the mortgagor's property against the pursuit of other creditors. Whether it was fair or fraudulent in a

given case is a fact to be determined by the jury from the surrounding circumstances.

In this case it is not clear from the testimony of the salesman whether he regarded the mortgagor or the trustee as his principal when the attachment was sued out. There is confusion and obscurity in his statements on that point. No formal surrender of possession was made to the trustee by him. His instructions from the mortgagor, after the execution of the mortgage, were to continue the business as usual in his absence, and deposit the proceeds in bank or with Henry Fink. Henry Fink was the beneficiary of the mortgage, but the instruction did not go to paying anything on his debt, and it was optional with the agent at which place he should deposit the proceeds under the mortgagor's instructions. If he continued to act under these instructions without regard to the demand made upon him by the trustee until the attachment was levied, he was not the trustee's agent, and the trustee would not have been accountable for his acts. If he was his agent, the trustee was chargeable with the proceeds of all sales made by him, whether actually received or not. It would then have been all the same to the other creditors whether the agent paid the proceeds to the trustee, or to the mortgagor, or misappropriated them. In either case the value of the goods sold would have gone as a credit on the mortgage debt. This is the reason given for permitting the mortgagor, or one who represented him, to remain in possession and sell for the benefit of the mortgagee. *Bracket v. Harvey, sup.; Overman v. Quick, 8 Biss., 134.*

2. SAME: Trustee liable for sales of agent.

If it was optional with the agent conducting the business to pay the money to the mortgage creditor, or deposit it in bank to the mortgagor's credit, he might have paid it to the mortgagor himself without, of course, making the trustee chargeable. This would in effect have

been possession, and a sale by the mortgagor for his own benefit, and a fraud upon his creditors.

The inference and deductions to be made from the facts in proof were matters for the jury. It was for them to determine whether the person in possession held for the mortgagor or the trustee, and if they found that he held for the latter, whether the possession was *bona fide* or only colorable.

The full scope of all the questions presented was submitted to them under unobjectionable instructions from the court, and they found against the mortgage. Let the judgment be affirmed.

BOYD V. JONES, TRUSTEE.

1. PRACTICE IN CHANCERY: *Parties: Trustee and cestui que trust.*
The owner of a debt is a necessary party to a suit by a trustee to foreclose a deed of trust executed to him by the debtor to secure the debt.

2. SAME: *Dismissal without prejudice.*
When a demurrer which is general as to the merits, and special for defect of parties, is sustained generally, to a complaint which is sufficient in equity, but wanting in necessary parties, and the plaintiff refuses to amend, the court should dismiss the complaint without prejudice and not absolutely; and an absolute dismissal will be modified here into a dismissal without prejudice.

APPEAL from *Jefferson* Circuit Court in Chancery.
Hon. J. A. WILLIAMS, Circuit Judge.

Compton & Fuller for appellant.

The court erred in dismissing the bill *absolutely*. It showed equity on its face, and if dismissed at all, should have been dismissed without prejudice.

The general rule is that the *cestui que trust* should be joined as a party plaintiff, but one notable exception is where the disposition of the property was within the power of those before the court. (*5 Beav., 173.*) See also *23 Ark., 507; 31 Ark., 210.*

Martin & Taylor for appellee.

In suits to foreclose a mortgage the *cestui que trust* is a necessary party. (*3 Ark., 364; 2 Jones on Mortg., sec. 1384; Story Eq. Pl., secs 202, 209.*) There is nothing in the decree that would preclude the trustee and *cestui que trust* from bringing suit, and they were not prejudiced by the dismissal, even if it be construed as an absolute dismissal. (*Ky. Code, p. 502 and notes; 17 B. Mon., 602.*) See also *18 Ark., 24.*

EAKIN, J. Boyd is trustee in a trust deed of a small tract of land, executed by Jones the purchaser, to secure the payment of a note for the purchase money, given to the vendor Emmett Yell. The complaint sufficiently sets forth the facts and seeks foreclosure, but does not make Yell a party. Jones demurred generally, and also specially because Yell was not made a party. The demurrer was sustained in general terms, without specifying the ground, and complainant declining to amend, the court dismissed the bill. From this Boyd appeals.

1. PARTIES: Trustee and *cestui que trust.*

There was plain equity in the bill, and we suppose the Chancellor sustained the demurrer on account of a supposed defect of parties.

Boyd had no interest in this suit, except for commissions as trustee. Yell was the real party interested, as complainant. Section 4933 Mansfield's Digest directs that every action must be prosecuted in the name of the real party in interest, except where the subject of the action is

transferred during the suit; or where the complainant is an executor, etc., or trustee of an express trust. There are some other exceptions having no bearing on this case.

We have derived the section of our Code, making these exceptions (*sec. 4936 Mansfield's Digest*) from the Kentucky Codes of Practice. In that State it has been held that the object of the section was to save to the guardian or trustee still the right to sue in his own name in all cases where he might have done so before. That is to say, the general provision that every action must be brought in the name of the party really interested, is not to apply to cases where the trustee or fiduciary might have sued in his own name before the act; without intending, however, to *confer* upon him the power to sue in his own name where he could not before. *Anderson v. Watson, 3 Met., 509; B. & L. R. R. Co. v. Metcalfe, 4 Ib., 199.*

This is not a case where, before the Code, the trustee could have sued alone. The trustee does not seek to have the absolute control of the proceeds of sale, subject only to an account to be made by him with the creditor holding the note. He seeks foreclosure of an equity, and a distribution of the proceeds by the court, between the costs, the creditor and the debtor, according to the rights respectively. That is what, under our practice, is meant by foreclosure. The general rule under the old practice required the creditor in this case to be made a party. (*Story's Eq. Jur., sec. 201.*) There were some exceptions to the general rules, very clearly expressed in the case of *Carey et al. v. Brown, 92 U. S., 171.* The court there quotes and approves the following declaration of the Master of the Rolls in *Horsley v. Fawcett, 11 Beav., 569:* "If the object of the bill were to recover the fund, with a view to its administration by the court, the parties interested must be represented. But it merely seeks to recover the trust

moneys, so as to enable the trustee hereafter to distribute them agreeably to the trusts declared. It is therefore unnecessary to bring before the court the parties beneficially interested."

2. Dismissal without prejudice.

If the demurrer had been alone for want of parties, and the bill had been dismissed for the perversity of the complainant in declining to bring the creditor in, after being thus advised by sustaining the demurrer, the effect of the decree would not perhaps have precluded another suit. But as there was a general demurrer united with the special one, and the court does not intimate whether its general ruling was on the merits or on defect of parties, the proper decree would have been to dismiss without prejudice. *Eddins v. Buck, 23 Ark., 507*, is a case as to the proper practice upon this point; although in this case there is this difference, that the complainant has already declined to amend, and is not entitled to have a remand with leave to do so. Still the dismissal should have been without prejudice, that when advised to do so he may proceed *de novo* with proper parties, and upon the merits.

Enter a decree here, modifying the decree below, so as to make the dismissal without prejudice, and affirm it otherwise.

HEMPSTEAD COUNTY v. GRAVE, COUNTY JUDGE.

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1. MANDAMUS: *None to control judicial action.*

A court cannot be compelled by mandamus to reinstate an action which has been stricken from its docket. The reinstatement or refusal to reinstate is the exercise of judicial functions which cannot be controlled by mandamus.

2 SAME: *To compel county court to adjust claim.*

If the county court of a new county refuses to ascertain and adjust its proportion of the debt of the parent county, when properly presented to it for adjustment, it may be compelled to by mandamus.

APPEAL from *Hempstead* Circuit Court.
Hon. H. B. STUART, Circuit Judge.

D. W. Jones for appellant.

The board of supervisors had but one duty to perform, which was to examine the statement, and if found correct, to enter of record. (*Acts of 1878, pp. 127–9.*) This act is identical with section 6, Acts 1873, pages 143–5, and the course of procedure was settled in *34 Ark., 240.* The board of Howard had no power to dismiss the cause for want of prosecution. It being clearly the duty of the board to act, by either entering of record the statement as the debt of Howard, or by declaring there was no debt; and having done neither, mandamus was the remedy to compel it to act. *34 Ark., supra; 9 Ib., 240; 37 Ib., 339; Hays, ex parte, 26 Ark., 510; 3 Ib., 427; 5 Ib., 49; 14 Ib., 368; High on Ex. Rem., ch. 3, p. 122, et seq.*

The demurrer should have been overruled. *34 Ark., 240; 37 Ib., 339.*

C. B. Moore for appellee.

The action of the supervisors in dismissing the cause, whether right or wrong, *was subject to appeal.* (*34 Ark., p. 243.*) It was the duty of Hempstead to have appeared, and as a party interested as a party plaintiff, and prosecuted her claim, or *to appeal.* (*Supra.*) The order was *final* (*10 Ark., 633; 11 Ark., 151; 22 Ark., 176*), and Hempstead could have appealed during that session or the next, but not thereafter. *Gantt's Digest, secs. 705, 1193.*

The county judge, after nine long years, had no right or authority to redocket the case. The power was gone. *12 Ark., 95; 10 Ib., 241; 32 Ib., 676*, and particularly *11 Ark., 151.*

But admitting (which we deny) that the county judge had the power to redocket, he had *exercised a judicial discretion* in refusing to do so. Mandamus only issues where there is no other remedy, and never to correct an erroneous decision, where error or appeal lies. (*6 Ark., 437; 14 Ib., 368; 26 Ib., 482; 6 Peters, U. S., 216.*) Nor will it lie to compel an inferior court to reverse its action in the dismissal of actions. *High on Ext. Rem., sec. 173, p. 139, ed. 1874; 25 Ark., 614.*

SMITH, J. The petition in this case represented that under the fourth section of the act approved April 17, 1873, creating Howard County, the supervisors of Hempstead had ascertained the total indebtedness of the last named county, outstanding at the date of the passage of the act, to be $92,159.35; that according to the assessment for the year 1872, the aggregate amount of taxable property in the county was $1,967,036, and the aggregate amount in that portion which was cut off and given to the new county was $297,717.50; that the proportional part of the debt falling to Howard was accordingly $13,948.14: that a certified copy of the proceedings had in the ascertainment and apportionment of said debt was transmitted to the county clerk of Howard, and the same was by him laid before the board of supervisors of Howard at its next session thereafter; that said last-named board wholly failed and neglected to investigate and determine the correctness or falsity of said statement, or to take any action in the matter until the January term, 1875, when it

caused to be entered on its records a *nunc pro tunc* order, reciting that said cause, having been dismissed for the want of prosecution at October term, 1874, and said order of dismissal not having been entered of record, the same was now entered; that at July term, 1883, Hempstead County had moved the county court of Howard, the same court as the former board of supervisors, under another name, to redocket said cause and proceed to hear and determine the same upon its merits, but the motion was dismissed, and that the dismissal of said cause was unauthorized by law. And the prayer was for a writ of mandamus to compel the county judge of Howard to redocket said cause and proceed to a hearing.

The petition was accompanied with appropriate exhibits, showing the several steps that had been taken in the matter by the county authorities of the two counties. But it was dismissed upon demurrer.

1. MANDAMUS: None to control judicial action.

If the submission of the statement of indebtedness by Hempstead to the supervisors of Howard, is to be regarded as the institution of an adversary suit, the judgment below is doubtless correct. Probably none of our courts have the power at a subsequent term to restore to its docket a cause which it has previously ordered to be stricken from its docket, at least where objection is made. But if the power exists, the reinstatement of an action, or the refusal to reinstate, implies the exercise of judicial functions. And this places the court beyond the control of the writ. *Johnson, ex parte, 25 Ark., 614; High's Extra. Rem., sec. 173.*

2. To compel County Court to adjust claim.

But adjudged cases in this court have not treated the preliminary proceedings for the adjustment of burdens growing out of the formation of new counties, as in the nature of an action at all. *Phillips County v. Lee*

County, 34 Ark., 240; Pulaski County v. County Judge, 37 Ib., 339.

Thus, the case of *Monroe County v. Lee County, 36 Ib., 378*, proceeds upon the idea that there is no right of action in the parent county until the county court of the new county has fixed the amount of the debt by the statutory method, and until that is done, mandamus to set the court in motion, and compel it to discharge the duties devolved upon it is the sole remedy.

According to this view no cause was pending before the board of supervisors or the county court of Howard which Hempstead was required to prosecute, or which was subject to dismissal for failure to prosecute, and there is none to be redocketed.

But the so-called order of dismissal should be considered as a refusal to adjust the debt, and the present petition as an application to compel the county judge to ascertain and declare the extent of Howard's liability in the premises. It was the plain duty of the board of supervisors, and of its successor, the county court of Howard, to act upon the statement furnished by Hempstead. If that statement was satisfactory, it should have been adopted and entered upon their own records; if incorrect, they could make an independent investigation and finding of the amount. The items may all be verified or disproved by reference to the public records of Hempstead.

The judgment is reversed and cause remanded, with directions to overrule the demurrer to the petition, and require the defendant to answer.

MEMPHIS & LITTLE ROCK RAILWAY CO., AS REORGANIZED, V. STRINGFELLOW.

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1. RAILROADS: *In hands of receiver: Who liable for negligence.*

A railroad corporation is not liable for the negligence of the servant of a receiver who is operating the road. His possession is not theirs, and they cannot control either him or his employes.

2. PRACTICE: *Misjoinder in tort.*

Where a complaint for a tort shows no liability as to part of the defendants, a general verdict and judgment against all will be arrested as to those not liable, and stand as to the others.

3. RAILROADS: *Negligence.*

This was a case of premature announcement of a station, causing a passenger to alight in the dark at wrong place. For the facts, which are too numerous for a syllabus, see the opinion.—REP.

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

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

It is not negligence for a railroad's servants to call out the name of a station before reaching it, nor was it so to stop before crossing another railroad, nor do the two acts together constitute negligence. The call is only designed to admonish passengers that a particular station is near, that those destined there may prepare to alight. (*51 Mich., 236; 47 Am. Rep., 566; 12 Am. & Eng. Ry. Cases, 163; 92 B., 66, reported 7 Moak, 119; L. R., 3 Exch., 150; 23 Penn. St., 147.*) "The result of the cases seems to be that the liability of the company rests on the fact whether the passengers were warranted in forming the conclusion that the final stand-still was arrived at; but that the calling out the name of the company's station by the company's servants is not enough to authorize the passengers to assume that

this is the case, in the absence of other circumstances." *1 Cent. Law Jour., 335.*

2. The verdict is excessive. The actual damages amounted to only $135, leaving $1,115 for physical suffering.

3. The motion in arrest should have been sustained. There were two defendants; there was no joint wrong; hence the verdict, which does not specify the defendant against whom it was directed, is fatally defective. *5 J. J. Marsh, 676; 7 Wis., 219; 25 Ill., 42.*

Sanders & Husbands for appellee.

1. Although the facts in this case are undisputed, it is for the jury and not for the judge to determine whether proper care was given, or whether they establish negligence. *17 Wall., 964; Redfield on Law of Rys., vol. 2, p. 231; 1 McQueen, H. L. Cases, 748; 38 N. Y. (11 Tiff.), 455; 17 Mich., 99.*

While the calling of a station before reaching it, nor the stopping of a train at a crossing are not negligence if properly done, yet in this case there was wanton and unjustifiable departure from the common usage, such as to render the company liable as guilty of gross negligence. *Wharton on Negligence, secs. 647, 379, 371, 650, reference 5; St. Louis, I. M. & S. Ry. v. Cantrell, 37 Ark., 522; 31 Ind., 408.*

Reviews the cases cited by appellant's counsel, and argues that they are of the class spoken of by Wharton on Negligence, section 650, note 5, as *extreme cases*, and do not give the true rule. See *7 Irish Rep., C. L., 40; L. R., S. B. Div. 85, 1875; L. R., 2 Exch., Div. 248, 1876.*

2. The verdict not excessive. The circuit judge heard all the testimony, saw the exhibitions of personal injury, and refused a new trial.

3. There was no misjoinder. (*39 Ark., 162; 30 Ark.*,

399; sec. 4564, subd. 4, and sec. 4567 Gantt's Digest.) The company was the owner of the road, and interested, as the damages would be paid out of the profits of the road.

1. RAILROADS: In hands of receiver: Who liable for damages.

SMITH, J. In this action, brought by a passenger to recover damages for personal injuries, the railroad company and its receiver were jointly sued. The complaint alleged that at the time of the injury the road was operated under the management of E. K. Sibley, who was appointed receiver under a decree of the Circuit Court of the United States for the Eastern District of Arkansas. The answer denied negligence and averred contributory negligence in the plaintiff. The following verdict was returned: "We the jury find for the plaintiff and assess the damages at $1,250." The defendants filed separate motions in arrest of judgment, on the ground that the verdict was general, and did not fasten the liability on either of them. These were both overruled.

The complaint states no cause of action against the railroad company. "The corporation itself cannot be held responsible for the negligence of servants of a receiver operating the road. The receiver's possession is not the possession of the corporation, but is antagonistic thereto, and the company cannot control either the receiver or his employes." *Pierce on Railroads, 285; High on Receivers, sec. 396; O. & M. R. Co. v. Davis, 23 Ind., 553.*

The effect of the misjoinder of these defendants is not, however, to vitiate the verdict as to the receiver. Nothing was alleged in the pleadings and no evidence was given at the trial, showing any liability of the railroad company. And not even at common law in actions for torts was a misjoinder of defendants available to those who were properly sued. The plaintiff might succeed as to some and fail as to others.

A motion for a new trial was filed on the ground of want of evidence to support the verdict, error in the instructions, excessive damages, etc.

The facts, as shown by the bill of exceptions, were as follows: Plaintiff got on the train at Forrest City, with the intention of going to Brinkley. Just on the outskirts of Brinkley the track of the Texas and St. Louis Railway, popularly known as the "Paramore Road," crosses the track of the Memphis and Little Rock Railroad. When the train on which plaintiff was a passenger had arrived within a short distance of the station at Brinkley, the brakeman, as usual, called out the name of the station. The train ran on a few paces further, and arriving at the crossing of the Texas & St. Louis Railway, stopped a few moments, as is customary, before crossing the track of another road. The night was dark. The plaintiff thought he had reached his destination. He arose from his seat, went out on the platform, and looked out on one side. He saw no platform or other indication of a depot, only a bright light ahead, which he took to be the headlight of a locomotive. The plaintiff then went across the platform to the other side. Just at this time the train began to move slowly forward. The plaintiff, supposing that he was about to be carried beyond his station, stepped off, fell and was taken in an insensible condition to a doctor's shop.

It is contended that, on this state of facts, the plaintiff is not, as a matter of law, entitled to recover, and that no shadow of negligence is shown.

The appellants rely on the case of *Lewis v. London, Chatham & Dover Railway Co., L. R., 9 Q. B., 66;* also reported in *7 Moak, 119.*

The facts were that plaintiff, a woman, took passage on a train from St. Mary Cray to Bromley. As the train ap-

proached Bromley the name of the station was called out, and shortly afterwards the train stopped, but not until it had carried the plaintiff's car beyond the platform. The plaintiff got up from her seat, and started to descend from the car where it was. Just as she was stepping from the train, it was backed suddenly for the purpose of bringing all the cars abreast of the platform, and the plaintiff fell, and was injured. It was held that she was not entitled to recover.

Mr. Justice Blackburn said: "It appears that the train was coming up to the station, and some official on the platform called out 'Bromley—Bromley!' Calling the name of the station, I understand, and have always understood, to mean this, that it is an intimation to all who are traveling by the train that the station at which the train is about to stop is that particular station. Calling out the name of the station is not an invitation to alight."

But this case has been virtually overruled by *Bridges v. North London Railway Co., Law Rep., 7 H. L., 213; S. C., 9 Moak, 165.* The action was tried before the same judge, Blackburn, at nisi prius, and the evidence disclosed a similar state of facts. But the case was withdrawn from the consideration of the jury. This was held to be error. No positive rule of law was laid down as to the effect to be given to calling out the name of a station, but Mr. Baron Pollock, in his opinion before the Lords, concurred in the opinion of Mr. Justice Willes in the same case in the Exchequer Chamber: "It is an announcement by the railway officers that the train is approaching, or has arrived at the platform, and that the passengers may get out when the train stops at the platform, or, under circumstances induced and caused by the company, in which the man reasonably supposes he is getting out at the place where the company intended him to alight."

In *Weller v. London, etc. Ry. Co., Law Rep., 9 C. P., 126; S. C., 8 Moak's Eng. Rep., 441*, on the approach of a train to the station, a porter called out the name of the station and the train was brought to a stand-still. The plaintiff, a season-ticket holder, accustomed to stop there, stepped out of the carriage in which he was seated, and falling upon an embankment was injured. The train had overshot the platform. It was night and there was no light near the spot, and no caution was given, nor anything done to intimate that the stoppage was a temporary one only, or that the train was to be backed. Brett, J., said: "I agree that to call out the name of the station before the train has come to a stand-still is no evidence of negligence on the part of the company. I also agree that merely overshooting the platform is not negligence. But if the porter has called out the name of the station, and the engine-driver has overshot the station, and the train has come to a stand-still, the company's servants are guilty of negligence if they do not warn passengers not to alight. At all events the jury may from the facts infer negligence."

And the best considered American cases are to the same effect. Thus in *Central R. R. Co. v. Van Horn, 38 N. J. Law, 133*, Beasley, C. J. said:

"The court would not be warranted in saying that it is not negligence to give notice of the approach to a station, and then to stop the train short of such station, in the night time. Such a course would naturally tend to jeopard passengers, for it would induce them to believe that they had arrived at the station designated, and they would, in the ordinary course, go to the car platform. At night this must be the inevitable result. It is said, in the brief of the counsel of the defendant, that it was right to give the notice at a long distance from the depot, so that the passengers might prepare to leave the cars. This

may do when the train is not to stop before it reaches the station. When a station is called, the passengers have the right to infer that the first stop of the train will be at such station."

In *Taber v. D. L. & W. R. Co., 71 N. Y., 489,* plaintiff was a passenger on defendant's train; she had a ticket for W.; she was not familiar with that station, but knew it was the next station to C. F., and about three-fourths of a mile therefrom. The night was dark, there was no depot at W., or station light, or anything to indicate the stopping place to a person not familiar with it. She knew when the train passed C. F., and as her evidence tended to show, after the proper interval, so as to run the distance to W., the train came to a full stop; it had in fact run by the station. Before reaching it the brakeman announced the station; several passengers arose to leave; plaintiff then rose from her seat near the center of the car, walked out upon the platform, took hold of the rail, stepped down one step and was in the act of stepping to the second, when the train with a violent jerk started back, throwing her down and off, and she was injured. In an action to recover damages, held that it was a question for the jury, whether in the exercise of reasonable care and prudence, defendant should not have given notice to passengers desiring to alight at the station, that the train had not come to a final stop but would back up, and that the plaintiff was justified under the circumstances in supposing she had reached her destination and in attempting to leave the car; at least that the question of contributory negligence on her part was proper for the jury. See also *Milliman v. New York Central & Hudson River Railroad Co., 6 Thomp. & C., 585; S. C., 3 Abb., N. C.; affirmed, 56 N. Y., 585.*

In the case of "*The Columbus & Indianapolis R. R. Co. v. Farrell, reported in 31 Ind., p. 408,* the plaintiff was

on the car of the defendant railroad. The night was dark. The conductor stopped the train and announced the name of the station, "Cumberland." Plaintiff could not see whether there was any platform or not, or where he was going to alight, but in good faith, relying on the announcement made by the conductor, stepped off in the dark into a culvert twenty feet deep, and was injured, and the Supreme Court of Indiana in passing upon the question of contributory negligence in that case, by approving the instructions, say: "If the plaintiff did not alight from the train until it had been fully stopped, nor until the defendant's servants had announced the name of the station, or it had been announced from the proper and usual place of making such announcements, he had the right to believe that the train had reached a proper stopping place and that he could safely alight, and if he did then alight and did so without knowing the danger of the place, and in consequence of the darkness of the night he had no reasonable opportunity of ascertaining the danger, and he was injured in so alighting, he will be entitled to a verdict."

In Mitchell v. Chicago and Grand Trunk Ry. Co., 51 Mich., 236, S. C. 47 Am. Rep., 566, also relied upon by appellants, the facts of the case as stated by the court were as follows:

"Just before arriving at the junction, and when the train was some 300 or 400 feet from it, the name of the station was called out by the proper person, and the cars came to a full stop, as required by law before reaching crossings. Plaintiff at once left her seat, and hurried to leave the car. It does not appear that any person employed on the train noticed her. She went down the steps where there was no platform or other convenience for landing, and just as she stepped off, the cars were suddenly started again to go forward to the depot, and she fell, and

broke her ankle." And it was held the plaintiff had no right of action.

But that case is distinguished from the present in several particulars. The accident happened during daylight, and that is a material circumstance in this class of cases. Then no announcement was made or other invitation given to alight. And again, before reaching the place, the conductor notified her he would escort her to the depot of the connecting line.

To apply the principles discussed to the case in hand: It was no negligence in the receiver's servants to stop the train before crossing the track of the St. Louis & Texas road. That was only a proper precaution to prevent collision. It would, also, have been no negligence to announce the name of the station before stopping, provided passengers had been warned to keep their seats, or otherwise informed that the stop was only a temporary one. But to make the announcement without such caution, was an invitation to passengers bound for that station to alight when the train came to a stop, and was a circumstance from which a jury might well infer negligence, if, in attempting to alight, an injury was received. The charge of the court and its refusal to charge were in accordance with these views.

All that is left in this case is the question of damages. The plaintiff received a severe cut upon the head, leaving a permanent scar; and the ends of his fingers on one hand were mashed off. As we have stated, he lost consciousness when he fell. He was confined to his bed for four weeks and disabled from work for four months. His bill for medical attendance and medicines was between $25 and $35. He lost thirty pounds of flesh and suffered great physical pain, his hand having risen and become a running sore. His labor on the farm at that time of the year was worth $25 a month.

The assessment of damages was, perhaps, somewhat too

liberal to the plaintiff. Yet there can be, from the nature of the case, no exact measure of compensation for physical pain and mental anguish which is inseparable from it. Under such circumstances, appellate courts are loth to interfere merely because damages seem excessive. The jury and the trial judge, before whom the plaintiff's wounds were exhibited at the distance of nearly a year from the happening of the accident, could more justly estimate the extent of those injuries than we can possibly do from the transcript.

The judgment against the railroad company is arrested, and the judgment against the receiver is affirmed.

Bearden v. The State.

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1. Criminal Practice: *When presence of defendant necessary.*

A defendant under indictment for a felony must be present whenever any substantive step is taken by the court in his case. And to annul a verdict against him for a violation of this right it is not necessary that he show that he was actually prejudiced by the proceeding in his absence. It is sufficient if it appears that he may have lost an advantage or been prejudiced by the proceedings; but where no prejudice could by any possibility result from the action of the court, there is no reason for requiring his presence.

2. Same: *Same.*

It is no infringement of the defendant's rights for the clerk, in his absence, to place the names of the panel in a box preparatory to drawing the jury for the trial; but to swear the witnesses and put them under rule in his absence is a violation of his rights.

APPEAL from *Boone* Circuit Court.
Hon. J. M. Pittman, Circuit Judge.

The appellant was convicted of murder in the first degree. The facts sufficiently appear in the opinion.

O. W. Watkins and *W. F. Pace* for appellant.

Permitting the defendant to announce "ready for trial by attorney in the absence of defendant;" swearing the witnesses and putting them under the rule, and putting the names of the jurors in the box to be drawn in the absence of the defendant, were, each, *substantive steps* taken during the trial when he was not present, and reversible errors. *19 Ark., 209; 24 Ark., 635 and 627; Gantt's Dig., sec. 1887; 43 N. Y., 3.*

D. W. Jones, Attorney General, for the State.

By appearing in person and announcing himself ready for trial, without objections to the proceedings had in his absence, appellant waived all objections to those proceedings. (*42 Ark., 94.*) None of the steps taken was a substantial one coming within the rule.

1. CRIMINAL PRACTICE: Presence of defendant.

COCKRILL, C. J. After indictment found for a felony, the defendant must be present whenever any substantive step is taken by the court in his case. This is general doctrine, and is the construction given by this court to the statute requiring the presence of the defendant "during the trial" on indictment for felony. *Mansf. Rev. Stat., sec. 2213; Sweeden v. State, 19 Ark., 205; Osborn v. State, 24 Ib., 629; Brown v. State, Ib., 620.*

Under this rule it is not necessary that the accused shall show that he was actually prejudiced by the proceeding had in his absence. It is sufficient to annul the verdict against him if it appears that he may have lost an advantage or been prejudiced by reason of a step taken in his absence. The reason of the rule is to secure to the accused full facilities for defense. However, while he cannot be deprived of his right to be present at all stages of his trial, it does not follow that he must be.

The statute provides that certain proceedings may be had in the absence of a defendant who absconds, or is on bail and absents himself. (*Mansf. Rev. St., sec. 2213*) Where, also, no prejudice could by any possibility result from the action of the court, there is no reason for requiring the presence of the defendant.

2. SAME: Drawing jury.

In the case at bar, counsel in defendant's absence announced his case ready for trial, and the clerk, by direction of the court, placed in a box which the law requires him to keep for that purpose, slips of paper containing the names of the regular panel of jurors. This was done preparatory to drawing a jury to try the case. There is no time prescribed for putting the names of the jurors in the jury box. (*Mansf. Revised Stat., 2221.*) The presumption is that they are kept there subject to be drawn out whenever occasion requires, and it is immaterial when they are put in the box. When the appellant's case was called the State was ready for trial, and it had been so announced in his presence. After a short interval, when he had conferred with his counsel, he was asked by the court if he was ready to proceed to draw a jury to try his case. He answered that he was. This was a declaration that he was ready for trial as unequivocal as his counsel had made in his absence, and it was in apt time. He had then the same opportunity to except to the panel, examine the names placed in the box, or do any other act that he might have done at any time in relation thereto.

We are not so sure, however, that the rights of the prisoner might not be affected by swearing the witnesses and placing them under the rule in his absence, as was done in this case. We may readily conceive advantages to be derived by his personal presence at such time. He is interested in seeing that the witnesses are all actually sworn, that the proper oath is administered, and that all

of his own witnesses are included in the rule. He would be apprised, too, of what witnesses the State would call against him, and thus be better enabled to prepare for his defense. In the light of the decisions of this court we are not prepared to say that a substantive step in the case was not thus taken in his absence. Every reasonable presumption should be indulged *in favorem vitae.*

The only other point pressed, here, is the sufficiency of the evidence to sustain the verdict. The bill of exceptions is inartificially and awkwardly made up, and we are fortunately relieved from the necessity of considering this point.

For the error pointed out, let the judgment be reversed and the case remanded for a new trial.

MOORE v. GORDON.

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1. PARTITION: *None for land adversely held.*

A party claiming the legal title to an undivided interest in land cannot maintain proceedings for partition with his co-tenant while his interest is held adversely by others. He must first establish his title at law.

2. SPECIFIC PERFORMANCE: *Parol contract: Part performance.*

Possession of land by the purchaser, to constitute part performance of a parol contract of sale, must be taken under the contract and with a view to it and in pursuance to its provisions.

3. SAME: *Proof of the contract.*

Specific performance of a parol contract for the sale of land will not be decreed unless it be clearly proven, its terms definitely shown by a decided preponderance of evidence satisfactory to the Chancellor, not only as to the fact that a contract was made, but also as to its precise terms.

4. SAME: *Part performance: Making improvements.*

The making of improvements on land by the purchaser as owner under a parol contract of purchase is an independent ground for specific performance of the contract, unless the improvements be of a transient nature, or of so little value as to be paid for by the temporary enjoyment of the land.

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

Stephenson & Trieber for appellant.

Before a court of equity will decree a specific performance of a parol contract for the sale of land the contract must be *clearly and conclusively* proven; must have been partially performed, and the acts of part performance must be referable to and done under and in consequence of it. *39 Ark., 429; 4 Wall., 513; 21 Ark., 279; 13 Penn. St., 16; 1 Johns. Chy., 131; 3 Ves., 381; 1 Bailey Eq., 118; Freem. Ch., 290; 5 Md., 184; 5 Rich. Eq., 170; 3 S. & R., 543; 14 Pa. St., 260; 53 Am. Dec., 538 and note.*

Appellee was *in possession* when this contract is alleged to have been made. *Supra.*

As to the improvements made, if appellee has gained more by the possession and use of the premises than the improvements amount to, they are no ground for specific performance. *Browne on Stat. Fraud, 5490, and cases cited.*

Tappan & Hornor for appellee.

The preponderance of the evidence decidedly shows that the trade was made, that appellee paid the consideration as agreed upon, took possession and made valuable improvements under claim of ownership. This entitled him to specific performance. *16 Ark., 367; 21 Ib., 116; Ib., 137; 15 John., 15; 2 Caine's Cases, 87; 5 Wend., 638; 2 Story Eq., 763.*

EAKIN, J. Moore, claiming an undivided interest in two lots in the town of Helena, on the eighteenth of April, 1883, filed a petition in the Circuit Court against Laura M. Leach, the undisputed owner of the remaining interest, seeking a partition. He alleges that said Laura and one Emmet Baldwin were tenants in common of the property; and that on the fifteenth of May, 1876, said Baldwin conveyed his interest to petitioner, who has been since, and is now, the lawful owner of that interest. The lots are described in the petition as being numbered 511 and 512 in "Old Helena." The deed from Baldwin to Moore, exhibited, contains other property and lands, together with lot 511, but does not include lot 512, either expressly or by any recognizable description. This may be a clerical error, as the parties throughout treat the deed of Baldwin as conveying to Moore the undivided half of both lots. No point being made as to this we will so regard it.

Mrs. Leach, in her answer, admitted the former joint ownership of herself and Emmet Baldwin, who was her brother, and that Baldwin had conveyed his interest to Moore as alleged. But she denied that Moore was then the owner of that interest, saying that it belonged to Robert Gordon, who was in possession, claiming to be the owner.

Petitioner demurred, generally, to the answer. The court overruled the demurrer; and because it appeared that Gordon claimed an interest, ordered that he be made a party. Whereupon, he appeared by attorney and filed an answer and cross-complaint, and the cause was transferred to the equity docket. The answer admits the sale from Baldwin to Moore, but sets forth that, at the time defendant, Gordon, was in the quiet, adverse and peaceable possession of the lots, and had so continued for more than seven years before the commencement of the suit.

The equitable counter-claim set up is, in substance, that about the year 1879 defendant, Gordon, being in possession of the lots, agreed with Moore to sell him a tract of land in Giles County, Tennessee, which was bound to one Jarman for a debt of ——— dollars, in consideration of which Moore agreed to convey him the interest in the Helena lots, and to pay off Gordon's debt to Jarman. Gordon, on his part, agreeing further to repay to Moore the taxes which had been paid by Moore on said lots for the years 1876, 1877 and 1878. The terms of the trade were fully agreed on both sides, and deeds were to be exchanged. Defendant alleges that he remained in possession and paid to Moore the back taxes as agreed, and offered to execute to him a deed for the Tennessee lands, but was told by him that he preferred to obtain his title through the trust deed in favor of Jarman. To this defendant acceded, being desirous that Moore should have such title as would be most satisfactory to himself. Thereupon the lands were sold under the trust deed and bought in by Moore, who received a deed and thus perfected his title. Having fully performed his part, defendant alleges that he requested of Moore a deed for the Helena lots, which was prepared by Moore and retained for proper execution by himself and wife; but that he put the defendant off from time to time with one excuse or another and never did deliver it, never denying, however, that he had sold the lots to Gordon, or that they had been paid for. At that time the parties were copartners, as merchants, at Helena, and defendant says there was between them such mutual confidence that he did not deal with Moore with that strictness and rigidity he would have used with a stranger. He denies that complainant has any further interest in the lots, and prays that his own title be decreed, and that the partition be denied.

All the material allegations with regard to this counterclaim were denied. The cause was heard upon the pleadings and depositions, and the Chancellor found: That Gordon, in December, 1879, purchased of Moore an undivided half in the lots and went into possession under said purchase; paid in exchange certain lands in Giles County, Tennessee, which complainant took, charged with a certain debt due Jarman, and repaid to Moore the taxes upon the lots for 1876, 1877 and 1878. Further, that complainant, Moore, was in the possession and enjoyment, as owner, of the Tennessee property. Whereupon, the court held the defendant, Gordon, to be in equity entitled to a specific performance of the contract of sale, and decreed his right as against Moore to an undivided half of the lots, with all his costs. From this decree the complainant in the original petition appealed. The hearing had been upon cross-bill and answer, and no decision was made upon the original petition for partition.

1. PARTITION: None for land held adversely.

The answer of Mrs. Leach was a complete defense to the suit for partition. It represented that the interest claimed by Moore was also claimed by Gordon, who was in possession, holding as owner, and adversely. The title under which Moore claimed was cognizable at law, and he could not maintain a suit for partition until he had established it at law. The proceeding for petition cannot be made a substitute for ejectment to recover an interest in land held partially by others.

By consent of all parties, however, or at least without objection, the court allowed Gordon to appear for his own interest, who set up claim to an equitable title, not cognizable at law. The court having thus obtained jurisdiction of the subject matter, might properly retain it for all purposes; and, if it had found the equitable claim of Gordon to be invalid, might have retained the cause for par-

tition also. After the appeal was prayed, we suppose the complaint for partition was retained to be in the case if the decree should be reversed and remanded. No superior court should presume that its action may be reversed, and upon that account leave a decree in an unfinished state, for there may be no appeal perfected, or it may be dismissed. It followed, upon holding that Moore had no right in the land, that the decree should have closed the whole matter and dismissed the petition for partition. A reversal here would open all.

2. SPECIFIC PERFORMANCE: Part performance.

Passing these points of practice, which are noticed for the preservation of good form, we find that this appeal questions principally the finding of the court as to the facts. In one respect we think the view taken by the Chancellor was erroneous. Gordon did not take possession of the lots, in any true sense, by virtue of or in pursuance of the contract of purchase. He had married the daughter of Mrs. Leach, and had been living upon the lots with her for some time before the parol purchase, and was then as fully in possession as he ever became. His possession, under the circumstances, could form no element of itself in his equity for a specific performance. Possession to have that effect must have been taken *under the contract* and with a view to it, and in pursuance of its provisions.

But a right to specific performance may arise from other facts besides possession, under the doctrine of part performance of a parol contract. The doctrine is general in its application, and was devised to prevent the perpetration of fraud under cover of the statute of frauds. It is based upon this principle, says Mr. Bispham, "that where a contract is so far performed that the parties could not be restored to their original position if the contract be rescinded, it would be highly unjust to allow any technical objection to the fulfillment of the contract to be interposed."

We must look, then, to see if there be anything else connected with this continued possession which will bring this case within the principles established for relief.

3. SAME: Proof of the contract.

First, as to the contract of sale itself, the rule is that it must be clearly proven. Its terms must be definitely shown. We do not conceive that the matter must be proved beyond reasonable doubt in the criminal sense, but fairly made out, by decided preponderance, in a manner to be satisfactory to the Chancellor, not only as to the fact that a contract was made, but also as to the precise terms. In this case it is shown by the testimony of the counter-claimant, Gordon, corroborated in many points by several unimpeached witnesses, that there was a contract to sell the lots to Gordon, and the consideration and the terms are definitely shown. That is to say, Gordon agreed to convey to Moore a tract of land in Giles County, Tennessee, burdened with a debt to Jarman, of a little over $1,000, and also to repay Moore the taxes on the lots, which he had discharged for the years 1876, 1877 and 1878. Moore, on his part, agreed to convey the lots in question to Gordon, or his half interest in them. If the contract can be considered as proved at all, the terms are very definite. There is no obscurity there. We think the evidence preponderates to show that there was such a contract made in good faith in 1879. It is not uncontradicted. The complainant denies it. But he may mingle his recollections of his original views with his subsequent determinations, and may honestly have forgotten after several years what precisely had been determined. The other witnesses, with attendant and subsequent circumstances, make it most probable the contract was made, and we think, upon this point, the Chancellor did not err.

4. SAME: Making improvements.

Then as to the facts constituting part performance, they show that the counter-claimant, on his part, acted in pursuance of the contract, and endeavored to carry it out. Did all in his power. According to his testimony he offered to make a deed to the Giles County land, and did reimburse Moore the amount of the three years' taxes. He says, and the facts render it probable, that Moore preferred to obtain title by causing the execution of the deed of trust and purchasing under the sale. Gordon assented to that mode, and allowed it to be done. He owned the equity of redemption, and, in effect, ceded that by his acquiescence. The object being simply to allow Moore to get title after the fashion he preferred. We cannot say that Gordon could not have made an arrangement with Jarman and saved his equity. Gordon did more. He remained in possession of the lots claiming them as his own, which indeed would not be sufficient in itself, but he made valuable improvements. This is an independent ground for specific performance of a parol contract regarding land, unless the improvements be of a transient nature, or of so little value as to be considered as compensated by the temporary enjoyment of the land. There is nothing to indicate that they were of this nature. They were permanent and valuable and the benefit of Gordon's occupation very uncertain. Whether he was on as the head of the family, or as the guest or the boarder of his mother-in-law, is not quite certain, although there is some evidence that he furnished the supplies in whole or in part. But that is of no consequence. The improvements made were of more value than any proved benefit, and they were made under claim of ownership. Of these facts the evidence tends to show that Moore was aware. At least there is every fair presumption from his residing in the same place, and his connections with Gordon and his family that he did know them.

The doctrine expressed in the case of *Mims v. Lockett, 33 Ga., 9*, is quoted with approval by an eminent modern writer on equity jurisprudence. (*Pomeroy on Contracts, sec. 129, n. 5.*) It is this, that "possession and the making of improvements by the vendee are a sufficient part performance of a verbal contract of sale, without regard to the amount of benefits received by the vendee from the use of the lands, in comparison with the sum expended by him for improvements."

The same writer cites numerous cases (*Ib., sec. 126*) to sustain the general proposition that " the making of valuable improvements on the land by the vendee or lessee, in pursuance of the agreement, and with the knowledge of the other party, is always considered to be the strongest and most unequivocal act of part performance by which a verbal contract to sell and convey, or to lease is taken out of the statute."

It is to be observed that where possession alone is relied on, then the principle applies that the possession must have been taken under and in pursuance of the contract.

The equity which arises from improvements made under the claim of ownership is independent of that which arises from merely taking possession under and by virtue of the contract. Thus in *Guynn et al. v. McCauley et al., 32 Ark., 116*, possession was taken in pursuance of a verbal gift, which of itself being purely voluntary, would not have raised an equity for specific performance. It was held that the making of valuable improvements did.

In the recent English case of *Williams v. Evans, L. R. Eq., 19, p. 547, 13 Moak Eng. Rep., p. 490*, a tenant already in possession made a verbal contract with his landlord for a thirty-year lease, and made improvements on the faith of it, or had them made by a sub-lessee. It was held that he was entitled to specific performance, by virtue of the

improvements, although in that case he was in possession when the contract was made.

The improvements made by Gordon in this case could have been made in no other conceivable view than to improve the property which he claimed as his own by the verbal contract, and the proof shows that he claimed to be owner at the time. We think upon principle and authority, if the facts found be true in other respects save that of his having taken possession under and by virtue of the contract, which he certainly did not, he was nevertheless entitled to specific performance.

Besides, leaving the improvements out of the question there would be strong reason to sustain his equity, on the ground that the parties could not be put *in statu quo*, if Moore were allowed to repudiate the verbal contract. If the facts as found by the Chancellor be true, and we think they are sustained, then it would be a fraud in Moore to decline, under the peculiar circumstances, to carry out the contract.

Ordinarily the payment of the purchase money, or other consideration by the vendee, will not be such part performance as will raise an equity to have the contract perfected. Money or property of no peculiar value may be recovered or compensated. Mr. Bishpam thus qualifies the rule:

"But mere payment of the purchase money is not enough, *unless, indeed*, owing to peculiar circumstances, the purchaser cannot be restored to his original position by repayment." It would be attended with difficulty and embarrassment to do that in this case. The money paid by Gordon for taxes might indeed be refunded with interest. His improvements might perhaps be assessed and compensated, but how is he to be restored again to his title to the Giles County land, free to sell them subject to the incumbrance, or to pay it off and keep them? The

title by his agreement has been passed under the machinery afforded by the deed of trust, and the incumbering debt has been extinguished. The court of Phillips County cannot make any direct order divesting title to Tennessee lands, and it would be embarrassing to determine what kind of conveyance it should compel Moore to make, in order to restore the old status. True, some *cy pres* scheme might be devised, and we make no decision on this point. But any scheme would be in some respect inadequate, and the consideration of the matter strengthens the equity of Gordon for specific performance. Under the preponderance of evidence as to the facts, the relief afforded by the Chancellor is the most obvious, immediate, just and satisfactory.

Let the decree upon the counter-claim, answer and depositions be affirmed, and the original petition be dismissed. There is no object in retaining it.

COHN & WEIS v. HAMLET ET AL.

APPEAL: *Final order.*

An order of the Circuit Court sustaining a demurrer to a complaint in replevin and dismissing the complaint and directing a writ of inquiry to assess the defendant's damages, is not a final order from which an appeal can be taken to the Supreme Court.

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

J. G. B. Simms and *Dodge & Johnson* for appellants.

The judgment was a final one, and subject to appeal. *5 Ark., 399; 38 Ark., 394.*

SMITH, J. The appellants, after default in the payment of a mortgage debt due by the appellees, brought replevin for the mortgaged chattels. A demurrer to the complaint was sustained for failure to allege a previous demand for possession, or a conversion of the property, and leave to amend was refused. The record entry then recites that the court ordered the complaint to be dismissed and that a writ of inquiry issue, returnable to the next term to assess the defendants' damages. And from this order an appeal is prosecuted.

This is not such a final judgment as that an appeal will lie from it. Under the writ the property in controversy had been taken from the defendants and delivered to the plaintiffs. And the order appealed from does not direct restitution, nor ascertain the value of the property, nor make any disposition of it which can be enforced by execution. It does not even give judgment for costs. It does not purport to discharge the parties from the action, or to conclude their rights in respect to the subject matter in litigation. *Baily v. Ralph, 4 Ark., 591; Campbell v. Sneed, 5 Ib., 398; Hornor v. State, 27 Ib., 113; Benton County v. Rutherford, 30 Ib., 665; Fitzpatrick v. Phillips, 41 Ib., 85; The Palmyra, 10 Wheaton, 502; Perkins v. Fourniquet, 6 How., 206; Beebe v. Russell, 19 Ib., 283.*

McCreery v. Taylor, 38 Ark., 393, is distinguishable. In that case there had been a final judgment for a definite sum against the defendant in the principal cause and only certain proceedings against garnishees remained to be disposed of. The process of attachment was regarded as anxiliary and incidental to the main action and the pendency of such collateral proceedings as not suspending the right of appeal.

The judgment here being interlocutory only, the appeal is dismissed for want of jurisdiction.

REED ET AL. v. MCILROY.

ATTACHMENT: *Property of principal for debt of agent.*

Property purchased by an agent in his own name for an undisclosed principal, cannot be seized for the debt of the agent unless his creditor has been misled by appearances or the conduct of the parties into giving him credit upon a false basis.

APPEAL from *Washington* Circuit Court.
Hon. J. F. WILSON, Special Judge.

B. R. Davidson for appellant.

The contract as entered into amounted simply to an unwritten mortgage, which *could not* be acknowledged or recorded, and created no lien. (*Gantt's Dig., sec. 4288.*) Had it been in writing and recorded it would have been void. (*41 Ark., 186; 39 Ib., 325.*) Any arrangement made to secure money is a mortgage. (*5 Ark., 321, 335–6; 27 Ib., 500.*) Where one is allowed to hold himself out as the ostensible owner of property, and thereby gain a delusive credit, the property is subject to his debts. (*1 Gillman, Ill., 188, 217–18.*) Appellants knew nothing of the secret arrangement, and so long as the property was in Nolen's control they were subject to his debts. *Waples on Attach., 153.*

L. Gregg for appellee.

There is no proof that appellants knew anything of the agreement between Nolen and McIlroy, or that they advanced money or that Nolen obtained credit by reason of his ostensible ownership. McIlroy was the *owner* of the property, Nolen only receiving a commission on profitable sales for his services. See *40 Ark., 216.*

COCKRILL, C. J. Reed & Ferguson sued one Nolen in the Washington Circuit Court, and attached fifty odd head of hogs as his property. McIlroy interpleaded for the hogs, and, a jury being waived, the court found in his favor and gave judgment for him.

There was virtually no conflict in the testimony, and when summed up it amounts to this: Nolen was a live-stock buyer. He was insolvent and indebted to McIlroy, a banker at Fayetteville. They entered into an agreement to buy and sell stock, by which McIlroy hoped to enable Nolen to reduce his indebtedness to him. The arrangement was, that Nolen should attend to all the details of the business; he was to purchase stock, ship by rail to St. Louis, Mo., to a commission merchant selected by the parties, who was instructed, upon making sales, to place the proceeds to McIlroy's credit. McIlroy, in the meantime, was to furnish money to make the purchases, and it was distinctly understood that all stock purchased under the agreement should be his property. After a return of sales from St. Louis, Nolen was to receive a part of the profits as compensation for his services. If no profit was realized Nolen was to take nothing. If there was a loss it was to be deducted from his share of the next profits realized. In pursuance of this agreement the business was carried on for about a year before the attachment, and all the while in Nolen's name. McIlroy was not known in it—at least to the public. Nolen usually drew checks in his own favor on McIlroy's bank to pay for the stock he bought. This stock account was kept separate from his individual account in McIlroy's books, and the proceeds of sales in St. Louis, where all the sales appear to have been made, were placed to McIlroy's credit. The parties seem to have conformed to the terms of their agreement in their transactions.

The hogs in question were bought under it in the usual way.

Reed & Ferguson presented the case in the Circuit Court solely on the theory that Nolen was held out to the world as the owner of the property purchased by him, and that the agreement between him and McIlroy to the effect that it should belong to the latter was inoperative because it was secret. This is the tenor of all their prayers for declarations of law. They did not prove, however, that they were ignorant of the real state of affairs, or that they had been induced to contract with Nolen on a false basis of credit. In a proper case a creditor may subject what is only apparently the property of an agent to the payment of his debt. The plaintiff did not present such a case. There was no proof that they had been misled in any way by appearances or by the conduct of the parties. In the absence of such showing, no one is injured by the failure of an agent to disclose his principal.

We do not think the evidence sustains the appellants' present contention, that the money advanced by McIlroy was a loan to Nolen, and that the title to the property purchased vested in him. The evidence fairly points to Nolen as agent merely, receiving a share of the profits, when realized, as remuneration for his services. (See *Alexander v. Tomlinson, 40 Ark., 216.*) This is the view taken of it by the court below, and the judgment is affirmed.

GORDON v. MOORE.

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1. ACCORD AND SATISFACTION: *Payment of part.*

An agreement by a creditor to accept a smaller sum in satisfaction of a debt, carried into execution by receipt of the money and execution of a formal and positive instrument of release, with all other acts essential to an absolute relinquishment of his right, is a valid and irrevocable act.

2. SAME: *Part payment by third party.*

An agreement by a creditor to accept from a third person, in behalf of the debtor, money or a security for a smaller sum in satisfaction of the whole, is valid and binding and will discharge the debt.

3. SURETIES: *Release of part: Effect on others.*

A release of a surety is no release of the principal; but a release of one of two sureties is a release of the other from one-half of the debt.

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

Tappan & Hornor for appellant.

The note being a joint one, whatever in law satisfied it as to one of the parties satisfied it as to all. The liability of the makers was not changed by judgment; a satisfaction of the judgment as to one released the others. A release of one of several obligors is a release of all. (*4 Ark., 510; 6 Eng., 513; 16 Ark., 351; 1 Hill, 185; 3 Den., 238; 17 Mass., 580; Story on Prom. Notes, sec. 425; 1 Parsons on Notes and Bills, 249; 23 Pick., 434.*) Though the release had no seal, it was based upon a consideration, which was paid. (*2 Dan. Neg. Inst., sec. 1290.*) In this State seals are abolished. The release was an executed agreement; all was done that was necessary, and it discharged all. *4 Col., 543; 3 Cold. (Tenn.), 395; 33 Pa. St., 268; 30 Ala.,*

444; 7 Ind., 597; 4 Gilman (Ill.), 536; 11 B. Mon., 74; 51 Barb., 570.

Stephenson & Trieber for appellee.

The release of a judgment debtor, upon payment to him in money of part of the judgment debt, does not operate as a satisfaction of the whole judgment. A promise by a creditor to receive a part of his debt in full satisfaction of the whole is *nudum pactum* and void. (*Pinnell's Case, 5 Coke, 117.*) This is the rule in England and America, except in Pennsylvania. The cases in *2 Ark., 209; 33 Ib., 572; 40 Ib., 180*, are exceptions, as where the debt is not due or unliquidated, etc., but where the debt is ascertained by judgment, an agreement to accept less in full satisfaction is void for want of consideration. (*27 Cal., 611; 1 Smith Lead. Cas., 147; 17 Cent. Law J., 302.*) But Gordon and Childress were *co-sureties*, and the release expressly provides for Childress' release only, and appellant is not released thereby. *Brandt on Sur. and Guar., sec. 383.*

EAKIN, J. On the twenty-fourth day of May, 1883, Moore recovered, by default, a judgment against Gordon for $2,293.20, being for the balance, with interest, due upon a certain promissory note executed to Moore by Robinson, Childress and Gordon on the twelfth day of January, 1881, and due at twelve months.

On the seventh of April following, Gordon filed this petition in the Circuit Court under section 4692 of Gantt's Digest, setting forth, as amended, that Moore had sued Robinson and Childress upon the same note in the District Court for the Northern District of Mississippi at Oxford, and at the December term thereof, in 1882, had recovered a judgment against them for the same balance, which appears then to have been $2,202.90. He alleges that, in

March, 1883, this judgment was discharged and satisfied upon the payment by Childress to Moore of the sum of $450, which operated as a discharge of the claim as to petitioner also; that, in consideration of said payment, Moore had executed to Childress a release, as follows:

"STATE OF ARKANSAS, }
County of Phillips. }

"Know all men by these presents, that I, John P. Moore, of the county and State aforesaid, in consideration of the sum of four hundred and fifty dollars paid to me by D. C. Childress of Coahoma County, Mississippi, I have this day released said Childress from any and all liability to me upon a certain judgment rendered in my favor against said Childress, by the United States Court for the Northern District of Mississippi, at Oxford, in said State, at the December term thereof, 1882, and hereby authorize the clerk of said court to enter satisfaction as to said Childress upon said judgment, in accordance herewith.

"Witness my hand and seal this nineteenth of March, 1883.

"JOHN P. MOORE."

This instrument was filed with the clerk of the said District Court, who made the following indorsement upon the margin of the recorded judgment:

"This judgment is satisfied as to D. L. Childress, and is here so entered by authority of plaintiff on file, March 23, 1883.

"G. R. HILL, Clerk."

The petitioner states that Moore well knew all these facts when the judgment by default was obtained, but that they had not come to his own knowledge until after the adjournment of the term. He therefore prayed that the judgment rendered against him in the Phillips Circuit

Court be vacated, and that he be allowed a new trial, with other appropriate relief.

Moore, in response, admitted the recovery of the Mississippi judgment against Robinson and Childress, and the payment to him by Childress of the sum of $450, which should have been entered as a credit upon the balance, but which had been inadvertently omitted. He consents that the judgment in the Phillips court against petitioner may be to that extent modified. For the rest he says that Robinson was the principal in the note, and that Childress and Gordon were only his sureties, and denies that the release executed to Childress was intended, or did operate to discharge his *claim* against the principal, Robinson, or the other surety, Gordon. He says that petitioner was insolvent, and that he sued the principal with Childress in Mississippi, hoping to make his money there, but soon learned that Childress was insolvent also. The most that could be got out of him was the sum of $450, and that only by an agreement to release him from the judgment. He submits that petitioner was not released by the transaction.

Upon hearing by the court, the suretyship of Childress and Gordon was shown. Childress testified, in explanation of the release, that he then owned a half interest in the Brown and Childress place in Mississippi, which he desired to mortgage for a loan of money, and was obliged, in order to get a perfect abstract of title, either to pay off the judgment debt of Moore, or to have it released as to himself. He never saw Moore about the matter, but transacted the business through others. A Mr. Carter made the trade with Moore, and a Mr. Brown paid Moore the money, and witness settled with Brown for it afterwards.

The Honorable Circuit Judge, confessing some doubt, expressed the opinion that, notwithstanding some slight

differences, the facts of this case come within the principles announced by this court in the cases of *Cavaness v. Ross, 33 Ark.*, and that of *Coblentz, 40 Ark., p. 180;* and upon the authority of those cases he held that the agreement for a release, and the release itself, was *nudum pactum*, not operating as a release of the whole judgment nor as a release of Gordon.

A judgment was thereupon rendered modifying the former judgment by allowing a credit of $450, the amount paid by Childress. The motion for a new trial was overruled. A bill of exceptions was properly taken, and Gordon appeals.

The general principle announced in *Cavaness v. Ross* is well settled, being this, that the payment of a less sum of money will not be good in satisfaction of a larger sum actually liquidated and clearly due and payable, unless there be in the transaction some other element of consideration of real or supposed benefit to the creditor or detriment to the debtor. The question arose upon a compromise, made *pendente lite*, by which the plaintiff accepted a less sum and dismissed the suit. Held, no discharge as to the balance.

The case of *Coblentz v. Wheeler & Wilson Man. Co., 40 Ark., 180,* comes somewhat nearer this. It was a case of injunction by Coblentz to restrain the sewing machine company from enforcing a judgment which it had obtained against him, upon the grounds that he had agreed with the agent of the company to pay, upon a certain day, a sum less than the amount of the judgment, and had attended at the end of the time appointed prepared to make the payment, but that the agent had not attended to receive it, and had afterwards caused an execution to be issued. The court held that the agreement was an accord unexecuted, without consideration, invalid, and not en-

forceable in equity. The decree below, dismissing the suit, was affirmed.

In the Cavaness case nothing was done but the payment of the money by the debtor. No release was given. The original notes were retained and afterwards assigned, as valid, to one ignorant of the compromise. The dismissal of the suit does not imply abandonment of the claim.

In the Coblentz case there was only a parol agreement for a future release of a judgment never carried into execution. No money was ever paid.

This cause is distinctive from either. There was not only payment of the sum agreed, and the actual execution of a release, but there was a power of attorney given the clerk to enter upon the margin of the record a full satisfaction of the judgment as to Childress. The authority was filed amongst the archives of the office, and the power was executed as directed. There was nothing further to be given up. Everything had been done, of the most solemn and positive nature between the parties and by the clerk, to carry out the intention and to give notice to the world of what had been done. There was an object which made it necessary that nothing should be left executory. That was, that the land of Childress might be no longer incumbered by the lien of the judgment, but left free for a contemplated mortgage. There is no reason why such a transaction should not be considered as valid and as irrevocable as a gift executed by delivery.

Certainly there must be some mode by which one may dispose of that which is his own, as his generosity or his sound views of his best interests may prompt. It is often very desirable that he should have that privilege. It is done in business every day. Collections cannot always be made promptly by law. The best men are prone to amicable adjustments, and the exigencies of business often require

it. It would be hard and unreasonable if a creditor, pressed for money, might not say to an embarrassed or reluctant debtor, "pay me a part and I will release the balance." He is cut off from doing that, in many cases, by the rule as it now stands, but the rule is a hard one, based upon purely technical reasoning. It is hedged in with numerous exceptions.

Further, there is in this case a positive element of benefit to the creditor, which may form a good consideration. The money was not paid to Moore by Childress, but was paid by Brown, a third person and friend of Childress. There are numerous cases holding that the rule in discussion does not apply where a negotiable note or security of a third person is taken for a less amount. The exception applies *a fortiori* to the payment of the money in cash by the third person, since it is better for the creditor than any note or security. The consideration is that the creditor gets, or is assured of getting what, perhaps, the debtor might never pay. And it cannot alter the nature of the case that the debtor repaid the advance.

1. ACCORD AND SATISFACTION. Payment of part of debt.

We conclude, therefore, that an agreement by a creditor to accept a smaller sum in satisfaction of a debt, carried into execution by receipt of the money, and the execution of a formal and positive instrument of release, with all other acts essential to an absolute relinquishment of his right, is a valid and irrevocable act.

2. SAME: Part payment by third party

And also, that an agreement to accept from a third person, in behalf of the debtor, money or a security for a smaller sum in satisfaction of the whole is valid and binding, and will discharge the debt.

We think, for these reasons, that his honor the circuit judge erred in holding the agreement in this case to be *nudum pactum*.

The release to Chilldress being valid, it remains for us to consider its effect as to other parties.

3. SURETIES: Release of part, effect on others.

It was intended, as shown by its terms and by the circumstances, to release Childress alone, from the joint judgment recovered against him and Robinson. This is as clear as if all the rights of Moore, on the judgment, against the principal had been expressly reserved. Was it competent in Moore to do that? Or did the release, however intended, have the effect of satisfying the judgment against Robinson also?

In the former case, confining its immediate operation to Childress alone, it took away from Gordon his right to contribution against Childress, and must inure to release Gordon to the extent of his right to contribution, but no further. It must give him at once what he might get by contribution if he had paid the debt, and Childress had not been released. In the latter case, that is, if the effect were to release Robinson also, it would deprive Gordon of his right against Robinson to entire exoneration, and would release him wholly. This would ensue, not from the direct legal effect of the release of the Mississippi judgment by which Gordon was not bound, but from the equitable principles which regulate the dealings and adjust the rights of creditors, principals and sureties.

It is pressed by appellant that the release of one joint debtor releases all. That is the common law rule as to debts which were *technically* joint, as well as to those which were joint and several.

The evidence in this case discloses, however, that Robinson was the principal, and that Childress and Gordon were sureties. It did not alter the relations of the parties, that a joint judgment had been rendered against the principal and one of the sureties. As to Moore all were principals from the beginning, inasmuch as he had the right to

collect the debt of all or either. He was only required to take cognizance of their relation to the extent of avoiding any act which would prejudice the rights of the sureties to obtain exoneration from the principal, or contribution amongst themselves.

Release of surety no discharge of principal.

But the surety is under no obligation to the principal, and the discharge or release of the surety does not affect the principal in any manner. It is simply doing for the principal what he ought to do himself. (*Brandt on Sur. & Guar., sec. 129.*) Robinson was not discharged by the release of Childress, and remains liable to exonerate Gordon.

It remains to consider the effect of the release of Childress upon the rights of his co-surety Gordon.

Sureties *inter sese* are joint obligors; all secondarily liable together. Their mutual rights and obligations were first determined in the courts of chancery and enforceable there alone. It is still the more appropriate forum, from its more flexible means of adjustment; but courts of law have long assumed a concurrent cognizance of these rights and will enforce them as defenses. The practice is well settled in England (*W. & T. Lead. Cas. in Eq., vol. 11., p. 1894*), and has obtained in this State for forty years or more. *State Bank v. Watkins, 6 Ark., 127; Wilson v. Tebbetts, 29 Ark., on p. 587.*

The right of a surety compelled to pay a debt as against his co-surety is not exoneration of the burden. It is his as much as his fellow's. It is the right of contribution, the right to recover from his co-surety just so much as will make both equal in the loss. It is obvious that by the discharge of one surety the others are injured (or would be) just to the extent of their right of contribution. The equitable rule adopted in such cases is not uniform in England and all the States.

In England it is settled *at law*, or seems to be, that a release or discharge of one surety operates as a discharge of the others, but in equity a mere composition with one surety would not. *Ex parte Gifford, 6 Ves., 805.*

It is also held that a release of a surety may be made with a reservation of remedies against the others, made in such a manner as to be construed into a covenant not to sue.

In America it would seem that almost every phase of the question has been adopted by different States, and at different times by courts of the same State. Sometimes it has been held that a discharge of one surety releases all. It was so expressly held in *Tourns v. Riddle, 2 Alabama*, and in *Stockton v. Stockton, 40 Ind., 225.* The first of these is a case where a surety was released by having given notice to the creditor to sue, which he neglected, and the principal became insolvent. It was held that the release of the one giving notice was the release of the other also. Upon that point this court has held directly *per contra.* In another case in Indiana it was held that the release of the property of one surety in a joint judgment against several, had no effect whatever upon the other sureties who might be held liable for the whole debt. *Starry v. Johnson, 32 Ind., 438.*

There are, however, quite a number of cases by Mr. Brandt, which sustain the proposition which he lays down as follows: "If there are several sureties liable for the same debt, and the creditor releases one of them from liability, but does not thereby materially alter the contract, he generally releases the remaining sureties to the extent that such released surety would otherwise have been liable to contribute to his co-sureties." (*Brandt on Sur., etc., sec. 383.*) Upon this principle, in connection with another well settled rule in equity that where some

of the sureties are insolvent the others must contribute to make up the loss, was decided the case of *Dodd v. Winn, 27 Mo., 501.*) There there were five sureties. Judgment was obtained against one, execution levied on property enough to pay the debt, and returned by order of the creditor unsatisfied. Afterwards he sued another of the sureties. It was held that if all were solvent he could only recover four-fifths, inasmuch as the defendant surety ought himself to bear the burden of one-fifth, and had still unimpaired his right against three others for contribution to a like amount. It was held at the same time that if the other sureties were shown to be insolvent, he would be held liable for only half, inasmuch as that would be the extent of his equitable burden, and the creditor must lose the other half as to which the right of contribution had been cut off by his release of the property taken in execution.

Release of one of two sureties.

This mode of adjustment injures no one. Its plain, common sense equity commends itself to every man's sense of right, and is harmonious with the well settled rule, that the release of the principal discharges the surety altogether, because it takes away the right to exoneration. When the relief goes beyond the injury it becomes technical and arbitrary. We think, in this case, it would have been proper to have rendered judgment for only half the unpaid balance of the debt with interest, leaving out of the estimate of that balance the $450 paid by Childress. With that payment Gordon had nothing to do. It was the consideration of the release to Childress, and was paid in behalf of Childress personally.

For error in holding the release of Childress *nudum pactum*, and in rendering judgment against appellant for the whole balance, less the amount paid by Childress, a new trial should have been allowed.

Reverse the judgment and remand the cause with directions for a new trial and further proceedings in accordance with law and this opinion to be had either at law, or, if desirable, on motion, upon the equity side.

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SPRINGFIELD & MEMPHIS RAILWAY COMPANY v. HENRY.

1. RAILROADS: *Right of Way: Elements of damages for.*
The destruction of a land owner's crop by reason of his fences being thrown down by the builders of a railroad, and the cost and annoyance of keeping the stock out of his crop are not proper elements of damages in a proceeding for condemnation of the right of way. They are an independent tort.

2. SAME: *Damages from overflowing lands.*
If by the construction of the road-bed and ditches the surface water is diverted from its usual and ordinary course, and by means of embankments or ditches is conveyed to any particular place, and thereby overflows land which did not overflow before, the company will be liable to the land owner for the injury.

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

Newman Erb and *Caruth & Erb* for appellant.

No compensation can be recovered for damages to a land owner on account of destruction of his crop and throwing down his fence while constructing a railroad, in a proceeding to condemn the right of way. It is a tort, and an independent action must be brought therefor. *Mills on Em. Dom., sec. 220, notes 3, 4 and 5.*

The railroad having let the contract to do the work, is not liable for the negligence of contractors' servants. *25*

Ill., 434; 46 Pa. St., 213; Pierce on R. R., p. 286; 28 Vt., 3; 36 Mo., 202; 16 Wal., 566; 7 Hurl. & N., 826.

The flooding of land by defective construction of the road, *not yet completed*, was not a proper element of damage to be considered in this proceeding. (*8 Dr., 31; Mills Em. Dom., sec. 220; Pierce on R. R., p. 218.*) Nor overflow by reason of surface water accumulating by reason of the construction of the road. But if so, the cost of a drain or ditch sufficient to carry off the surface water accumulated, was the measure of damage.

See also *34 Ia., 455; 28 Pa. St., 203; 33 Ib., 426; 5 A. & E. R. Cas., 384.*

W. F. Henderson for appellee.

The damage to appellee's crop by pulling down his fence and thus allowing stock to enter and destroy it, was properly left to the consideration of the jury. It was incidental to and naturally flowed from the construction of the road, and was a part of his actual *damages*, resulting from the appropriation of the land. *Sec. 22, art. 2, Constitution 1874.*

To divert a running stream in such manner as to flood one's land is an element of damage in a proceeding like this (*Field on Corp., secs. 451, etc.; Mills Em. Dom., sec. 183*), as is also neglect to put in proper culverts to drain the surface water, or to permit it to flow in its natural way. *39 Ark., 463.*

The elements properly entering into the assessment of damages have been settled by this court, *39 Ark., 167; 42 Ib, 528*, and under the circumstances the verdict is not excessive.

SMITH, J. This was a proceeding by the railroad company for the condemnation of a right of way across a farm. 1. RAILROADS:

The land owner answered, setting up his damages by reason of the actual appropriation of a part of the tract and the injury to the remainder. When the case was called for trial, he filed a supplemental answer, setting forth a new and distinct item of damage, to wit:

Right of Way: Elements of damage for.

"That he has been damaged, in addition to the amount claimed in his answer, in the sum of two hundred (200) dollars, on account of the destruction of his crop and throwing down his fence, while constructing said railroad by the agents and contractors of said railroad."

The sufficiency of this supplemental answer was questioned by demurrer, but the demurrer was overruled. At the trial evidence was gone into against objections, to show injury to appellee's crop, outside the location of the road, caused by stock entering through gaps in the fence made by the sub-contractors during construction. And the court gave the following charge upon this subject:

"The jury are instructed that the destruction of the land owner's crop during the construction of the road, by reason of his fences being thrown down by the builders of the road, and the cost and annoyance of keeping the stock out of his crops, are to be considered in assessing his damages, if they believe from the evidence that it was necessary to throw down the fences in the construction of the road."

In *Springfield & Memphis R. Co. v. Rhea, ante, 258*, we gave a somewhat liberal construction to the statute by allowing the land holder to show permanent injury to the land not taken by flooding and rendering it unfit for cultivation by defective construction of the road-bed. But we are not disposed to extend this principle so as to authorize a recovery in this form of action for an independent tort, having no natural or necessary connection with the subject matter of the suit.

Whether a railroad company, having let out the contract to do this work through the defendant's farm, is liable for the negligence of the contractor's servants is a question upon which no opinion is expressed. (See *Clark v. Vt. & C. R. Co., 28 Vt., 103; Clark v. H. & St. J. R. Co., 36 Mo., 202; C., St. P. & F. Du Lac R. Co. v. McBarthy, 20 Ill., 385.*) All we mean to decide is that it is not a proper element of damage in a proceeding for the condemnation of the right of way under the statute.

Damages for overflowing land.

The railroad company likewise contends that the flooding of Henry's land by the faulty construction of the road was not a legitimate subject of inquiry by the jury. The proofs showed that the building of the road had the effect to drain the surface water from the right of way and to throw it upon the defendant's meadow. Also, that the farm, which had before been protected from inundation from a neighboring creek by a slight elevation or ridge running between the creek and the farm, was now exposed to overflow by the cutting away of said ridge by the railroad company. Our Constitution (section 22, article 2) provides that "private property shall not be taken, appropriated or damaged for public use, without just compensation therefor." That proof of such damages is admissible in a proceeding of this kind was decided in Rhea's case, *supra*. So far as the diversion of the water of a running stream from its natural channel is concerned, the authorities are not in conflict. But some courts have taken a distinction between running water and surface water. However, the sound rule appears to be that whoever, by artificial means, changes the natural condition of another man's land, whereby he is damnified, ought to answer to him for the damages. As it was expressed by the Supreme Court of Texas, in *Galveston, etc., R. Co. v. Donahoe, 59 Texas, 128:* "If by construction of the road-bed and ditches the

surface water is diverted from its usual and ordinary course, and by means of embankments or ditches such surface water is conveyed to any particular place, and thereby overflows land which before the construction of the road did not overflow, the company will be liable to the land-owner for such an injury." See also *L. R. & Ft. S. R. Co. v. Chapman, 39 Ark., 463.*

It is also objected that the damages awarded, $1,250, are excessive. The farm containod 240 acres, proved to have been worth $30 per acre before the road was built. The right of way, 100 feet wide, extended through the whole tract for nearly three-fourths of a mile, consuming not less than 7½, nor more than nine acres. Several other acres of tillable land were made marshy and liable to overflow. The tract was divided into parcels of inconvenient size, and the owner had to travel the distance of a quarter of a mile, in passing from one part of the land to the other, in order to get to a crossing. But for the amount, which the jury no doubt estimated, for the destruction of the owner's crops on lands adjacent to the right of way, the verdict is not so unreasonable as to call for interference at our hands. And if the appellee shall, within two weeks, enter a remittitur of $200, the sum claimed by him on this account, and shall also abandon of record all right to proceed on the recognizance, his judgment will be affirmed on the usual terms of paying costs. Otherwise he must submit to another trial.

JOHNSON ET AL. v. RICHARDSON.

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1. RESULTING TRUST: *Proof of.*

To establish a resulting trust by parol, the evidence must be full, clear and convincing.

2. HEALING ACTS: *Power of Legislature to pass.*

Our Constitution does not prohibit retrospective legislation; and in the absence of such prohibition, healing laws may be passed confirming previous conveyances and curing defects which arise out of some technical informality in their execution or acknowledgment.

3. HEALING STATUTES: *Acknowledgments: Dower.*

By the curing acts of March eighth and fourteenth, 1883, the Legislature intended to cure defects in the previous acknowledgments of the relinquishments of dower. It had the power to do so. It was no invasion of vested rights, but was giving to the acts of the relinquishers the effect they intended, but which, from mistake or accident, had not been effected.

4. STATUTES: *Healing, affect pending suits.*

The institution of a suit does not entitle a party to any particular decision. The cause must be determined according to the law in force when it is decided.

APPEAL from *Jefferson* Circuit Court in Chancery.
Hon. F. J. WISE, Special Judge.

W. P. & A. B. Grace for appellants.

1. Richardson was never seized of an estate of inheritance in the land, but merely held the naked legal title in trust; and a widow is not entitled to dower in a trust estate. (*Sugd. on Vend., 8th Am. ed., p. 700; Bisp. Eq, sec. 80; Story Eq. Jur., sec. 1201; Perry on Trusts, secs. 98, 126; 20 Ark., 272; 4 Kent Com., *p. 43–50; 1 Wash. R. P., p. 161–2; 31 Ark., 580.*) Parol testimony is admissible to establish a resulting trust, in contradiction to the terms of a deed, even after the death of the nominal purchaser.

Bisp. Eq., sec. 83; 9 Ark., 527; 42 Ib., 511; 29 Ib., 67; 39 Ib., 313.

2. The mere recitals of fact in a deed may be disputed, though parol testimony cannot be received to contradict or vary its legal effect, yet it "is admissible to explain or even disprove the consideration or mere recitals of fact." *18 Ark., 79; Bisp. Eq., sec. 79.*

3. The joining in the deed by appellee was sufficient without any formal relinquishment of dower (*41 Ark., 101*), and the defective acknowledgment was healed and cured by *acts of March 8 and 14, 1883, pages 101 and 107.*

The bringing of a suit vests in a party no right to a particular decision, and the case must be decided by the law as it stands, not when the suit was brought. (*Cooley Const. L., p. 381.*) Nor does the healing act divest any vested right. (*Cooley C. L., p. 377.*) A party can have no vested right to do wrong, nor do courts regard rights as vested contrary to the justice of the case. (*16 Mass., 245; 3 Dutch., 197.* See, also, *61 Penn. St., 337; 15 Serg. & R., 72; 8 Pet., 88; 2 Ib., 380; 16 Serg. & R., 35; 6 Gill. & J., 461; 30 Cal., 139; 17 Ind., 41; Cooley C. L., 371–2; 1 Kent Com., p. 456; 27 Ark., 26; 28 Con., 97; 1 Watts, 330; 3 Dall., 386.*

The cases in 20 Ark., 508; 42 Ark., 141; Scott v. McKenzie, 43 Ib., are not applicable, because in the first case the act did not pretend to validate defective acknowledgments; in the second the deed had been *invalidated* before passage of the act; and in the third there was *no* acknowledgment.

M. L. Bell for appellant.

There is no dower in a trust estate. (*31 Ark., 580.*) Parol testimony admissible to explain the consideration of

a deed. (*13 Ark., 65; Ib., 34.*) Argues upon and explains the various transactions and testimony, and submits that, by express agreement and contract, Richardson was a trustee for Johnson.

N. T. White for appellee.

Every writing in existence, executed by either of the parties at the time, and especially the deed of release to Richardson, shows that Richardson purchased the lands, paid his own money and held them in his own right and not as trusts. The only safe and reliable way of treating instruments, after the lapse of so long a time, is to let the instrument itself speak, rather than trust to the treacherous memory of man. Man may forget, but writing cannot change. (*13 Ark., 593; 15 Ib., 543; 16 Ib., 519; 20 Ib., 293; 21 Ib., 69.*) By the release from Johnson to Richardson the *entire* title passed, purged of any trust, if any existed, and the dower right of appellee attached. (*1 Scribner on Dower, pp. 113–14; Gantt's Dig., sec. 2210; 31 Ark., 577; 5 Ark., 608; 8 Ib., 9.*) The acknowledgment failing to show privy examination in the absence of the husband, fatally defective. *Gantt's Digest, sec. 849; 39 Ark., 434; 20 Ark., 190; 27 Ib., 339; 33 Ib., 432; 29 Ib., 650.*

The acts of 1883, p. 107 and 129, could not cure it, nor divest the widow's vested right to dower after it attached. On the death of the husband the dower right is *absolute*—a vested right. (*31 Ark., 576; 5 Ib., 608; 18 Ib., 440; 26 Ib., 650; 23 Ib., 263.*) This right the Legislature could not divest. *20 Ark., 508; 41 Md., 633; S. C. 20 Am. R., 76; 12 N. Y., 202; 46 Me., 9; 17 Iowa, 517; 9 Ind., 57; 14 Mich., 191; Cooley Cons. Lim., 3d ed., side p. 361; Const. Ark., art. 2, secs. 21 and 22.*

SMITH, J. This is a suit by Mrs. Richardson for dower in certain lands, and the decree below was in her favor. She is the widow of one Benjamin F. Richardson, who died in 1881. She and the said Benjamin F. were married in September, 1856. In October, 1856, Benjamin F. Richardson, jointly with William E. and Henry C. Ashley, purchased a tract of land containing eight hundred acres, for the sum of twenty thousand dollars, all on credit; and for the purchase money they made their three notes in favor of James H. Scull, the vendor, for $6,666.66 each, with eight per cent. interest, payable on January 1, 1858, 1859 and 1860, and the said Scull executed to them his bond for title. A short time after this purchase the Ashleys and Richardson divided the lands equally between them, and marked the division line with a stone. It was the understanding that the Ashleys were to pay one-half of the purchase money, and Richardson the other half.

In the division of the lands, the Ashleys received, as a part of their half, the lands in controversy in this suit, and they, immediately after the division of the same, entered into the possession of their part, and Richardson entered into possession of his part.

At the close of the war two of the purchase notes had been paid, but one of the notes, with accrued interest, remained unpaid, and suit was brought upon the same in the Jefferson Circuit Court, and a decree of foreclosure rendered against Richardson and the Ashleys, and the lands ordered sold to pay the decree.

This decree was rendered in favor of Mildred Scull, administratrix of James H. Scull, in December, 1868, for $12,211, and M. L. Bell was appointed a commissioner of the court to carry into effect the decree.

It was agreed that the unpaid part of the purchase money for which the decree was rendered was due and

owing by the Ashleys; that Richardson had fully paid his half of the purchase money; but before he could get title to his half it was necessary to pay off the decree, as it was a lien upon his part, as well as on the Ashley part of the land.

In February, 1869, the commissioner advertised the entire eight hundred acres of land for sale under the decree, but afterwards made an agreement with Richardson and Henry C. Ashley that, if they would pay $3,000 on the decree he (Bell) would wait until fall for the balance.

Ashley went to Little Rock to arrange this payment, and on February 10, 1869, the day fixed for the sale, Richardson received a telegram from S. H. Tucker that his (Richardson's) draft for $3,000 would be honored. Richardson declined to give this draft, as the debt was Ashley's, and he feared being made liable if he gave the draft, but after repeated assurances from Bell he was induced to give the same, and it was paid and the sale postponed.

It appears about this time that Henry C. Ashley agreed with the appellant, Samuel H. Johnson, that if he (Johnson) would pay off the balance of the decree and secure to him (Ashley) the 8 72-100 (eight and seventy-two one hundredths) acres on which the gin-house was situated, he could take the balance of the land, and it appears that Richardson consented to this arrangement. It was thought best the lands should be sold under the decree, as there were minor children of Scull who could only make deeds by order of the court.

On the fourth day of October, 1869, Bell, as commissioner, sold the lands at public auction, and the same were purchased by Benjamin F. Richardson, and the commissioner's report and deed were confirmed by the court.

It is claimed on the one side that Johnson paid the purchase money for the lands to the commissioner, while on

the other side it is contended that Richardson paid the same. One thing, however, is certain, that Richardson was forced by operation of law to pay the draft he gave for $3,000, with accrued interest, which was a part of the purchase money.

On the fifth day of December, 1870, Johnson, by deed of release, re-conveyed back to Richardson all right, title or claim to the lands in controversy, which he had obtained by his previous contract with either Ashley or Richardson. And on the eleventh day of October, 1871, Richardson and wife undertook to convey back to appellants the lands in controversy.

The acknowledgment of this last mentioned deed was fatally defective, as far as the relinquishment of dower is concerned, because the certificate of the officer before whom it was taken fails to show the privy examination of the wife.

1. RESULTING TRUST: Proof of.

It was earnestly contended that B. F. Richardson was never seized of an estate of inheritance in the land, and that he held the legal title in trust for Johnson. To establish a resulting trust by parol the evidence must be full, clear and convincing. Here all the writings that were produced tended to repel any presumption of a trust. And even if a trust once existed, the subsequent release by the alleged *cestui que trust* seems to be irreconcilable with the theory of the appellants. That deed recites that Richardson did make a verbal agreement with Johnson to sell and convey to him the lands in controversy for the consideration and price of $8,000, but that Johnson is unable and unwilling to pay the money, and desires to rescind; therefore, in consideration of $1,000 paid to him, he releases Richardson from the performance of any part of said agreement, quit-claims to Richardson whatever right he may have acquired to the land by virtue of said agree-

ment, and acknowledges himself to be Richardson's tenant. It is safer, after the lapse of a long time, to let instruments of writing speak for themselves, and to gather the meaning of the parties to them from their contents, rather than from the uncertain memory of witnesses. We, therefore, incline to think that Mrs. Richardson is entitled to dower, unless the defect in her acknowledgment has been cured by the legislation on this subject that was had in the year 1883.

By the act approved March 8, 1883, for "the better quieting of titles," it was provided:

"Section 6. That all deeds and other conveyances recorded prior to the first day of January, 1883, purporting to have been acknowledged before any officer, and which have not heretofore been invalidated by any judicial proceeding, shall be held valid to pass the estate which such conveyance purports to transfer, although such acknowledgment may have been on any account defective." *Pamphlet Acts 1883, page 107.*

And on the fourteenth day of March, 1883, the following statute was enacted:

"Section 1. All conveyances and other instruments of writing authorized by law to be recorded, or which have heretofore been recorded in any county in this State, the proof of execution whereof is insufficient because the officer certifying such execution omitted any words in his certificate * * * shall be as valid and binding as though the certificate of acknowledgment or proof of execution was in due form, and bore proper seal." *Pam. Acts 1883, p. 129.*

2. HEALING ACTS.

It is contended for appellee that these statutes are inoperative in the case at bar for two reasons:

First—Because the act was passed after this suit was brought; and,

Second—Because to give them effect would be to deprive her of a vested right.

Affecting suits.

The first of these objections was answered in the case of *Green v. Abraham*, *43 Ark.*, where it was explained that the institution of a suit does not entitle a party to any particular decision.

Dower: Acknowledgment.

There can be no doubt that the Legislature intended to cure just such defects as are disclosed by this record. The fact that conveyances executed by minors and insane persons are exempted from the operation of the act, while there is no similar saving clause in favor of married women, demonstrates that intention. The question is thus resolved into one of legislative power.

Power of Legislature.

Our Constitution does not prohibit retrospective legislation. And in the absence of such prohibition, it is settled by the vast preponderance of authority that healing laws may be passed, confirming previous conveyances, and curing defects which arise out of some technical informality in their execution or acknowledgment. The cases on this subject are collated in *Cooley's Constitutional Limitations*, *4th ed.*, *460–79*, and in *2 Scribner on Dower*, *2d ed.*, *375–88*. The case of *Grove v. Todd*, *41 Md.*, *633*; *S. C.*, *20 Am. R.*, *76*, and of *Russell v. Rumsey*, *35 Ill.*, *362*, deny that a release of dower, executed by a married woman, but so defectively acknowledged as to be inoperative, can be made valid by a subsequent statute, because this would be to take from the woman a vested right. But these cases are decided clearly against the current of authorities, and also, as we believe, against the better reason. Judge Cooley, in his work cited above, at page 471, says:

"The objection (depriving a party of vested rights) is more specious than sound. If all that is wanting to a valid contract or conveyance is the observance of some legal formality, the party may have a legal right to avoid it; but this right is coupled with no equity, even though the case be such that no remedy could be afforded the

other party in the courts. The right which the healing act takes away in such a case is the right in the party to avoid his contract—a naked legal right which it is usually unjust to insist upon, and which no constitutional provision was ever designed to protect."

Accordingly he stated the correct doctrine to be, that when these acts go no further than to bind a party by a contract or conveyance which he has attempted to enter into, but which was invalid by reason of some personal inability on his part to make it, or through neglect of some legal formality, the question is one of policy and not of constitutional power. The parties to a deed and those who have succeeded to their rights with no greater equities, can have no vested right which grows out of the mistake of a public officer in certifying its acknowledgment.

Mercer v. Watson, 1 Watts, 330, affirmed on error, *8 Peters, 88*, is a remarkable illustration of this principle. A wife, in conjunction with her husband, had conveyed her lands; but the deed was so defectively acknowledged as not to pass her estate. After her death her heirs recovered the lands and remained in possession for seventeen years, when the Legislature of Pennsylvania passed an act to cure all defective acknowledgments of this sort.

And it was held that the claimants under the deed were entitled, by virtue of the curative statute, to recover back the premises from the wife's heirs.

See, also, *Barnet v. Barnet, 15 S. & R., 72; Tate v. Stooltzfoos, 16 Ib., 35; Jackson v. Gilchrist, 15 Johns., 89; Raverty v. Fridge, 3 McLean, 230; Chesnut v. Shane, 16 Ohio, 599; Purcell v. Goshorn, 11 Ohio St., 641; Dentzell v. Waldie, 30 Cal., 139.*

In the case last cited, the court said:

"The act in question does not divest the plaintiff of her

title to the land in controversy. On the contrary, it gives effect to the contract made by her fairly and in good faith, by which she intended, but failed, to pass the title to another, merely because the legal forms were not observed. The same will which prescribed those forms has said that a non-compliance therewith shall be waived or excused, and the act held valid, notwithstanding, and we find no constitutional impediment in the way."

We do not mean to say that the Legislature could retroactively confer upon a married woman an authority which she did not previously possess, as was attempted to be done by the law which came before the court in *Shonk v. Brown, 61 Pa. St., 320.* Mrs. Richardson had the power all the time to relinquish her dower; she was restricted merely in the manner of its exercise. As the Legislature might have antecedently authorized her to exercise the power without an examination separate and apart from her husband, or without any examination at all, so it might subsequently remove any defect arising merely in the form of proceeding. And so far from this being an invasion of her vested rights, it is giving to her act the very effect which she intended, and which from mistake or accident has not been effected.

The law was in force when this cause was determined, and the Circuit Court erred in not applying it. Its decree is reversed and a decree will be entered here dismissing the complaint.

TEXAS & ST. LOUIS RAILWAY v. HALL.

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1. REPLEVIN: *Defense in justice of the peace's court and on appeal.*
It is not necessary for a defendant to file a written answer to the complaint or affidavit in replevin in the justice's court, or in the Circuit Court on appeal. He can defend in the Circuit Court without any answer at all in the justice's court.

2. APPEAL FROM JUSTICE OF THE PEACE: *Amendments in Circuit Court.*
In appeals from a justice's court, the Circuit Court may permit amendments and new issues to be made, excluding new causes of action and set-offs not presented in the justice's court.

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

Lawrence A. Byrne for appellant.

The court erred in striking out the answer of defendant and in affirming the judgment of the justice without a hearing. (*35 Ark., 445; 36 Ib., 501; 42 Ib., 485.*) The cause should have been tried *de novo*, and defendant had the right to answer or go to trial and have a hearing without any answer whatever. See cases *supra.*

COCKRILL, C. J. Hall sued the railroad in replevin for two bales of cotton before a justice of the peace. There was a trial and judgment for the plaintiff. The justice made no record of the nature of the defense made by the railroad company, and in the Circuit Court, on appeal, in response to a rule on him to amend his record, he stated in writing that the railroad had filed no written answer but appeared on the trial day and denied the plaintiff's title and right of possession to the cotton, and laid claim to the property in its own right. He stated further that

there was no answer to the affidavit for the order of delivery, but that the defendant went to trial on the evidence without such answer. In the Circuit Court the railroad filed an answer denying that plaintiff had title or was entitled to possession of the cotton, and alleged title in itself. The plaintiff moved to strike the answer from the files because, as was alleged, it set up defenses not pleaded before the justice; and the court granted the motion and ordered the answer stricken from the files. The plaintiff then moved for judgment against the defendant because there was no answer. The court thereupon affirmed the judgment of the justice, and without evidence entered the same judgment rendered by the justice.

1. REPLEVIN: Defenses in justice of peace's court and on appeal.

It is apparent from the transcript of the justice's record, that the defendant contested the plaintiff's right of recovery. It was not necessary that this should be done under a written answer in either court.

2. Amendments on appeal in Circuit Court.

The justice neglected to note the substance of the defendant's answer on his docket, but when called upon to amend his transcript made it appear that the same issues were made before him as were tendered in the Circuit Court. The plaintiff had presented his case with the formality usual in the superior courts. He had filed a written complaint and a separate affidavit in replevin. The affidavit required no answer. (*Donnelly v. Wheeler*, *34 Ark.*, *111.*) If there had been no answer at all in the justice's court, the defendant could not be precluded from making defense to the action in the Circuit Court on appeal. The Circuit Court may permit amendments and allow new issues to be made, keeping clear of new causes of action and set-offs not presented in the justice's court. *Mans. Rev. St.*, *secs. 4151*, *1367; Hall v. Doyle*, *35 Ark.*, *445; Chowning v. Barnett*, *30 Ib.*, *560.*

It was error in the Circuit Court to strike out the de-

fendant's answer and then treat the case as though the defendant were in default in prosecuting the appeal. There was no necessity for a written answer in the Circuit Court, and if none had been made the defendant was entitled to a trial *de novo* upon the issues made before the justice. It was error in the Circuit Court to affirm the judgment without a hearing. *Hall v. Doyle, sup.; Touhy v. Rector, 26 Ark., 315; Mansf. Rev. St., sec. 4152.*

The judgment is reversed and the case remanded for further proceedings.

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WHITESIDES v. KERSHAW & DRIGGS.

1. JURISDICTION: *Of Circuit Court on appeal from justice of peace.*
On appeal from a justice of the peace's court, the jurisdiction of the Circuit Court is derived from and dependent upon the appeal. It cannot put its original jurisdiction into exercise by superadding to the controversy a cause of action, or an issue that the justice of the peace could not entertain, and can render no judgment that the justice could not render.

2. SAME: *Equitable, of justice of the peace.*
A justice of the peace may apply equitable doctrines to the solution of questions in cases properly coming within his jurisdiction, but he cannot administer the flexible remedies of equiiy.

APPEAL from *Nevada* Circuit Court in Chancery.
Hon. C. E. MITCHEL, Circuit Judge.

B. B. Battle and *Montgomery & Hamby* for appellant.

Admitting for the sake of argument that Driggs had a lien on the note, the justice of the peace could not enforce it. He had no jurisdiction to do so, and in refusing to

make Driggs a party he did right. The enforcement of such a lien belongs exclusively to courts of equity. *Const. 1874, art. 7, secs. 15, 40.*

The justice having no jurisdiction, the Circuit Court could acquire none on appeal. *6 Ark., 41; Ib., 182, 371; 10 Ib., 265; 24 Ib., 177; 27 Ib., 508; Gantt's Dig., 3837.*

W. V. Tompkins for appellee, Driggs.

The law presumes that superior courts of record have jurisdiction unless the contrary is shown. (*Newm. Pl. and Pr., 15, 49.*) No evidence was introduced to show that the court had none. The Circuit Court will not be presumed to take cognizance of matters not within its jurisdiction. (*26 Ark., 52.*) By section 3791 the justice is inhibited from issuing execution on judgments after filing transcript in the clerk's office. It was the manifest intention of the Legislature to transfer all jurisdiction for enforcing same, by garnishment as well as by execution, to the Circuit Court. Driggs was properly allowed to interplead, and the decree is correct.

COCKRILL, C. J. The appellant sued Mrs. Kershaw on a promissory note before a justice of the peace. The defendant, without making answer, filed an affidavit stating that Driggs, the appellee, claimed an interest in the matter in controversy, and asked that he be made a party. This the justice declined to do, and rendered judgment against the defendant. She appealed to the Circuit Court, and there renewed her motion to bring Driggs into the controversy. The prayer of her motion was granted. The defendant paid the amount due on the note into court and left Mrs. Whiteside, the plaintiff, and Driggs to settle the right to appropriate it. Driggs filed an interplea setting forth this state of facts, viz: He had

recovered a judgment against the plaintiff's husband. At some time prior to the present suit the husband, being insolvent, bought a piece of land, paid for it and had it conveyed to the plaintiff, his wife, to hinder and delay his creditors. Subsequently he sold the land to Mrs. Kershaw, the defendant, and had the note on which the suit was brought executed to his wife with the same fraudulent design upon his creditors. Driggs had sued out a writ of garnishment on his judgment against Mr. Whiteside, and had it served on Mrs. Kershaw, the maker of the note. The interplea sought to have the note declared the property of Mr. Whiteside, the judgment debtor, and subjected to the payment of the judgment. The case was transferred to the equity docket, where, after a trial, the court found and decreed as prayed by the interplea. The original plaintiff appealed. The correctness of the decree is attacked *in limine* by questioning the jurisdiction of the Circuit Court.

JURISDICTION: Of Circuit Court on appeal from justice of the peace.

On appeal from a justice of the peace court, the jurisdiction of the Circuit Court is derived from and is dependent upon the appeal. It cannot put its original jurisdiction into exercise by superadding to the pending controversy a cause of action, or an issue that the justice of the peace could not entertain. In such case the Circuit Court can render no judgment that the justice is not authorized to render. *Cunningham v. Holland, 40 Ark., 556; Hanna v. Morrow, 43 Ark., 107; Davis v. Davis, 83 N. C., 71; Cross v. Eaton, 48 Mich., 184.*

Jurisdiction of justice of the peace.

The question presented, then, is, can a justice of the peace entertain jurisdiction to administer the relief demanded in Driggs' interplea. The motion to make Driggs a party and require him to assert his claim had been aptly made before the justice, and was by him denied. If he erred in this it was certainly competent for the Circuit

Court, on appeal, to correct the error by bringing in the new party. That was the object of the appeal. But Driggs' claim was in the nature of a new action, and if when presented to the Circuit Court it became apparent that it presented a case not enforceable in the tribunal appealed from, the court should have dismissed the interplea. The facts disclosed in the interplea show anattempt on the part of Driggs to subject the equitable assets of his judgment debtor to the payment of his debt, by means of a complaint in the nature of a creditor's bill. Could a justice of the peace take cognizance of such a suit? At common law they had no civil jurisdiction. The grant of this authority is American, and results from positive law. With us their jurisdiction is derived from the Constitution, and they possess only such jurisdiction as is expressly given, coupled with the incidental powers necessary to carry it into effect. All jurisdiction was parceled out and distributed by the Constitution, and the jurisdiction not expressly granted to some other court, or authorized to be granted, is reserved to the Circuit Courts. (*State v. Owens, 34 Ark., 188.*) The justices of the peace take nothing by implication except what is necessary to make effective their express powers. The grant of civil jurisdiction to them is limited to "matters of contracts," and to suits for the recovery of or damage to personal property of a limited value. The Constitution of 1836 contained a similar provision as to jurisdiction of matters of contract, and in *Gibson v. Emerson, 7 Ark., 172*, it was said that the evident design of the Constitution was not to extend the jurisdiction to any other class of cases. Looking to the interplea and giving it the benefit of the most favorable interpretation in the light of the evidence adduced under it, we are unable to see that the cause of action alleged or proved can be brought within the mean-

ing of any of the terms of the Constitution granting jurisdiction to the justice of the peace. There was no contractual relation between the interpleader and either of the other parties to the suit, and the proceeding was not for the recovery of specific property. The object of the interpleader was to work out his rights, not upon any element of contract, but upon purely equitable principles. He had already set the machinery of the law court in motion to effect his object, by suing out a writ of judicial garnishment in the Circuit Court and making an equitable levy upon the fund in the hands of Mrs. Kershaw. This proceeding at law, as was held in *King v. Payan, 18 Ark., 583*, has the same effect, and is concurrent with the remedy in equity by creditor's bill. But Driggs, in his interplea, was not pursuing his law remedy. He abandoned that for the time, at least, and sought to enforce the lien he claimed on the chose in action by removing the fraudulent incumbrance alleged to be placed upon it by his debtor, in order to make clear the way of his judgment. It is the peculiar province of courts of equity to do this, and a justice of the peace court is not a chancery court. The justice may apply equitable doctrines to the solution of questions in cases properly coming within his jurisdiction, but he does not possess the machinery and appliances of a court of equity, and cannot administer the flexible remedies of that court. (*Jones v. Graham, 36 Ark., 405; Snell v. Mohan, 38 Ind., 494.*) Aside from the trial of the right of property and the condemnation of attached property, the only thing a justice of the peace can ultimately determine is the question of indebtedness. (*Steiger v. Surgit, 10 S. & Mar., 154.*) These courts were not designed for complicated matters. They have been aptly called the people's courts, and the object of their organization was to afford to every one a convenient, expeditious and cheap method for the settlement of the small,

Equitable jurisdiction of justice of the peace.

every day affairs of life. It was the design that these tribunals should be presided over by worthy and practical men, versed in ordinary business matters, but not learned in the law; and, in keeping with this design, no equitable powers have been conferred upon them. That jurisdiction is given to the Circuit Courts until separate courts of chancery are organized. (*Art. 7, secs. 15 and 40, Const. of 1874.*) A justice of the peace can exercise only such powers and perform such duties as are prescribed for him by law. If he may enforce a lien, such as the decree in this case undertook to do, the reason would be stronger for permitting the foreclosure of a mortgage on personal property in his court, for in that case is added the element of contract in the creation of the lien; but that power was denied by this court in *Lemay v. Williams, 32 Ark., 173*, upon the ground that no chancery jurisdiction has been conferred. See, too, *Snell v. Mohan, 38 Ind, 494.*

These views are in no wise affected by the fact that Mrs. Kershaw, the defendant, adopted as her remedy the statutory substitute for an interpleader's bill, to rid herself of the possibility of twice paying a debt she stood ready to discharge without suit. The inconvenience that she might experience could not aid the justice's jurisdiction. She is not without remedy, however. It would be abhorrent to justice if she must, of necessity, be twice subjected to the payment of the same debt. The Circuit Court, in a proper proceeding, can adjust all the matters presented by the record, and hold the creditor's proceedings against Mrs. Kershaw in *statu quo* until it is determined who is entitled to receive the fund arising from her note.

Let the decree be reversed and the case remanded with instructions to dismiss the interplea without prejudice; transfer the case to the law docket and proceed in accordance with law.

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PERRY v. LITTLE ROCK & FORT SMITH RAILWAY COMPANY.

1. COMPROMISE: *Rescission of: Recognition of claim.*

The rescission of a compromise of a claim by mutual consent of the parties restores them to the positions they occupied before the compromise was made; and the claimant cannot urge the compromise as a recognition of the claim by the other party.

2. RES JUDICATA: *Decision of Supreme Court.*

The decision of the Supreme Court in a case is the law applicable to all further proceedings in the same case.

3. CORPORATIONS: *Liability for services before organization.*

To make a corporation liable for services performed under contract with its promoter before it was organized, the services must be intended at the time to inure to the benefit of the future corporation, must be rendered in its behalf, and with the expectation and confidence that the company will be bound, and not the credit of individuals.

APPEAL from *Pope* Circuit Court in Chancery.
Hon. G. S. CUNNINGHAM, Circuit Judge.

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

1. The new company was bound by the contract entered into by Everett, as the representative of its promoters; and,

2. The new company has ratified and adopted Everett's contracts, thus making them its own. *Redfield on Railways, p. 16, sec. 5; 1 Mylne & C., 650; 7 Eng. L. & E., 124; 1 Simons, N. S., 586; 9 Simons, 264; 3 Mylne & C., 773; 9 Hare, 129; Field on Corp., sec. 221; 45 N. H., 375; 1 Redf. Am. R. R. Cases, 1; 49 Pa. St., 277; 40 Md., 395; 101 U. S., 392; 37 Ark., 164.*

This was a contract with the promoters of the new company. It inured to its benefit when it organized, and the new company took the benefit of it. The corporators of

the new company were the bondholders of the old, whose agent Everett was. See *1 Pick., 372.*

Where one officer is allowed to control the corporate affairs (as was the president, Redfield, in this case) his action will be binding upon the corporation, without proof of special authority. (*34 N. H., 378; 3 Const., 156; 98 Mass., 59.*) So a corporation will be bound by the acts of an unauthorized agent, if it accepts the advantages. (*Field on Corp., sec. 194; 25 Barb., 323; 5 Hill, 137; 7 Greenl., 96; 37 Conn., 534; 15 Eng. L. & E., 598–9.*

J. M. Moore for appellee.

Before the new company can be held under the rulings and law as laid down in *37 Ark., 164; 1 Redf. on R., 15; 79 Penn. St., 54; 65 Ill., 328; 7 Eng. L. & E., 130*, it must be shown that the organization of the corporation was contemplated at the time the alleged contract was made; that the parties were acting in view of future organization, and the credit extended to the promoters of the enterprise as such, and with the expectation and understanding on the part of both parties to the contract, that the company would pay for the supplies and advances alleged to have been made, and the company must be shown to have accepted the benefits of the contract.

Reviews the evidence and contends that *none of these requisites* are shown.

The statements made by Everett as to the intention of the bondholders, and his authority to bind them, are not competent to prove either proposition. *Wharton on Agency, sec. 44; 31 Ark., 212; 29 Ib., 512.*

As to the ratification by the president, it was merely a proposition to compromise a debt of the old company. And the appellant rejected or rescinded the compromise, leaving the parties precisely as they were before. *9 Ired.*

(N. C. L.), 380; 4 Dev. & Bat. L, 208; 30 Me., 458; 3 Otto, 548.

But it was not binding on appellee. As an original undertaking of the president to pay the debt of another, it was unauthorized and void. *34 Vt., 144; Morawitz on Corp., 234.*

EAKIN, J. This appeal is from a decree upon further proceedings in the case, after its remand upon the opinion delivered here in a former appeal by defendants; see *Little Rock & Fort Smith R. R. Co. v. Perry, 37 Ark., 164,* for a more definite statement. The opinion then delivered becomes the law of the case, with reference to subsequent proceedings. These were all in equity, the plaintiff having been allowed to file an amended complaint on the equity side. It charges: That the defendant was the successor of the Little Rock & Fort Smith Rail*road* Company, which had begun and completed a part of the road from Argenta to Fort Smith. The original grant of lands to aid in the construction of this road, made by Congress on the ninth of February, 1873, is set forth, together with the act reviving and extending the grant, passed on the twenty-sixth of July, 1866, and the amendment to the same, passed April 10, 1869, by which the time for building the first section of twenty miles was extended to the nineteenth day of May, 1870. It shows, further, that the old company began the construction of the road late in 1869, and to raise the means, prepared two classes of first mortgage, 7 per cent. coupon bonds, aggregating the sum of $8,500,000. Of these $3,500,000 were secured by a first mortgage upon the railroad and its equipments, appurtenances, privileges, franchises, and all property then owned or afterwards to be acquired, save lands granted

by Congress. The remaining $5,000,000 of bonds were in like manner secured by a first mortgage upon all the lands granted by Congress, and all other lands owned or to be acquired. From the time it so began work, until some time in April of the year 1871, when it became insolvent, the company had issued of these bonds, including both classes, an aggregate amount of about $6,000,000, or more, which had been put upon the market, and, as is alleged, bought up for a trifle by George O. Shattuck; F. M. Weld and others, their associates. The company failed to pay any of the coupons or interest warrants. In 1874 suits were instituted to foreclose these mortgages in the Circuit Court of the United States for the Eastern District of Arkansas, and on the tenth of December of that year, all the property, franchises, lands, etc., embraced in the mortgages were sold under a decree which had been rendered on the sixth of November.

The ostensible purchasers were Shattuck, Weld and George Ripley; but it is alleged that they bought for Shattuck, Weld and their associate bondholders, as shown by the report to the court made by Shattuck, Weld and Ripley, explaining the nature and character of their purchase, and by the schedule to said report, containing the names of the bondholders, with the amounts held by each. The property was of the value of several millions of dollars, and was bought in for about a hundred thousand.

It is further alleged that afterwards, on the nineteenth of December, 1874, under the provision of an act of the State, passed ninth day of December, 1874, the said bondholders, as the successors of "The Little Rock and Fort Smith Rail*road* Company," organized the defendant company under the name of "The Little Rock and Fort Smith Rail*way* Company."

Going back in time, the bill asserts that the old com-

pany, in April, 1871, had completed two sections and a half, or about fifty miles of their road from Argenta, and had graded and done labor on other parts of the road to the value of more than a million of dollars. About that time the road became deeply involved in debt, and was much embarrassed, having procured the greater part of the work to be done on a credit. It was particularly indebted to Pierce, Stacy and Yorston, a firm of building contractors. This firm, on the twentieth of April, 1871, attached the road with all its equipments and property, in the Pulaski Circuit Court, and it never after that resumed operations. The said contractors were placed and remained in possession of all that part of the road which had been finished and equipped, operating and receiving the revenue and income, until near the end of the year 1871, when the Treasurer of the State was appointed receiver under an act to provide for paying interest on bonds which had been issued by the State in aid of railroads. He remained in possession, taking the revenue and income, until the first of November, 1873, when, by some means unaccountable by complainant, the bondholders got into possession and have been in ever since, exclusively, taking the revenues and profits.

Meanwhile, however, whilst the State had possession, complainant says, it became apparent that ten additional miles must be finished before the tenth of May, 1872, in order to save the land grant, under the conditions imposed by Congress. The bondholders advanced the money and completed the required section, ending at Perry's Station. After that it was still necessary to complete twenty additional miles each year until the road should be finished. But he says that the old company never had possession or control of the road from April 1871 up to the time when it was sold out, and the new company or-

ganized on the nineteenth of December, 1874; but that the corporators of the new company, to wit, the bondholders by their trustees, had the possession from the time they obtained it from the State until the organization of the new company, which has had it ever since.

It is alleged that the corporators of the new, and defendant company, are in effect the bondholders of the old company, and composed all of the corporators of the old company who were capitalists; that they controlled the fortunes of the old company, and desired that it should fail and be sold out, and that a new company should be organized, in order to get rid of about a million and a half dollars of debt for labor and materials. In effect that the new company is in fact the old company "*transmogrified*" to elude its debts. Complainant states that in the latter part of 1872 said bondholders, to save the security of the lands, held a conference in Boston to devise a scheme for the purpose. There it was agreed amongst them by joint operation, to complete the whole line, foreclose the mortgage, purchase the property and franchises, and organize a new corporation, as a successor of the old. With a view to that they entered upon the construction of the road. They appointed one of their number, George Everett, to represent all, and clothed him with powers to let all contracts for building and supplies and materials, and do all things expedient for the speedy construction of the road. He let to the firm of Beaumont, Curry and Oliver a contract for laying ties and rails to Clarksville, from Perry Station, a distance of forty miles. All materials and supplies were to be furnished by the bondholders. Everett bought of complainant, for the purpose, 11,315 railroad ties, about the first of January, 1873. They were sold to him for the bondholders at thirty cents apiece, amounting to $3,394.50, and were used in laying the track.

Upon this account Everett afterwards paid $270, leaving still due $3,124.50. Also, complainant says, that in June, 1873, at the request of Everett, he erected a depot building on the company's right of way at Russellville, for which he was to receive $1,600. The defendant company afterwards in 1875, paid him for this $1,500, which he accepted in full. Further, he claims that from time to time, between the first of January and the first of May, 1873, at the request of Everett and upon assurances from him that the *bondholders* would pay for the same, he paid construction hands, advanced money and supplies, and furnished wood, fuel and material for the construction of the road to the extent of $4,829.27. He alleges, specifically, that all these things "were furnished to the aforesaid bondholders of the old company, and who afterwards organized and became corporators of the defendant, and credit therefor was specially to them given, upon the representations to him then and there made by the said Everett, that he was the agent of the said bondholders, and that they had taken charge of said railroad for the purpose of constructing and completing the construction of the same, *with the view* of organizing a new corporation as successor to the old;" which matter, he adds, was of general notoriety and understanding. He says further, that he stated to Everett, at the time the latter applied to him for material, money, etc., "that he would not trust the old company for a dollar, that they then owed him a balance of $6,000 and the rise," for work, material and supplies during the years 1870 and 1871. The work on the railroad steadily progressed from the time it was taken possession of by Everett, up to the time of the new organization, and afterwards to its full completion, without intermission. He claims thereby to have been, himself, a promoter of the designs of the new corporation, and to have

thus contributed to its full establishment as successor of the old, with all its franchises and rights of property unimpaired, and charges that the new company, after its organization, accepted the results and enjoyed the benefits of his labor, materials, etc. Wherefore, he says that the new company in equity and conscience should pay him the balance due on his cross-ties, with interest, and also his account of $4,829.27 for labor, materials, money, etc.

Continuing, he says that after the organization of the new company, its president, Joseph H. Converse, was duly authorized to adjust and settle outstanding claims and equities existing against defendant company then, and at the time of its organization, and his acts in that regard were afterwards ratified and confirmed by the company, and that it held him out to the world as so empowered. That, on the twenty-sixth day of October, 1875, said Converse, upon presentation of complainant's demands, recognized their justice and validity, and paid him $1,500 for the depot building. As to the other claim he agreed to pay, and complainant to accept, fifty cents on the dollar in stock of the new company at par value. He says, however, that he was induced to do so by the false representations of Converse to the effect that the stock was really worth par, and that other creditors, holding similar claims, had taken stock in payment. Finding the representations as to the stock untrue, he alleges that he declined to draw it from the treasurer. He then sought Converse and induced him to cancel that part of the agreement which regarded the stock. To obtain this concession he says he paid to Converse one hundred and fifty dollars, or in other words conveyed the depot buildings for $1,350. He submits that this transaction was an acknowledgment and valid ratification of his claim by the defendant.

The prayer of the bill is that his claim be adjusted and

declared valid against defendant, and that he have a decree therefor and general relief.

The answer of the defendant railroad, upon the points deemed material in this controvery, is substantially as follows:

It denies that it is the successor of the old company in any other sense than this, that it is purchaser for a full and valuable consideration, of the property, rights and interests of that company, as they stood on the nineteenth day of December, 1874, said effects being the road completed from Argenta to Clarksville, a distance of about one hundred miles, together with the road-bed, side tracks, station houses, rolling stock and other property appertaining thereto, and the right to complete and own the road to Fort Smith.

It admits that the old company built three sections (of twenty miles each) of the road, and avers that it built five, a distance of one hundred miles—the three sections, from Argenta to Perry's Station, having been built with means procured by the sale of bonds. The work was done by the contractors, Pierce, Stacy and Yorston.

It denies positively that the old company ever built any part of the road, except through Pierce, Stacy and Yorston, to whom it had let the contract, and who were to furnish all the material, ready for laying down the iron; or that it ever purchased anything of value from complainant, for the purposes of the road.

It admits that the contracting firm did attach the road in the hands of the old company, for a balance claimed, and that it was for a while in the hands of the sheriff, who controlled its running operations, and that in the summer of 1872 it passed into the hands of a receiver for the State.

It states that, in view of the possible loss of the land grant, and to save it, a few of the Boston bondholders

subscribed and advanced to the old company $50,000, to be applied to the two additional sections to Clarksville. This was done upon an agreemont between those subscribing and the board of directors of the old company, that Everett, as the agent of both parties, should direct the disbursement of the money in the work. Everett, with the sanction of the old board, let the contract to Curry & Beaumont, to complete the two sections to Clarksville. By the terms of that contract Everett and the directors were to furnish iron rails and ties, and nothing else. In this work defendant concedes that plaintiff did sell to Everett about 6,500 ties, but nothing else in his accounts. If the other things were furnished at all it was to Pierce, Stacy & Yorston, in their work east of Perry's Station. With regard to the depot house, that was built by complainant largely for his own purposes, but was used as a station. Inasmuch as it was built upon the grounds of the old company, with its permission, his property in it was recognized, and has been equitably adjusted.

It is positively denied that the bondholders ever took possession of the railroad, or any part of it, or of its revenues and income.

Further, it alleges "that the said Everett had no authority or power whatever, as agent of the bondholders, or any one else, for any purpose, except to disburse the $50,000 in the work of completing the said two sections; and had no power or authority whatever to act for the bondholders, or to purchase anything upon their credit."

Upon the foreclosure proceedings in 1874, the bondholders bought in the property by their agents, Shattuck, Weld and Ripley, nominally for $100,000, but really for their bonds, amounting in face value to eight and a half millions of dollars, and organized the new company on the

nineteenth day of December, 1874, under an act of the Legislature passed the ninth day of December, 1874.

Again, defendant denies "that the said Everett, in expending the $50,000, acted for the bondholders, or that said bondholders, at the time of the expenditures, had any idea of taking possession of the said road, or ever owning the same," * * * "nor were such expenditures made with any view to the said bondholders taking possession of the said road or organizing into a corporation, or with a view of promoting any such organization."

With regard to the matter with Converse, president of the defendant company, it is denied that complainant ever presented to him any account against the new company, or against the bondholders or against Everett, but one against the old company, or against Pierce, Stacy & Yorston. There were some negotiations about it, by way of compromise, which failed.

Upon these pleadings and depositions taken the cause was heard, and the bill was dismissed for want of equity, the costs, however, being adjudged against defendant. The complainant appeals.

1. COMPROMISE: Rescission of: Recognition of claim.

It is evident that the complainant relies, for recovery, chiefly upon two grounds. One being this: That although no contract may have been proven with the defendant nor with persons engaged in the organization of the company, of such nature as to render the company liable after it came into existence, on the grounds of having accepted and enjoyed the benefits of the contract, yet that the company had made itself liable by the recognition of his claim by the president, Converse, and the offer to settle the same in stock. Upon this point the argument seems to be, that although the offer to pay stock was rescinded at the request of complainant, yet that the recognition of the claim remains fully binding, and that it must now be

discharged in money. To say nothing of the failure of any proof of the power of the president of defendant company to bind it by mere verbal promises, there is no clear proof, or even preponderating evidence, that the president so intended. Doubtless the company respected his action in the matter and would, without demur, have acquiesced in any settlement of the account made by him, as it appears to have done in the matter of the purchase of the depot house. But it does not follow that such supposed acquiescence implies right in the president to positively bind the company, much less when a mere compromise was intended, which was never accepted. The matter with regard to the purchase of the building stands unquestioned by either party, and passes out of the case. The rescission of the agreement to give stock for the account for the cross-ties and other matters, simply throws the parties back upon their original rights without prejudice to either. It cannot leave the complainant with a right newly acquired through an agreement he has insisted upon repudiating. This is the settled law with regard to all propositions made by way of compromise. The claim on this ground is not tenable.

The pivotal question on which this case must turn, lies behind this in the equity which one who deals with the projectors of a corporation, with regard to matters which are intended to inure to the benefit of the corporation, when organized and in enjoyment of the benefit, to have the contract carried into effect. This will become a legal right if the corporation should affirm the contract, or do any act from which an affirmance may be implied, but at law the general rule obtains that corporations cannot be bound by acts done or promises made in their behalf before they come into existence. This principle was discussed, and its limitations defined in this case upon the

former appeal as clearly as the authorities afforded light for doing. It originated in equity, and is still subject of equity jurisdiction, although in clear cases of ratification or adoption it may now be enforced at law, especially in those States in which the separate courts of equity have been abolished. This was done in the case of *Bommer v. Am. Spiral, etc., Manf. Co., 81 N. Y., 468.*

2. RES JUDICATA: Decision of Supreme Court.

A careful review of the doctrine announced upon the former appeal (*see 37 Ark., 164*) has confirmed the court in its conclusions then reached; and, in any case, it must be the law applicable to further proceedings in the same cause.

3. CORPORATIONS: Liability for services before organization.

It was there announced that the doctrine cannot apply to cases in which private persons, contracting exclusively upon their individual credit, afterwards create a corporation for the more convenient management and enjoyment of the benefits acquired by the contract. This is obvious from the consideration that the enhanced value of the property so benefited, or the rights so acquired by individuals are estimated and allowed by the corporation subsequently taking it, and shares are issued accordingly. It would be unjust to other stockholders to require the corporate body to pay again for the labor or material which enhanced this value. That obligation should still rest upon the original contractors, upon whose credit the work was done or the material furnished. It may be illustrated by supposing that the proprietors of an eligible site for a manufactory should contract, upon their individual responsibility, for the erection of suitable buildings, the addition of the necessary appurtenances, and the acquisition of water privileges and rights of way, with a view to forming a corporation for manufacturing; and should afterwards form one with others who subscribe for shares and put in their property for shares at its enhanced value.

It would be unjust, in the absence of any claim of lien, to hold the corporate body liable for the improvements. The services performed must be intended at the time to inure to the benefit of the future corporation; must be made or done in its behalf, and with the expectation and confidence that the company will be bound and not the credit of the individuals.

The proof upon the hearing before the Chancellor does not materially alter the somewhat lengthy and full statement of the case made by the reporter in the former report in 37 Ark. It fails to show clearly, in the first place, that Everett had authority to bind the bondholders, or that his agency extended beyond the expenditure of the $50,000 subscribed by some of the bondholders, for the purpose of making the requisite construction, to save the security of the land. It does show that the contracts were made by Everett, at least formally, in behalf of the old company, which was still a corporate being. And although it is shown that Perry refused to rely upon the credit of the old company, and was assured by Everett that the *bondholders* would be responsible, yet it was still to the credit of the bondholders as individuals that he trusted. They were men of wealth, and responsible if Everett had authority to give those assurances. *Non constat* that they might not have been only perfecting their security with a view to realizing their debts. That afforded sufficient motive for their action. There was nothing in that to induce the conclusion that they would afterwards create a new corporation and become stockholders in that. It was not a necessary consequence, in a business view, that they would find it best to do so. There is some proof, in complainant's own testimony alone, that he expected *from Everett's assurances* that the bondholders would continue to manage and control the road under a new organization, but the proof

utterly fails to show that Everett had any authority to make such representations, and the preponderance of evidence is strong to show that the bondholders, then, had no intention of buying in the property and making a new corporation, and never matured the plan until more than a year afterwards. To this effect is the testimony of Converse, one of the bondholders, and the president of the defendant company. His evidence is unimpeached, and his interest in the matter gives assurance of better information upon the subject than could have been had by any other witness. In other words, the proof fails to show sufficiently that, at the time of the contract, either Everett or the bondholders who had employed him to act in their behalf in conjunction with the old directory, were engaged in promoting the new corporation, afterwards resolved upon and created, or doing anything else than endeavoring to save the securities of the bondholders. The onus of this proof was on complainant. When the sale was afterwards made under the foreclosure, any other parties might have bid and would have had to pay the enhanced value of the securities given by the construction of the road; and, in theory at least, the actual purchasers did the same. If it had been bought by strangers there is no equity upon which Perry might have followed his claim into their hands and made it binding on any corporation they might form. The bondholders bid, we must presume, in competition with the world, and would have the same right to form a disincumbered corporation, although their individual liability to Perry might remain as it was. It is a fallacy to contend that any number of individual debtors, becoming a corporation, thereby shift their obligation upon the corporation, even though they may constitute its capital stock, by putting in the property for which the debts were incurred. Still their individual debts

will remain, and the corporation itself will owe nothing nor be affected, except in case of liens.

We do not think, upon a review of the whole testimony, that this is a case of a contract made with the promoters of a future corporation, upon the credit of the corporation to be formed, and with the intention mutually entertained that the corporation would be bound when organized. It rather appears a case of credit extended to the individual bondholders in person, and their liability will depend upon the authority vested in Everett. With that aspect of the case we have nothing to do.

Affirm the decree.

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BATTE ET AL. v. MCCAA ET AL.

1. MARRIED WOMAN: *Conveyance by attorney.*

A married woman cannot convey her lands by power of attorney.

2. STATUTE OF LIMITATIONS: *Against married woman.*

The decision in *Hershey v. Latham*, 42 *Ark.*, 305, that the act of April 28, 1873, authorizing a married woman to sue alone and in her own name did not repeal by implication the saving clause in the statute of limitations in her favor, was based upon the *proviso* in the act of January 4, 1851, which expressly saves to a married woman and her heirs the right to sue for land within three years after her *discoverture;* which displaced the provision of the act of December 14, 1844 (*sec.* 4130 *Gantt's Digest*) limiting the time of her action after her "*disability is removed.*"

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

O. D. Scott and *W. L. Terry* for appellants.

1. The demurrer to the first plea was properly sustained. *Holland v. Moon, 39 Ark., 121.*

2. The statute of limitations does not commence to run against a married woman until after discoverture. *39 Ark., 358; 42 Ib., 305.*

B. B. Battle for appellees.

While this court, in *42 Ark., 305*, ruled that the statute of limitations did not run against a married woman until after "*discoverture*," we think the court fell into error by overlooking *sec. 4130 Gantt's Digest*, which reads "*after such disabilities may be removed.*" See on this point *93 U. S., 674; 51 Me., 305; 50 Cal., 303; 82 Ill., 385; 82 Ib., 172; 52 Barb., 146; 3 Ohio St., 80.*

SMITH, J. This ejectment for an undivided half of 637 67-100 acres of land was brought in the year 1882. The plaintiffs claimed title by inheritance from their mother, to whom her father had, by deed of gift executed in 1852, conveyed that interest in the lands. The complaint averred that the said donee was, at the date of the execution of said conveyance, the wife of Thomas Batte and so continued to be until his death in September, 1881, and that she died in October of the same year.

The answer did not traverse any of these allegations, but pleaded by way of confession and avoidance first, that Mrs. Batte had, in 1855, joined her husband in the execution of a power of attorney to one McCarthey, authorizing him to sell and convey these lands, and that said attorney in fact had in the same year bargained and sold the premises to one Higgs, under whom the defendants held by sundry mense conveyances; and second, the statute of limitations and adverse possession were relied upon.

A demurrer was sustained as to the first of these pleas and overruled as to the second. Upon the issue thus raised, the parties went to trial before the court, a jury having been waived. The proofs showed that Higgs had taken possession under his purchase and that he and those claiming through him had held actual and unbroken possession ever since. And the court found the facts and the law to be in favor of the defendants and gave judgment accordingly.

1. MARRIED WOMAN: Conveyance by attorney.

In adjudging the first plea to be defective, the court followed *Holland v. Moon, 39 Ark., 121.* A married woman cannot convey her lands by power of attorney. But as no exceptions were reserved to the disposition of this plea, no further notice needs be taken of it.

2. Statute of limitations against.

But the plaintiffs did except to the action of the court in holding the second plea to be good, and they also moved for a new trial because the finding was against the law as well as the evidence.

The action was not barred. This was expressly decided in *Hershy v. Latham, 42 Ark., 305;* nor did we overlook the *act of December 14, 1844* (*sec. 4130 of Gantt's Digest*), which gives a married woman the same time for bringing her action after her disability is removed that she would otherwise have had, from the accrual of the cause of action, if she had not been under disability. But this can not control the proviso of the later *act of January 4, 1851* (*sec. 4113 of Gantt's Digest*), which expressly saves to a married woman and her heirs the right to bring suit for her lands within three years after her discoverture.

Reversed and remanded with directions to sustain the plaintiffs' demurrer to the second plea.

KOSMINSKY V. GOLDBERG.

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1. HUSBAND AND WIFE: *Action for wife's torts: Abatement.*

Husband and wife are jointly liable, and must be jointly sued for torts of the wife committed during coverture; first, where he is absent and had no knowledge of the intended acts; second, where he is absent but the tort is done under his direction and instigation; and third, where he is present but the wife acts of her own volition. But where the act is committed in the presence of the husband and by his command and encouragement, he alone is liable. In the first three cases the wife is the offender, and if the marriage is dissolved by divorce or the death of either spouse before the judgment, the liability of the husband ceases.

2. SAME: *Same: Pleading: Presumption.*

The presence of the husband at the commission of a tort by his wife raises the presumption that she was acting under his compulsion; and therefore a complaint alleging that it was done in his presence, states a *prima facie* cause of action against him alone, without stating that it was done at his instigation; but this presumption may be rebutted by proof.

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

Scott & Jones for appellant.

The husband is liable for the torts of the wife during coverture. If committed in his company, or by his order, he alone is liable, the presumption being that they are done under his compulsion or coercion, etc. *2 Kent Com., sec. 149; 2 Hilliard on Torts, 506; 21 Ind., 427; 8 Minn., 236; Wright (Ohio), 9; 38 N. Y., 178; Pomeroy on Rem., sec. 320; Bliss on Code Pl., sec. 85; Newman on Pl., 278.*

SMITH, J. This action was against the husband alone

for defamatory words spoken by the wife. The complaint did not show whether the defendant was present or absent at the time the slander was uttered; and a demurrer to it was sustained for non-joinder of the wife. The plaintiff proposed to amend by stating that the injurious words were spoken in the presence and hearing of the husband; but the amendment was stricken out. By this action we understand the court to have decided that the amendment stated no case materially different from that which had already been adjudged insufficient, and to have insisted that the wife be brought in as a party. The plaintiff declining to plead further, and electing to rest on his amended complaint, final judgment was entered dismissing the action.

1. HUSBAND AND WIFE: Action for wife's torts.

For the wife's torts, committed during coverture, the husband is responsible. Such torts may be committed under either of the following circumstances: 1. Where the husband is absent and had no knowledge of the intended act, as in *Head v. Briscoe, 5 Carr. & Payne, 484; (24 E. C. L. R., 667)*, where a man was held answerable for a libel published by his wife, although they were permanently living apart. (*See, also, Catterall v. Kenyon, 3 Q. B., 309; 40 E. C. L. R., 749.*) 2. Where the husband is absent, but where the tort is done under his direction and instigation, as in *Handy v. Foley, 121 Mass., 259.* 3. Where the husband was present, but the wife acted of her own volition, of which *Cassin v. Delaney, 38 N. Y., 178,* is an example. And 4. Where the tort is committed in the company of the husband, and by his command or encouragement; for instances of which see *Daily v. Houston, 58 Mo., 361; Brazil v. Moran, 8 Minn., 236.*

Joint and separate liability.

In the first three cases they are jointly liable, and the wife must be joined. She is in reality the offending party, and if the marriage should be dissolved by divorce or the

death of either spouse before judgment recovered, the liability of the husband ceases. He is joined because she cannot be sued alone. But in the last case supposed, the law considers the tort as committed by the husband, and he alone is liable. To exempt her from liability, however, requires the concurrence of his presence and his command. A wrong done by his direction, but not in his company, does not excuse her; nor does his presence, if unaccompanied by his direction. The rule is stated too broadly in *2 Kent's Com., 149*, where it is said, "If committed in his company, or by his order, he alone is liable."

2. SAME: Pleading: Presumption.

Here the injury is alleged to have been done in the husband's presence, but not at his instigation. Yet his presence raises a presumption that she was acting under compulsion. And therefore the complaint states *prima facie* a cause of action against him alone. Of course this presumption may be rebutted by proof that he did not authorize or influence her act. *Pomeroy's Remedies, sec. 320; Bliss on Code Pleading, sec. 85.*

The presumption of coercion, arising from the mere presence of the husband in the case of crimes, has been abolished by statute, and the excuse has been left to be made out by proofs. *Gantt's Dig., sec. 1233; Edwards v. State, 27 Ib., 493.*

Judgment reversed, with directions to require defendant to answer the amended complaint.

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KAHN v. KUHN.

1. ATTACHMENTS: *Consolidating debts due and not due.*

A debt not due may be consolidated with one that is due, and an attachment be issued for the aggregate amount of both, where grounds of attachment applicable to either debt are alleged in the affidavit.

2. WRITS: *Not running in name of the State: Amendment.*

A writ not running in the name of the state is amendable, and should be amended by the court of its own motion, or be considered as amended.

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

Cohn & Cohn for appellant.

The court erred in quashing the attachment. If it was defective in not running in the name of the State, the court should have amended it, or treated it as amended. *13 Ark., 414, 417.*

There is no law requiring separate affidavits or attachments on debts due and not due. *Secs. 437, 440 Gantt's Digest; Acts 1881, p. 9.*

Ordinarily if the pleadings substantially contain all that is required in attachment cases, it seems to be immaterial whether there be an extra affidavit or not. *30 Ark., 681; 32 Ib., 781, 783; 36 Ib., 648; 17 B. Mon., 324; 1 Met. (Ky.), 156; Ib., 470; Myers' Ky. Code, 448–9.*

By filing the traverse and pleading to the merits of the attachment, the defendant waived all defects. *Drake on Att., sec. 421.*

Scott & Jones for appellee.

The order of attachment did not run in the name of the State. (*13 Ark., 414; Const. 1874.*) It is true it might have been amended, but the appellant never asked leave

nor moved to amend, but on the contrary elected to stand on the writ.

2. A debt due and one not due cannot be joined or united in one attachment. The proceedings are different. *Gantt's Digest, secs. 388 and 437, 392, 439; Drake on Att., 4th ed., sec. 30; 7 Ga., 167; 1 Iowa, 546.*

EAKIN, J. Appellant, Kahn, on the sixteenth of December, 1882, began an action, by attachment, before a justice of the peace, against J. H. Kuhn. There was no written complaint. His affidavit based his claim upon an overdue acceptance of the defendant for $75.25, and upon an open account for $197.75, not due until the seventeenth of February, 1883, making an aggregate amount, which he makes oath he ought to recover, of $273 with interest. He alleged as grounds that defendant "has removed a material part of his property out of this State, not leaving enough therein to satisfy his creditors." Also, "that he was about to convey and otherwise dispose of his property with the fraudulent intent to hinder and delay his creditors," and also, "that he has conveyed and disposed of his property with a like intent." He added afterwards, by way of amendment, that defendant was at the time the affidavit was filed, and still is, a non-resident of the State.

An order of attachment issued with the venue at the head: "State of Arkansas, County of Miller," and beginning, "To any constable of Miller County." It ordered the attachment of goods sufficient to secure the debt of $273 with interest and costs of suit. Goods were attached and claimed by several interpleaders, who gave bonds and retained the property by them severally claimed.

Upon return of the attachment defendant moved to discharge it:

First—Because the affidavit showed the claim to be based on two debts, one of which was not due; and,

Second—Because it was otherwise defective and insufficient. Also, because the order did not specify the amount for which it was allowed by the justice, and because no complaint was filed. This motion was overruled.

The cause was tried by the justice after the account became due. He found for the plaintiff the whole debt, and sustained the attachment against the defendant and the interpleaders. Judgment was rendered accordingly, and the defendant, with the interpleaders, appealed to the Circuit Court.

There, upon motion renewed, the attachment was quashed, and judgment, by consent, was rendered against defendant on the acceptance alone. The plaintiff took a a bill of exceptions and appealed to this court from the judgment quashing the order of attachment.

The bill of exceptions shows that the whole attachment was quashed because it did not run in the name of the State, and further, as to so much of it as regarded the debt not due, because it was an attempt to unite an attachment for an undue debt with one for a debt due, thus making the affidavit defective. No appeal was taken by the interpleaders who occupy the position here of appellees, nor by the defendant on account of the judgment for the debt on the acceptance.

2. ATTACHMENTS: Consolidating due and undue debts.

The appeal raises this question of practice: Can an attachment issue in a suit for a debt due, which unites and consolidates with the due debt, another which is not due, including both in one gross amount. In other words can the two classes of attachments be joined and consolidated? The further question is raised as to the form of the writ of attachment.

Ordinarily, an attachment is incidental to a suit, and

ancillary to the satisfaction of any judgment which may be rendered. In this view it so depends upon a right of action that it cannot be issued where no right of action exists. The argument now made or suggested in support of the court below is, in effect, that the proceeding to secure an undue debt by attachment is exceptional and special. That it is not ancillary to any existing right of action, does not lie for the same causes with an attachment for an existing right of action, and is otherwise so distinctive in its features and purposes that it ought not to be united with an attachment under the general law. And that if it be now divided and quashed as to the debt not due, the affidavit of the amount due will be falsified, and the attachment will be excessive, so that it cannot be maintained as to the debt due, and that therefore all must be quashed.

We are not aware that this question has been ever before presented to this court, although we are advised that the practice of uniting debts due, and still to mature, in the same attachment is not unusual in the Circuit Courts, and common in the Circuit Court of the United States for this district. The practice requires to be definitely settled.

Under the general law, as fixed by the Code of 1868, an attachment in an action to recover money may be had upon any one of eight specified grounds. This applies to existing rights of action. The same Code, but slightly modified since, made separate provision for attachments where the claim might not be due.

These provisions, in both cases, are brought forward in Mansfield's Digest, sections 309, and from 361 to 364 inclusive. It is declared in the section last cited, that all the provisions regarding the proceedings in general cases of attachment shall apply, so far as applicable, to attach-

ments for debts not due. It does not appear even that the *ancillary* nature of attachments was lost sight of, or attempted to be changed; but rather that the Legislature in case of emergency, springing from the fault or fraud of the debtor, meant to accelerate the right of action, and to support it in cases where but for the imminent danger from fraud it would have been premature. Section 361 says: "In *an action* brought by a creditor against his debtor, the plaintiff may, before his claim is due, have an attachment," etc.

This view removes much of the distinctive character of these attachments, as separate classes of proceedings. There is a manifest intention to put them on the same footing as far as possible.

Only three grounds, however, are given for these attachments upon immature debts. All of them are expressly connected with the condition that the acts must be done with the fraudulent intent to cheat or defraud creditors, or hinder or delay them in the collection of their debts. They are:

First—Where the debtor has sold, conveyed or otherwise disposed of his property, or suffered or permitted it to be sold; or,

Second—Is about to make such sale or disposition; or,

Third—Is about to remove his property, or a material part of it, out of the State.

The first two are grounds for a general attachment. The third is not. To make it so in the case of actual or contemplated removal of property, it must be stated that the defendant is not leaving, or about to leave enough property in the State to satisfy the plaintiff's claim or the claim of defendant's creditors, but the fraudulent intent need not be alleged.

Thus it will be seen that there are two grounds common

to what we may designate mature and immature attachments. That is, where the party has disposed of his property with fraudulent intent, or is about to do so. There is one ground for an immature attachment which will not support an attachment on a mature debt. That is where the defendant is about to remove his property or a material part of it out of the State with fraudulent intent, notwithstanding he may intend to leave in the State enough to satisfy his creditors.

All the material proceedings being the same, and directed to the same object, and the debts being such as might be joined after the acceleration of the right to sue as to some, and where grounds are alleged, as in this case, which would support an attachment on either debt, being common to both, then it is difficult to see why one attachment may not be made to suffice for all. It would certainly be highly inconvenient and onerons to compel the creditor to bring two suits, and levy separate attachments. We do not think it was bad practice, so far as the transcript shows in this case, or ground for quashing the writ.

It is true that some difficulties suggest themselves, *per contra*, but they are not insurmountable. It may be suspected, too, that courts often borrow trouble unnecessarily, and fail to do substantial justice, in the fear of spectres in the future, which would prove but mist, in the encounter. If a plaintiff should, as in this case, besides the common grounds, allege others which would only support an attachment on a mature debt, and upon controverting the grounds it should be found that the common grounds could not be sustained, and the others might, there might be some difficulty apprehended in splitting the attachment and holding it good *pro tanto*, as to the mature debt, and this may be urged as an objection to making the joinder at all, or to allowing the practice. The plaintiff, however, takes the

responsibility of any trouble on this score, and his bond may compensate for an improper portion of an attachment or an excessive levy, without the necessity of quashing the attachment altogether.

2. WRITS: Amendable.

We have dwelt upon this to settle the practice, and because it is presented by the record. The decisive action of the honorable circuit judge, in quashing the writ, was based upon the defect that it did not run in the name of the State.

It has been long settled law in this State that the provision in the Constitution that all writs shall run in the name of the State, did not prevent an amendment of a writ in this respect defective. (*Mitchell v. Conley, 13 Ark., 4144.*) Formerly it seems that a motion was required for the purpose, but since the Code, in a case of manifest but not substantial error in its own process, a court should of its motion direct the amendment, or consider it as amended. The style of process is matter of form, worthy to be preserved as form, to keep alive the idea of State sovereignty. But it is not matter of substance.

By section 5080 of Mansfield's Digest, courts may at any time amend any pleading or proceeding by correcting a mistake in any respect. It might be well enough in many instances, before correcting a pleading, to require a motion for the purpose, for parties have the right to frame their own pleadings and to rest upon them. But the framing of process is the act of the court or clerk, and the court should not wait to be moved in order to correct an obvious mistake, which has not been misleading or otherwise detrimental. The object of the constitutional provision is manifestly political rather than judicial. It is to keep alive the idea that all the powers of government, judicial, as well as legislative and executive, emanate from the sovereignty of the people, who constitute the State,

and it is the duty of the court, of its own motion, to preserve the form, or at least treat the process as if amended.

The quashing of the attachment necessarily superseded any trial upon the issues made by controverting its grounds, and the court moreover seems to have considered the claim on the account to have passed off with it. The cause was heard upon the acceptance alone, and as to that was determined in plaintiff's favor as an ordinary suit. If the motion to quash had been overruled, the proper proceeding would have been to determine the issues controverting the grounds of the attachment, and if that had been sustained in both aspects, then to have tried the issues, as to both claims upon the merits *de novo*.

For error in quashing the attachment, reverse the judgment and remand the cause, with directions to overrule the motion for that purpose, and for further proceedings in accordance with law and this opinion.

BEIDLER V. FRIEDELL.

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44 411 | f89 289

1. PRACTICE IN SUPREME COURT: *Motion for a new trial: Bill of exceptions.*

When the bill of exceptions fails to show that a motion for a new trial was made, or that any exceptions were saved to the overruling of it, no errors as to the proceedings on the trial, nor proof, can be noticed by the Supreme Court, although the *record* shows that a motion for new trial was made and overruled.

2. PROBATE SALES: *Irregularities in proceedings.*

Mere irregularities in the proceedings of the probate court in ordering the sale of a ward's land, which do not affect the jurisdiction of the court, afford to the purchaser at the sale no grounds for refusing to complete his purchase; and upon a re-sale at a less price than his bid, the guardian may recover from him the difference.

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

L. A. Byrne for appellee.

The motion for a new trial is made no part of the bill of exceptions. *30 Ark., 585; 34 Ib., 420; 39 Ib., 483; 40 Ib., 251.*

The bill of exceptions must show that it contains all the evidence. *2 Eng., 408; 17 Ark., 327; 35 Ib., 412.*

EAKIN, J. The complaint in this case was made before a justice of the peace of Miller county by Edwin Bancroft, as guardian of the minor heirs of Charlotte Bancroft, against the appellee, Beidler, showing that the guardian had obtained from the probate court, at the April term, 1881, an order to sell two certain town lots of the wards for their support and education, and that at the sales, which occurred on the twenty-fifth of May following, Beidler bid the sum of $1,680 for the lots, and was declared the purchaser. He declined, however, to perfect the sale and execute his obligation for the purchase money, and the facts were reported to the probate court, when a re-sale was ordered to take place on the sixteenth of July following. At this sale the lots brought only $1,538, and this suit was brought against Beidler for the difference in the price and the costs of first sale, being $160.

For answer, Beidler stated that the guardian had not given the notice required by statute, that he would make application to the probate court for the order of sale; and also that no notice of the sale itself could be found amongst the records of the probate court; of which irregularities he was not advised when he bid.

Further, that he was willing, then, and offered to execute

his bond at three months, with approved security, according to the terms of the order for sale, but that the guardian refused to accept it and to make a deed, unless defendant would make bankable paper, upon which the guardian could raise cash from the bank at Texarkana; and that the guardian never executed or tendered a deed of conveyance.

The defendant also demurred to the complaint because the title to real estate was involved. This was overruled, and upon trial judgment was rendered by the justice for plaintiff. An appeal, with supersedeas, was taken to the Circuit Court. There the death of plaintiff was suggusted and shown, and Friedell was appointed guardian *ad litem*. The demurrer was again interposed and overruled. The plaintiff then demurred to the answer of defendant. It was sustained as to so much of the answer as set up want of proper notice of sale, and overruled as to the rest. There was a trial by jury and verdict for plaintiff. The record shows that a motion for a new trial was made and overruled, and defendant appealed. The bill of exceptions fails to show, directly or indirectly, that any motion for a new trial was made, or any exceptions saved as to overruling the same. It is wholly silent as to any motion for a new trial at all. No error, therefore, as to proceedings on the trial, nor as to the proof, can be noticed, if any there were. It remains only to see if there be error in the original or primary record.

1. PRACTICE IN SUPREME COURT: Motion for new trial: Bill of exceptions.

The title to the lands is in no way involved from anything that appears upon the record. If the sale had been perfected according to its terms, and confirmed by the court, it would have been a proceeding within the proper jurisdiction of the probate court and valid. Had the defendant doubted that it would have been open to him to have appeared and resisted the confirmation, and to have

appealed from the decision if adverse. There is no question of outstanding title in other parties, or of the entire soundness of the title of the wards.

2. Irregularities in probate sales.

Courts of probate, controlling, directing and acting through the agency of guardians have jurisdiction *in rem* of the property of wards. Want of notice of the sale was irregular and erroneous. This fact is admitted by demurrer to the answer. But it was not jurisdictional, and would not have affected title on confirmation without appeal. If there had been an appeal and reversal the defendant would not have been injured or bound by his obligation for the purchase money. The demurrer as to that defense in the answer was properly sustained. See general principles on this subject announced in *Trimble and wife v. James, admr., 40 Ark., 401; Phelps et al. v. Buck et al., Ib., 219; Mock et al. v. Pleasants, 34 Ark., 63; Myrick v. Jacks, 33 Ark., 428; West and wife v. Waddill, Ib., 575; Guynn v. McCauley, 32 Ark., 97;* and especially *Fleming v. Johnson, 26 Ib., 421.*

Affirm.

St. Louis, Iron Mountain & Southern Railway v. Meese et al.

Damages: *From obstruction to navigation: Bridge.*

It is the duty of the owners of a bridge across a navigable stream to use reasonable diligence to prevent such accumulation of drifts about the bridge piers, either above or below the surface of the water, as might endanger navigation; and for failure to use such diligence they will be liable for damages resulting from such obstructions to crafts navigating the river, unless there was contributory negligence in the careless and unskillful piloting of the craft.

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

Dodge & Johnson for appellant.

The conclusions to be drawn from the evidence are:

First—That the raft was coming through the opening in the bridge in a quartering position, the most dangerous position it could assume for the purpose of passing through a narrow space.

Second—That it struck upon *an invisible* obstruction, which witness did not see, and which, to use his own words, "*could not be seen.*"

Third—That the raft, after striking this invisible obstruction, swung around and struck the drift and broke off *two or three* pieces of it.

Fourth—That in this condition the remainder of the raft, still remaining solidly fastened together, passed below the water works, where the witness, Brown, got on and tied the rope to it, and then fastened it to the shore.

Fifth—That then the raft again struck some driftwood, and the rope broke.

Sixth—That it passed on without *any* further effort being made to land it.

Seventh—And after passing the city landing, and when opposite the oil mill, just at the lower end of the city, "night coming on, they abandoned it and let it go."

It was contended on the trial, and is now earnestly contended here, that the evidence disclosed the patent facts, each of which entitles this defendant to a verdict, and, failing to secure that at the hands of the jury, entitles it to a new trial.

It was contended, *first*, that there could be no liability on account of negligence or unskillfulness in the construction of the bridge, because it was admitted that it was

a legal structure, skillfully constructed in strict compliance with the law and the requirements of the Secretary of War, and this was conceded by counsel for plaintiffs on the trial.

Second—That it was not the duty of defendant to keep driftwood from lodging against the structure, the bridge having been built in a skillful and proper manner, and that it had not been negligent or careless in the premises.

Third—That even if defendant had been guilty of negligence, the loss, if any, had been occasioned by the carelessness of plaintiffs contributing thereto.

There then being no negligence claimed because of the fact of the driftwood lodging against the breakwater and crib, and the defendant having done its duty in endeavoring to remove the same just as soon as discovered, and failing because it was an impossibility, there was in law no liability and the verdict cannot stand.

The third instruction asked by defendant should have been given. It certainly was not the duty of defendant to guard against *unknown* and *invisible* obstructions.

W. F. Hill for appellee.

The verdict is sustained by the evidence, and is not excessive.

The third instruction refused is not law. It should have stated that it was the duty of the defendant's servants to use reasonable diligence to discover the danger from driftwood, and either prevent its accumulation or remove it with due diligence. See 33 Ark., 350, and particularly instructions 9, 10 and 12 on pp. 273, 275.

EAKIN, J. The appellants are lessees of the Baring Cross bridge, over the Arkansas River just above Little Rock. It is a well constructed bridge, built under authority of

Congress, having a draw for steamers and supported upon piers, with ample space between them for free navigation by any sort of water craft.

The appellees were the owners of a raft of logs which they were floating down the river for sale at Little Rock. It was during or just after a considerable rise in the river, which occurred in the month of February, 1882. Some driftwood had accumulated against the breakwater which protected the pier of the bridge which supported the draw, and more below the pillar, between that and the crib still below. In attempting to run their raft between this pier and the shore, it was caught near the upper end by a log, under water, which had been lodged against the breakwater. The raft swung around with its lower end amongst the driftwood below the pier. Two or three of the oars were broken, and parts of the raft became detached. The main body of the raft, however, swung clear and went through, but slightly damaged and holding together. The employes upon the raft endeavored to land it at its destination, that being a saw-mill a short distance below the bridge, but failed to get it into shore. They sent out a rope, which was fastened to the shore. That broke, and the raft passed on down to the lower part of the town, beyond any point at which it could be sold. It was then abandoned as without market value, and the owners sued the bridge lessees for damages, alleging that they were negligent in allowing the driftwood so to accumulate about the breakwater and pier as to endanger navigation.

The company denied negligence on its part, and charged contributory negligence and unskillful navigation of the raft as the cause of the injury. Upon the trial, by a jury, the court charged generally on behalf of the plaintiffs, no

special written instructions being asked. We must presume that the instructions were in accordance with law.

The instructions asked by the defendant company, and given in its behalf, were as favorable as it could have desired. Their purport was, that the jury must find for defendant if they believed that there was sufficient space between the breakwater, pier and crib on one side, and the shore on the other, for the raft to have passed by the exercise of care and skill on the part of those in charge; or—

Second. If they believe from the evidence, that the men in charge, through excitement or want of skill in steering, ran closer to the breakwater, pier and crib than was prudent under the circumstances, and thereby struck the logs and driftwood, causing the loss; or—

Third. If they believed that the raft was lost by running against obstructions above or below the pier, through want of care and skill on the part of the plaintiffs, or through unavoidable accident, or the action of the current of the river; or—

Fourth. If they believed that the river, at the time, was very high, with large quantities of timber, logs and drift floating upon it; and that the defendant company used reasonable efforts to keep the bridge clear of the same, but was unable by ordinary diligence to do so; or—

Fifth. If the drift was visible, and there was sufficient space between it and the shore for those in charge to have avoided it by the exercise of reasonable caution, prudence and skill; or—

Lastly, if they believed that the logs between the pier and the crib had been lodged there during the rise of the then high water, and by reason of the then high water could not be removed.

The third instruction asked by defendants the court de-

clined to give. It was as follows: "If the jury believe the raft was lost by reason of striking logs above or below the pier, and under the water, so that they could not be seen, and that defendant's servants in charge of the bridge did not know that said logs were so lodged, or have reason to suspect their presence, they will find for the defendant." The refusal of this is made one of the grounds of a motion for a new trial.

Damages from obstruction to navigation.

As the case is presented by the evidence, and in view of the favorable instructions given for defendant, it is not apparent that there was error in refusing this. It was certainly the duty of the bridge company to take reasonable care to prevent such accumulations of drift about their piers, either above or below the surface of the water, as might endanger navigation. This duty was, perhaps, the more imperative in the case of submerged drift, inasmuch as being hidden from navigators, it was so much more dangerous and treacherous. At the same time it would be more easily discoverable by the keepers of the bridge than by strangers coming down with rafts. It is true that the company ought not still to be liable for hidden drift which it could not, by reasonable care and watchfulness, have discovered at all. But it was not excusable for want of active watchfulness against so probable a danger, and which, in its nature, was so easily discoverable by those on the spot. Besides, the evidence does not show that the employes in charge of the bridge were ignorant of the existence of the log which caused the injury.

This is a case depending on the evidence, the real questions in issue being these: Was the proof sufficient to show negligence on the part of defendant; and if there was such negligence was there failure of proof of such carelessness or want of skill on the part of plaintiffs, conducing to the damage, as would deprive them of relief?

It was necessary to such a verdict as was rendered that negligence of the company should be shown, and no want of due care and skill in management on the part of plaintiffs. Upon either point it is not necessary that the evidence should be conclusive. If there be any substantial evidence of negligence, or a conflict of evidence upon either side as to negligence, then, according to the rules of this court, the verdict must stand.

Taking up, first, the evidence of plaintiffs. Besides the facts above stated, it tends to show that the raft was well built, and under charge of a good pilot; that the projecting log at the breakwater was invisible, and caught *under* the raft. It was the cause of breaking and crippling the raft to such an extent as to prevent the landing below, thus being the proximate cause of the damage. There was, below the pier, a pile of driftwood rising four or five feet above the surface, with logs extending from it fifteen or twenty feet towards the bank. This drift combined with the log at the breakwater to damage the raft. The raft itself was eighteen feet wide and over one hundred feet long, being about the ordinary size. The width of the channel between the pier and bank was about one hundred feet. Men were engaged next day in cutting out the drift and making it into cord-wood.

Upon the point of negligence of defendant, this might well be considered by the jury as making a *prima facie* case, throwing upon defendant the onus of showing that these dangerous impediments had been deposited and continued there without fault of defendant, and that it had not failed in watchfulness to prevent it, or in reasonable efforts to remove it. It was certainly the duty of the company so to exercise its franchises and privileges that its piers should not be allowed to become nuisances in the way of navigation.

On the part of the defendant the evidence tends to show in exculpation that there was a clear space for boats of one hundred and sixty feet between the pier and the shore; that the drift did not extend into it over six or eight feet. It shows that, generally, efforts were made to keep the driftwood off, and take it away, but that it could only be done by chopping out, and that could not be done before the fall of the water. It was badly tangled up and fastened together. The drift was removed as soon as it possibly could have been. It never stays long on the breakwater, but usually drifts away. The drift below the pier takes a long while to remove, and that was done as soon as possible.

If, upon the evidence, this jury had rendered a verdict for defendant it would have been well supported. But they found for plaintiffs, and the question is, whether it was so much against evidence as to demand a new trial.

It will be found that the principal witness for the company, as to the facts, is vague and general as to matters in which he might be expected to be specific. For instance, Tim Keller, who had charge of the bridge at the time, whose duty it was to know all about the matter, uses such general phrases as this: "We used every effort to keep the logs from lodging against the breakwater," but not a single effort is detailed as to time, means employed, or any other circumstance. Efforts and means are active, visible things, and if used are apt to be mentioned by those who are charged with having neglected them. No explanation is made of the submerged log, which proved so disastrous, or of any efforts to get that away, nor is it shown how or when it was lodged there; nor is it shown that the employes of the bridge were ignorant of its existence. Again he says: "We tried every means in our power to get the driftwood away from between the draw-pier and

the crib. We tried to pull it loose by hitching a strong cable to a locomotive. We broke a three inch cable twice in trying to pull the drift apart, and were unsuccessful. The only way the drift could be removed was by chopping it out with axes, and this could not be done until the river fell sufficiently to get at the drift. Offered men as high as ten dollars a day to get it away while the water was high, but could not get it done." All these things are given without dates, or any mode of fixing the time. When asked, on cross-examination, when it was he had the locomotive at work, said he did not recollect. The breaking up of the raft was certainly an event of some note to the habitues and employes of the bridge, and he might certainly have had some idea as to whether the work he spoke of was before that or after that, or about that time. Generalities, used by those who ought to speak particularly, are of little worth as evidence in cases of conflict and doubt. Another bridge employe says "the drift was removed as soon as it possibly could have been," without stating when or how. Upon the other hand, there was evidence that the drift had been there from two weeks to a month, and that it was accessible, being above the water; and that next day people were working at it and removing it in boats for cordwood. It is not beyond the province of a jury to say that it is dissatisfied with this evidence, and to conclude that defendant had not satisfactorily shown due care.

The jury must also have found that there was no contributory negligence on the part of those managing the raft. Upon that point the tenor and effect of the evidence is about this: That very expert raftsmen, knowing the dangers, might have run the raft through without injury. The men engaged in steering this one were under a fair pilot, who had run the raft so far down from Perry County

with success, and were about to run this passage with success, and would have done so but for striking on the unseen obstacle, which hung the raft and swung it around.

There is some evidence that when the accident happened they became scared and demoralized, but not enough evidence to show they neglected any such precautions to prevent or remedy the consequences as they were required to take. They had no premonition of the danger. The submerged log could not be seen at all, and the drift below the pier could not be seen in time to guard so unwieldy a body as a raft in strong water, from danger of coming in contact.

Whilst there might be some doubt in our minds of the negligence in the company as to the matter of drift, we must regard the verdict of the jury, and the opinion of the circuit judge in denying a new trial. The verdict cannot be said to be without evidence or against evidence, and it cannot, therefore, be held here that there was error in denying a new trial.

Affirm.

Culley & Son v. Edwards, Adx.

1. Probate Court: *Jurisdiction: Partnership accounts.*

The probate court has no jurisdiction to adjust the partnership accounts between a deceased and surviving partner. But when their accounts have been settled and a balance struck against the partner who afterwards dies, the probate court may render judgment for this balance against his estate.

44	423
57	301
44	423
61	474
44	423
63	523
44	423
74	442
77	618
44	423
80	26
44	423
87	417

2. PARTNERSHIP: *Test of.*

The rule that participation in the profits of a business was the test of partnership as to liability to creditors, has been abandoned in England and generally in America; and now the test is whether the business has been carried on in behalf of the person sought to be charged as a partner; *i. e.*, did he stand in the relation of principal towards the ostensible traders by whom the liabilities were incurred and under whose management the profits have been made; but as between the parties themselves, the test has always been their actual intent.

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

O. D. Scott for appellant.

1. The probate court is a court of record, a superior court, and the presumption is in favor of the regularity and vadility of its proceedings. (*11 Ark., 529; 19 Ib., 485; 18 Ib., 292.*) Even if the agreement constitutes a partnership it will be presumed that a settlement had been made and a balance struck, and appellants could sue. *Parsons on Part., 278.*

2. As appellants were to be repaid the sum *at all events*, and all losses were to fall on appellee's intestate, the mere fact that appellants were to share in the profits did not constitute a partnership. The old English rule that sharing in the profits is conclusive evidence of a partnership has exploded in England and in nearly all of the States. *13 R. I., 27; S. C. 43 Am. Rep., 3; Cox v. Hickman, 8 H. L; 83 Pa. St., 286; 28 Oh. St., 319; Smith v. Knight, 71 Ill.; 8 Sawy., 286; 7 Ia., 435; 5 Sneed, 721; 53 N. H., 276; 5 Mees & W., 518; Davis, ex parte, 4 De Gex, F. & J.; 76 N. Y., 55; 32 Am. Rep., 267; 12 Conn,, 69.*

The contract itself, as between the parties, determines the partnership relation. *Story on Part., secs. 3, 4, 5, 6;* see also *2 Ark., 346; 4 Ib., 425; 6 Ib., 191; 22 Ib., 381; 25 Ib., 327; 26 Ib., 154; 39 Ib., 280.*

A. B. & R. B. Williams for appellee.

The contract created a partnership. Edwards was to take the money, put it into merchandise, or other safe and profitable investment, he and Culley *to share the profits* and accounts, etc., which constituted a partnership, *inter sese.* (*Story on Part., secs. 2, 23, 27, 32, 33, 34; 3 Kent Com., Lect. XLIII, sec. 24; 16 Johns., N. Y., 33.*) An agreement to share in the profits is sufficient. *45 N. Y., 797; 27 Conn., 250; 58 N. Y., 272.*

The surviving partner should have taken possession of the assets and wound up the business, and the probate court had no jurisdiction. *Const., art. 7, sec. 34; Hempst., 560; Willard's Eq., p. 718; 1 Paige, 393; 9 Ib., 178; 3 Black. Com., marg., p. 437.*

SMITH, J. In the year 1866 the appellants lent to the intestate of the appellee a sum of money. Four years later, said intestate executed the following instrument:

"$9,491.77.

"Received, Rondo, Lafayette County, Arkansas, April 15, 1870, of L. T. Culley & Son nine thousand four hundred and ninety-one dollars and seventy-seven cents, that being the amount which I did invest in merchandise during the year 1866, which moneys I promise and bind myself to keep invested and employed in merchandise or some other legitimate business which may be agreed upon by the parties interested, continuously until the first day of May (1886), eighteen hundred and eighty-six, at which time I promise and bind myself to pay the said L. T. Culley & Son or their legal representatives, heirs or assigns, the said sum of nine thousand four hundred and ninety-one dollars and seventy-seven cents, together with the one-half of the net earnings, which shall have arisen from the employment of said moneys and moneys arising

therefrom, from the commencement of business the first day of May, 1866, it being a term of twenty years.

"Witness my hand and seal the day and date above.

"THOS. J. EDWARDS. [L. S.]"

Edwards died in 1877 and Culley & Son exhibited their claim in the probate court against his estate, and after a contest recovered judgment for the principal sum specified in said receipt and one-half of the net earnings of the business carried on by Edwards, total, $19,885.60. This judgment was acquiesced in by the administrator, and some partial payments have been made on account thereof. The administrator *de bonis non* of Edwards now petitions the Circuit Court to quash said judgment of allowance, on certiorari, on the ground that the original parties to these transactions were partners, and the probate court had no jurisdiction to settle the accounts of a deceased and surviving partners. And the Circuit Court being of opinion that the demand of Culley & Son, based upon the writing copied above, showed conclusively upon its face that it grew out of partnership transactions, granted the petitioner the relief prayed for.

It may be conceded, for the purposes of this appeal, that if Culley & Son and Edwards were partners, the probate court was without jurisdiction to adjust their accounts. See, on this point, *Halderman v. Halderman, Hempst., 559; Nelson v. Green, 22 Ark., 547; Tiner v. Christian, 27 Ib., 306; Constitution of 1874, art. 7, secs. 15 and 34.* Still, in the trial of the cause in the probate court, it may have been shown that their accounts had been settled and a balance struck; in which case one partner could have sued the other for the amount found to be due. And we must indulge the presumption in favor of the regularity and validity of its proceedings, which is accorded to all courts of record. *Borden v. State, 11 Ark., 529.*

Yet we go further and say that, even if no settlement was had in Edwards' lifetime, the claim of Culley & Son, as presented to the probate court, does not conclusively import that it arose out of a partnership relation. It is true that, besides the return of the original loan, they are to have one-half of the net profits of the business to be carried on by Edwards, and that this implies the right to an accounting and an inspection of the books. But beyond this they stipulated for no control over the business, except the right to be consulted in the event of a change from one line of business to another.

Test of partnership.

It used to be thought that a participation in profits was the decisive test of a partnership, so far as liability to creditors was concerned. The rule was so laid down in *Waugh v. Carver, 2 H. Blackstone., 235,* decided in 1793. That was a case where two ship agents, carrying on business at different points, agreed to allow each other certain portions of each other's profits, but it was stipulated that each should be answerable for his own losses. And it was held that both parties to the agreement were bound for the debts of each. The decision is placed upon the ground that a participant in profits takes from creditors a part of that fund which is the proper security for the payment of their debts. It was thus established that persons who share profits incur to third parties all the liabilities of partners, although no partnership was ever in fact contemplated by the persons themselves. And such continued to be the rule both in England and America, until the year 1860, when it was overthrown by the case of *Cox v. Hickman, 8 H. L. C., 260,* and the final test declared to be whether the business has been carried on in behalf of the person sought to be charged as a partner; *i. e.*, did he stand in the relation of the principal towards the ostensible traders, by whom the liabilities have been incurred, and

under whose management the profits have been made? This is the settled rule in England, and has been very generally adopted in this country. *Bullen v. Sharp, 1 L. R. C. P., 86; Mollwo v. Court of Wards, 4 Moak's Eng. Rep., 121 ex parte Tenant, S. C. 22 Moak's Eng. Rep., 831; Eastman v. Clark, 53 N. H., 276; S. C. 16 Am. R., 192; Smith v. Knight, 71 Ill., 148; S. C. 22 Am. R., 94; Richardson v. Hughitt, 76 N. Y., 55; S. C. 32 Am. R., 267; Boston, etc., Smelting Co. v. Smith, 13 R. I., 27; S. C. 43 Am. R., 3; Hart v. Kelley, 83 Pa. St., 286; Beecher v. Bush, 45 Mich., 188; Harvey v. Childs, 28 Ohio St., 319.*

But while the old rule prevailed that participation in the profits was conclusive as to third persons, and before the introduction of the modern principle that it is a mere circumstance to show the relation of principal and agent between the persons taking the profits and those carrying on the business, the test of partnership, as between the parties themselves, has always been their actual intent. Thus, *in Elgie v. Webster, 5 M. & W., 518*, decided in 1839, W advanced to E £59 for the purpose of perfecting certain inventions. If these proved to be profitable, W was to have one-third of the profits in consideration of his advance, and there was an express agreement on the part of E to pay back the advance at all events. E, when sued for the debt, objected that the effect of the agreement was to create a partnership, and consequently to prevent their suing each other in respect of the matters contained in the agreement. But the court held that the express promise to repay the £59 at all events, took away the objection of that sum forming a part of any partnership fund, so as to constitute a partnership.

Here Edwards bound himself to refund the principal sum that was borrowed in any contingency, and the stipulation for a division of the profits is merely a mode for

compensating Culley & Son for the use of their money. The share of the profits they take not as partners, but on account of the debt due them by Edwards.

It is evident from the fact that Culley & Son suffered the assets to pass into the hands of an administrator, and contented themselves with proving their claim, that they looked upon Edwards as their debtor and not as their partner. By virtue of the right of survivorship they would have had a right to possess themselves of the assets, and to wind up the concern.

Judgment reversed and cause remanded, with directions to dismiss the petition.

HALEY v. HALEY.

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1. DIVORCE: *Custody of offspring: Permission of mother to visit.*

In divorce cases where the custody of the offspring is given to the father, it is not necessarily erroneous for the decree to give leave to the mother, though immoral, to visit it. The courts should regard the maternal instinct of the veriest trull that walks the streets, taking proper care that it do not lead to the corruption of the child. It is the strongest and holiest sentiment of humanity; the freest from selfishness or impurity, and often the last hope for the redemption of fallen nature.

2. SAME: *Practice: Decree on bill and cross-bill.*

Where there is a cross-bill in a suit for divorce, the decree granting the divorce ought to state on which bill it is granted, the original or cross-bill; but the omission to do so will not be reversible error.

3. DIVORCE: *Personal indignities.*

The indignities to the person mentioned in the statute as the cause for divorce, need not consist of personal violence. They may be unmerited reproach, rudeness, contempt, studied neglect, open insult, and many other things habitually and systematically pursued to an extent which would render a woman's life intolerable. Nor is it necessary that she be wholly blameless.

APPEAL from *Garland* Circuit Court in Chancery. Hon. J. B. Wood, Circuit Judge.

G. W. Murphy for appellant.

Reviews the evidence in detail, and contends that it does not establish the complaint.

A divorce will not be granted on grounds of ill treatment, where such treatment may be attributed to the misconduct or fault of the complaining party, or is not of such character, duration and frequency as to evince settled hatred, total loss of affection, and a fixed purpose of mistreating complainant. Nor is being drunk three or four times in as many years habitual drunkenness. *38 Ark., 119; Ib., 324; 33 Ib., 156.*

Eakin, J. Mrs. Bridget Haley, the appellee, on the thirteenth of January, 1883, brought suit against her husband for a divorce, alleging, among other things, that he freely used towards her approbrious epithets; and was, and had been for years, in the habit of offering to her such personal indignities as rendered her condition intolerable; evincing discontent by sullen silence for days and weeks towards her, together with conduct specially set forth which, if true, would manifestly sustain the charge of rendering her situation as his wife intolerable. They have a child, a boy of about six years old. She prays for a divorce, the custody of the child, alimony, and general relief.

He answered, denying all the material charges, and filed a cross-complaint. He charges that on the thirteenth of October, 1881, she left his home without just cause, declaring that she would never live with him again. She remained away until September following, associating exclusively with persons whom she knew to be degraded and

immoral, subjecting him and herself to the most disagreeable criticisms. She returned and staid with him a few weeks, declaring, meanwhile, that she did not intend to live with him again as man and wife; and then left again, and has remained away ever since. That she has kept clandestine correspondence with men of bad repute, and meets them. That she is in every way untrue to him.

He states, further, that in 1881 he bought a lot in Hot Springs, and took a deed in her name and built a house upon it, intending it for their joint home. He prays a divorce on his part, and a re-conveyance to him of the land, the custody of the child, and general relief.

1. DIVORCE: Custody of child. Right of mother to visit.

The cause was heard upon the pleadings, depositions of the parties, and other witnesses. The Chancellor dissolved the bands of matrimony without indicating the grounds, or upon whose prayer the relief was granted, and decreed, further, that "each of said parties * * * be restored to all property not disposed of at the commencement of the action, which either of them obtained by, from or through the other during said marriage, or in consideration or by reason thereof." The custody of the child was left with the father, subject to the right of the mother to make weekly visits. The costs were decreed in favor of the wife. The husband appealed.

Costs were in the discretion of the Chancellor. There is no reason to infer from the transcript that this discretion was abused. The appeal cannot be sustained on that ground. The disposition of the child was in accordance with the prayer of the cross-bill, and the privilege of visiting accorded to the mother is a plain dictate of humanity, in the absence of any reason to suppose that the privilege would be abused to the injury of the boy. There was none in this case. The charges of immorality against the mother were not sustained. She is shown to be an indus-

trious, hard-working woman, and a good woman, by all the witnesses except the defendant. But had it been otherwise the permission to visit would not be necessarily erroneous. The courts should regard the maternal instinct in the veriest trull that walks the streets, taking proper care that it do not lead to the corruption of the offspring. It is the strongest and holiest sentiment of humanity; the freest from selfishness or impurity, and often the last hope of redemption for fallen natures.

The decree regarding the property is in the language of our statute, and means that each party shall have back any property which he or she may have conveyed to the other during marriage and is not disposed of before suit. The use of the word "restored" indicates that. There is no specific decree concerning the lot, fixing the title. No other property is involved. The lot was bought by defendant and the title taken to the wife. The decree on this point, so far as it fixes the rights of parties, is favorable to defendant.

2. PRACTICE: Decree on bill and cross-bill.

So far, there is nothing to sustain the appeal. The question arises whether either party, where there have been cross-complaints and a prayer for divorce on both sides, can appeal from a decree for a dissolution of the marriage bond rendered on the merits. If the decree had shown upon its face that it had been in favor of the wife, there would be little difficulty in holding that an appeal would lie by the husband who had answered, and denied the allegations of the complaint; although he had himself unsuccessfully filed a cross-complaint asking a divorce on his part. The prayer in his cross-bill does not authorize a decree of divorce in favor of complainant. That would make it operate as a consent, and it is peculiar to divorce cases that they cannot be granted upon consent or by collusion. If the cross-bill be dismissed for want of merit, the defendant may

still reasonably claim to stand upon his answer to the original complaint, and resist the divorce wholly, and appeal from any error in granting it. It is, therefore, unnecessary in such case to notice the cross-complaint, which could only have the effect of consent, and that is not allowable. Or, upon the other hand, if the decree should show that the complaint was dismissed and the divorce granted on the cross-bill, then the complainant might for like reason appeal. It is well to remark, in passing, that in cases like this the decree itself should show the ruling of the court as to the complaint and cross-complaint.

Waiving the point of practice in this case, we have considered it well to adopt the views of counsel in treating it as a decree adverse to the wishes of defendant, rendered on the original complaint, and have looked into the merits.

The complainant proves good character, as we have said, by all the witnesses save her husband. If his assertions of her gross and open immorality were true, they are of such a nature as might have afforded the means of much corroborative evidence. There is absolutely none. We must presume his charges to be the delusions of a morbid jealousy. The evidence does not sustain a case of willful desertion on her part for the space of a year. It would have been proper for the decree to have dismissed the cross-bill as not sustained by proof.

Upon her complaint, the proof does not sustain the charge of habitual drunkenness, or of any cruel or barbarous treatment to endanger life, or anything in the nature of *saevitia* in the sense of the canonists. There were two or three cases of slight personal violence at rare intervals, very reprehensible and repugnant to more refined ideas, but not in themselves causes of divorce. The graver charge, that of such indignities to her person as to render her condition intolerable, is better supported.

These, it seems, sprung more from an inordinate jealousy than any settled dislike. He seems, notwithstanding all, to have been really attached to her. But he followed her up and watched her conduct, and not only in her presence but before others, made to and concerning her the grossest charges of lewdness. He denounced her as a liar and a thief, and sent her notes couched in language disgustingly obscene and abusive, making charges which even the coarsest woman must have found intolerable. These circumstances of life impelled her to seek employment away from home. He opposed this and resented it, attributing it to the motive suggested by his ungrounded suspicion. He constantly sought her at her places of employment, to take her away, and became an annoyance to others. She refused to return to him, declaring herself afraid, and that she had tried living with him until she despaired of doing so amicably. Upon the other hand, it is apparent that there never was a time when he would not have taken her back if she had come.

3. Personal indignities

Under the principles long ago established, in construing our statute, in *Rose v. Rose, 9 Ark.*, the indignities to the person therein mentioned need not consist of personal violence. They may consist of unmerited reproach, rudeness, contempt, studied neglect, open insult, and many other things, *habitually and systematically pursued*, to an extent which would render a woman's life intolerable. Nor is it necessary that the woman be wholly blameless. It is always a difficult and anxious point for a Chancellor to determine how far those things may go to render the woman's life intolerable. Much allowance is to be made for infirmities of temper and for indications of regret and repentance. Much consideration is due to the habits of the parties and their condition in life, and it is best that Chancellors should not give too serious an aspect to mere

passing quarrels or acts done under the irritation of the moment. Upon the other hand, it is the most refined of all cruelties to hold a woman for life subject to the subtle tortures which the marital state gives an opportunity of practicing in private, which may be concealed from the world by the false guise of courtesy and respect in the presence of others, and which may still produce a condition of heart misery to which death would be often preferable. No rule can be framed for the determination of such cases. Each must, of necessity, depend upon what can be brought to light, and how far it may indicate what lies concealed, and which even language cannot express.

Whilst the rule in *Rose v. Rose* is to be administered with caution, and not misapplied to transient quarrels or trifling and occasional injustices, which time and mutual forgiveness may cure, yet it expresses a true principle, founded on the highest considerations of humanity. Where it appears probable that no cure is to be expected, and that the evil will continue in its intolerable aspect, the happiness of a life is too sacred for sacrifice, although the subject may be an humble, hard working woman, without the refinements of education and culture.

It is for the Chancellor to judge of this. We think he might reasonably have concluded that the wife could not continue to endure the gross insults and charges which seem to have been wantonly blazoned to the world, without any proof to sustain them; and might have reasonably thought that, without any sign on his part of contrition or retraction, no reform was to be hoped from one so little regardful of the future happiness of his innocent son as to persistently blacken the character of the mother in the indulgence of fits of resentful passion. The best woman might forgive that once or twice and try to forget it, but the coarsest woman could not endure it continuously.

Whatever our own opinions upon the merits of the case may be, we do not feel authorized to disturb the decree. We cannot say the Chancellor erred.

Affirm.

MATHEWS v. MARKS.

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CHANCERY PRACTICE: *Removing cloud from title.*

A party who sues in equity to remove a cloud upon his title to land must be in possession unless his title be merely an equitable one, or the land be wild and unoccupied.

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

Compton & Fuller for appellant.

The demurrer admits that appellant is the owner of the land, and that the sheriff's deed is a cloud upon his title, and that said deed was procured by fraud and misrepresentation. This makes a case for a court of chancery. It is the only forum to afford the relief prayed. *24 Ark., 431; 29 Ib., 612;* see also *19 Ark., 139, which we think is conclusive.*

SMITH, J. This was a bill to remove a cloud from the title to lands. The plaintiff alleges that he is the legal owner in fee of the lands, and the cloud he complains of is cast by a sheriff's deed based upon a judgment and execution against him. He avers the nullity of said judgment on account of the non-service of process in the action, whereby he had no day in court. It is not disclosed who

is in possession of the lands, or whether they are occupied at all.

The bill was dismissed upon demurrer, the plaintiff having declined to amend.

Removing cloud from title.

A party who sues in equity to remove a cloud upon his title must be in possession, unless his title be merely an equitable one. For where the title is a purely legal one and the defendant is in possession, the remedy at law is plain, adequate and complete, and an action of ejectment cannot be maintained under the guise of a bill in chancery. In such case the adverse party has a constitutional right to a trial by jury. *Bryan v. Winburn, 43 Ark., 28; Lawrence v. Zimpleman, 37 Ark., 643, and cases cited; Lewis v. Cocks, 23 Wall., 466; Hipp v. Babin, 19 Howard, 271; 3 Pomeroy Eq. Jr., sec. 1399.*

The decree is affirmed without prejudice to the plaintiff's right to bring ejectment if he is out of possession, or to file another bill if he is in possession or the lands are wild and unoccupied. But no costs are allowed him for this modification.

BARTON v. SWEPSTON.

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AGENTS: *Public: Their contracts beyond authority void.*

The agent of a county to contract for repairs on county buildings has no power to bind the county to pay more in county warrants than the cash value of the labor and materials in United States currency; and parties contracting with such agent must take notice of the limits of his authority.

APPEAL from *Crittenden* Circuit Court.
Hon. J. G. FRIERSON, Circuit Judge.

Lyles, Harris & Ray for appellee.

This case is not governed by the act of December 7, 1875. (*Acts 1875, p. 51.*) The spirit of the proviso reaches this case. It is the duty of the county court to keep the court house in good repair. *Gantt's Digest, sec. 668.*

This case also differs from *33 Ark., 788, and 4 Dillon, 209.* In one the principal part of the account was for something that the county had no right to pay. In the latter case the county allowed five to ten times the value of the claim.

The contract was for $1,700, with the right to pay in currency for a less amount. The proof shows the county had no currency.

SMITH, J. The court house of Crittenden County needing repairs, the county court appointed an agent to have the same made. This agent let the work to Swepston, under a contract, by which he agreed, on behalf of the county, to pay $850 in currency, or $1,700 in county warrants, these last being then worth in the market only fifty cents in the dollar. The work was completed, but a portion of it not having been done according to specifications, Swepston deducted $100 from the contract price, and presented to the county court his account for $1,600, which was allowed and county warrants were ordered to be issued to that amount, there being no money in the county treasury. Barton, a citizen and tax payer, appealed, in behalf of the county, to the Circuit Court, where Swepston again recovered judgment for the same sum.

Section 1411 of Mansfield's Digest makes it unlawful for the county court to allow any greater sum, upon any demand against the county, than the amount actually due, estimating a dollar in county warrants as at par with a dollar in lawful money of the United States. The agent

who made the contract had no power to bind the county to pay for labor and materials more than their cash value in currency. And those who deal with public agents must take notice of the limitation which the law imposes upon their authority to bind their principals. It is possible that owing to the depreciation of county scrip, the county authorities could not have procured these repairs, which were necessary to preserve the building from waste and damage, to be made except upon an agreement to pay double the value of them. But the enhancement of allowances on account of such depreciation only aggravates the evil and is a ruinous financial policy. *Goyne v. Ashley County, 31 Ark., 552; Desha County v. Newman, 33 Ib., 788; Union County v. Smith, 34 Ib., 684; Shirk v. Pulaski County, 4 Dillon, 209.*

Reversed and remanded for a new trial.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY v. MUDFORD.

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1. COMMON CARRIER: *Damages for delay in delivering freight.*

For the conversion or loss of goods, or total failure to deliver them to the consignee, a common carrier is liable only for their value and interest at six per cent. per annum.

2. SAME: *Same.*

A common carrier is liable in damages for the negligent delay in the transportation of property; but the owner cannot on account of unreasonable delay in the transportation and delivery, refuse to receive the goods and sue as for a conversion. He can claim only the damages sustained by the delay.

3. DAMAGES: *For breach of contract: Measure of.*

For the breach of every contract the law implies that some damages have resulted. Yet if a party seeks more than nominal damages he must prove actual or substantial loss, unless the contract furnishes a guide for the measurement of the damages.

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

Dodge & Johnson for appellant.

The verdict is contrary to the evidence and is excessive. Plaintiff had no power to refuse to receive the goods and sue for their value. He could only sue for such damages as were caused by the delay. (*35 N. H., 400; 6 Hill, 588; Field on Damages, sec. 383; Story on Bailments, sec. 582; 12 N. Y., 515 and 518; 28 Barb., 520; Angell on Carriers, sec. 431-3.*) The only damage caused plaintiff was that caused by loss of time in *his search* for the goods, not exceeding twenty-five dollars.

2. In case of unreasonable delay by a carrier, the only damages recoverable are the actual losses sustained, less the freight due. *Hutchinson on Carriers, sec. 771; Field on Damages, sec. 375; Sedg. on Dam., marg. pp. 336, 359 and notes; Wood's Mayne on Dam., secs. 14, 15, 26, 31, 39; 47 N. Y., 33; 28 Barb., 520; 20 Wisc., 598; 54 Me., 378; 13 Allen, 384; 106 Mass., 470; 22 Ga., 273.*

3. No special damages were averred and none could be recovered. *1 Chitty on Pl., 348; 16 John., 127; 46 Miss., 458; 25 Ill., 88; Sedg. on Dam., p. 575; Hutchinson on Carriers, sec. 772; Field on Dam, secs. 388, 389; 4 Vroom, 517; 106 Mass., 468; 34 Vt., 565; 5 Jones, N. C., 301.*

Scott & Jones for appellee.

The verdict is not excessive. The machines were worth twenty-five dollars at the time of shipment. By the delay of appellant, the ginning season passed, and there was no sale for them when delivered. For the value of an article, as dependent on the season, see *17 C. B., 21; 9 C. B. (N. S.), 632; Wood's Mayne on Damages, secs. 16, 17.*

To set aside a verdict as excessive, the damages must

have been so large as to indicate passion or prejudice. It must be so flagrantly excessive that the mind at once perceives it to be grossly unjust or such as to warrant the belief that it was brought about by corruption, malice or undue influence or means. *25 Ark., 380; 1 Minn., 156; 10 Ib., 350; 27 Mo., 28; 27 Miss., 68; 54 Ga., 224; 12 Barb., 492; 24 Cal., 513; 38 Ill., 242.*

SMITH, J. Mudford filed the following complaint against the railway company, viz.:

"The plaintiff alleges that heretofore on the eighth day of February, 1881, said defendant was a common carrier for hire, from Texarkana, Miller County, Arkansas, to Cairo, in the State of Illinois, and on said day received from plaintiff at said Texarkana, one box of gin-sharpening machines, *for transportation to said Cairo, there to be delivered to a connecting carrier, to be forwarded to Goble Bros. & Co., at Cincinnati, Ohio.*

"Said box of gin-sharpening machines was of the value of nine hundred and fifty dollars, and was so to be by defendant as a carrier for a reward there agreed upon and paid to defendant by plaintiff, *carried and delivered to said connecting carrier within a reasonable time.*

"Said plaintiff alleges that three days is a reasonable time in which said machines *should have been transferred from Texarkana to Cairo, Illinois, aforesaid,* yet the defendant so negligently misbehaved in regard to the same in its calling as carrier for hire, that it failed and neglected *to deliver the said box to a connecting carrier* for transportation to Goble Bros. & Co., aforesaid, until the *sixteenth day of May, 1881,* to the plaintiff's damage in the sum of one thousand dollars, wherefore plaintiff prays judgment," etc.

Defendant filed the following answer:

"The defendant admits that there was some delay in the

transportation of said goods and the delivery of the same to a connecting carrier.

"It denies that said goods are of the value of nine hundred dollars, or that plaintiff was damaged, as alleged, by said delay, as alleged."

The only testimony in the case was that given by the plaintiff himself as follows:

"I am the plaintiff. I shipped the gin-sharpeners to Cincinnati by the defendant's road. There were forty-seven (47) of them. They *cost me five dollars apiece.* They were defective, and were shipped to Cincinnati for repairs. Machines were worth and sold for twenty-five dollars apiece at the time. It would have cost me one dollar apiece to send them to Cincinnati and back for repairs. *I was the patentee of the machine.* I was forced to get other machines by the delay. They were shipped in February and did not arrive at Cincinnati until May sixteenth, almost three months after they were shipped. The station agent of the defendant at Texarkana notified me that they were lost, and asked me to make a bill of them. I waited four or five weeks, and then ordered other machines. The time for using the machines was in the spring, and they would not sell so readily in May, on account of the lateness of the season. *When they were found,* the machines *were in the same condition as when they were shipped. They were worth five dollars when they were shipped, and were worth that when found.* I suppose I made as many as twenty trips into Texarkana to ask about them. I lived five miles away. It would, with ordinary diligence, require half a day to make a trip. My time was worth two dollars and a half per day. I refused to receive the machines when found."

Upon a trial before a jury the sum of $550 was awarded plaintiff. Defendant's motion for a new trial, alleging

misdirection of the jury, and that the verdict was contrary to the evidence and excessive in amount, was overruled.

1. COMMON CARRIER: Damages for delay of freight.

It is obvious that the verdict is grossly in excess of any damages that the plaintiff could have possibly sustained, and that it cannot stand. If the railway company had converted these machines to its own use, or had lost them, or for any other cause had wholly failed to deliver them to the connecting carrier, the measure of damages would have been their value, $235, with interest at the rate of six per cent. per annum. How then could the plaintiff be damaged in more than double this sum, when the goods were delivered in less than three months, and in the meantime had suffered no depreciation in market value, and no intrinsic deterioration?

2. SAME:

A common carrier is liable in damages for a negligent delay in the transportation of property. But the owner cannot, on account of unreasonable delay in the carriage and delivery, refuse to receive the goods and sue as for a conversion. *Hutchinson on Carriers, sec. 775; 3 Sutherland on Damages, 215; Scovill v. Griffith, 12 N. Y., 509.*

Consequently, when the defendant delivered the machines in good order to the connecting line at Cairo, it had performed its undertaking to carry, and was not responsible for their value as in case of a destruction or conversion. And the only claim which the plaintiff could have had against it was for the loss he had sustained by reason of the delay.

Now the complaint does not aver any special damages, that is, any damages which are not the necessary consequence of the delay, or which could not have been reasonably anticipated by the parties when the shipment was made. Hence none are recoverable except such as necessarily result from the injury complained of. *2 Gr. Ev., sec. 254; Sedgwick on Damages, 575.*

3. Damages for breach of contract

For the breach of every contract the law implies that some damage has resulted. Yet if a party seeks to recover more than nominal damages, there must be evidence of an actual, substantial loss, unless the contract itself furnishes a guide to the measurement of damages. *Adams Express Co. v. Egbert, 36 Pa. St., 360.*

The answer admitted that the delay was inexcusable, but no testimony was adduced to show that the plaintiff had sustained any pecuniary loss beyond the trouble and inconvenience of making inquiries for the machines.

Reversed and remanded for a new trial.

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MASON v. DELANCY.

UNLAWFUL DETAINER: *When maintainable.*

The action of unlawful detainer can be maintained only where the relation of landlord and tenant exists. It cannot be maintained against one in possession of land under a written or parol contract for its purchase which he has failed to perform. He is in as owner and not as tenant.

APPEAL from *Jefferson* Circuit Court.
Hon. F. J. WISE, Special Judge.

Martin & Taylor for appellants.

Appellee was only a tenant at will of appellant, as he claimed title to the land by virtue of a verbal contract to purchase. (*Gantt's Dig., sec. 2960.*) One who is a tenant of the vendor is also the tenant of the vendee. (*18 Ark., 284.*) An implied tenancy is as good as an express one. *33 Ark., 686; 41 Ib., 535; 42 Ib., 540.*

See also *McAdams Landlord and Tenant, sec. 29; 25 Barb.,*

243; 46 Vt., 84; 2 Wm. Bl., 1173; 2 Smith Lead. Cases, sec. 75 and notes; 9 A. & E., 849; 38 Mich., 707; 60 N. Y., 102.

In all uncertain or parol tenures the law makes the tenancy from year to year or at will, as the case may be. *Sedg. & Wait, Trial Title to Land, pp. 239 and 240; Gault v. Stormont, 51 Mich.*

There was no proper plea of part performance. Part performance is no defense at law. *See Brockway v. Thomas, 36 Ark., 524; Browne Stat. Frauds, sec. 451.*

COCKRILL, C. J. In an action of unlawful detainer the court sitting as a jury found the following facts from the evidence:

"The defendant Delancy purchased the lands described in the complaint from Robert Lemons by parol, and was placed in possession and made improvements. The plaintiff Mason, after defendant's purchase, entry and two years, possession, purchased the same lands from Robert Lemons and received a deed therefor. The defendant paid nothing under his purchase, but cleared about ten acres of the land, and made other improvements." Upon this finding, which is in the nature of a special verdict, there was a judgment for the defendant.

UNLAWFUL DETAINER: When maintainable.

As the action of unlawful detainer can be maintained only when the relation of landlord and tenant subsists between the parties to the action, it becomes material to ascertain whether the parties here stood in that relation to each other on the facts found in this case.

No objection can be urged against the plaintiff because he is not himself the vendor. If his vendor could have maintained the action, the plaintiff who succeeded to his rights could do so. *Bradley v. Hume, 18 Ark., 284; Johnson v. West, 41 Ark., 535.*

While it is not necessary under our statute to show an

express demise or letting of lands to sustain the action, the facts must show, impliedly at least, that the defendant occupies as tenant of the plaintiff, and this must be something more than a *quasi* tenancy. It is sometimes said that one who is in possession of lands under a contract for a sale is a tenant at will to the owner. This is true in a restricted sense only. He is a tenant at will just as a mortgagor after condition broken is a tenant at will of the mortgagee. He may be deprived of the possession if it can be done peaceably, or may be evicted in an action of ejectment. The mortgagor is not a tenant within the meaning of the unlawful detainer act, however. *Necklace v. West, 33 Ark., 682; Evertson v. Sutton, 5 Wend., 281.*

Our statutory remedy for use and occupation of lands has been construed to relate to proceedings between landlord and tenant only. But in *Byrd v. Chase, 10 Ark., 602,* the court say that remedy could not be resorted to in a case like this. See, too, *Wood's Landlord and Tenant, p. 8, n. 9, Ib., 948; Howard v. Shaw, 8 Mees. & Wels., 118.* The reason is obvious. When one purchases lands, or makes an agreement to do so, and enters into possession in pursuance of the agreement, his entry and his possession are as owner and not as tenant. If nothing more than the entry and possession with the consent of the owner were shown, a demise would be implied on the one hand and an agreement to pay rent on the other, and the relation of landlord and tenant would *prima facie* be established. But if the defendant shows that he is in under a contract to purchase he rebuts the idea of a tenancy, and a different agreement cannot be inferred from that the parties have deliberately entered into. The fact that the agreement to purchase is by parol and the action at law can make no difference. (*Carpenter v. U. S., 17 Wall., 489.*) The agreement is proved not for the purpose of enforcing it or of

giving it any vitality as a title, but only to rebut the idea of a tenancy. The defendant's relation to the plaintiff is the material fact to be ascertained and the agreement between the parties about the possession may determine that question. *People v. Howlett, 76 N. Y., 574.*

The distinguishing feature between this case and that of *Brockway v. Thomas, 36 Ark., 518*, is, that in the latter case the defendant held by virtue of a lease which in terms created the relation of landlord and tenant. The lease was by parol for a term of three years, but as it was not effective for more than one year by reason of the statute of frauds, and that year having elapsed, the tenant was holding over after the close of his term. It is this very class of cases that the action of unlawful detainer is provided for. (*Johnson v. West, sup.*) The case of *Gault v. Stormont, 51 Mich., 636*, relied on by appellant, was an action of forcible entry and detainer against a trespasser, and has no application unless in the implied recognition of the defendant's right to show his parol contract of purchase. The contract in that case gave no right of possession; the defendant entered without right and was dispossessed.

Finding no error the judgment is affirmed.

HART v. MORTON.

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REPLEVIN: *For goods intermixed.*

Replevin cannot be maintained for a mass of cotton in which the plaintiff's has been innocently mixed by the defendant, nor for an undivided share of the mass. It must be first separated and capable of identification.

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

Z. M. Morton for appellant.

First—The price of crop depended on amount when gathered and ascertained, all of which was to be done by Hart; if so, sale vested title in him, and McCrady could convey nothing to Morton. *37 Ark., 490; 35 Ib., 190; 31 Ib., 131 and 155; 19 Ib., 267; Parsons on Con., vol. 1, 526-7-8; Powell's Analysis Amer. Law, p. 275, par. 6-1.*

Second—A cotton crop in field is not the subject of manual delivery, and will pass without if so intended by the parties. *37 Ark., 490; 35 Ib., 304; 31 Ib., 131.*

Third—Appellee's rental rights did not give him right of possession of entire crop. *36 Ark., 529; 38 Ib., 418.*

Fourth—McCrady was holding as bailee when sold to appellee, and could convey no greater right than had himself—and having no property therein could convey none. *Story on Bailments, 101, 102, 103, 322, 323, 324.*

Fifth—Innocent purchaser not protected when seller no property. (*Powell's Anal. Amer. Law, p. 275, etc.*) Morton not innocent purchaser; has not paid anything on cotton. Had sufficient notice to put him on inquiry. (*16 Ark., 94; 14 Ib., 69; 27 Ib., 557; 55 Ala., 517; 36 Tex., 511; 75 Ill., 354.*) Is cognizable only in equity as a defense. The above cases real estate, but principle applies.

Sixth—Replevin will lie for *all* the cotton. After demand by appellant subsequent detention became wrongful, clearly a case of "confusion of goods." *Parsons' Con., vol. 3, 6th ed., 199, 200 and note a*, and authorities there cited; *Blackstone's Com. (Chitty), B. 2, 326-7.*

J. Frank Wilson for appellee.

1. If the vendor was to do anything to the goods, so as

to bind the purchaser to receive them, or to put them in a delivery state, the sale is not complete.

If you must either *weigh*, measure or test the goods, so as to determine the price, the sale is not complete still. *Beller v. Block, 19 Ark., 567.*

2. As a second reason why appellant cannot recover in this action see *Benjamin on Sales, section 675, note D* to said section. Here we have the authority given that, as between vendor and purchaser, and as against strangers and trespassers the title to personal property passes without delivery; but as to *subsequent* purchasers (in good faith, of course, and from the evidence appellee surely was), attaching creditors and others standing in like relation—this rule does not apply; to render a sale valid against these, *there must be a delivery*—citing a *host* of *authorities.* Also, from the same authority we find that when the same chattels are sold to two different purchasers, by conveyances equally valid, he who first takes possession will hold as against the other. *Fletcher v. Howard, 2 Aiken, 115; Brown v. Pierce, 97 Mass., 46-48; Daws v. Cope, 4 Binney, 258; Lanfier v. Sumner, 17 Mass., 113; Bab v. Clemson, 11 Serg. and R., 419; also, 5 Whart., 53; 2 Kent., 522; 60 Maine, 372; 4 Gray, 307; 5 Allen, 280.*

3. A third reason why appellant cannot recover in this action of replevin is, that the evidence wholly fails, as we humbly conceive, to show that the appellee *willfully* mixed the cotton purchased from McCrady with that of his own, but did as he believed he had a right to do—mixed the cotton as a necessary convenience—having no knowledge of appellant's pretended claim at the time. Therefore, not "clearly a case of confusion of goods," but clearly replevin will not lie. (*Wells on Replevin, secs. 196 and 7.*) Mixture must be willful. Also see *McKennon v. May, 39 Ark., 442.*

REPLEVIN: For goods intermixed

COCKRILL, C. J. The plaintiff and defendant each asserted title by purchase from the same vendor, to a lot of seed cotton. The plaintiff claimed to have purchased it in the field before it was picked, subject to the landlord's lien for rent. The defendant was the landlord, and after the cotton was picked got possession of it with the assent of the tenant, taking a part in satisfaction of his rent, and part in payment of a debt the tenant owed him. The plaintiff sought to take the whole from him in replevin. He admitted the defendant's prior right and superior title to the rent cotton, but claimed that the defendant had intermixed his own and that claimed by the plaintiff, and thereby forfeited his right to any part of it. It is not shown by the testimony that the defendant was guilty of any fraud or willful wrong in intermingling the rent cotton with that claimed by the plaintiff, if indeed it can be said the cotton was by his act intermingled at all. There had been no separation of the rent cotton from the other at the time of his purchase. He bought it in bulk in the condition it came from the field, without notice of the plaintiff's claim of title, and in good faith as far as the record discloses. In order to ascertain what he was entitled to, he weighed out, after the tenant had absconded, first the rent cotton and then the residue he had purchased. There was a small lot of four hundred pounds left, which was laid aside for the plaintiff, and not then claimed by the defendant. It appears, subsequently, to have been swallowed up in the mass, but how or when we cannot determine, and no point is made in regard to it.

The defendant could not be visited upon this showing with the loss of his cotton. The rule that takes from the wrong-doer who confuses his goods with those of another, the right to claim any part of the intermixture, and confers the title to the whole upon him whose original domin-

ion was invaded, was devised to prevent fraud. It does not govern where the intermixture is not wrongful. The most usual and familiar illustration is this: if a man mixes two parcels together, supposing both to be his own, no change of property takes place. *Ryder v. Hathaway, 21 Pick., 306; The Idaho, 93 U. S., 575; 2 Schouler's Pers. Prop., sec. 49; Story on Bailments, sec. 40.*

It is also said, generally, that there is an exception to the rule, or at least that it is less rigorously enforced when all of the goods are of the same quality and value, as corn, wine or cotton; then each party remains the owner of his aliquot share of the bulk. (*Authorities sup.*) But whatever may be the remedy of the parties as to a separation in case of disagreement between them, it is settled as far as this court is concerned that replevin cannot be resorted to for that purpose. That action lies only for specific property capable of identification, and cannot be maintained for an undivided interest or share. *Person v. Wright, 35 Ark., 169; McKennon v. May, 39 Ib., 442; Washington v. Love, 34 Ib., 93; Ward v. Worthington, 33 Ib., 830.*

The determination of these questions settles the case against the plaintiff and in favor of the judgment. As the plaintiff could not recover an undivided share of the cotton in this form of action, the question of his title to a share only is not presented and is not determined. If we admit that the defendant took title to nothing except the rent cotton by his purchase, the judgment is still right.

Affirm.

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COLEMAN v. HILL.

1. SWAMP LANDS: *Conflicting entries.*

A lawful entry of swamp lands before the swamp land commissioner vested in the enterer an equitable title to the land, and an absolute right to a patent; and a subsequent sale and patent to another would be vacated by a court of equity, and the title vested in the first purchaser. No negligence or mistake on the part of the agent in permitting a second entry could affect the first purchaser's rights in equity.

2. STATUTE OF LIMITATIONS: *Adverse possession.*

The statute of limitations does not move in favor of a vendor who is under obligation to convey the legal title, until he has given his vendee notice of his intention not to convey, or done some other act indicating unequivocally that he claims or holds the land adversely. Mere possession by the vendor does not indicate a hostile intention.

3. SAME: *Equitable owner in possession.*

When the owner of the equitable title is in possession, under his contract, the statute of limitations does not run against his right to a conveyance.

APPEAL from *Clark* Circuit Court in Chancery.
Hon. H. B. STUART, Circuit Judge.

H. H. Coleman, pro se.

The act of Congress, approved September 15, 1851, vested in the State the swamp lands from its date. *Rose's Digest, 746; 20 Ark., 346.*

By the act of 1851 the commissioners were authorized to sell, and upon sale the title of the State passed to the purchaser. *Ib.*

A sale of the land by the land agent is no excuse for refusing to issue a patent certificate to a purchaser from the commissioners, while they were authorized to sell. (*Rose's Digest, p. 747, sec. 11.*) A land agent could not be required to issue a patent certificate except upon the surrender of the original certificate of purchase. (*Ib., 747, sec.*

12; 20 Ark., 337.) This provision accounts for the original certificate of purchase surrendered by Newton. The patent certificate and deed given to Newton, were authorized by law. Hearn's were not.

The right to a patent is treated by the Government, when dealing with public lands, as equivalent to a patent issued. When it issues it relates back to the inception of the right. (*6 Wall., 402; Blackwell on Tax Titles, 453; Caine's Rep., 62; Johnson's Rep., 80.*) Where one party has acquired the legal title to which another has a better right, a court of equity will compel him to convey. (*6 Wall., 419.*) Payment of taxes is not a disseizin, unless there is also a continued and open possession. *2 Greenleaf, 557, quoting 2 Greenl. Rep., 275; 14 Pick., 224.*

Appellant's possession has been continuous and unbroken. (*22 Ark., 79; 34 Ib., 602.*) It is presumed to continue until notorious and adverse possession be taken by appellees. (*Idem.*) If Newton's first certificate be regarded as an application to purchase, it comes within the purview of *34 Ark., 334.*

B. B. Battle for appellee.

When the Government conveyed the land to Hearn, the legal title vested in him, and there was nothing to be conveyed to Newton. (*96 U. S., 530.*) The second patent was void. The land being wild and uncultivated, the possession followed the legal title, and was in Hearn and his grantees. (*21 Ark, 17; 6 Peters, 743; 5 Ib., 354.*) There was nothing in the acts of Coleman and his grantor to bar Hearn and his vendees. *3 Met. (Mass.), 125; Spencer (N. Y.), 487; 21 Cal., 453; 1 A. K. Marsh., 207; 7 Iredell, 310; 3 Green (Me.), 126 * p.; 2 Johns., 280; 30 Cal., 408; 54 N. Y., 387.*

Possession of an adjoining tract under the same deed

will not give constructive possession to the land in controversy, he having acquired no title thereto, although his title to adjoining tract be good. (*12 N. H., 9.*) Coleman is barred by the title and acts of Hearn, and lapse of time. *21 Ark., 17.*

1. SWAMP LANDS: Conflicting entries.

COCKRILL, C. J. In its inception this was an action of ejectment by C. S. Hill against Coleman, for forty acres of land. Each party claimed title to the tract by patent from the State, issued under the swamp land laws. The patent under which Hill asserted title was the older in date, but Coleman claimed a superior equity. It appears from the record that his vendor, John Newton, entered the land on the tenth of December, 1853, and received a certificate of purchase therefor from the swamp land commissioner. On May 29, 1855, he surrendered this certificate to the land agent for the Washington District, in which the lands were situated, in pursuance of the requirements of the act of January 20, 1855, and got a patent certificate in its stead, upon which a patent issued September 7, 1855.

Hearn entered the same land on the fourteenth of October, 1854, received a certificate of purchase from the land agent of the Washington District, surrendered it as Newton had done, and took a patent certificate in its stead, in August 1855, and got his patent on the twenty-second of that month.

The case was transferred to the equity docket, where Hearn and his immediate vendee were made parties. Coleman filed an answer and cross-complaint, alleging the facts stated above, and showing a conveyance of the land from Newton to him in 1859. He also alleged that Newton entered into possession of the land at the time of his entry in 1853, and held the same until his sale in 1859;

that he (Coleman) had maintained possession ever since, and that the possession of each was adverse to the plaintiffs. The plaintiffs, in turn, asserted adverse possession in themselves for more than seven years.

There was a decree in Hill's favor, and Coleman appealed.

Newton's original certificate of purchase is not before us, but it appears from a certified copy of entries made in the books of the swamp land office for the Washington District, that the transaction between Newton and the commissioner, in 1853, was a purchase of the land, under the act of January 6, 1851, and not an application to purchase, such as has frequently been before this court.

This was the first step taken by any one to acquire title to the land in litigation. It had been previously selected as swamp land, but had not been patented to the State. Newton's entry vested in him the equitable title to the land, and absolute right to a patent. Afterwards it could not lawfully be sold by the State to another. *Branch v. Mitchell, 24 Ark., 448; Brewer v. Hall, 36 Ark., 334.*

In speaking of the right to a patent after the issue of a certificate by the proper authority, the Supreme Court of the United States, in *Johnson v. Towsley, 13 Wall., 72,* say:

"In every such case where the land office afterwards sets aside this certificate, and grants the land thus sold to another person, it is the very essence of judicial authority to inquire whether this has been done in violation of law, and if it has, to give appropriate remedy. And so if for any other reason recognized by courts of equity as a ground of interference in such cases, the legal title has passed from the United States to one party, when, in equity and good conscience, and by the laws which Congress has made on the subject, it ought to go to another, 'a court of equity will,' in the language of the court in *Stark v. Storrs, 6*

Wall., *402*, 'convert him into a trustee of the true owner, and compel him to convey the legal title.' In numerous cases this has been announced to be the settled doctrine of this court in reference to the action of the land officers."

Mistake of land agent no prejudice.

In this case there appears to have been no contest, or decision of the land officers as to the relative rights of the parties. We are not apprised of the real reason of the second entry, but are led to infer that it happened through the inadvertence of the land agent. No negligence or mistake on his part could affect the purchaser's rights in equity. It must be admitted that at law Hearn had the better title, but that can be of no avail to him in this proceeding, unless he has coupled with it such proof of possession of the land as to bar the equitable right by virtue of the statute of limitations.

Newton's relation to the State was that of a vendee under a contract for a conveyance, the conditions of which were fully performed by him. Equity regarded him as the absolute owner of the land, and the State as a naked trustee, having no estate, and charged with the simple duty to issue him a patent at the proper time.

2. STATUTE OF LIMITATIONS: Adverse possession.

It is familiar doctrine that the statute of limitations does not move in favor of a vendor who is under obligation to convey the legal title, until he has given his vendee notice of his intention not to convey, or done some other act indicating unequivocally that he claims or holds the lands adversely. The mere possession of the land by the vendor, it is held, does not indicate a hostile intention. *Harris v. King*, *16 Ark.*, *122*.

In this latter respect Hearn's position, after he received the patent, differed from that of his vendor, the State. The trust, such as it is, was forced upon him against his will, and his relation to the holder of the equitable title would be hostile without the specific proof of intent re-

quired in case of the vendor. Open and notorious acts of ownership of the land by him would be regarded as adverse to the interest of the equitable owner from the outset, and if continued for the statutory period, would vest a complete title in him. The intention to claim the land, however, must be manifested. In the absence of proof of dominion over the land by notorious acts of ownership or other notice to the equitable owner, there is no magic power in the dry legal title to work a change of estate in favor of its holder. *Harris v. King, 16 Ark., 122; Wood on Lim., sec. 219, n. 1, at p. 439.*

3. SAME: Equitable owner in possession.

When the owner of the equitable title is in possession under his contract, the statute cannot run upon his right to a conveyance.

Hill is not in a position under the proof disclosed here to claim anything by the statute of limitations. Neither he, nor any of his predecessors in title, have ever been in the actual possession of the land. They have paid the taxes, and Hearn went over the land once after his purchase. On the other hand, Newton, who lived on the adjoining land, and near the line of this piece at the time he entered it, built a log cabin on it in 1853 or '54, and a *possessio pedis* was maintained by him, under his purchase, until he sold to Coleman in 1859. In the meantime Coleman located his home on the section of land adjoining the tract. Newton entered, and had acquired title to the intervening lands, including the piece Newton resided on in 1853. He had actual possession for a time after his purchase, and testifies that he always claimed it, and exercised acts of dominion over it as over his adjoining lands from time to time. The lands were wild and unimproved, except five or six acres which were cleared before Newton's entry. This has been cultivated in part by Coleman at times, but for many years was not put to any use.

Coleman was not cultivating it when the suit was commenced, and his possession was not more apparent than it had previously been, but the plaintiff recognized that he was in possession by bringing an action of ejectment against him.

In the absence of proof of notorious acts of ownership by the holder of the legal title, and the proof of such acts of ownership by Coleman, we can see nothing upon which the plaintiff can base a claim of right under his plea of the statute of limitations.

The decree of the Circuit Court must be reversed, and a decree entered here in accordance with this opinion, vesting the legal title to the land in Coleman, and quieting his title thereto, and it is so ordered.

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HORSLEY ET AL. V. HILBURN ET AL.

1. DEEDS: *Construction of: Tenant for life: Remainder-man.*

Shelton conveyed to Marietta Hilburn, "and the heirs of her body that now are or may hereafter be born," a tract of land, providing in the deed that "neither the said Marietta nor her husband, nor either of her children that now are or may hereafter be born, nor any other person for them, shall have any power to sell said land during my natural life, or until the youngest child of said Marietta, now or hereafter born, shall arrive at full age." *Held:* That the deed vested in Mrs. Hilburn a life estate, and upon her death the remainder in fee in her children that survived her, and the issue of such as had died during her life, *per stirpes.* That it vested nothing in the children during the life of the mother; and they had no interest that during her life could be transmitted to her by their death, or be sold with or without the consent of the donor.

2. VENDOR AND VENDEE: *After-acquired title.*

Section 642 Mansfield's Digest, vesting the after-acquired title of a grantor in his previous grantee, applies only to voluntary sales by the persons to be bound.

3. PRACTICE: *Tranfer to equity docket.*

It is not imperative upon the Circuit Court to transfer a cause to the equity docket except where the answer presents some defense exclusively cognizable in equity, or where all the issues are cognizable in equity, but not exclusively so.

CROSS-APPEALS from *Benton* Circuit Court.
Hon. JAMES A. RICE, Special Judge.

Clark & Williams for appellant, Horsley.

The court below, without doubt, acted upon the idea that this deed created what, by common law, was a conditional fee, or an estate in fee tail general. See *4 Kent's Com., page 11; 2 Blacks. Com., 110; 1 Wash. on Real Prop., mar. page 66, et seq.*

This kind of an estate our statute converts into a life estate in the donee with a fee simple in the heirs, to whom, by common law, the estate tail would first descend. See *Gantt's Digest, section 833.*

We contend that Marietta and her husband had power to deed the land, and that their deed to Greenwood conveys a fee simple title, bars all or any right in the heirs to the property, and we put this, first, upon general principles of law, and second, upon the powers and limitations contained in the deed itself.

And first, as to the general law, a deed to a party and the heirs of his body, did not at common law, properly speaking, create an estate tail. It was a conditional fee, although it is by most English writers classed as coming in many respects within the meaning of estates tail. But the very essence of an estate tail was that it could not be alienated by any tenant, but must descend as limited by the donor or grant. An estate such as is created by this deed could, by the common law, be alienated by

the donee at any time, and a fee simple title conveyed after an heir of his body had been born; but in this case an heir had been born before the grant. The right, by common law, in Marietta and her husband to sell, was complete when the grant was made. The statute *De Donis Conditionalibus* (*13 Edw., 1; Stat. 1, C. 1, sec. 2; see 1 Wash., 94, secs. 7 and 10; 2 Inst., 342, 333; 2 Prest. Est., 378*), took away this right of alienation, and *declared that the will of the giver*, according to the form of the deed manifestly expressed, should thereafter be observed. That they to whom the land was given should have no power to alien the land, but it should remain unto the issue of them to whom it was given after their death, *or should revert to the donor*, if such issue failed.

The object of the statute was to give effect to the will of the donor, so that the property should go to the heirs of the body, if any such should be born, if not, that it should revert to the donor or his heirs. See *Bacon's Abr., 3d vol., Estates Tail "C" and "D;" 1 Wash., 67, 68 and 69; 2 Black. Com., 231; Williams' Real Property, 31, 32.*

In regard to the conditional fee or fee tail general, when conveyances by bargain and sale took the place of feoffments and common recoveries, this mode of conveyance was as applicable to a fee tail general as to a fee simple; and in all the States of the Union, where no statute has changed the law of entailments, a fee tail general is alienable by the tenant after issue is born, the same as a fee simple—it being the modern policy of the law in both countries to favor the free alienation of all kinds of property. *Williams' Real Property, 45, 46; 1 Wash., 72; 4 Kent's Com., *15, 16, 17, 18; 2 Bay (S. C.), 397; 1 McCard's Ch. Rep., 91; 2 Bailey's, 231; 1 Hill, S. C., Ch. Rep., 276.*

Had our statutes converting estates tail into life estates never been passed, this deed of gift would have conveyed

a fee simple title to Marietta Hilburn, and she could at any time, by a joint deed with her husband, have sold and conveyed a fee simple title, because heirs of the body had been born to her when the deed of gift was made.

Does our statute change this state of the law? Does the statute properly apply to this class of conveyances? Unquestionably the grantee or devisee of a life estate can only convey his life estate, and the remainder-man takes by purchase from the grantor and not by descent from the life tenant. But this is a gift to a party and the heirs of her body, which the law says is a fee simple whenever such heirs exist. Such a conveyance never did convey an estate tail proper, but only a conditional fee. It was not, we insist, the object of our statute to convert an estate in fee, either absolute or conditional, into a life estate with remainder over and the statute applies only to estates in fee tail proper, or to estates in special fee tail.

This deed of gift in this case is in nothing different, so far as the rights of these heirs are concerned, than if it had been to Marietta and her heirs general. In either case the property would go to them only in case she died seized of it.

Upon this subject we ask the court to examine the cases: *Coe v. Dennett, 22 Hun., N. Y., 428; Wendall v. Crandall, 1 N. Y., 491; 13 Ark., 89; 64 Penn. St., 9.*

We insist most emphatically that it was not the intention of our statute to convert the grant of an estate virtually in fee simple, by common law, into a life estate with the remainder over. *Sale v. Crutchfield, 8 Bush. (Ky.), 632, 648; Breckenridge v. Denny, 8 Bush., 533; Huges v. Knowlton, 3 Conn., 429; Newman v. Welletts, 52 Ill., 98; Carpenter v. Keeter, 65 N. C., 475; Megargee v. Naglee, Ib., 216; McCollough v. Fenton, 65 Pa. St., 418; Grant v. Carpenter, 8*

R. I., 36; Arnold v. Lincoln, Ib., 384; Graham v. Graham, 4 W. Va., 320.

In the next place this deed of gift was coupled with a power in Marietta and her husband to sell the land with the consent of Shelton, the donor, and was sold in strict accordance with such power; for a restraint on the donee against a sale of the property without the donor's consent, is equivalent to a power to sell *with* such consent. *Bishop of Oxford v. Leighton, 2 Vern., 376; Lavender v. Blackstone, 3 Neb., 26; 2 Coke's Littleton, *page 123, 124, and note 1; Hele v. Bond, Price Ch., 474; Zauch v. Woolston, 2 Burr., 1136; 2 Ves., 211; Thompson v. Freston, 2 Rol. Abr., 262; Colston v. Gardner, 2 Ch. Co., 46; Atwaters v. Best, Cro. Eliz., 84.*

And, moreover, a power of disposal in the first taker renders a subsequent limitation void. (*Jones v. Bacon, 68 Me., 34.*) And as to the right to impose restrictions upon the power to alienate by the grantor. *Mandlebaum v. McDanell, 29 Mich., 78; 1 Wash., *page 54; Brundige v. Domestic, etc. Missionary Society, 60 Barb. (N. Y.), 204; Stewart v. Barrone, 7 Bush., 368.*

It may be said that the consent of the grantor to a sale, reserved in the deed, could only be expressed in writing. The answer to this is that the right to consent is reserved in writing in the deed, and does not specify that the consent should be so. It is not required by the statute of frauds, for it constitutes no part of the conveyance made upon such consent, which was made by Marietta and her husband. It is connected with, and forms a part of a power, in writing, to them to sell. It is a limitation upon that power. If the parties would not have the power to sell independent of such reserved consent, then the reservation is a nullity, unless itself impliedly operates to confer such power, which undoubtedly it does. If with-

out this reservation in the deed it would create an estate tail by common law which in our statute would convert into an estate for life with the remainder over, in fee to the heirs, this reservation converts it into a fee simple by condition subsequent. It recognizes the power upon a condition, which condition is under the control of the grantor himself, to convert the estate into a fee simple. Only in case this condition reserved in the deed had been required by the deed to be in writing, was it necessary for it to be so.

And upon well known principles, it makes the estate granted a fee simple title. See *2 Wash.*, *8*, under head of Estates upon Condition, *et seq.*

In other words, taking into consideration our statute referred to, the following words in the grant, "it is distinctly understood as a part of this deed of gift that my daughter nor her husband, nor none of her children now born or hereafter to be born, shall have any power, nor no other person for them, to sell or dispose of any part of said lands *without my consent during my natural life, or* until the youngest child of my said daughter, now born or which may be born hereafter, shall have arrived at full age," operate simply as a limit of the grant to the heirs, upon condition that the tenants for life should not sell the property by the consent of the grantor before the death of the grantee. Their rights, their whole title, depended upon this condition; and the sale by the consent of the grantor was strictly in accordance with the conditions of the grant. This condition, upon which their title depended, never happened, and they never had any right to bring this suit.

Unquestionably if Marietta never had anything under this deed of gift but a life estate, and no power to sell more than her life estate, and the heirs, except those who

in their lifetime sold their interest under the orders of the probate court, were entitled to an estate in remainder, the statute of limitations would not run against them until after the death of the tenant. If they had no such remainder, then the statute has no application. But the claim for improvements made upon the property before the death of the life tenant, is quite another thing. Horsley purchased what purports to be a fee simple title. He improved it as his own property, never doubting and never having occasion to doubt his ownership of the property. He comes within the *betterment act, approved March 8, 1883, (see Acts of 1883, page 106)*, and if the finding was right that Mrs. Montgomery and Mrs. McConnell were entitled to recover two-fifths of the land, the defendants were entitled to an offset for the whole amount of improvements they put upon the land, and the court erred in not allowing evidence of such improvements.

E. P. Watson for appellee, Hilburn.

1. Under the common law the deed made by Shelton would have created an estate tail, beyond any question. In limiting estates tail it was not necessary to use any particular form of words or technical phrase. If from the description the *issue of a particular person be designated as heirs that is sufficient. 1 Waseb. Re. Prop., bk. 1, ch. 4, secs. 22, 24, 26, 32, 39, 42; Greenleaf's Cruise, title 32, ch. 22, par. 11 p. 659, vol. 2, 2d ed., Shep. Touch., 105; 24 Beav., 296; 69 Mo., 524; 3 Wash. R. P., bk. 3, ch. 4, p. 26; 2 Wall., U. S., 607; Shep. Touch., * 86, note d.*

2. At common law it would have been an estate tail at the date of the deed, and by our statute converted into *an estate for life, in the donee in tail, and passed as remainder in fee to her issue, as through purchase. (Gantt's Dig., sec. 833; Rev. St. Ark., 1839, ch. 31, p. 188, et seq.)* The tenant for

life "has no power to do any act to defeat or incumber the estate in the hands of the heirs." *4 Kent. Com., *15, note C., and 1 Wash. R. P., bk. 1, ch. 4, *61, note; 24 Mo., 453; 58 Ib., 147; 64 Ib., 312; 69 Ib., 512.*

3. While in our view the remainder in fee will in some sense be deemed to have been vested in the first born children so far as to prevent any interference with the estate by the life tenant, yet the estate shifted by vesting, divesting and revesting as exigencies demanded, until the hour of the ascertainment of the persons to whom the estate would have passed according to the course of the common law. *Farrar v. Christy, 24 Mo., 268, and other cases supra.*

The seizin of the particular freehold estate having gone by the deed of Mrs. Hilburn was not extinguished until her death. And although the deceased infant child of Mrs. Hilburn was while *in esse* presumptively an heir, she, dying during the existence of the particular estate, would by the common law have been out of the question, as only *heirs* of the donee could first take the full estate upon her decease, and not before. *Nemo est haeres viventis*, and "the course of descent of estates in fee simple and fee tail general, is the same by the common law." (*1 Wash. Re. Pr., bk. 1, chap. 4, secs. 53, 46; Williams Re. Pr., *53.*) Then, it would seem, the death of Ida, without issue, before fully vested with any estate as *heir* to her mother, the donee, nothing could pass to her mother or other person as statutory heir or distributee; and the whole estate belonged, at the death of the donee, to her four heirs, the plaintiffs, as purchasers. So, if it were conceded that the guardian's sale passed anything it could not have been more than the interests of the plaintiffs, Robert and Clarence.

Probate court no power to sell.

The probate court had no power to alienate the interests of any of the plaintiffs who, before the death of the donee

in tail, could not know what interests they would have, respectively, at her death as heirs. This of itself might seem sufficient objection to the attempt to convey, but there were two obstacles aside from this. One imbedded in the Shelton deed—the other in the *law* of the State.

As to improvements and taxes claimed by defendants: The court below properly declared the law as to improvements by or for a tenant for life, whether the tenancy be for the life of himself or of another. (*Sedg. & Wait Land Tr., secs. 708–9; Sohier v. Eldredge, 103 Mass., 345; Austin v. Stephens, 24 Me., 520; Thurston v. Dickinson, 2 Rich. Eq., 317; Merrett v. Scott, 81 N. C., 385; Runey v. Edmonds, 15 Mass., 291.*) And the life tenant must pay taxes. *Varney v. Stevens, 22 Me., 331; Patrick v. Sherwood, 4 Blatch., 112; Cairnes v. Chabert, 3 Edw., 312; McDonald v. Heylin, 4 Phila., 73; Fleet v. Dorland, 11 How. Pr., 489; Johnson v. Smith, 5 Bush., 102; Wade v. Malloy, 16 Hun., 226.*

After the determination of the life estate, the common law as to improvements was in force until the betterment act of 1883 went into effect; and, at common law, compensation for improvements by wrongful occupants, whatever they may have believed as to their rights, cannot be obtained. (*Sedg. & Wait Land Tr., sec. 690.*) The betterment act of 1883 could not avail defendants anything. In the first place they are not proved to be within its provisions, which reach only the "person believing himself to be the owner."

And then plaintiffs' rights to the land, and all improvements constituting a part of the realty, had accrued before the passage of the act; and to cut off their right to recover them or any part of their value, by any sort of retroactive statute or imposition of conditions of payment, would be to infract both our State and United States Constitutions, being clearly an impairment of a pre-existing

substantial right of enjoyment. *Wade on Retro. Laws, secs. 156–7–8–9 and 160; Wade on Retro. Laws, secs. 172, 190, 195–6, 229; Cooley Const. Lim., *353–4, *358; Sedg. Constr. Const. & L. (Pomeroy's ed.), p. 563–4; Story's Const. (Cooley's ed.), secs. 1943, 1951; Const. U. S., 14th Amend.; Const. Ark., secs. 8, 13 and 22, art. 2; Green v. Biddle, 8 Wheaton, *14–16; Craig v. Flanagin, 21 Ark., 319.*

EAKIN, J. The plaintiffs in this cause, Hilburn, *et al.*, are the four children and heirs of Marietta Hilburn, who were living at the time of her death. On the fourteenth of September, 1882, they sued the defendants, the Horsleys, with a number of others, in ejectment, to recover two contiguous quarter sections of land, described as the northeast quarter of section 10, and the northwest quarter of section 11, in township 19 north, of range 30 west. They claim under Jesse Shelton, their grand father, who, on the eleventh of July, 1851, conveyed the lands to his daughter, their mother, and "the heirs of her body that are now born or hereafter may be born," alleging further, that on the thirteenth of December, 1877, she conveyed to plaintiffs.

A copy of Shelton's deed is incorporated as an exhibit in the complaint. They offer also to exhibit the deed of the mother, but it does not appear to have been filed.

Burrell and William Horsley pleaded that they were exclusively in possession of the northwest quarter of section 11, the others being in possession of the northeast quarter of section 10; and that there was a misjoinder of parties. The plaintiffs seem then to have split their action, and on the fourteenth of April, 1883, to have filed a separate complaint against the Horsleys alone, for the northwest quarter of section 11, leaving the original suit to proceed against the other defendants, for the northeast

quarter of section 10. In this new complaint they pretty much reiterate the matter of the first, except that they do not set up the mother's deed to them, but say she died on the fourteenth of August, 1881.

Shelton's deed contained this clause: "It is hereby distinctly understood, as a part of this deed of gift, that my said daughter nor her husband, Francis M. Hilburn, nor none of her children now born, or which may hereafter be born, shall have any power, nor no other person for them, to sell or dispose of any part of said lands, without my consent during my natural life, or until the youngest child of my said daughter, now born or which may hereafter be born, shall have arrived at full age."

The Horsleys excepted to this deed on account of the uncertainty of the title of plaintiffs claimed under it, but no disposition seems to have been made of the exception. They then answered, saying:

"That after the execution of Shelton's deed to his daughter, Marietta, she, with her husband, and with the consent and approval of her father, sold and conveyed the said northwest quarter to A. B. Greenwood, but that there was a mistake in the certificate of her acknowledgment, whereby it failed to show that she was separately examined; whereas, in fact, she was." Saying further: "That afterwards F. M. Hilburn, who had been duly appointed the guardian of said heirs, by the Benton probate court, acting under the authority of that court, lawfully obtained for the purpose, sold and conveyed the same tract to said Greenwood; but 'by the exigences of the late war or otherwise,' the record of his appointment as guardian, and the order authorizing the sale, and the approval of the sale by the court, had all been lost."

They ask leave to prove the lost records, and set up a conveyance from Greenwood to Burrell Horsley.

They say further, that said Marietta, before her death, had been for fifteen years discovert, and that they had been in the open, peaceable and adverse possession of the land for that length of time before commencement of the suit; wherefore they plead the statute of limitations.

They submit if they were mistaken in the effect of Shelton's deed, which they contend conveyed a fee simple title, yet as she sold for valuable consideration, the plaintiffs are only entitled to the proceeds after her death, to be recovered of her estate. They ask, in case plaintiffs may be found entitled to the land, that an account be taken of valuable and lasting improvements made by them, and for taxes paid, and that a lien for same be declared.

The court overruled a motion to transfer the cause to the equity docket.

The cause was heard by the court without a jury. It was adjudged that two of the plaintiffs, Sarah and Cora J., who were married women, made parties with their husbands, were entitled to an undivided two-fifths of the land, and damages were assessed in their favor for use and occupation at $138.48, after deducting emblements belonging to defendants as life tenants, and taxes paid after the termination of life tenancy. For the rest, the judgment was for the defendants and against the other plaintiffs. Costs were adjudged in the same proportion, and both plaintiffs and defendants appealed.

There were two bills of exceptions prepared by the parties respectively, both of which were signed by the judge and made matter of record.

The material facts further disclosed by these bills of exceptions are substantially, that Mrs. Marietta Hilburn and her husband conveyed all her interest in the land to Greenwood, on the fourteenth of January, 1853. The certificate of acknowledgment failed to show a privy examination.

Also, a deed from Greenwood and wife to Burrell Horsley, dated seventh of December, 1867.

Also, by oral proof, that Francis M. Hilburn was duly appointed guardian of Robert and Clarence Hilburn; that he made application to the probate court for the sale of said land, as required by law; that it was granted for the maintenance and education of the wards; that the land was sold to Greenwood, reported to the probate court, and confirmed; and that all the records and proceedings of the probate court relating to said sale had been lost or destroyed through the war. The proof was very full, definite and reliable upon each and every point essential to the validity of the sale. Exceptions to it were saved.

Hilburn's deed as guardian recites his appointment, the order for sale, the sale itself, and the purchase by Greenwood. The deed dated the fourteenth of January, 1853, conveys all the interest of Robert and Clarence Hilburn.

The defendants offered, but were not allowed to prove that after the purchase from Greenwood by Burrell Horsley, they made lasting and valuable improvements on the land to the value of $2,000. The court refused that, but conceded that they might prove such improvements as were put upon the lands between the death of Mrs. Marietta Hilburn, on the fourteenth of August, 1881, to the beginning of the suit. No proofs were actually made of any improvements, or of their value, or of amounts of taxes paid at any time.

Mrs. Marietta Hilburn had been the mother of five children, born respectively as follows: Robert, born in 1846; Ida, in 1849; Clarence, fourteenth August, 1851; Sarah, in 1854, and Cora in 1859. Ida died in December, 1851, without issue. The others are the present plaintiffs. It thus appears that when Shelton's deed to the mother was made, on the eleventh of July, 1851, she had issue living, Robert

and Ida. That Clarence, Sarah and Cora had been born, and Ida had died afterwards; Sarah had married Montgomery and Cora, McConnell.

The court found the facts accordingly, adding, with regard to Mrs. Marietta's deed to Greenwood, that it was, in fact, actually acknowledged properly, but that the certificate was defective; also, that after the death of Marietta, defendants had paid taxes and made improvements, but no *amount* was found either of improvements, taxes or rents.

The court also made declarations of law to this effect:

First—That Shelton's deed conveyed to his daughter, Marietta, a life estate, with remainder in fee to the heirs of her body.

Second—That the restriction upon alienation was void, as inconsistent with the estate granted.

Third—That upon the death of Ida, her mother took, by descent, an interest in fee to the extent of one-fifth of the remainder.

Fourth—That by her deed Greenwood took her life interest and one-fifth of the fee in remainder.

Fifth—That by the guardian's deed he took two other fifths of the remainder in fee.

Sixth—This life estate and three-fifths of the remainder in fee passed by Greenwood's deed to Burrell Horsley.

Seventh—That the life estate determined by the death of Marietta, on the fourteenth of August, 1881.

Eighth—That Robert and Clarence Hilburn had nothing left.

Ninth—That Sarah and Cora were entitled to two-fifths of the fee, and one-fifth, each, of the value of the rents for 1882 and 1883.

Tenth—That defendants have three-fifths of the fee, and the right to recover of Sarah and Cora the value of two-

fifths of the improvements, and of taxes expended. Doubtless by clerical misprision, the court is made to add, "and three-fifths of all the costs of this action paid out by defendants."

The judgment was rendered in favor of Cora and Sarah against defendants, for two-fifths of the costs, and in favor of defendants against *plaintiffs* for three-fifths of the same.

There were separate motions for a new trial, each insisting that the judgment was contrary to the law and the evidence. It is urged, also, that the court erred in refusing to allow proof of improvements during the entire time of defendants' alleged ownership.

1. CONSTRUCTION OF DEED: Life tenant: Remainder-man.

The first and most material question which arises is this: What interest did Mrs. Marietta Hilburn take by her father's deed, and if not a fee simple, then what were the rights of the heirs of her body to any remainder? Did it vest in any of them, and which, and when?

The first colonial charter under which the English were permanently planted in America, was granted by James I, in the fourth year of his reign, to a company of business adventurers in London, who established their colony at Jamestown, in Virginia. The colonists had prescribed to them no code of laws beyond a few political regulations. For the regulation of their private affairs they brought with them, as Englishmen, the body of laws which governed at home, and which, except as changed by colonial or parliamentary regulations, or as rendered inapplicable to their peculiar circumstances, was recognized and administered by the courts of the colony. This body of laws formed the basis of the jurisprudence of Virginia, and the other States of the South, formed in whole or in part out of her vast original territory.

After the purchase by the United States, from the French, of the territory west of the Mississippi, that portion of it

out of which Arkansas and Missouri were afterwards created, was largely settled by immigrants and pioneers from Virginia, Kentucky, North Carolina and Tennessee, which had been themselves formed, wholly or in part, out of the territory of the original Jamestown colony. They too brought over the Mississippi the same birthright which their ancestors had brought over the ocean.

In the year 1816, whilst this constituted a part of the Missouri territory, it was enacted that:

"The *common law* of England, which is of a general nature, and all the statutes of the British Parliament in aid of, or to supply the defects of, the said common law, made prior to the fourth year of James I, and of general nature, and not local to that kingdom, which said common law and statutes are not contrary to the laws of this territory, and not repugnant to, or inconsistent with, the Constitution and laws of the United States, shall be the rule of decision in this territory until altered or repealed by the Legislature."

This statute remained to govern the subsequently formed territory of Arkansas, and was afterwards re-enacted as a part of the laws of the State, with some change of phraseology and grammatical arrangements. *Rev. Stat., ch. 28, sec. 1; Mansf. Digest, sec. 566.*

Originally, as it first emerges into the dim light of judicial history, the common law was of small proportions, dealing with the few interests and simple habits of a plain rural population. It expanded with the advance of civilization, the growth of trade, and the more diversified and complicated interests of social life. This growth was due mostly to the courts, but was aided from time to time by statutes, more or less ancient, changing it, or enlarging the application of its principles. Meanwhile there gradually grew up a system of equity jurisprudence, with principles

and modes of procedure distinct from those administered in the courts of common law. Although originally the common law consisted wholly of usages and maxims established in times so remote that the memory of man ran not to the contrary, and although this, strictly, is what is meant by the common law, yet with the importation of the feudal system, with its radical changes of the laws regulating lands, and with the necessary legislation which thereupon arose, the common law came in time to be commonly understood to mean that body of laws which had been modified by the feudal system and ancient statutes, and which was administered in the courts of law, in contradistinction with that body of laws administered in courts of equity, and also with those recent statutory changes which had been made in the old common law, after the latter had been adopted, and for a long time had obtained in the administration of justice by courts of common law. It was to preclude the idea of its ancient and strict sense, and manifest the policy of adopting it in its more popular sense, with the addition of *all* statutes modifying and changing it, down to the fourth year of James, that our statute makes allusion to these statutory changes.

It is contended, plausibly and very ingeniously, by counsel for defendant appellants, that at common law the deed now in question would have created a conditional fee, which by the old law would have become absolute on the birth of issue, so that the donee might have disposed of it freely.

That is true. There were no estates in tail at common law, strictly speaking, and such a deed as this would have given the absolute estate (issue having been shown) to Mrs. Hilburn. (*Blackstone, book 11, p. 110.*) And it so remained until about six hundred years ago, in the reign of Edward I. Then was passed the statute *de donis condi-*

tionalibus, which changed all that, and created a new species of estates theretofore unknown, and which we call estates in tail. They are of different kinds, but it may suffice to say that a deed like this would have created an *estate tail general;* that is, an estate which might go to any of the descendants of the donee, by any husband, or of either sex, but which would be so tied up in her hands that she could not so alienate as to prevent the heirs from taking in remainder *per formam doni.* This statute provided that in case of such a gift the land should go, after the grantee's death, *to his issue*, if there were any, or if not, should revert to the donor.

In 1837 it was enacted by the Legislature of this State as follows:

"In cases where, by common law, any person may hereafter become seized in *fee tail* of any lands or tenements, by virtue of any devise, gift, grant or other conveyance, such person, instead of being or becoming seized thereof in *fee tail*, shall be adjudged to be and become seized thereof for his *natural life only*, and the remainder shall pass in fee simple absolute to the person to whom the estate tail *would first pass* according to the course of the common law by virtue of such devise," etc.

It is now claimed that by common law, before the statute *de donis*, Mrs. Marietta Hilburn, having issue, would have a fee simple absolute, and that the statute last above cited can of course have no application. It is evident, however, that at common law, in the sense of the law as it existed before the statute *de donis*, there was no such thing as a fee tail at all. The statute evidently means the common law as altered by that statute, and considered in its aspect of recognizing the newly created species of estates in tail. In this view Mrs. Hilburn, as the circuit judge properly held, took nothing but a bare life estate.

Her conveyance could affect that alone, unless Ida had a vested interest, which her mother inherited. This leads to a nicer, and not quite so obvious construction of the statute. The question affects not only the interest of Ida, but also the guardian's sale of the interests of Robert and Clarence.

The statute says that the remainder shall pass in fee simple absolute to the person to whom the estate tail *would first pass* according to the course of the common law. It never could, under the circumstances, have passed to Ida at common law. During her mother's lifetime she was not heir at all. At her mother's death she was gone without leaving issue. There had been only a contingency that she might get an interest by surviving the mother, and that a vague and uncertain interest, which might be more or less according as there might be no more or many brothers and sisters. Nothing was vested as a right which she might transmit. At common law the surviving brothers, sisters and their descendants *per stirpes*, would be entitled to have the estate pass to them on the death of the mother, without any portion being intercepted by inheritance of the mother from Ida. (See *Fearne on Remainders, vol. 11, p. 202**.) The estate vested in the surviving children and their issue at the death of the mother, and did not vest in remainder at all, in any one, during her life. The mother inherited nothing from Ida, and the court erred in holding that she did, and that the interest of Ida passed by her deed through Greenwood to Burrell Horsley. *Carmichael v. Carmichael, 43 N. Y., 359.*

For like reason there was nothing in the ward of F. M. Hilburn which could be sold under order of the probate court during the lifetime of the mother. There was no error in permitting the proof to be made, by parol, of the

loss of the records, and of the proceedings which had been taken. The sale passed all that the wards had in the land that was salable, and which the probate court could authorize to be sold, but that was nothing. Nor was the sale effective to carry subsequently acquired title. Section 642 of Mansfield's Digest, upon this point, applies only to voluntary sales by the persons to be bound. It is to the effect that "if any person shall convey," etc., having no title at the time, and shall afterwards acquire title, legal or equitable, it shall pass to the grantee.

2. VENDOR AND VENDEE: After-acquired title

The court erred in holding that the interests of Robert and Clarence had become vested in Burrell Horsley. There was no error in holding that Sarah and Cora were entitled to recover.

The bills of exceptions fail to show the value of the rents. It was error, without proof, to render judgment for any rental value whatever. The record discloses that the real contest was concerning title. All the amounts are left blank throughout.

The court below, it is true, excluded proof of improvements made by the defendants during the existence of the life estate. They were indisputable owners of the land, tenants of the freehold *per outrie vie*. Improvements made on such a title may be referred to the interest of the owners of the life estate, and for these they would not, on general principles, be entitled to compensation from those in remainder. Whether or not the Horsleys would be entitled to any compensation at all for improvements made by them, or by Greenwood, would depend wholly upon their *bona fides*, and their innocence of the real condition of the title. The occasion does not now arise for any discussion of the act of March 8, 1883, "for the better quieting of titles," commonly called the "betterment" act, inasmuch as it does not appear what improvements, if any,

were made after the decease of Mrs. Marietta Hilburn, nor their value, nor that they were made in ignorance of the true condition of the title. Greenwood certainly, and Burrell Horsley probably, had access to all the knowledge concerning the title which the courts have now. It is better to reserve an opinion as to the force and true construction of the betterment act, for a case in which there may be full argument upon those points principally.

3. Transfer to equity docket.

The court did not err in declining, on motion of defendants, to transfer the cause to the equity docket. This is only *imperative* where the answer sets up some defense exclusively cognizable in chancery. (*Mansfield's Digest, sec.* —), or where all the issues are cognizable in chancery although not exclusively so. Any statutory rights which defendants may have under the betterment acts, are cognizable at law. With regard to the equitable right which exists independent of the statute, to have the improvements and taxes set off against rents and profits, although under the new systems of procedure, it has been permitted in some States, in actions of ejectment based on legal titles, yet formerly, it was only permissible in equity where the adverse claimant came into a court of chancery, asking its aid to establish an equitable title. The authorities did not support the practice of allowing this sort of claim to be set up in defense, where the action was at law, upon a legal title, nor generally to be asserted by the claimant, as actor, moving the court originally. It was a condition of doing equity imposed upon a complainant seeking the aid of equity.

The attempted restriction of alienation in Shelton's deed cannot be construed to confer upon the mother, or the children, or the probate court for them, a power in either with the consent of Shelton to alienate the whole.

This is as far as this case requires us to go. We are re-

lieved of the necessity of deciding whether or not the restraint was inconsistent with the grant, since the deed of the mother, made with the assent of her father, is conceded to have carried all her interest.

For errors in ruling upon the title a new trial should have been granted on motion of the plaintiffs; and, for error in finding damages, it should have been granted on the part of defendants. Both appeals are sustained. Reverse the judgment and remand the cause for further proceedings in accordance with law and this opinion.

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CHANDLER v. NEIGHBORS.

STATUTE OF LIMITATIONS: *After disability removed.*

Where seven years have elapsed since the right of action for land accrued, and three of those years have been free from disability, the right of entry or of action is barred.

APPEAL from *Hot Springs* Circuit Court.
Hon. J. B. WOOD, Circuit Judge.

Compton & Fuller for appellant.

1. Parol proof not admissible to show that a greater number of acres was conveyed than described in the deed. *33 Ark., 151.*

2. The third instruction for defendant is in direct conflict with the law, as applicable to this case. *Ib.*

3. Appellee estopped from claiming any interest by his express disclaimer. *39 Ark., 131; 9 Cal., 204.*

4. The verdict contrary to the evidence. The description contained in the deed was the only evidence that could be properly resorted to.

Curl & Hughes for appellee.

The survey by Tolley in 1857 or '58, and the adverse occupation, with the acquiescence of the then claimants, are proved beyond question, as well as such facts can be proved after the lapse of so long a time. They were proved to the satisfaction of the jury. They found against appellants, and this court will not disturb the verdict on mere weight of evidence, or where there is a conflict.

2. Ordinarily when one enters upon land without color of title, his possession will only extend to so much as he actually occupies or incloses, but this is not always so. *6 Ind., 273 and 277–8; Tyler on Eject. and Ad. Pos., pp. 99 and 100; 1 Caines R., 358, 903; 19 N. Y., 290; 16 Wend., N. Y., 302–3.*

3. As to the lapse of time necessary to constitute a bar by limitation. *Gantt's Digest, sec. 4113; Mansfield's Digest, sec. 4471.*

SMITH, J. This was ejectment to recover a strip of fifteen or twenty acres in the western part of north half of southeast quarter of section 6, township 5 south, range 19 west. The plaintiff showed a *prima facie* title in himself to the whole tract of eighty acres, of which this strip was a part. The defendant, who was the owner of the adjoining tract on the west, relied upon adverse possession of the land in controversy, continued for such a length of time as to confer a title under the statutes of limitation. To sustain this plea, he introduced the patent deed made by the United States, in the year 1857, to Smith Sullivan, for the southwest quarter of said section, and proved that in the same year the deputy county surveyor of the county had run the line between the two quarters, locating this land west of the line; and it was claimed that subsequent proprietors of both tracts had acquiesced in this survey, and

had occupied and improved with reference to the supposed line. And the Circuit Court instructed the jury that, if they found these facts to be true, their verdict should be for the defendant. But the difficulty on this point is, that when the survey of 1857 was made, the east half of section 6 belonged to the General Government, not having been patented until 1859. And there was no proof that the original patentee, or any one holding under him, had ever assented to the line then traced as the correct boundary.

The improvements upon the land in dispute were made by one Holstein, after his purchase of the southwest quarter, in the year 1872. But at that time two of the three owners of the land adjoining on the east were infants. One of these became of age in March, 1880, less than three years before the commencement of this action. And another was still younger. Consequently the verdict, which was favorable to the defendant, was to this extent without evidence to support it. The proper construction of section 4113 of Gantt's Digest is, that when seven years have elapsed since the cause of action accrued, and three of those years have been free from disability, the right of entry or of action is tolled. *Jackson v. Johnson, 5 Cowen, 74; Willson v. Betts, 4 Denio, 201; Gray v. Yates, 67 Mo., 601.*

Reversed and remanded for a new trial.

TOWNSEND v. TIMMONS—*Two Cases.*

1. JUSTICE OF THE PEACE: *Jurisdiction.*

Where the record from a justice of the peace shows that the action was upon a contract for an amount within his jurisdiction, and that the parties appeared and submitted to a regular trial, it sufficiently shows jurisdiction.

2. APPEAL FROM JUSTICE OF PEACE: *What necessary for.*

An appeal from a justice of the peace is a matter of right, and all that is necessary to obtain an appeal is for the appellant to file the affidavit required by the statute.

3. PRACTICE: *Ruling on motions: Bill of exceptions.*

The rulings of the Circuit Courts upon motions upon oral evidence will be presumed correct where there is no bill of exceptions showing the evidence adduced upon the motion.

APPEAL from *Perry* Circuit Court.
Hon. J. B. WOOD, Circuit Judge.

G. B. Denison for appellant.

1. The transcript fails to show that the justice had jurisdiction. That must affirmatively appear.

2. There was no affidavit or prayer for appeal, or order of the justice granting it. (*Gantt's Dig., sec. 3823.*) The Circuit Court should have required the justice to appear and show whether an appeal was allowed or not.

J. F. Sellers for appellee.

1. The record shows that the action was upon contract within the jurisdiction of the justice and the voluntary appearance of the defendants. This settles the question of jurisdiction.

2. The law was substantially complied with in taking the appeal; the affidavit is shown by the certificate of the

justice to have been made and filed on the day of trial. *Gantt's Dig., sec. 4141.*

1. Jurisdiction of justice of peace.

COCKRILL, C. J. It is urged that the Circuit Court failed to acquire jurisdiction in these cases because, first, the justice of the peace who rendered the judgments had no jurisdiction; and, second, the justice failed to note upon his record the grant of an appeal in either case.

It is a sufficient answer to the first objection to say, the records disclose that the actions were upon contracts in amounts within the justice's jurisdiction, and that the parties appeared before him and submitted to a regular trial. This was all that was necessary to confer jurisdiction.

As to the second point, it appears that an affidavit for appeal was made in each case on the day the judgments were rendered. The statute makes it explicit that an appeal shall not be dismissed for omissions or informalities in the justice's docket. *Mans. Rev. St., sec. 4142.*

2. Appeal from justice peace.

The counsel for the appellant says it was the duty of the court to send for the justice and have him amend his record or ascertain from him whether an appeal was actually granted or not. An appeal from a justice of peace is a matter of right, and all that is required of the party desiring to prosecute an appeal from a justice's judgment is to file with him the affidavit required by the statute. If we should admit, however, the correctness of appellant's position it would not relieve the situation. The judgments in the Circuit Court were by default. Motions to set them aside were made upon the grounds stated. The orders overruling them show that oral testimony was adduced upon the hearing of the motions. No bill of exceptions was taken, and the presumption must be indulged

3. Ruling on motions Bill of exceptions.

that the supposed defect was cured by the proper proof at the hearing.

Our attention is called to the fact that there were other grounds alleged in the motions to set aside the judgments, and that proof was taken to sustain at least one of them. But the appellant has not seen fit to bring either the motion or the proof upon the record by bill of exceptions, and there is no other question before us.

Affirm.

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COTTON v. PENZEL & CO.

LIEN: *Material-man's: Jurisdiction of justice of the peace.*

A mechanic's or material-man's lien involves a lien on real estate, and a justice of the peace has, therefore, no jurisdiction to enforce or protect it.

APPEAL from *Yell* Circuit Court.
Hon. ZENAS L. WISE, Special Judge.

Harrison & Crownover for appellant.

It was the duty of the justice to investigate the matter set up in the interplea, and ascertain and adjudicate what the rights of all parties were. This was not an attempt to *enforce* a material-man's lien, but an effort only to have the interpleader's rights protected. *Sec. 432 Gantt's Dig.; 15 Ark., 129; 38 Ib., 329; 33 Ib., 475.*

Hall & Carter, contra.

The justice had no jurisdiction of the subject matter of the interplea, and the Circuit Court acquired none on appeal. *31 Ark., 486; 40 Ark., 557.*

COCKRILL, C. J. In a proceeding before a justice of the peace, Penzel & Co. caused an attachment to be levied on "a box store-house." The appellant appeared and filed an interplea alleging that he had furnished shingles and lumber to build the house, and had fixed a lien on it for the sum of $118.15, the value of the materials furnished, by complying with the provisions of the mechanic's lien law. On appeal to the Circuit Court a demurrer for want of jurisdiction in the justice of the peace was sustained to the interplea, and it was dismissed.

MATERIAL-MAN'S LIEN: Jurisdiction of justice peace.

The statute provides that one who shall furnish "any materials, machinery or fixtures for any building, erection or other improvement upon land, shall have a lien upon such building and upon the land belonging to the owner or proprietor on which the same is situated." It is the obvious design of this statute that the lien shall attach in every instance to real estate. The object of the act is to prevent the owner, or those having an interest in land, whatever the estate or right may be, from getting the labor and capital of others without compensation. It was not the intention to attach the lien to mere personal property. The materials must become, in some measure, a part of the land in the form of a building or other erection before a lien can be asserted under the statute, and it is necessary that the person who builds should have some estate in the land. *Coddington v. Dry Dock Co., 31 N. J. Law, 477; Collins v. Mott, 45 Mo., 100; Phillips on Mechanics' Liens, secs. 176, 199; Galbreath v. Davidson, 25 Ark., 490.*

It follows that whenever a mechanic's or material-man's lien exists, a lien upon real estate is involved, and a justice of the peace has not jurisdiction. *Art. 7, sec. 40, Const.; White v. Millbourne, 31 Ark., 486.*

Section 356 Mansfield's Revised Statutes, which gives the

right of intervention to persons claiming an interest in or lien on attached property, is applicable to proceedings before justices of the peace only in cases where a justice has jurisdiction to administer relief. *Cunningham v. Holland, 40 Ark., 556.*

The appellant insists that the justice could entertain jurisdiction for the purpose of fixing the status of the property, and thereby protecting his rights in case of a sale under the attachment without enforcing the lien. If there were no other objection to this course, it is obvious that the justice of the peace could make no adjudication as to the lien without determining the very questions he is inhibited from entering upon the consideration of. "A justice of the peace shall not have jurisdiction where a lien on land is involved." (*Const., sup.*) If the appellant has a lien, as he alleges, the record of it will be notice to the purchaser at the attachment sale.

The Circuit Court acquired no jurisdiction of the interplea by the appeal, and it was properly dismissed.

Affirm.

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MOLEN AND WIFE v. ORR.

1. PARTNERSHIP: *Dissolution: Transfer of partner's interest: Parties:*
When a partnership is dissolved and one partner assigns his interest in the partnership to the other the latter takes all the rights of the firm, and may exercise them in the firm name for all purposes necessary to their enforcement and for closing up the joint business. But an action may be maintained in his own name unless objection for want of the other as a party be distinctly made.

2. EVIDENCE: *Variance from pleading.*
The materiality of a variance between the proof and the pleading is not to be determined as at common law by the incoherence of the two statements on their face. The party alleging the variance must show that he has been misled to his prejudice.

3. PRACTICE IN SUPREME COURT: *Variance: Presumption.*

Where testimony variant from the allegations of the pleading is admitted without objection this court will presume that the parties deemed the variance immaterial, or treated the complaint as amended to admit the evidence.

4. HUSBAND AND WIFE: *His liability on her contracts.*

A husband is not liable on a contract made by his wife in her own name for repairs on a hotel controlled and conducted by her.

APPEAL from *Garland* Circuit Court.
Hon. J. B. WOOD, Circuit Judge.

G. W. Murphy for appellant.

There was a fatal variance between the complaint and the proof. The evidence showed that the work was done by Orr & Wirfs and not by Charles G. Orr, and that it was done for Louisa Molen alone. Orr had no right to sue in his own name, and there was no proof that he was the successor of the firm. *Gantt's Digest, sec. 4644; Acts 1877, p. 26; 1 Gr. Ev., secs. 58, 66.*

Sanders & Husbands for appellees.

The evidence shows that Orr was the successor of Orr & Wirf. Actions shall be brought in the name of the real party in interest. (*Sec. 4469 Gantt's Digest.*) This demand was assignable. (*Ib., sec. 4077.*) The objection as to variance could only be taken by demurrer or answer, and if not done all such objections are waived. (*Ib., secs. 4564-7.*) The other objections are too general. *39 Ark., 422.*

COCKRILL, C. J. The theory of the appellants is, that there was a fatal variance between the cause of action alleged in the complaint, and that proved upon the trial. The case presented is this: The appellee sued the appellants to recover the amount of an account due him, as he

alleged, for painting a hotel in Hot Springs, and also to enforce a mechanic's lien against the hotel premises. Upon the trial he proved that the work had been done by him and one Wirfs, who at the time was his partner; that before suit the partnership was dissolved, and Wirfs executed a formal assignment of this and all the other firm contracts to him and withdrew from the business. No objection was made to this testimony, and none to a want of proper parties, but the defendants undertook to avoid payment under an answer alleging that the work had been done by the partners in an unskillful manner, and that the full value of it had been paid by the defendant, Louisa.

1. PARTNERSHIP: Dissolution: Transfer of partner's interest.

If the action had been prosecuted in the name of the firm as it stood when the work was done, there would have been no room for objection at any point. After the dissolution and assignment of his interest by one copartner to the other, the latter took all the rights of the firm and might have exercised them in the firm name for all purposes necessary to their enforcement, and for closing up the joint business. *Busfield v. Wheeler, 14 Allen, 139; Holmes v. Shands, 26 Miss., 639.*

If the objection that the former partner should be a party had been distinctly made, an amendment might have been allowed bringing him in. By failing to make the objection it was waived. *Mans. Rev. St., sec. 5031; Yonley v. Thompson, 30 Ark., 399; Dodge v. N. Y. St. Ship Co., 37 How., Pr., 524.*

2. EVIDENCE: Variance from pleading.

That there was a variance between the proof and the allegations of the complaint there is no question; but the materiality of the variance is not to be determined as at common law by the incoherence of the two statements on their face. It must be shown by the party alleging the variance that he has been misled to his prejudice. (*Mans. Rev. St., 5075; Newman on Pl. & Pr., 720, et seq.; Green*

Ib., *467.*) There was no pretense of surprise or of being misled in this case. Indeed the only fact in the proof that is not found in the pleadings is the dissolution of the copartnership, and the release by one copartner to the other of his interest in the matter in controversy. This evidence was admitted without objection, and we must take it that the parties deemed the variance immaterial, or that they treated the complaint as amended to admit such evidence. *Burke v. Snell*, *42 Ark.*, *57; Green. Pl. and Pr.*, *sec. 468; Manice v. Brady*, *15 Abb. Pr.* (*O. S.*), *173; Speer v. Bishop*, *24 Ohio St.*, *598.*

3. Presumption in Supreme Court.

So long as the claim proved is within the "general scope and meaning" of the pleadings the variance cannot amount to a failure of proof (*Mansf. Rev. St.*, *sec. 5077*), and it is apparent from the record that no other claim than the one proved was within the meaning of either the complaint or answer.

The appellants ask a reversal because their motion for a continuance was overruled; but this motion failed to show diligence in trying to procure the testimony of the absent witness, or that the testimony was anything more than cumulative. It was certainly no abuse of the court's discretion to overrule it.

4. HUSBAND AND WIFE: Liability on her contract.

The proof, however, fails to disclose any fact from which Joseph Molen's liability can be inferred. His wife seems to have controlled the hotel and made this contract in her own behalf in a business conducted by her, and the only exemption from liability claimed on her part was upon the theory that she had paid all that was justly due under the contract. Her answer admits that the necessary steps were taken to fix the mechanic's lien against her interest in the premises described. None was claimed against Joseph Molen's. He appears to have been a nominal party only. Upon the showing made, he should not

have been a party at all. He denied the allegations of the complaint, and it was error to render judgment against him.

Let the judgment be affirmed as to Louisa Molen and her interest in the premises, and reverse and remand as to Joseph Molen.

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PADGETT v. NORMAN.

WIDOW: *Dower: Statute limitations.*

A widow has no estate in her husband's homestead until her dower is assigned, but a mere right of occupancy. Her possession is not hostile to the heir's title, and she has nothing to convey to a stranger to the title; and if she abandons the possession the heir may enter and occupy the premises subject to her right to have her dower assigned.

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

Coleman v. Yancy for appellee.

In ejectment plaintiff must recover on the strength of his own title, not upon the weakness of the defendant's.

The court properly instructed the jury. (*See 19 Ark., 202; 38 Ib., 181; sec. 2168 Gantt's Dig.; 1 Gr. Ev., sec. 74; Gantt's Dig., secs. 2493, 2494.*) If Henry Norman, at the time of his death, had *any* kindred capable of inheriting, the title could never vest in the widow. *Supra.*

In proving pedigree or relationship, evidence of family likeness, the appearance, manners, motions, features, etc., is admissible. *7 Ark., 470; Gantt's Dig., 4694.*

The evidence of the identity of the brothers, while not *conclusive*, satisfied the minds of the jury, and under proper

charges of the court, having found for defendant, this court will not disturb their verdict.

COCKRILL, C. J. Henry Norman purchased a tract of land in Independence County, established his home upon it and died in 1864 intestate and without issue. His widow continued in possession for some years after his death, remarried, sold the land to the plaintiff and removed from the State. Shortly after her removal from the land, the defendant, John Norman, took possession of it, and Padgett instituted this action of ejectment against him. The complaint alleged that Henry Norman died leaving no kin capable of inheriting and that the title to the land had vested under the statute in the widow under whom he claimed by purchase. The defendant claimed to be the brother of Henry Norman and his only heir. The fact of relationship between the two Normans was the chief question investigated on the trial. It was maintained by the plaintiff that Henry Norman had no brother or other kin. Nothing was known about the matter, however, by the plaintiff's witnesses except what was said by Henry Norman in his lifetime. John Norman, the defendant, testified that he was a member of a family that removed from North Carolina to Tennessee in the thirties; that his eldest brother Henry, who was just turning into manhood, left the ancestral roof about the time of the removal from North Carolina, and he never saw him afterwards. He ascertained in the fifties that Henry had removed, or was about to remove to Arkansas, and later was informed that he lived in Independence County, and again that he had died there. Facts were proved tending to show the identity of the brothers, and under a fair charge from the court, the jury found for the defendant.

WIDOW: Dower: Statute of limitations.

The appellant had held possession of the land for a year or more under his deed from the widow and he undertook upon the trial to have the jury instructed that they might connect the possession of the widow with his own for the purpose of making out an adverse possession for the statutory period. The court properly refused to instruct the jury as requested. There is nothing in the record to indicate that the widow held the land under a hostile claim of title during the time of her possession. She simply tarried in the mansion of her deceased husband as she had the right to do under our statute until such time as the heir saw fit to set apart her dower. The statute intends to secure to the widow the actual enjoyment of the premises as a means of coercing the heir to the speedy assignment of dower. She has no estate in the land until her dower is assigned, but a mere right of occupancy. Her possession is not hostile to the heir's title, and she has nothing that she can convey to a stranger to the title, and if she abandons the possession the heir may enter and occupy the premises, subject to her right to have dower assigned. *Burks v. Osborn, 9 B. Mon., 579; Halsey v. Dodd, 1 Halst., 367; Weaver v. Crenshaw, 6 Ala., 873; 18 Ib., 810; Carnall v. Wilson, 21 Ark., 62.*

There were no exceptions to the introduction of evidence, and the record discloses no error in the instructions for which the judgment should be reversed, and it is affirmed.

BELL v. ARKANSAS COUNTY.

FEES: *Tax assessor's.*

The assessor is entitled to one dollar and no more for assessing all lands of non-residents and unknown owners in each township in which there may be any of either.

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

Gibson & Holt for appellant.

The only question is the construction of *sec. 60, acts 1883, p. 235.*

The law allows the assessor $1.00 for each non-resident *list*, counting all the lands in one township and range as one list; that is $1.00 for all lands belonging to *each* non-resident in each township, and $1.00 for all the lands in each township belonging to "unknown" owners.

If the Legislature had meant otherwise it would merely have said $1.00 for all lands belonging to non-residents and unknown owners in each township.

EAKIN, J. Bell, as assessor, filed in the county court of Arkansas county, for allowance, his account for assessing. It was allowed as claimed for the personal assessment lists and for listing farmers, but was continued as to the items for assessing real estate of unknown owners and of non-residents. Of the former there were thirty-six, and of the latter four hundred and eighty-five, for all of which he claimed one dollar each. This order was made on the twentieth day of July, 1883. At the January term following the account was again taken up. The court reciting that there were thirty-six townships in the county,

allowed the assessor only $36.00, being one dollar for each township for making assessments of both unknown owners and non-residents. The balance of the claim was rejected.

Bell appealed to the Circuit Court, where it was submitted to the judge on law and fact. The same judgment was there rendered. Bell moved for a new trial, which motion being overruled he took a bill of exceptions and appeals here. The motion complains of error in declarations of law made by the court, and that the finding was contrary to the law and the evidence. The evidence was, that he did assess 485 non-resident owners of real estate in the county, "counting each non-resident in each one of said townships as a separate and distinct list—counting all the lands belonging to the same party in each township as one list," and that there were thirty-six townships in the county.

The court declared the law to be, that the assessor was only entitled to one dollar for assessing all the lands of unknown owners and non-residents in each township, however numerous they might be—that the compensation of one dollar covered all together. It refused to declare that the assessor was entitled, in each township, to one dollar for each list of lands assessed to different non-residents or unknown owners therein.

Assessor's fees.

This appeal involves the construction of section 60 of the revenue act of 1883, which provides that the assessor "shall be allowed the following compensation for his services: For each name listed, twenty-five cents, and all property belonging to one individual or corporation *in the county* to be counted as one name. For each list of real property, the owner or owners of which are unknown *or non-residents*, one dollar, and all such lands in one township and range to be embraced or counted as one list; but if

any unknown person *or non-resident* owns lands in more than one township, he shall be allowed one dollar for each township. See, also, *Mansfield's Dig., sec. 5663.*

It is easy to see why a lumping compensation with regard to unknown owners, of one dollar for all in any one township, should have been adopted. They could not be distinguished by separate lists. The reason does not apply to non-resident owners when known. The assessment of their real estate requires the same care and trouble as those of residents, and the Legislature might have put them all on the same footing, allowing twenty-five cents for each *name* listed, wherever the property of that individual might be in the county. What the policy of the Legislature may have been it is not easy to conjecture, but it is not at all probable that it intended the result for which appellant contends, for that would allow several dollars for assessing the real estate of one non-resident lying in different townships, whereas the assessor would get but twenty-five cents for assessing all the property of a resident, though scattered over every township in the county.

The intention of the Legislature to place lands of non-residents on the same footing with those of unknown owners is made clear by reference to the act of March 3, 1875, to fix the compensation of assessors. (*Pamphlet acts of 1874–5, p. 207.*) That act is the same in all respects as that of 1883, above quoted, save that it omits the words "or non-resident" after "unknown person," where it occurs above. The interpolation of those words, in two places in the act of 1883, must have been by design, and to effect what the literal meaning of the last law imports.

The assessor is entitled to one dollar, and no more, for assessing *all* lands of non-residents and unknown owners in each township in which there may be any of either.

Affirm.

JACKSON v. REEVE.

1. PRACTICE: *Verification of answer.*

An answer cannot be stricken from the files, or its contents be refused consideration for want of verification, unless the party refuses to verify after order made to do so; and where an unverified answer has been filed, and no order made to verify it, proceedings as by default cannot be taken against the defendant on a motion in the cause because of the absence of himself and attorney when it is called up. It should be considered on its merits.

2. PLEADING: *Fraud, how alleged.*

Fraud when relied on, must be distinctly charged, if not in direct language characterizing conduct and actions as fraudulent, at least by a clear statement of facts and circumstances which unexplained would be fraudulent *per se.*

3. ADMINISTRATION: *Power of probate court over estate: Granting letters, etc.*

The probate of a will authorizes the grant of letters testamentary; but until letters are ordered the court has no jurisdiction to make orders for the management or disposition of the estate. And if it grant letters of administration, generally, instead of letters testamentary, or of administration with the will annexed, the error, if any, must be corrected by appeal. It will not render the subsequent proceedings void.

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

Robert A. Howard for appellants.

It was error to render judgment by default, for there was appearance, answer and motion to transfer. The court erred also in refusing to transfer to the Chancery Court. The answer presented an equitable defense, and the cause should have been transferred as prayed.

Wm. G. Whipple for appellee.

The defendants being in default, and not present to

urge their motion, it was properly dismissed; the motion was not self-executing, and not being verified was not evidence of anything.

The answer presented no defense properly cognizable in equity. There is no sufficient allegation of error or irregularity, much less of fraud.

Probate allowances have the force of judgments. (*38 Ark., 475.*) Chancery will not vacate them for error, but only for fraud. (*39 Ark., 256.*) An order of sale by the probate court is valid, though erroneous. (*23 Ark., 129.*) And chancery only interferes in cases of fraud. (*42 Ark., 186; Adams v. Thomas, 44 Ark.; Greely Burnham Grocer Co. v. Graves, MS.*) The fraud must be specifically alleged (*34 Ark., 71*), and must be more than a mere suspicion. *41 Ark., 378.*

EAKIN, J. Ejectment by Reeve against Jackson and others, to recover certain town lots of small value, which are alleged to have been the property of May J. Jackson, deceased. Complainant claims under a sale made by her administrator, for the payment of debts, under order of the probate court.

James A. Jackson filed an answer which he makes a cross-bill in equity, showing that in April, 1881, May Harris, then unmarried, but who afterwards became his wife, together with himself and another person, executed to Reeve a note at sixty days for thirty-five dollars; that she died in March, 1882, leaving a will devising to him the property in question; that Reeve, on the sixteenth of November, 1882, petitioned the probate ccurt as a creditor, stating that there had been no administration on her estate nor probate of any will; that upon this suggestion an administrator was appointed, and the claim of Reeve presented and allowed; and that the administrator made an

irregular application to sell the real estate of the deceased, and obtained an order therefor and made advertisement. It is charged that the application to sell did not state correctly the facts regarding the condition of the estate.

Respondent shows further: That on the seventeenth of July, 1883, he filed in the probate court a petition to set aside the administration and all the proceedings had under it, which application is pending and undecided. He says that the note was his own debt also, that he had always been willing to pay it, but that no application was ever made to him for the purpose; that he had no notice of the proceedings for an administration, and that the will had been duly probated before they begun. Various other allegations are made to show that the administration of the estate to secure so small a debt was ruinous and unnecessary. Respondent offers to pay into court the debt, with interest, and any other amount the court may deem proper.

Prayer to vacate all the proceedings in the administration and to enjoin the plaintiff from prosecuting the action in ejectment. This answer was filed October 8, 1883, and was accompanied with a motion to transfer the cause to the Pulaski Chancery Court.

The record shows that next day the cause came on to be heard, and on motion of plaintiff, the defendant not appearing, the motion to transfer was overruled as by default. After reciting that the court had assessed the damages, the record shows that judgment was rendered for plaintiff for the lands, and against Johnson for fifty dollars damages, and that plaintiff have writ of possession. There was afterwards a motion to vacate this judgment, which was overruled. Defendant appealed without any bill of exceptions.

There being no evidence to support the answer, and no

bill of exceptions to negative proof of plaintiff's title and damages, we must presume that the court had evidence to sustain the judgment.

The only error, averrable, must therefore be in the proceedings. The question concerns the action of the court in overruling the motion to transfer.

1. PRACTICE: Verification of answer.

The answer upon which the motion was based does not appear to have been verified. That would not have been regarded as sufficient to have justified striking it from the files, or to have prevented a consideration of its contents, unless there had been a refusal to verify after order made to do so.

The defendant was not in default. He had appeared and answered. He was not compelled to appear and argue the motion. It was before the court for judicial determination, and should have been granted if found meritorious.

2. PLEADING: Fraud, how alleged.

The answer contains no direct allegations of fraud. That should be distinctly charged in all cases in which it may be relied on. If not in direct language characterizing conduct and actions which appear fraudulent, at least by a clear statement of facts and circumstances, which unexplained would carry the conviction of fraud; in other words would be fraudulent *per se*. This court has often said that fraud must be specifically alleged. If there was any fraud at all it was in procuring letters of administration to be granted upon the estate of a person whose will had been probated, or who, in other words, was not intestate.

The answer fails to state any other provisions of the will than that the lands were by it devised to defendant, Jackson. It fails to show whether an executor was appointed, or who, or when the will was probated, or that letters testamentary were issued. It appears that May Jackson died in March, 1882; that the sale was made

in November of that year, and the action of ejectment brought in July, 1883. The answer does not show why it was that Jackson, standing in the intimate relation of husband of the deceased, had during all that time failed to impetrate letters testamentary or letters of administration, *cum testamento annexo*, or to object to the appointment of a general administrator or the proceedings for sale, or to pay the trifling debt which was as much his own as his wife's. He does not attempt to show any finesse, craft or circumspection on the part of Reeve to mislead him or prevent the assertion of his rights.

3. ADMINISTRATION: Power of probate Court over estate.

The probate of a will authorizes the grant of letters testamentary, but until letters be ordered it gives no jurisdiction over the estate—that is to make orders concerning its management or disposition. Courts of probate have general jurisdiction to grant letters of administration, and if there was any error in granting letters generally, instead of *cum testamento*, etc., it did not render the proceedings void. It was matter to be corrected by appeal.

We see no issues tendered by the answer which should have been sent to the Pulaski Chancery Court.

Affirm.

POE v. BRADLEY.

UNLAWFUL DETAINER: *No damages recoverable.*

In an action for unlawful detainer where possession is delivered to the plaintiff under the writ, the only judgment he is entitled to is for cost. No damages are recoverable for detention of the premises.

APPEAL from *Polk* Circuit Court.
Hon. H. B. STUART, Circuit Judge.

E. H. Poe for appellant.

The court erred in rendering judgment for damages; it should have been for costs only. *24 Ark., 575; 36 Ib., 330; 40 Ib., 38; Acts 1875, secs. 2, 7, etc.; Act March 2, 1875, p. —.*

No demand or notice was given after permission to occupy was obtained. *Sedg. & W. Trial Title to Land, sec. 384, etc., p. 240–1.*

SMITH, J. The defendant was a tenant of the plaintiff under a lease which expired on the first of January, 1884. On the twenty-fifth November, 1883, he was served with a notice in writing to quit at the end of his term. The early days of January were extremely cold, and the defendant requested and was accorded permission to occupy the house for a few days until the severity of the weather should abate. About the middle of the month, the defendant not having vacated, the plaintiff, without serving any additional notice, brought unlawful detainer, and possession of the premises was delivered to him under the writ. The answer set up that no demand for possession had been made after the arrangement for a temporary occupation beyond the term was entered into. The jury found a verdict for the plaintiff and assessed his damages at $2.50, and judgment was given accordingly.

This is correct except as to the assessment of damages. In this form of action the only judgment that can be properly rendered for the plaintiff is for costs. No damages are recoverable for detention of the premises. *Mansfield's Digest, sec. 3361; Keller v. Henry, 24 Ark., 576; Collins v. Karatopsky, 36 Ib., 330; Walker v. McGill, 40 Ib., 38.*

The judgment for damages is vacated and in other respects is affirmed, the appellant to recover his costs in this court.

FRY v. STREET.

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JUDICIAL SALES: *Inadequate price: Confirmation.*

Where due and legal notice of the time, terms and place of a judicial sale of land has been given and there is no fraud or unfairness in the conduct of the sale, confirmation of it will not be refused on account of its being at a grossly inadequate price.

APPEAL from *Chicot* Circuit Court in Chancery.
Hon. J. M. BRADLEY, Circuit Judge.

D. H. Reynolds for appellant.

The confirmation of the sale is objected to because:

1. Misconduct of commissioner in going from place of sale to another place and informing parties that no bidders were present, and then making the sale when only those notified were present, instead of returning that he could not sell for want of bidders, when none came in response to his advertisement as ordered by the court.

2. The price was grossly inadequate.

The court is the vendor at sales under its decrees, and will confirm or reject the sale as the law and justice require (*32 Ark., 391*), and for reasons above stated, the sale should not have been confirmed. (*Ib.*) The property was sacrificed.

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

Appellant should have attended the sale and caused the land to bring its value. No excuse is shown for his negligence; no fraud is alleged or shown, no offer to bid more on a second sale. The court properly confirmed the decree. *2 Jones Mort., secs. 1672, 1676; 3 How. Pr., 205; 11 N. J. Eq., 235; 30 N. Y., 80; 1 Clark, N. Y., 475; 9 U. S. Dig., 271; 11 John., 566.*

There is nothing in the record to show that the lands did not bring full value. No affidavits were filed in support of the motion. *43 Ark., 404.*

SMITH, J. A decree was rendered in July, 1881, condemning certain lots in the town of Lake Village to be sold at the court house door on the third of October next ensuing. The commissioner appointed to execute the decree, reported at next term that, after giving due and legal notice of the time, place and terms of sale, he had made the sale, $500 being the best bid that was offered. The defendant excepted to the report, alleging that the parties and the public generally had forgotten the day of sale, in consequence of which no one attended and the commissioner had gone into the clerk's office and invited all who were present to participate in the biddings, that only two bids were made and the property was sold for one-fifth of its real value. But the exceptions were overruled and the sale was confirmed.

No affidavit, or other evidence of the truth of the exceptions was presented. And no offer is made to advance the bidding, nor is there even a suggestion that the property will bring a better price if a re-sale is ordered. But if it be conceded that the property has been sacrificed, this result is attributable to the defendant's own inattention and negligence. And in the absence of fraud or unfairness in the conduct of the sale, mere inadequacy of price does not invalidate a judicial sale. *Brittin v. Handy, 20 Ark., 381; 2 Jones on Mortg., secs. 1672, 1676.*

There has been no such abuse of discretion in the Circuit Court as calls for interference at our hands.

Affirmed.

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RODMAN ET AL. v. SANDERS, AD.

1. VENDOR'S LIEN: *Conventional subrogation to.*

The voluntary payment by a stranger of a debt due to the vendor of land, and which is a charge upon it, extinguishes the debt and the lien. And the mere lender of money, which the vendee applies to payment of the purchase money for land, is not substituted to the rights and remedies of the vendor. But one who pays the debt at the instance of the debtor, is not a volunteer; and if at the time of payment he manifests an intention to keep the lien alive for his protection, and for this purpose retains the purchase note and deed in his possession, with the assent of the purchaser, he will be deemed in equity a purchaser of the incumbrance and substituted to the rights and remedies of the creditor.

2. STATUTE OF LIMITATIONS: *Against assignee of vendor's lien.*

Where a vendor of land would not be barred of foreclosure for the purchase money, a party who has acquired his rights will not be barred.

3. TAX TITLE: *Purchase by tenant.*

One who is in possession and receiving the rents and profits of land cannot acquire a title to it by a purchase for taxes.

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

W. R. Coody for appellants.

1. There was no resulting trust, as the money was not advanced at the time of the purchase, but afterwards. (*29 Ark., 630; 2 Paige, 238.*) The payment could only have been a lien or advancement. *41 Ark., 301; 10 Paige, 626; 6 Blackf., 195.*

2. There was no subrogation, as the debt was paid and *extinguished*, a deed made, and no assignment of the note or lien. The father was a mere volunteer for the benefit of the son. (*3 Paige, 122; 7 Md., 164; 2 Brock., 224; 21 Barb., 262; 1 Sandf., 384; 1 Const., 586; 8 Leigh, 588, 602;*

16 Ark., 657.) Payment extinguishes the debt and destroys all possibility of subrogation. (*25 Ala., 250; 18 Vt., 77, 85; Dev. & Bat. (N. C.) Eq., 366.*) See also *39 Ark., 535; 25 Ark., 132; 33 Ib., 346.*

3. But if there was a *conventional* subrogation, the claim is barred by limitation. (*34 Ark., 312; 29 Ib., 591.*) Adverse possession for seven years bars all right to foreclose, and gives a complete title. (*34 Ark., 547; Ib., 534, 598.*

4. Under our system of recording deeds and mortgages there is no such thing as an equitable mortgage by deposit of title deeds. *1 Jones on Mort., sec. 179; 8 B. Mon. 435–7; 2 Story Eq., sec. 1020; Gantt's Dig., secs. 4287–8; 20 Ark., 18; 16 Ib., 671.*

5. Rodman was an innocent purchaser, but if he was aware of all the facts, yet appellee as the representative of P. W., is estopped by the acts of his intestate. *39 Ark., 132–3; 38 Ib., 465; 11 Ib., 249; 37 Ib., 47.*

J. W. House for appellee.

The evidence shows that no advancement was intended; that the money was paid at the son's request, and that the father held the note and deed at his request as a security for the payment of the amount, and looked to the land as his security. This did not make the father a volunteer, but by explicit agreement he was subrogated to all the rights of the vendor. He held the deed and note with the understanding that it was a lien on the land, and that such was the legal effect of it.

The doctrine of equitable mortgages by deposit of title deeds has been recognized in nearly all the States. (*3 Sandf. Chy., 9; 23 N. Y., 561; 24 Me., 311; 16 Wis., 307; 4 R. I., 512; 16 Ga., 469; 2 Hill, S. C., 166, 170.*) It does not come within the operation of the statute of frauds. *1 Bro. C. C., 269; 5 Wheat, 277; 2 Washb. R. P., 82.*

The statute bar of seven years never attached in this case. None of the parties held adversely for that period. Nor was Rodman an innocent purchaser; he was familiar with the entire transaction.

SMITH, J. In the year 1871 J. M. Williams, a citizen of Mississippi, purchased 240 acres of land in this State, and received a bond conditioned to convey the title to him upon payment of the price, $2,400. This being all paid except a note for $1,000, which matured December 1, 1872, the vendor brought suit for foreclosure of his lien. And the vendee, being unable to pay, appealed to his father, P. W. Williams, who also resided in Mississippi, for assistance. The father came to Arkansas, bringing the bond for title, paid off the incumbrance, using $965 of his own money for that purpose, and received the outstanding purchase note, together with a deed to his son. The circumstances and the conduct of the parties repel the presumption that this was intended as a gift or advancement to the son. The deed was not placed upon record, nor was it delivered to the son; but the father kept both deed and note in his possession until his death in 1878, and evidently considered that he held a security for the repayment of the money he had advanced. He took charge of the land, put his son-in-law, Rodman, who lived in the vicinity, in possession and took care that the annual taxes were regularly paid. Rodman held possession until December, 1874, when, by direction of P. W. Williams, he surrendered possession to another son of his, Thomas R. Williams. Thomas R., either before he entered or afterwards, made a contract with his brother, J. M., to purchase his interest in the lands. He held until 1879, when he sold out to Rodman, who was acquainted with all of the facts. In 1880 Rodman received from J. M. Williams a conveyance

for 144 acres of the land, that being supposed to be the extent of his interest. And he afterwards acquired a tax title to the remaining 96 acres.

The present bill was filed in 1882, by the administrator of P. W. Williams, against Rodman and J. M. Williams, to subject the land to sale for the satisfaction of so much of the purchase debt, with interest, as the deceased discharged. The defendants relied upon adverse possession under the statute of limitations and the title papers above mentioned. The decree was for the plaintiff.

1. VENDOR'S LIEN: Conventional subrogation to.

The voluntary payment by a stranger of a debt due to the vendor of real estate, and which is a charge upon it, extinguishes the debt and of course the lien also. (*Nichol v. Dunn*, *25 Ark.*, *129.*) And the mere lender of money, which the borrower applies in part payment of the purchase money of land, is not substituted to the rights and remedies of the vendor. (*Griffin v. Proctor*, *14 Bush.*, *571.*) But one who pays a debt at the instance of the debtor is not a volunteer; and if, when he made the payment, he manifested an intention to keep the prior lien alive for his protection, he will be deemed in equity a purchaser of the incumbrance. *Sheldon on Subrogation*, *secs. 243*, *247.*

When P. W. Williams paid off this charge upon his son's land, he took no formal assignment of the debt. But he expected to be substituted to the place of the creditor. This is evident from the fact that he retained the purchase note and deed in his possession and that he always looked to the land for reimbursement. This is not, however, sufficient in itself to give a right to subrogation. But the proof shows that when he returned to Mississippi, his son told him to keep the papers until the money was refunded. From the previous request made by the son that the father should relieve the land from the incumbrance, and his subsequent assent that the father

should hold the papers until he was reimbursed, we may infer a prior agreement between the parties that the father should be substituted to the securities and remedies of the creditor. And this presents the ordinary case of a conventional subrogation.

2. STATUTE OF LIMITATIONS: Against assignee of vendor.

Now, the original vendor, if the payment had not been made, and he were suing for foreclosure, would not be barred, according to the doctrine of *Ringo v. Woodruff*, *43 Ark.*, *469*, and *Whittington v. Flint*, *Ib.*, *504*. Consequently P. W. Williams, who advanced the money to pay off his debt, and who has exactly the same rights that the vendor would have had but for such payment, is also not barred. As against J. M. Williams and all claiming under or through him, with no greater rights or equities than he had, the debt itself and the lien, though extinguished for all other purposes, are considered as still subsisting for the benefit of P. W. Williams, the same as if the note had been actually assigned to him and no deed had been made. *Chaffe v. Oliver*, *39 Ark.*, *531*; *Robinson v. Leavitt*, *7 N. H.*, *99*.

3. TAX TITLE: Purchase by tenant.

Of the tax deed, it is only necessary to say that Rodman, being in possession of the lands, and in receipt of the rents and profits, could acquire no title by a purchase at tax sale. It only operated as a payment of the taxes. *Guinn v. McCauley*, *32 Ark.*, *97*, *and cases cited.*

Let the decree be affirmed.

PEARCE, EX PARTE.

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1. CERTIORARI: *For correction of errors.*

The writ of *certiorari* cannot be used as a substitute for appeal for the correction of mere errors of an inferior court.

2. SAME: *Not a writ of right: Practice on.*

The writ of *certiorari* is not a writ of right. It will be granted or refused in the discretion of the court, according to the circumstances of each particular case, as justice may require; and when it plainly appears that it has been improvidently issued, it will be quashed upon motion of either party or the court's own motion, notwithstanding a return has been made and the merits gone into; but the assumption of unauthorized jurisdiction will be corrected by the writ.

3. ADMINISTRATION: *Citation to administrator to file settlement.*

It is no excuse for disobedience to a citation to an administrator to file an annual account current, that he had filed an account several years before which the court had not acted on.

4. SAME: *Citation gives jurisdiction in personam.*

By the service of citation upon an administrator to render an account, the court acquires jurisdiction over his person; and any action of the court thereafter in revoking his letters of administration, re-stating or rejecting a former settlement, or ordering the distribution of the money in his hands, as shown by a former settlement, is within the jurisdiction of the court and not void.

APPEAL from *St. Francis* Circuit Court.
HON. M. T. SANDERS, Circuit Judge.

Tappan & Hornor for appellant.

The orders of the probate court were void for want of notice, and for want of jurisdiction over the person of the administrator. The administrator is not in court and subject to its jurisdiction without notice, except at the term when his settlements are to be filed or confirmed. An administrator can only be removed on complaint in writing by some interested person, supported by affidavit

and on fifteen days' notice. (*Gantt's Dig., sec. 36.*) The *nunc pro tunc* order was void for the same reasons. (*34 Ark., 300; 40 Ark., 223.*) No order of court was ever made confirming or rejecting his settlement, but the court seven years after ordered the administrator to pay the sum of money with interest, and without any report as to the action under the proper order of court. This was unlawful. *25 Ark., 473.*

B. C. Brown for J. W. Crouch, administrator *de bonis non, etc.*

The judgment should be affirmed for two reasons:

1. Laches. No excuse is shown for the delay of seven years. He was allowed twelve months in which to appeal. (*Act March 24, 1875.*) His excuse that his settlement was not acted on is frivolous. It was his duty to present it to the court and have it acted on. He was required to file annual settlements, and the term is prescribed, and a failure to do so is a breach of his bond. *Gantt's Dig., sec. 121; 24 Ark., 20.*

2. The orders complained of are matters within the jurisdiction of the court, and are not void. Having failed to make his settlements as required by law, he was properly removed and his letters revoked. (*Gantt's Dig., sec. 141.*) A citation was served upon him, and time was given him, but he contumaciously refused. The judgment was not *void*, and if erroneous could only be corrected by appeal. *34 Ark., 301; 11 Ib., 525; 19 Ib., 499; 14 Ib., 298.*

As to the order of distribution, see *Borden v. State, 11 Ark., 525.* It was within the jurisdiction of the court. (*Gantt's Dig., sec. 142.*) The court had the right to amend its record by *nunc pro tunc* entry. *Bobo v. State, 40 Ark., 224.*

3. *Quinlan v. Fitzpatrick, 25 Ark., 471*, is not an authority. If it is it should be overruled. For in holding that the judgment of a court acting within its jurisdiction is null, it is clearly in conflict with the whole line of our decisions.

HENDERSON, Sp. J. On the twenty-eighth day of December, 1865, the petitioner, Thomas Pearce, was appointed administrator of the estate of J. A. Sheffield by the probate court of St. Francis County. On the thirtieth of January, 1867, he filed his first annual settlement, which was approved by the court. On the fifth day of March, 1868, he filed his second settlement. This account was continued by order of the court, and an order entered requiring Pearce, as such administrator, to pay off certain incumbrances existing against the real estate of his intestate, and to pay the debts of the estate to the fourth class, and six per cent. on that out of the money in his hands as shown by his settlement accounts. It is stated in the petition that Pearce paid off the incumbrance on the lands and some of the debts as directed in that order. The settlement filed on the ninth of March, 1868, was never acted upon or finally disposed of by the court until November, 1875, when it was rejected. A citation was issued and duly served on Pearce, requiring him to file his annual settlement at the January term, 1875. He refused to obey the citation, but, as appears from the petition, he did after the service suggest to the judge of the court that he had a settlement on file as a reason for disobeying the order of the court. On the twenty-ninth of January, 1875, the court reciting the refusal of Pearce to obey the citation, ordered an attachment, but it does not appear what steps were taken, if any, to compel obedience to this order, or to enforce a further accounting on the part of Pearce. At

the April term (on the seventeenth day of May) the court made an order reciting the issuance and service of citation at the January term, and the refusal of Pearce to make his annual settlement, and reciting, further, the necessity for a new administrator, revoked his letters and ordered a final settlement of his accounts, and directed the clerk to have a copy of that order served on him. It does not appear that Pearce ever obeyed the order of the court requiring him to make settlements as prescribed by law, or to make a final settlement as required by the order of May 17, 1875, after his removal. At the January term, 1876, the court had entered of record an order reciting that at the April term, 1875, an order of payment was made on Pearce, but by neglect not then entered, and ordered it made *nunc pro tunc.* In this order the court finds that Pearce had in his hands, as shown by his settlement of January 3, 1867, in cash, the sum of $1,476.35, and that he had withheld it from the creditors of the estate. Interest was computed on this sum at the rate of ten per cent. per annum from that date down to the date of the order of payment, making in all the sum of $2,694.29, and ordered that sum distributed *pro rata* to creditors of the fourth class, making a dividend of $14 2-7 per cent., and awarded execution against him for that amount.

It does not appear that Pearce was present when these orders were made, or had notice except as stated. On the seventh of April, 1882, he applied for this writ, which was granted returnable to the April term, 1882, of the St. Francis Circuit Court. After the removal of Pearce from the administration, J. W. Crouch was appointed administrator *de bonis non*, and appeared in the Circuit Court, and on his motion was made a party defendant, and filed a general demurrer to the petition and return, which was by the court sustained. An amended petition was filed,

but no new facts were disclosed by the return to the writ. The cause was again submitted to the court, the writ quashed and petition dismissed. Pearce excepted and appealed.

It is contended on behalf of appellant that four separate orders of the probate court of St. Francis County, made at three different terms of that court, are void for want of jurisdiction over the person of Pearce when made. Two of these orders were made at the April term, 1875; one at the October term, 1875, and the other at the January term, 1876. Those of the April term were the orders revoking Pearce's letters of administration and ordering payment of funds in his hands to creditors. The third was the order rejecting his settlement at the October term, and the other at the January term, 1876, reciting the previous order of payment made at the April term, 1875, but not entered by reason of neglect, and entered *nunc pro tunc* at that time.

1. CERTIORARI: For correction of errors.

The question presented by the record is one of jurisdiction. We cannot consider mere errors, if any, appearing in the transcript. It is the settled doctrine of this court that the writ of *certiorari* cannot be used by the Circuit Courts in the exercise of their appellate power and superintending control over inferior courts, for the mere correction of errors as a substitute for appeal. *Baskins v. Wyld's ad., 39 Ark., 347; Flournoy v. Payne, ad., 28 Ark., 87.*

2. Not a writ of right.

Nor is the writ of *certiorari* a writ of right. It will be granted or denied in the discretion of the court, according to the circumstances of each particular case as justice may require; and whenever it plainly appears that such discretion has been improperly exercised, the court, on the motion of either party, or on its own motion, will quash the writ, notwithstanding a return has been made and the merits of the case gone into. But errors committed in

assuming jurisdiction where none exists will be corrected through the medium of this writ as a remedy. The law in force when all these orders were made, allowed any one aggrieved by the final order of the courts of probate, one year in which to prosecute an appeal. Pearce charges that he had no notice *at the time* these orders were made, but does not say that he did not receive notice in time to prosecute an appeal. No unavoidable circumstance or other sufficient cause is alleged as a reason or excuse for not prosecuting his appeal. See *sec. 1 of an act approved March 24, 1875; Wyatt v. Burr, 25 Ark., 476; Flournoy et al. v. Payne, admr., 28 Ark., 87.*

3. ADMINISTRATION: Citation to file settlement.

Section 121 Gantt's Digest makes it the duty of every executor and administrator, at the first term of the court one year from the grant of letters, and at the corresponding term of such court every year thereafter until the administration is completed, to present to the court a fair written statement or account current of the estate in his hands. Section 137 requires the clerk to issue a citation to delinquent executors and administrators who have failed to make settlement as required by law. Section 141 is as follows: "If any executor or administrator shall fail to make settlement as required by law, and shall not show good cause for such failure, the court, after a service of a citation on the delinquent, may revoke his letters." Pearce's letters were granted in December, 1865. The January term, 1867, was, therefore, his settlement term. The law required him to file a fair written statement or account current at the corresponding term *every year.* He had not filed a settlement for nearly seven years when cited to appear and settle. The citation was duly issued and served as appears by the transcript. He refused to perform his plain duty or to obey the orders of the court. On the twenty-seventh day of January, 1875, an attach-

ment was issued, but we are not advised what action was taken under it, if any. At the April term of the court, on the seventeenth day of May, an order was made revoking the letters of administration, which contained a direction to the clerk to cause a copy thereof to be served on Pearce. The order also required him to make a final settlement of his accounts. This order was clearly within the scope of power conferred by section 141, and it cannot be assailed on jurisdictional grounds. If appellant had good cause for his neglect to file his annual settlement, it was his duty to appear and make it known. The excuse must be a legal one, and addressed very largely to the discretion and judgment of the probate court in each particular case. The only pretense of an excuse here was, that he had filed a settlement nearly seven years before, that had not been disposed of by the court. This was not sufficient. *Wellborn v. Rogers, 24 Ga., 558; Musick v. Beebe, 17 Kansas, 47; Koon v. Munro, 11 S. C., 139; Mixe's Appeal, 35 Conn., 121; Collins v. Tilton, 58 Ind., 374; Sturtevant v. Tallman, 27 Me., 78; Schouler, Ex. and Admr., sec. 527.*

Excuse for disobedience.

The discretion of the court was wisely exercised in revoking the letters of administration. (*Bankhead v. Hubbard, 14 Ark., 298.*) He was clearly a delinquent in duty; had violated his trust, and was in no meritorious position before the court. He had, in fact, defied the power and process of the court and the authority of the law.

4. Service of citation gives jurisdiction *in personam.*

When regularly cited to appear and make his settlement, he was by that means given his day in court, and any action of the court thereafter in revoking his letters of administration, restating or rejecting his former settlement, or ordering a distribution of the money in his hands, as shown by his settlement of the thirtieth of January, 1867, was within the jurisdiction of the court, and for that rea-

son not void. If he had made payments under a former order of the court, it was his privilege and duty to have shown that fact when cited, or at his former annual settlements. The laws of this State require administrations to be completed within three years from the grant of letters. (See *sec. 198 Gantt's Dig.*) This estate consisted of cash and real estate. No reason is shown why final settlement could not have been made within three years. Yet the records show this administrator was appointed in December, 1865, and was not removed until November, 1875, lacking one month of ten years, and in all that time there is no proof offered to the probate court that Pearce ever paid out one dollar. He complains because the proper accounting tribunal accepted his own statement of cash in his hands, and ordered him to pay it out, with interest, when he had treated the efforts of that court to enforce a further accounting with contempt. The citation conferred jurisdiction over the person of the appellant, and he was in court at all times thereafter in the matter of settling his accounts. It would, doubtless, be in the interest of justice and for the protection of infants if probate courts would more rigidly enforce the plain letter as well as the spirit of our laws in holding faithless trustees to a strict account of their trusts. This court adheres to the rule repeatedly announced of upholding the jurisdiction of the probate court as a superior court within its sphere, with all the attendant presumptions in favor of the regularity of its proceedings. *Sturdy and wife v. Jacoway, 19 Ark., 499; Borden v. State, 6 Eng., 519; Rogers v. Wilson, 13 Ark., 507; Montgomery and wife v. Johnston, 31 Ark., 74; Baskins v. Wyld's ad., 39 Ark., 348.*

The case of *Guinlin v. Fitzpatrick & Teague, 25 Ark., 471,* is relied upon as an authority directly in point to the effect that inasmuch as the April term of the probate court was

not the settlement term of Pearce, and the money not having been found in his hands by the settlement of that date, and he having no notice of the order of distribution, it is void. This case is distinguishable in one particular from that. Mrs. Guinlin was not in default in making her settlements; nor had she been cited to appear in the probate court for that purpose. The balance in her hands, as shown by her previous settlement, was not in money, but consisted of a negro woman and some uncollected notes. This case is not in harmony with the current of authority in this State in holding that the order of payment made upon the administratrix was absolutely void for want of jurisdiction of her person. So far as the rulings of the court in that case are in conflict with this opinion they are overruled.

Affirm.

Hon. W. W. SMITH, J., did not sit in this case.

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GRIESLER ET AL. V. MCKENNON.

1. TITLE: *Parties claiming under same grantor.*

When both parties claim title to land under the same grantor both are estopped to deny his seizin.

2. ACKNOWLEDGMENT: *Of title bond and assignment.*

The execution of a title bond and of its assignment must both be acknowledged as required for a deed and properly certified and recorded before they can be admitted as evidence without other proof of execution. The omission of the word "consideration" in the acknowledgment is fatal. But where the execution is otherwise proven at the trial they are admissible notwithstanding the defective acknowledgment.

APPEAL from *Johnson* Circuit Court.
Hon. M. L. DAVIS, Special Judge.

W. F. Hill for appellants.

The court erred in excluding from the jury the title bond and assignment, after proof of actual notice to appellee.

While the acknowledgment is defective it is cured by *acts 1883, pp. 107 and 128-9.* But after proof of actual notice and of its execution, the documents were admissible without acknowledgment or record. Appellee was in no sense an innocent purchaser. The bond for title and assignment passed title without acknowledgment. *14 Ark., 286.*

Geo. L. Basham for appellee.

The title bond and assignment properly excluded. The acknowledgment was fatally defective, "consideration" being left out, and was not cured by the acts of 1883, as both conveyances were made and rights of the parties fixed before the passage of the act.

The contract was never acknowledged or *recorded*, nor was there any proof of its execution. *38 Ark., 181; 40 Ark., 237; 38 Ark., 278.*

C. B. Moore, Sp. J. On the twenty-ninth of October, 1883, F. R. McKennon brought suit in ejectment in the Johnson Circuit Court, against Mary E. Griesler and her husband George Griesler, for the recovery of the northwest quarter of the northwest quarter of section twenty, in township nine north, of range twenty-four west.

As evidence of his title McKennon filed with his complaint a copy of a deed of conveyance to the land, executed to him by K. T. Stovall, dated March 4, 1882, duly acknowledged and recorded on the seventh day of April, 1882. The defendants answered the complaint, denying McKennon's ownership and right of possession of the land,

and claiming ownership in Mary E. Griesler, the wife, by virtue of a contract of sale or bond for title executed by the Little Rock and Fort Smith Railway to the aforesaid K. T. Stovall on the eleventh day of October, 1878, and by him duly assigned on the fifth day of September, 1881, to Mary E. Blackard, since then married, and now Mary E. Griesler.

A copy of this contract of sale, and the assignment indorsed thereon was exhibited with the answer, which was filed on the sixth of December, 1883.

This document, which is styled an agreement or contract of sale, though more elaborate and lengthy than such instruments usually are, is nothing more nor less than what is commonly called and known as a title bond.

A jury trial was had before a special judge, Hon. M. L. Davis, and verdict and judgment rendered on the nineteenth of December 1883, in favor of McKennon for possession of the land.

Motion was made for a new trial, which was overruled, and bill of exceptions and appeal taken.

No exceptions were filed or noted, before the trial, to the documentary evidence exhibited by either party.

On the trial appellants offered in evidence the title bond, and the assignment of same to Mary E. Blackard, (Griesler). To the introduction of the assignment appellee objected "because of the defective acknowledgment to said assignment," which objection was sustained by the court and the assignment excluded.

1. TITLE: Claim under same grantor.

It will be noted that at the time of suit brought, and of the trial, the legal title to the land was outstanding in the Little Rock and Fort Smith Railway, but as both parties claim under and through Stovall, each is estopped to deny his seizin. *Stafford et al. v. Watson, 41 Ark., 17.*

Passing over this fact, and without deciding whether

either party to this suit could, under the condition of the title disclosed, *stricti juris*, maintain ejectment, we will consider the question as presented by the record.

There are several errors alleged in the motion for a new trial, apparently formal, and certainly immaterial, and not necessary to be considered by us.

2. Acknowledgment of title bond, etc.

The action of the Circuit Court in excluding from the jury the assignment of the title bond, is the only ground of error insisted upon, or particularly mentioned by counsel for either side, in argument here.

That the acknowledgment of the assignment of this title bond is defective cannot be denied, as the word "consideration" required by the statute, and which this court has held to be essential, is entirely omitted.

Our statute provides that "all deeds and other instruments of writing for the conveyance of any real estate, *or by which any real estate may be affected in law* or equity, shall be proven in conformity with the provisions of this act" (the act prescribing the mode of acknowledgment), "before they or any of them shall be admitted to record." *Mansfield's Digest, sec. 660.*

Section 664 further provides "that after being properly acknowledged or proved and certified, every deed and instrument in writing conveying or affecting real estate, may, together with the certificate of acknowledgment, be recorded; and when so recorded may be read in evidence without further proof of execution."

That a title bond is such an instrument "affecting real estate" as may be acknowledged and admitted to record we entertain no doubt, and this is equally true of the duly executed assignment of a title bond, and when acknowledged and recorded, they may be read in evidence without further proof of execution.

The primary object in taking the acknowledgment of

any instrument, is that it may be entitled to record, and the principal benefit to be derived from recording is to give notice to the world, constructively, of its contents, and to dispense with any other proof of its execution. It is not the acknowledgment alone that authorizes the introduction of a deed or other instrument as evidence of its execution. It must also be filed and recorded. *Mansfield's Digest, sec. 664; Wilson and wife v. Spring, 38 Ark., 181; Watson v. Billings, Ib., 278; Dorr v. School District, 40 Ark., 237.*

And it is not the acknowledgment and recording, or registry, of a deed or title bond (or its assignment) that imparts to it vitality or efficacy in the first instance. Such instruments are as valid and binding between the original parties and their representatives, before as after acknowledgment and record.

These two things impart constructive notice to the world, and then, other things being equal, the instrument will prevail as against subsequent purchasers and creditors or incumbrancers.

Actual notice.

But in the event of a contest between purchasers or incumbrancers, actual notice of a prior conveyance of the title to real estate is equally efficacious with constructive notice.

In the early case of *Floyd et al. v. Ricks, 14 Ark., at page 294,* this court made use of the following language: "Notice of an unrecorded deed is equivalent to a record of it, and will necessarily destroy the effect of a subsequent registered deed because one object of the registry acts is to give notice to subsequent purchasers, and if they have such notice without registry, that is all that can be required."

Actual notice, or "knowledge of the fact brought home to a party directly" as Bouvier defines the phrase, may be

proved in a variety of ways. It can be proved in no way more conclusively and satisfactorily than by the admission of a subsequent purchaser or incumbrancer, if fairly and fully made.

Now applying the foregoing, which are but elementary and well known principles, to the case under consideration, let us see whether the appellee had knowledge or notice of the assignment of Stovall's interest to appellant, in either of the ways above indicated. There being no proper acknowledgment nor registry there was no constructive notice.

Mrs. Griesler, in her testimony, says: "K. T. Stovall assigned to me a contract which he held with the Little Rock and Fort Smith Railway Company for this land now in dispute on the fifth day of September, 1881."

McKennon, the appellee, testified as follows: "In March 1882, I visited Mrs. Griesler in company with her brother K. T. Stovall, and tried to get her to surrender to me the contract which she held for the land now in controversy, without suit, but she refused. * * * *I knew that K. T. Stovall had assigned the railway cantract for the land now in controversy to Mrs. Blackard, now Mrs. Griesler, before K. T. Stovall executed deed to me for same.*"

It is difficult to conceive of language more explicit and direct, as an admission of knowledge or notice of the unrecorded assignment.

This admission unequivocally made to the jury deprived appellee of all pretext or claim to be regarded as a *bona fide* purchaser, without notice.

Mrs. Griesler, by her testimony, proved the execution of the assignment, and it was in no manner contradicted by appellee.

There was no error in excluding the assignment of the title bond from the jury on the ground of the defective

acknowledgment and want of registry, if this were all, but after the admission of actual notice by the evidence of appellee, and the proof of execution of the assignment, by Mrs. Griesler's testimony, the Circuit Court should have permitted the title bond and the assignment thereof to have been introduced in evidence to the jury.

For the error in excluding it, after this admission and proof of its execution, the judgment is reversed and the cause remanded for further proceedings in accordance with law, and consistent with this opinion.

Hon. JOHN R. EAKIN did not sit in this cause.

CHAFIN V. MCFADDEN.

On motion to advance and affirm as a delay case.

1. PRACTICE IN SUPREME COURT: *In delay cases.*

The statute regulating the practice on motions to advance delay cases does not limit the right of filing the motion, or of having it acted upon to any particular time or term, but contemplates an affirmance of a superseded judgment when the court is satisfied that the appeal is taken for delay, at the earliest practicable moment.

2. DAMAGES: *On appeals in Supreme Court.*

The damages awarded against an appellant and his sureties in his appeal bond, on affirmance of the judgment below, are not intended as compensation to the appellee for the delay he has been subjected to. It is an award against the appellant for prosecuting an improper appeal, and where his appeal is for delay only, it is intended that he should pay the award without getting the delay.

COCKRILL, C. J. This case is returnable to the next term. A motion has been filed to advance it to the present term and affirm the judgment upon the ground that the ap-

peal is prosecuted for delay merely. The statute which regulates the practice in this particular (*Mansf. Rev. St., sec. 1306*), does not limit the right of filing such motion or of having it acted upon to any particular time or term, but contemplates an affirmance of the superseded judgment, where the court is satisfied that the appeal is taken for delay, at the earliest practicable moment. The court will not lend its aid to parties prosecuting frivolous appeals by interposing the barrier of one or more terms for their protection. To do this would be to aid the object of the appeal by giving the desired delay. The damages awarded against the appellant and the sureties on his appeal bond are not intended as compensation to the prevailing party for the delay he has been subjected to. It is an award against the appellant for prosecuting an improper appeal; and where he prosecutes an appeal for delay only, it is intended that he should pay the award without getting the delay. With these views we have considered the appellee's motion and the record, and think the case should be advanced. Let it be set for June 6, to be then called for final submission or affirmance.

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St. Louis, Iron Mountain & Southern Railway v. Harper.

1. Master and Servant: *Injury from negligence of co-servant.*

The master is not liable to a servant for injuries resulting from the negligence of a co-servant.

2. Pleading: *Amended to conform to proof.*

Where there is no demurrer to a defective complaint, and no objections to the evidence at the trial, it will, after verdict for the plaintiff, be considered as amended to conform to the proof, and a motion in arrest of judgment will be overruled.

3. RAILROADS: *Negligence in testing boiler.*

If a railroad company omit any test of soundness in a boiler repaired at its shops that ought to be made, it will be guilty of negligence and liable for the damages to its servants resulting from its explosion.

4. MASTER AND SERVANT: *Injury to servant: Defective machinery: Fellow-servant.*

The rule of law which exempts masters from liability to the servant for injuries received from the ordinary risks of his employment, including negligence of his fellow-servants, does not excuse the employer from the exercise of ordinary care in supplying and maintaining suitable instrumentalities for the performance of the work required, whether this duty is to be performed by the master in person or by his agent. But when there is no notice to the master of defects, and no blame is imputable to him for not discovering them, he is not responsible for injuries resulting to his employe therefrom. And notice to a co-servant is not notice to the master.

5. SAME: *Same: Burden of proof: Fellow-servant.*

When a servant seeks to recover for an injury resulting from defective machinery, he must prove negligence on the part of the master in relation to the defect, or the want of such care and diligence as a prudent man would exercise under like circumstances; and where this duty of the master is deputed to another, the latter is not a fellow-servant, but stands in the master's place, and his negligence binds the employer.

6. RAILROADS: *Negligence of agent: Injury to employe.*

Both the master mechanic and foreman of a railroad company's shops, to whom is committed the supervision of repairs, and determining the necessary repairs, and how the work should be done, are, each in their sphere, agents of the company, and for their negligence, resulting in injury to a servant of the company, it will be responsible.

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

Dodge & Johnson for appellant.

1. The complaint stated no cause of action. It alleges that the explosion was the result of negligence on the part of *servants and employes* in the *proper care and management* of the engine, which engine was known to the *servants and*

employes of defendant to be defective and unsafe. For such injuries, caused by the acts of fellow servants, the master is not liable. (*10 Ind*, *556; 39 Ark.*, *25; 42 Ib.*, *420; Wood's Master and Servant*, *p. 803; 49 Mo.*, *167; 8 Am. Rep.*, *126.*) The answer did not waive the objection. *Gantt's Digest*, *sec. 4568; 34 Ark.*, *487–8.*

2. The first instruction for plaintiff was erroneous in this, that it authorized the jury "*to receive or discard the whole or any part of a witness' testimony according as they believe or disbelieve the same,*" without any qualification or limitation whatever. *67 Ill.*, *403.*

3. The mere fact of the incompetency of fellow-servants, or that defective appliances or machinery have been furnished, does not even make a *prima facie* case of negligence; but the burden is upon the servant to show *that the injury resulted because the master did not exercise reasonable and proper care in these respects.* (*18 C. B.*, *797; Wood Master and Servant*, *sec. 419; 117 Mass.*, *312.*) For an injury resulting entirely from the negligence of a co-servant, no fault being imputed to the master in his employment or retention, no liability exists. (*Wood M. and S.*, *pp. 802–3.*) The burden is on the servant to show this want of care in the selection or retaining of such negligent or unskillful servant. (*5 Oh. St.*, *566; 49 Barb.*, *324; 20 Ib.*, *442; 29 Conn.*, *557; 22 Ind.*, *29; 4 Cl. & F.*, *530; Wood M. and S.*, *sec. 419*, *p. 800.*) He must show *negligence on the part of the master*, and due care on his own part. *5 Oh. St.*, *521; 20 Barb.*, *449; 25 Ala.*, *659; 48 Me.*, *304; 106 Mass.*, *282; 53 Ga.*, *488; 101 Mass.*, *101; 46 Mo.*, *163; 2 Am. Rep.*, *497; Wood M. and S.*, *sec. 382; 10 Ind.*, *504; 32 Vt.*, *473; 25 N. Y.*, *562.*

J. D. Cook and *A. B. & R. B. Williams* for appellee.

The employer is bound to furnish safe and sound machinery, and to neglect to do so makes him liable. (*24*

N. Y., 413; 28 Vt., 59.) He must also provide competent and skillful servants. (*25 N. Y., 562; 46 Mo., 163; 42 N. H., 225; 3 Oh. St., 201.*) These are *master duties*, and as to such the agent occupies the place of the corporation, and the latter is deemed present, and consequently liable for the manner in which they are performed. (*53 N. Y., 549; 59 Ib., 517; 89 Ib., 46; 59 Mo., 495.*) The neglect, of Richardson, the master mechanic, was their neglect. *53 N. Y., 549.*

1. MASTER AND SERVANT: Injury from co-servant.

COCKRILL, C. J. The appellee, while in the discharge of his duty as watchman for the railroad, in its yards at Texarkana, was injured by the explosion of the boiler of one of the company's locomotives. Critically considered his complaint charges an injury to a servant by a co-servant, and nothing more. It is the well established rule of this court that the master cannot be made to respond in damages for this. The defendant, however, made no objection to the sufficiency of the complaint, but denied all knowledge of defects in the exploded engine, as well as a want of care on its part, and permitted the plaintiff to introduce evidence tending to show that the boiler of the engine which caused the injury was defective, and that the agents of the company who were charged with the duty of repairing it, ought to have known of the defects. After verdict for the plaintiff the complaint may be considered as amended to conform to this proof, and the defendant can take nothing by the motion in arrest of judgment. The court was right in overruling it.

2. Amendment after verdict.

The counsel for the appellant insist that there was no proof of any defect in the engine, nor of a want of care on the part of the company's servants in keeping the engine in repair. It is useless to detail all the testimony. It was made to appear that the engine that did the injury had,

several years before, collided with another engine and was badly damaged. Shortly afterwards it was put in condition in the company's shops at Baring Cross, and again put to service on the road. A few months before the explosion, it was carried to the same shops where the foreman who had superintended the former repairs was still in charge, to be again overhauled. This duty, as far as the boiler was concerned, seems to have devolved solely on the foreman of the boiler-making department of the shops. It was left to him to determine what repairs were necessary and how the work should be done; and the final test of safety by pressure of steam was applied by him. The foreman of the shops had general supervision over all the matters of repairs, and there was also a master mechanic for the entire road. Deno Casat, who was at this time inspector of engines in the same shops, testified that one of the usual methods to ascertain the soundness of a boiler is to sound all the rivets, and that this was not done in this instance. He examined the boiler after the explosion and found the line of rivets that hold together the "wagon top" and "cylinder" parts of the boiler had been partly cut in two by the old collision. Another witness testified that in the explosion the boiler parted at the weak point indicated by Casat.

3. Negligence in testing boiler.

This testimony tended to establish the plaintiff's case. It is true Casat was contradicted in almost every material particular by witnesses who appear to have been entitled to more credit than he was. Mechanics experienced in such matters testified also that the best test for finding a defect in a boiler was applied; that care and diligence failed to disclose any imperfection in the boiler, and an inspection of it after the explosion gave no clew to the cause. But these facts, while they greatly weaken, do not obliterate the testimony given for the plaintiff. If the company

omitted any test of soundness of the boiler that ought to have been made, it was guilty of negligence, and it was not for the court to take the question from the jury.

4. MASTER AND SERVANT: Injury to servant from defective machinery.

"The rule of law which exempts the master from responsibility to the servant for injuries received from the ordinary risks of his employment, including the negligence of his fellow servants, does not excuse the employer from the exercise of ordinary care in supplying and maintaining suitable instrumentalities for the performance of the work required. One who enters the employment of another has a right to count on this duty, and is not required to assume the risks of the master's negligence in this respect. The fact that it is a duty which must be always discharged when the employer is a corporation, by officers and agents, does not relieve the corporation from the obligation." *Ford v. Fichburg R. R., 110 Mass., 260.*

It is not an absolute duty of the master to maintain suitable and safe engines and machinery for his servants. There is no warranty that they are safe in the beginning, or that they will be so at any time. The master's duty is performed if he uses due care and diligence to effect this end, and this is rigidly required of him. *Fifield v. Northern R. R., 42 N. H., 245; M. & O. R. R. v. Thomas, 42 Ala., 672; L. R. & F. S. Ry. v. Duffy, 35 Ark., 602; Hurd v. V. & C. R. R., 32 Vt., 473.*

Notice to master of defects.

When there is no notice to the master of defects, and no blame imputable in not discovering them, he is not liable if injury results to his employe therefrom. *Noys v. Smith, 28 Vt., 59.*

5. Burden of proof.

When an injury has occurred to a servant in consequence of a defect in machinery furnished by the master, to warrant a recovery the servant must show negligence or the want of care and diligence on the part of the master in relation to the defect. The onus of proof is not

shifted to the master, as in the case of a passenger injured by a common carrier, by proof of the fact that an injury has resulted from the defect. *M. & O. Ry. v. Thomas, supra; N. & C. R. R. v. Elliott, 1 Cold. (Tenn.), 611; Wood on Master and Servant, sec. 382.*

Fellow-servant.

It is not essential to show more in this respect than the want of such care and diligence as a prudent man would have exercised under like circumstances. The master may not be able to perform this duty to the servant in person, but he must see that some one discharges it faithfully for him. He cannot shirk the responsibility. The law casts upon him certain duties to his employes, and if he deputes the performance to another, the latter, as to these duties, is not a fellow-servant with the other employes, but stands in the master's place, and his negligence binds the employer. *Fones v. Phillips, 39 Ark., 17; Brabitts v. C. & N. Ry., 38 Wisc., 289; N. & C. R. R. v. Elliott, sup.*

It is urged that the master mechanic of the railroad alone occupied that relation to the company in this case, and that no attempt was made to show negligence as to him. That the company would have been liable had the injury resulted from his negligence is established by numerous adjudged cases. The reason assigned for liability on the negligence of the master mechanic applies as well to the foreman of the shops and to the foreman of the boiler department in this case. "Each within his sphere was the agent of the company, charged with the performance of certain duties which the latter owed to the public and its servants, and on principle it seems quite immaterial that one of them was subordinate to the other, or that he operated in a narrower field." *Brabitts v. C. & N. R. R., sup.; Fones v. Phillips, sup.; Wood on Master and Servant, secs. 454, 445.*

We do not mean to determine that this rule would

extend to every subaltern who hammers on an engine in the course of repairs; but when the company appoints an agent for a particular purpose, his acts in the line of his specialty are the acts of the company. It is immaterial what the rank of the agent may be, if he is deputed to perform a duty that the company owes to its other employes, the corporation is deemed to be present and liable for the manner in which the duty is performed. As was said in the case of *Brabitts v. C & N. R. R., sup.*, it would be monstrous to allow the company to relieve itself from all liability for a breach of that duty by simply charging one of its inferior officers or servants with its performance.

The circuit judge kept these principles fairly in view on the trial of this case, in instructing the jury at the instance of appellee, and in refusing the requests of the appellant, except perhaps in this particular, viz.: In the second and sixth instructions given on behalf of the plaintiff, the jury were told that the company was liable for the injury if it was caused by the negligence of its servants, or if the defects in the boiler were known to the defendant's agents. If the negligence referred to in the second instruction, and the knowledge of the defects in the sixth were confined to the servants whose duty it was to repair the engine, these instructions would be without fault. But the complaint contained an allegation that the explosion occurred from negligence in the management of the engine, and the jury were told that if they believed that at the time the engine exploded it was being used by the defendant's servants in the customary and ordinary way, and in the usual course of the defendant's business, they might take this together with all the other circumstances in the case into consideration in determining the question as to whether the explosion was caused by defects in the engine, and as to whether the defects, if any,

were of such a character as could have been known to the agents of the defendant by the use of due diligence.

From this the jury could not fail to infer that the negligence and knowledge mentioned in the instructions were intended to apply to the plaintiff's co-servants who were managing the engine at the time of the explosion, as well as to those who stood in the master's place in the performance of the duty to repair. Notice to the co-servants of defects in the engine would not be notice to the company, and negligence on their part proximately causing an injury would not render it liable to the plaintiff. If any knowledge of defects in the boiler, or want of care in not discovering them was shown, it was as much imputable under the instructions to the plaintiff's co-servants who aided in the repairs as to the persons standing in the master's place. For these reasons the instructions were erroneous and a new trial should have been granted.

Notice to co-servants not notice to company.

Reverse and remand for a new trial.

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WILSON v. PRYOR.

1. STATUTE LIMITATIONS: *Indorsement of credit on note: Evidence.*

Proof of the indorsement of a credit on a promissory note by the holder before the note is barred, is *prima facie* evidence of an actual part payment upon the note; but such indorsement made *after* the statute bar is not proof of an actual payment unless made with the privity of the debtor.

2. SAME: *Same.*

Section 4505 Mansfield's Digest, declaring that "no indorsement of any payment written upon any instrument by or on behalf of the party to whom such payment shall be made, shall be sufficient proof of such payment to take the case out of" the statute of limitations, applies only to bonds and instruments under seal. The digesters of 1874 and 1884 have changed the original act to conform to the supposed effect of the constitutions of 1868 and 1874, abolishing private seals.

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

J. C. Wilson, pro se.

The note was barred by the statute of limitations. After the bar has attached, the promise to pay must be *in writing*. The indorsement of a payment, and an *understanding* between the parties that it shall take the note out of the operation of the bar, is not sufficient.

COCKRILL, C. J. This was an action before a justice of the peace on a promissory note due April 24, 1877. There was a credit of fifty cents indorsed on the note of date January 19, 1883. The action was brought in the following February. There was judgment for the plaintiff. The defendant appealed, and in the Circuit Court interposed the statute of limitations as a defense. A jury was waived and the case tried by the court. The following is all the testimony offered: The plaintiff read the indorsement on the note and testified as follows: "About the time the credit was entered he was about suing the defendant on the note, and so notified him. He said there was no use suing him, that he would give a new note. It was then agreed between them that a credit on the note should be equivalent to giving a new note, and that the defendant would pay the balance; and with this understanding the credit of fifty cents was made, and the defendant overlooked the indorsement of fifty cents on the note. The defendant, at the trial before the justice, refused to plead the statute, and said he had made the fifty cent payment to revive the note. The defendant's attorney admitted in open court that the plaintiff's testimony was true."

1. STATUTE OF LIMITATIONS: Indorsement of part payment on note.

There was no objection made to the introduction of testimony, and no declarations of law were asked or made. The judgment was for the plaintiff, and the only question is, did the evidence warrant it? The parol promise to pay, made by the defendant, is not sufficient to remove the bar of the statute (*Mansf. Rev. St.*, *sec. 4493*), and the appellant contends that an actual part payment of the debt is not shown.

The presumption of a deliberate promise to pay the residue, which the fact of part payment raises, can arise only from what would be deemed an actual part payment. But the fact of actual payment need not in every instance be proved directly. Circumstances from which the payment may be presumed are enough in the absence of a rebuttal of that presumption. It is a uniform rule of evidence, that proof of an indorsement of part payment upon a promissory note made by the holder before the note is barred, is *prima facie* evidence of an actual part payment upon the note, and it has been often sanctioned by this court. *Armistead v. Brook*, *18 Ark.*, *522*, and cases cited.

Indorsement after bar attaches.

If the date of the indorsement is at a period after the demand has become stale or affected by the statute of limitations, the interest of the creditor to fabricate it is said to be so strong as to countervail the presumption of payment, and such an indorsement will not make a *prima facie* case for the removal of the statute bar. But when it is shown that the indorsement is made with the privity of the debtor at any time, it is a reasonable presumption that an actual payment has been made. *Searle v. Lord Barrington*, *2 Str.*, *829*, *S. C.*, *8 Mod.*, *278*; *Roseborne v. Billingston*, *17 Johns.* (*N. Y.*), *182*; *Sibley v. Phillips*, *6 Cush.*, *172*; *Smith v. Simms*, *9 Ga.*, *418*; *Hawley v. Griswold*, *42 Barb.*, *18*; *see Greenl. Ev.*, *sec. 121*.

In this case the indorsement was made with the express assent of the debtor, and his admission that the payment had been actually made was proved. These were matters for the consideration of a jury, and the court acting in that capacity was certainly warranted in the inference that the payment was actually made.

2. SAME: Construction of statute.

We have not overlooked *section 4505 Mansfield's Revised Statute.* As it appears there and in *Gantt's Digest*, it reads as follows: "No indorsement of any payment written upon any instrument by or on behalf of the party to whom such payment shall be made, shall be deemed a sufficient proof of such payment so as to take the case out of this act."

This provision is taken from the Revised Statutes of 1838, and has undergone a change in the revisions of 1874 and 1884. As passed by the Legislature it applied to bonds and instruments under seal only. The words "bonds or any other sealed" (instrument) are omitted in the last two compilations. This was doubtless upon the theory that seals having been abolished, the reference to sealed instruments should be stricken from the statute. Whatever the effect of this might be in other instances, we think it gives a meaning to the statute that the abolition of seals alone would not effect. As it reads in the late compilations, it would change the common law rule of evidence pointed out as to simple contracts, and by raising them to the grade of sealed instruments require the more onerous proof provided by statute for the latter class of instruments only. The abolition of seals has the effect rather of reducing sealed instruments to the grade of simple contracts, as held in *Dyer v. Gill, 32 Ark., 410.* That it does not change the rule of evidence applicable to this case we entertain no doubt.

Affirm.

WEBSTER v. CITY OF LITTLE ROCK.

44 536
58 499

1. STATUTES: *Unconstitutionally passed.*

The courts may look beyond the enrollment of an act to the journals of the Legislature to see if the act was constitutionally passed. But, if admitting all that the journals affirmatively show, the act *may* have been properly passed, the courts should so presume and sustain the act. The power to annul an act of the Legislature as unconstitutionally passed is a dangerous one, and should never be exercised in the face of a reasonable doubt.

2. SAME: *Reading of bills in the Legislature: Change of title.*

The Constitution of 1868 did not require bills in the Legislature to be read in full. It was sufficient to read them by title; and a change of title in the House before the last reading, into another indicating the same bill, did not impair the constitutional passage of the bill.

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

Geo. W. Carruth for appellant.

1. The act of April 28, 1873, was not constitutionally passed. The reading *by title* only is not sufficient. The journals show this *affirmatively*. It was *never read in the Senate at all. Sec. 21, art. 4 Const. 1868.*

2. The appellant's property is neither adjacent, adjoining or contiguous to the city within the sense of the act, but is separated by a large tract.

John H. Cherry for appellant.

The boundary limits of the city, prior to April 28, 1873, were fixed by public statutes and will be judicially noticed. (*Dig. City Ord., pp. 76–8.*) The power to fix the boundaries is vested in the Legislature. (*Const. 1868, art. 5, sec. 49; Const. 1874, art. 13; Cooley Const. Lim., sec. 191, et seq.*) And that power cannot be exercised by the judiciary.

(*Const., art. 4.*) The intimation to the contrary in *36 Ark., 177*, is not well considered.

The pretended act of April 28, 1873, did not constitutionally pass either house. (*Const. 1868, art. 5, sec. 21.*) It had only *one reading*, the third; the first and second being of a local or special bill to extend the corporate limits of Little Rock. It nowhere appears how the change of title occurred. In the Senate the bill *was never read, except by title.* (*Cooley Const. Lim., p. 139; Dillon Mun. Cor.; 7 Vt., 471; 10 Ib., 480.*) Municipal boundaries must be fixed and certain (*supra*), and this act was void for uncertainty, and the city council had no power to amend it so as to make it certain.

It was clearly repealed by section 94, act of March 9, 1875. *Acts 1875, p. 39; Gantt's Dig., secs. 3318, 3328.*

W. L. Terry, city attorney, for appellees.

Plats and bills of assurance *speak for themselves*, and it is not competent for the maker to prove by parol that his *intention* was something else. (*36 Ind., 331.*) These lands *were* subdivided into lots, blocks, etc., and it was clearly within the power of the Legislature to declare that adjacent territory so subdivided should become a part of the city. (*1 Dillon M. C., sec. 185.*) As to the rule in regard to lands available *only for agricultural purposes*, and its limitations, etc., see *Cooley on Taxation, p. 120; Martin v. Dix, 52 Miss.; 6 Neb., 54; 5 Dillon C. C., 443; 34 Iowa, 195.*

After the passage of the act of 1873 the people of Lincoln's Addition *acquiesced* in the fact that they were in the city, as did also those of the other additions, paid city taxes, voted in the city, and were exempt from road duty, etc. As to the effect of this see *13 La., p. 47; 13 Gratt., Va., 389.*

As to the *dedication* of the streets in said additions, see

Dillon M. C., vol. 2, secs. 628, 636; 11 Ill., 554; 36 Penn. St., 58–9; 29 Iowa, 73; 23 Penn. St., 200; 26 Ib., 187. As to the effect of *building upon lines of streets* and acquiescence by adjoining owners. *5 Taunt., 125; 2 Smith L. C., 176; 3 Zabr., 23; N. J. L., 712.*

As to effect of *sale of lots with reference to plats, 2 Dillon, sec. 640; 37 Ind., 229; 24 La. Ann., 194; 49 Tex., 347; 23 Mich., 173; 59 Ill., 198.*

The act was constitutionally passed. It was the *same bill*, with merely a change of title to make a *general* instead of a *special* bill, and amended so as to make it apply to *all* cities of the first class. Reading by title is equivalent to reading at length, but under the Constitution of 1868 bills were not required to be read *at length*, as under the Constitution of 1874. *28 Ark., 317; 36 Ib., 166; 40 Ib., 206; sec. 22, art. 5, Const. 1868; Bentham Pol. Tac., 11, 353; 32 Ark., Worthen v. Badgett; 33 Ib., 17.*

The objection that the act is void for uncertainty is disposed of by *36 Ark., 173, 177*, as is also the point that the act is repealed by section 94, act of March 9, 1875. *Ib., p. 170.*

Ordinance No. 5, June 5, 1881, was an *official acceptance* under the act by the city. It was *an official direction* to the county clerk to do his duty. *Dillon M. C., vol. 2, sec. 641.*

EAKIN, J. Webster, in behalf of himself and others who are residents and taxpayers, in a certain district of land described as S. E. qr. of section 4, in T. 1. N., of R. 12 W., filed this bill on the fifteenth of April, 1882, against the county collector and the city of Little Rock, to enjoin the collection of city taxes in that territory, on the ground that it was not within the proper city limits.

The complaint alleges that the said quarter section lies just west of the city limits, and that the collector has in

his hands lists with items of city taxes extended upon said lands, and that he is proceeding to collect them under the pretended authority of an "act to provide for adding territory to cities of the first class," approved April 28, 1873, and of a city ordinance of June 7, 1881, which assumes to include within the corporate limits various tracts in the vicinity, naming some of the subdivisions into which said tracts had been divided, such as "Lincoln's Addition," "Faust's Addition," and "Marshall & Wolfe's Addition," and directing the county clerk to include them in the tax books as city property, to be taxed as such. He says that the city had no power to pass such ordinance, and that the same is in these respects void.

With regard to the act of the Legislature, he says that it was never constitutionally passed, and sets forth in detail the alleged defects in the manner and form of its passage. He says, moreover, that the first section of the act is void for uncertainty, as it proposes to change the former boundary lines of the city, and fixes definitely no other boundary, nor tribunal to establish it; and because it does not prescribe the size of the tracts to be added, or of the lots or blocks into which they might be subdivided, nor authorize any tribunal to do so. He says that of the tracts of land that were then contiguous to the city according to its existing boundary lines, some, in large bodies, belonged to individual owners, whilst others adjacent to these, but still more remote from the city limits, had for convenience of description, and by numerous partitions, been divided up into tracts and lots of almost every conceivable shape and size, from forty acres to the fraction of an acre named "lots" or "blocks;" but these terms, as applied to such suburban parcels, designated no particular quantity of land; and they are so situated that it would be impossible

to embrace them within the city limits without taking in also lands not subdivided.

The complainant says, further, that the said quarter section, prior to February 2, 1857, had belonged to the estate of L. R. Lincoln, who had conveyed ten acres of it to the Catholic Church out of the eastern portion on the eastern line contiguous to the city to Henry Jacobi. At that date Peter T. Crutchfield, as commissioner of the Chancery Court, divided the remainder of the lands into what he called in his report "lots and blocks," the lots being seven and one-half and ten acres in extent, and the blocks of smaller dimensions. A plat of these divisions was recorded, in which the east half of east half of said southeast quarter appears subdivided into the smaller tracts called "blocks," which blocks he at that date conveyed away, a part to the State and the remainder to individuals, without any reservation or dedication to the public of any part of the lands for streets, alleys or highways. These divisions of the east half of east half of said quarter section have remained the property of the State and individuals as thus conveyed. Taken with the east half of the Catholic Church tract they form a tract extending for half a mile along the western boundary of the city, between it and the remaining portion of the southeast quarter of section four. Southward, along the western boundary of the city in section nine, the lands were not then divided into lots, nor claimed to be in the city limits. They have since been partitioned amongst heirs. On the north the lands along the western boundary of the city belong to the State, and have never been laid off into streets and alleys. The complainants and other inhabitants of the said southeast quarter of section four, or the remaining parts of it, have no access to the city on its west side by any street or alley way.

In the year 1867 Marshall & Wolfe were the owners of the southwest quarter and a part of the south half of the west half of the southeast quarter of section four, and for convenience of making conveyances subdivided their tract into small portions or blocks, under the name of "Marshall & Wolfe's Addition," and dedicated the lands lying between the blocks to the county for highways. This with bill of assurances was recorded.

Afterwards, on the fifteenth of January, 1871, John W. Faust, who owned the remainder of the southeast quarter, for like reasons and purposes, subdivided his lands and made a like dedication of streets to the public, but not to the city, calling it "Faust's Addition," which was also recorded. It is alleged that neither of said owners intended or desired to annex the lands to the city, and made no dedication of streets to the city; nor has there ever been any petition made, either by the inhabitants of the district or the city, to include the lands in the city limits, nor has any court ever adjudged that they did or should constitute a portion of the city, but on the contrary the inhabitants have always been opposed to it.

He says it would be unjust to the inhabitants of said southeast quarter of section four to annex them to the city. It is sparsely settled, being in large part open commons; is more than a mile from the business portion of the city; is well adapted for suburban residences for those desiring grounds, orchards, gardens, and other conveniences of country life, and is so used so far as used at all. Their necessities do not require a government appropriate for dense population, and they are too remote from the city to be within reach of the convenience of gas, water facilities, protection by police, and from fire, etc., etc. That, in short, they would have the burdens without the

benefits of the city government, and that they are peaceable folks and need no police regulations.

He says, further, that the southeast quarter of four was not, under the circumstances, within the purview and intent of the act of 1873. Further, that no assessment of city taxes was ever made, or pretended to be made, for 1880 until after the passage of the city ordinance of June 7, 1881, and then was only made by the county clerk in extending city taxes against the property on the county tax books. During the whole of 1880 the city government did not claim jurisdiction over the territory in any way, or expend anything on it; nor did the inhabitants vote in city elections or participate in municipal affairs; but, on the contrary, were compelled to perform country road and other duties.

On the fifth of May an interlocutory injunction was ordered as prayed, and the city of Little Rock submitting to the court, upon the law, the questions upon the validity of the act and ordinance as to the rest answered:

That long prior to the second of February, 1857, Lemuel R. Lincoln owned the quarter section in question, and made a plat of the east half of the east half of the same, upon which the land was divided up into blocks, lots and streets, corresponding with those of the city, the streets being continuations of the city streets under the same names. This was called Lincoln's Addition, and a sale of a block of land to Jacobi was made with reference to it. Lincoln died without having recorded the plat. It came to the hands of Crutchfield, his administrator, with the will annexed, who made application to the Chancery Court for power to sell the lands to carry out the trusts of the will. The court was satisfied of the existence of the plat and division, and directed Crutchfield, as its commissioner, on making sales to sell so much of the east half of the quarter section as Lincoln had laid off

in blocks and lots as an addition to the city, by the numbers and descriptions designated in Lincoln's plat, and to sell the residue of the quarter section in ten or twenty acre parcels as he might deem most advantageous. Whereupon Crutchfield did sell all the blocks in said Lincoln's Addition by that division and with reference to the streets, partly to the State and partly to individuals. This sale was reported by Crutchfield, as such commissioner, with a copy of Lincoln's plat attached thereto. The streets, with a few exceptions, have since been open to the public and used by it, and afford access to all persons coming into the city from "Marshall & Wolfe's Addition" and "Faust's Addition," and are within the jurisdiction and power of the city to keep them open. This addition was considered by the inhabitants, and by the city, and by the county authorities as within the corporation, until the passage of an act of the Legislature in March, 1877, defining the boundary lines of the city, during which time the citizens of the addition paid city taxes, were allowed to vote in municipal elections, and were exempt from road duty.

Further, that the streets laid off in Marshall & Wolfe's Addition, although dedicated to the county, were made in all respects to correspond with the streets through Lincoln's division, continuing them westward. The same allegations are made regarding "Faust's Addition," in which the streets were dedicated to "the public." It is contended that all these became part of the city by force of the act of 1873, and were so treated, in all respects, by the inhabitants of said additions, and by the county and city authorities.

The city taxes for 1880 were not extended over these areas from a mistake of the clerk, who supposed they had been cut off by the act of 1877 defining the boundaries.

This act having been declared unconstitutional, the county clerk was instructed to extend taxes over them again.

Depositions of witnesses tended to show that the streets through Lincoln's Addition had been kept open, affording free passage to and fro, to all inhabitants of the other additions, and that they had enjoyed some of the advantages of the city government, and participated in it up to the time of the passage of the act of 1877.

An agreement of counsel, too long for insertion, sustains the answer substantially with regard to the origin of Lincoln's Addition, the plat and the continuation of the streets, with other matters which will be referred to, if necessary, subsequently in this opinion. Also with regard to the extension of the streets through Lincoln's Addition, although some of them had been stopped by individuals, and the habit of conveying between owners of property there by the numbers and designations of Lincoln's plat. It shows also that although the inhabitants of Lincoln's Addition had been brought within some of the advantages of water and street cars from proximity, they had never had water or gas pipes. It is also agreed that none of said additions were ever brought into the corporation by virtue of a petition of the inhabitants, or by any action of the city corporation, directed to that purpose; but if parts of the city were made so by the results of the facts and circumstances under the operation of law.

Marshall testifies that it was not the intention of himself and Wolfe, in making their plats, to effect an incorporation with the city, but the division was for convenience of description in sales, and that the streets were dedicated to the county to give purchasers a right of way to their several parcels. He thought, then, that there could be no incorporation with the city without a petition by a majority of the occupants, and they so represented

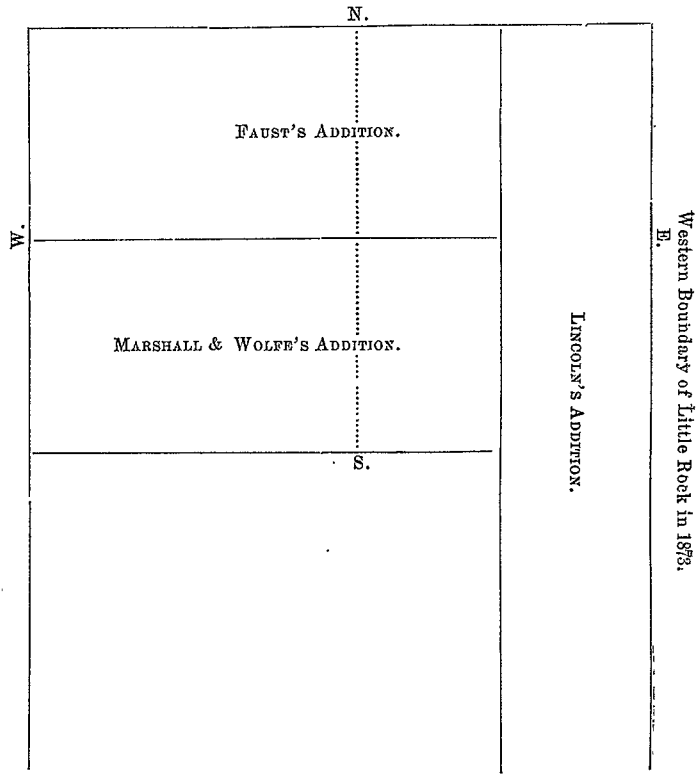
to purchasers. He says that a large portion of that addition, and of Faust's Addition, continues unoccupied, covered with copsewood, and with roads running over it at will. They have had no police protection, nor any from the fire department; and while inhabitants have spent much in improving the streets, etc., the city has spent nothing.

It is shown by agreement of counsel, that in 1881 Marshall petitioned the city council for a grant to himself and others to run a street railroad through the streets of the city and of Marshall & Wolfe's addition, and that he had acted as chairman of ward meetings in the city, and voted in a ward of the city at general election, and acted as a judge of election.

The Chancellor, upon hearing, held that Marshall & Wolfe's and Faust's Additions were part of the city of Little Rock, but for divers equitable reasons made the injunction perpetual as to the taxes of 1880, dissolving it as to all else. Lincoln's Addition is not named in his finding, but the effect of the decree is the same upon it as the others. The costs were divided between the parties. The complainant appealed.

A sufficiently clear idea of the relative location of the tracts may be obtained from this plat, the lands granted to the Catholic Church by Lincoln being omitted as unimportant—also lands of the State:

Southeast of section 4 in township 1 north, of range 12 west.



The streets leading westward from the city are mostly extended by the plats of the additions through all of them.

The Constitution of 1874 authorized the Legislature to provide, by general laws, for the organization of cities and incorporated towns. (*Article 12, section 3.*) At the first session of the Legislature a general incorporation act was passed, the fifth section of which adopted and classified all corporations which existed when the Constitution took effect, with their territorial limits as then, by law, existing. (*Pamphlet Acts of 1874–5, p. 4; Mans. Dig., sec. 729.*) To determine, therefore, whether the southeast

quarter of said section four is a part of the city we must look to the condition of things as existing on the thirty-first of October, 1874, the date of the adoption of the Constitution.

Under the former Constitution of 1868, which also provided for such general laws, an act had been passed on the twenty-eighth of April, 1873, providing for the addition of territory to cities of the first class. (*Acts 1873, p. 287.*) As the whole right of the city to collect the tax rests upon the construction of this act, the first question is upon its validity.

1. STATUTES: Passage of.

The appellant urges that, by the Constitution of 1868, it was requisite that the bill should have been read three times on different days in each house, unless the rules be suspended.

The facts with regard to this bill appear to be, as affirmatively shown by the journals, that on the fourteenth of April, 1873, the bill was introduced in the House of Representatives, marked and numbered "H. R., 343," and entitled "*An act to extend the corporate limits of the city of Little Rock.*" Under suspension of the rules it was read a first and second time by title. On the seventeenth a bill marked and numbered "H. R., 343," but entitled "*An act to provide for adding territory to cities of the first class,*" was read a third time and passed. It was transmitted to the Senate, and there, on the seventeenth of April, was by the title last given, read a first and second time *by title* and referred to a committee. On the twenty-third of April, without suspension of the rules, it was read a third time by title and passed.

It has been gravely questioned whether or not the American courts have done wisely in departing from the English rule regarding the recognition of statutes. There, where the Parliament is trammeled by no consti-

tutional restrictions, and may adopt its own modes of originating and perfecting bills, I understand the rule to be, that the existence of a public act is a question of law, requiring no proof, and that in advising themselves as to the law the judges will not look behind the enrollment of an act properly authenticated. Of course an act surreptitiously enrolled would not come within the rule. In a few of the American States this rule has been adopted in its fullest rigor. See case of *Sherman v. Story, 30 Cal., 253*, in which the American authorities are reviewed and compared, and the conclusion reached that an act of the Legislature properly enrolled, authenticated and deposited with the Secretary of State is conclusive. Also case of *State v. Young*, in New Jersey, reported in *5th vol. Am. Law Reg., p. 679, N. S.; Evans v. Brown, 30 Indiana, 514.*

The legislative department of the government is equal in dignity with the judicial—co-ordinate and not subordinate. Its officers take the same oath to support the Constitution. The constitutional provisions regarding the manner in which bills are to be passed are addressed directly to them, and they are responsible to the people for an abuse of powers. No human government can be devised in which powers must not be somewhere reposed which may be abused. It is not irrational to hold that, when a legislative body has put forth a bill meaning to do so, and that bill has been duly authenticated in the prescribed manner, then the common safety of law-abiding citizens requires that the court should respect it as law, without inquiring into the modes of its passage. It is this consideration which lies at the foundation of the rule everywhere recognized, that no law can be impeached for fraudulent motives actuating the legislators, nor on account of corrupt influences brought to bear upon them.

There is another line of decisions in which this State is

already ranged, which maintains the power and makes it the duty of the judges, in advising themselves of the validity of an act, when it may be questioned, to go behind its enrollment and authentication, and look into the journals to see if the constitutional requirements have been respected in its passage, and to annul it if they have not. This was first done in the case of *Burr v. Ross*, *19 Ark.*, *256*, for the purpose of ascertaining that a bill purporting to be a law, and printed as such, was ever passed at all. This was, in fact, a determination that the printing was a simple mistake, and does not conflict with the English line of authorities. It affirmatively appeared that the bill had been indefinitely postponed, and by usage it followed that it was never taken up again. The practice of referring to the journals has since obtained upon the bench, and in several cases it has been done to ascertain if the legislative body in putting forth a law which it really meant to enact, and considered as enacted, had neglected or violated any essential provision of the Constitution, regulating legislative proceedings. This may now be considered as settled, and we may examine the journals with regard to the act in question.

Presumption in favor of the act.

But there are very potent considerations pressing upon the court to refrain from declaring a statute null on this account, unless it should plainly appear beyond any cure by reasonable presumptions, that the Constitution has been violated in an essential point. If admitting all that the journals *affirmatively* show, the act *may* have been properly passed, then deference to a co-ordinate department, and a regard for those who make the published and authenticated acts of the State their rule of conduct requires that the presumption be entertained by the courts to its fullest extent. In other words the power is a dangerous one, and should never be exercised in the face of a

reasonable doubt. Conforming to the practice of the court, I desire at the same time to express my preference for the English doctrine, with which I do not consider our case of *Burr v. Ross* in conflict. That is to say that an act, actually and *bona fide* assented to in both houses, authenticated and deposited with the Secretary of State, should be conclusive of the law, in the breasts of the judges.

2. READING BY TITLE: Change of title.

Considering ourselves at liberty, however, from subsequent rulings to question the validity of this statute upon the ground of neglect of constitutional directions as to the mode of its passage, we find the only objections urged to the House proceedings to be, that it affirmatively appears, that one bill was read twice by title, and the *same* bill was read a third time by a different title. The title was changed between the second and third reading. That it was the *same* bill is sufficiently clear from its mark, number and subject matter. It was simply changed from a special to a general law. But the title by which it was each time read, indicated the same bill, and it was really read three times by the title which then belonged to it. If I lend my horse to James twice, and he then changes his name to Henry, and I lend him my horse again, I may truthfully say I have lent Henry my horse three times.

The objection to the Senate proceedings is, not that the bill with the new title was not the same bill that was read each time, but that it was never read in full at all. It was not necessary that it should be. The Constitution of 1868, then in force, did not require it. The language is that every bill and joint resolution shall be read three times, on different days, in each house, etc. To read by title is by universal parliamentary usage considered a reading of a bill, unless reading *in full* be specially required. This

is done by the subsequent Constitution of 1874, which requires bills to be read "at length."

It would destroy all confidence in legislation if the judges should subject the members of the Legislature to such martinet regulations as to require all their proceedings to be in rigid form. Most of the members are not lawyers. The act of April 28, 1873, became a law. Its first section provides that:

"All tracts of land or territory which adjoins, or is adjacent or contiguous to a city of the first class, and which is or shall be laid off or subdivided into lots or blocks, or additions, shall be, and the same is hereby declared to be a part of such city, and shall be subject to all the power, authority, jurisdiction, franchises, liabilities and ordinances governing such city, and such territory shall become incorporated with and a part of said city."

Appellant contends that this is too obscure to be intelligible, and therefore void. He says that neither the extent of the additions, nor the shape and size of the lots and blocks are designated. These terms must be construed with reference to the subject matter. The area of the additions is purposely left undetermined. They may be of any size. Lots and blocks mean such lots and blocks as are appropriate to cities—such as cities usually have, for convenience in city uses, for arrangement into groups, with streets and alleys between which may be larger or smaller in different cities, or different parts of the same city, subject to the general convenience. They are easily distinguishable in their nature from rural subdivisions for agricultural purposes, and from divisions for partition. Each case must be judged by its own characteristics in determining whether the divisions were made with a view to urban or rural objects. So considered, it is plain enough, from the proof, that all three of these additions

were so divided as to become city property, and fall within the law.

It makes no difference that any parts of them were mere copsewood and remain so. The Legislature acts without assent of proprietors in establishing municipal governments within the State. Its reasons may not be questioned. If the contiguous additions were subdivided as the statute prescribes, they were swept into the corporation by the *vis major* of the act.

It is more plausibly urged that the statute does not contemplate a "boundless contiguity" of different additions, all having separate existence when the act was passed. But that the several additions are to be considered as separate units, or distinct territories, and the statute only applies to those lying adjacent to the city line, and not those which "*eo instanti*" did not adjoin the city until the act took effect upon intervening additions, thus carrying out the city lines to make the contiguity. This question does not seem quite clear of doubt, inasmuch as it could not be said when the act was passed, that either Marshall & Wolfe's or Faust's addition was adjacent or contiguous to the city, although Lincoln's was. The result of this construction, however, would be against the policy of the act, which seems to have been to prevent the accumulation around the suburbs of cities of the thickly settled districts not under the city control. The effect of dividing these suburban districts into lots and selling them to different parties would be to encourage such dense collections, and the good order of the city could not well be preserved, if it were ringed round with a population independent of its regulations. The construction contended for would lead to just this state of things, for if the statute did not operate at once on these remote additions it could not afterwards.

The statute makes no mention of separate additions made and owned by different parties under different plats and dedications. It seems to contemplate the whole platted district without regard to the lines of separate dedications, or the time at which they had been made.

We think that by the act the territory in question became subject to the city control, and city taxation, and that the Chancellor committed no error prejudicial to appellant.

Affirm.

DAVIS v. MASON.

ATTACHMENT OF BOATS: *To enforce builders' lien.*

The States cannot empower their courts to proceed *in rem* against a boat after the manner of the Admiralty courts where a maritime lien is involved; but contracts for ship building, including contracts for materials furnished, are not of a maritime nature, and the jurisdiction to enforce them is not exclusive in the Federal courts; but they may be enforced by our State courts under the regulations prescribed by our statute.

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

W. R. Coody for appellants.

Chapter 18, p. 178, Gould's Digest, for the attachments of boats and vessels, has been decided by the Supreme Court of the United States to be obnoxious to *sec. 2, art. 3, Const. U. S. Ad. Hine's Cases, 4 Wall., 671*, approved in *Thompson v. Robinson, 34 Ark., 54.*

COCKRILL, C. J. This action was brought by Mason against Davis and his co-owners of the steamboat Music, to

enforce a claim for materials furnished them by the plaintiff, for use in building the boat in Jackson County. The complaint was in common form, and summons issued for all the defendants. The plaintiff filed an affidavit in compliance with the provisions of chapter 10 Mansfield's Revised Statute, regulating the attachment of boats and vessels in such cases, and upon giving bond, a specific attachment issued and was levied on the boat. The case seems to have been amicably settled with the other defendants, but Davis moved the court to quash the attachment upon the ground that there was no authority to issue the order in such a case. His motion was denied, the attachment was sustained, judgment for a small amount was rendered against him and he appealed. His only contention is as to the correctness of the ruling of the court in denying his motion to quash the attachment.

Attachment of boats to enforce builder's lien.

Since the decision of *The Hine v. Trevor, 4 Wall., 555,* it has been settled law that the States cannot empower their tribunals to proceed *in rem* against a boat after the manner of the Admiralty courts, where a maritime lien is involved. This proceeds from the fact that Congress, under the power granted by the Constitution of the United States, has vested the exclusive jurisdiction for that purpose in the United States District Courts. The necessity for the enforcement of this doctrine and the principle upon which it rests were clearly pointed out, and the result reached in the Hine case certainly foreshadowed by Chief Justice Watkins, in the opinion delivered by him in the case of *Merrick & Fenno v. Avery, 14 Ark., 370.* As is intimated in that case, so much of the statute as undertakes to confer upon our courts jurisdiction for the purpose stated is certainly inoperative. But the case presented does not fall

under this feature of the statute, nor come within the prohibited line.

Contracts for ship-building not maritime.

It is not necessary to consider whether the State courts can in any case by proceedings under this statute enforce a claim arising upon a maritime contract. Contracts for ship building are not of a maritime nature, and although they may be enforced in the United States District Court by virtue of the rules of the Supreme Court of the United States, where the State law creates a lien in the nature of a maritime lien for their security, yet Congress has not undertaken to give the District Courts exclusive cognizance of such claims, and it is competent for the State courts to enforce them under such regulations as our statute gives. The Supreme Court of the United States, which is the ultimate tribunal in matters pertaining to admiralty jurisdiction, have so determined the matter. (*Edwards v. Elliott*, *21 Wall.*, *232; Len v. Galechan*, *11 Ib.*, *185.*) Jurisdiction in the State courts for this purpose is sustained by numerous State decisions. *Edwards v. Elliott*, *36 N. J. L.*, *96; Senton v. Steamboat*, *46 Ind.*, *476; Steamer Petrel v. Dumont*, *28 Ohio St.*, *602; Weston v. Morse*, *40 Wis.*, *455; Switzer v. Heinn*, *27 La. Ann.*, *25; Jones v. Keen*, *115 Mass.*, *170;* see, too, *Eaton v. Pennywit*, *25 Ark.*, *144.*

There is nothing in the case of *Thompson v. Robinson*, *34 Ark.*, *44*, to conflict with the right to sue out an attachment by following strictly the provisions of the statute under consideration. That right has been frequently recognized by this court, and as we have seen, there is nothing in the Federal law to inhibit it in a case like this.

In the case last mentioned the subject of the action was an ordinary personal debt for money loaned, and it created no claim against the boat. Under such circumstances the only way to obtain an attachment, as the court held, was to proceed under the general attachment law.

For materials furnished.

There can be no question about the right to proceed by attachment upon a debt contracted by the owner for materials furnished to build the boat. Such claims are mentioned in terms in the original act as it appears in *section 1, chapter 18, Gould's Digest.* The act of December 7, 1860, is amendatory of this act. There is nothing in it to repeal the provisions referred to, and if the amending act is not of itself broad enough to reach this class of claims, we may look to the original act for the right notwithstanding it is omitted from the revised statutes.

There was no error in sustaining the attachment, and the judgment is in all things affirmed.

BURTON & TOWNSEND v. BAIRD & BRIGHT.

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1. COMPROMISE: *Consideration.*

A compromise of a disputed claim is a sufficient consideration to support an express promise to pay the sum agreed upon.

2. DELIVERY: *Of goods to common carrier.*

A delivery of goods to a common carrier, in pursuance of the directions of the purchaser, is a delivery to the purchaser; and he is liable to the seller for the price, though they be lost by the negligence of the carrier before they reach him.

3. PRACTICE IN SUPREME COURT: *Judgment right on the whole record.*

A judgment, which is right upon the whole record, will not be reversed on account of the admission of incompetent evidence, or the giving of instructions based thereon which could not have prejudiced the appellant.

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

J. H. Harrod for appellants.

1. The transcript from the United States Court was not competent evidence. The *same matter* was not in issue, nor was the cause between the *same parties.* (*Greenl. on Ev., 9th ed., vol. 1, secs. 522–28; 4 Macq. H. L. Cases, 913; Jacob's Fish. Dig., vol. 5, p. 7922; 1 Gray, 299, 303.*) And the instruction based on such incompetent evidence was erroneous and misleading. *26 Ark., 513.*

2. It was not necessary for appellees to "stipulate" to deliver the mill "at their own risk" before they were responsible. If they, acting under the order of appellants, undertook to deliver the mill at Gates' landing the carrier was their agent, and its negligence their negligence. *Benj. on Sales, 3d Am. ed., secs. 693, 682, note a.*

3. If appellees were not liable, and executed the note thinking they were liable, there was no consideration for it, and was no obligation of appellants. *26 Ark., 160.*

M. W. Benjamin for appellees.

1. The compromise of a doubtful or disputed claim is a good consideration for a note. *21 Ark., 69.*

2. The transcript from the United States Court (*13 Fed. Reporter, 181*) determined the fact that the mill was delivered properly, and was competent evidence. But if improperly admitted, it was not to the prejudice of appellants, and when the judgment is right upon the whole record this court will not reverse because some irrelevant evidence was admitted or erroneous instructions given, which did not prejudice the appellant. *7 Ark., 543; 2 Ib., 115; 10 Ib., 54; 19 Ib., 96; Hempst., 215; 13 Ib., 29; 14 Ib., 438; 17 Ib., 292; 18 Ib., 469; 23 Ib., 121.*

SMITH, J. This action was upon a promissory note, and the defense was no consideration. The evidence tended

to prove that Burton & Townsend, the makers of the note, had by letter ordered of Baird & Bright, dealers in machinery at Little Rock, one thirty inch Bradford corn mill, with directions to ship the same by river to Cates' landing on the Arkansas River; that the mill was shipped in good order from Little Rock on the steamboat Mill Boy, consigned to the defendants at Cates' landing, and was put off at its destination on a sand bar about forty yards from the main bank of the river, that being the usual place for putting off freight for that landing. Afterwards, by a rise in the river, the mill was washed away and lost. The loss would not have happened if the carrier had deposited the mill on the bank of the river out of the reach of high water, nor if the parts of the mill had been fastened together and the rocks fastened in the frame.

Six months after the loss occurred, and when all the facts were known to the defendants, and a voluminous correspondence had ensued between the parties as to the liability of the defendants to pay for the mill, they made the note in suit in payment for the mill.

The verdict and judgment were for the plaintiffs, both in the justice's court, where the cause originated, and in the Circuit Court where it was taken on appeal.

The burden of proof was upon defendants to establish their plea, the note itself importing a consideration. But so far from the testimony showing a want of consideration, the judgment may be upheld on either of two theories.

1. COMPROMISE: Consideration.

First. The compromise of a disputed claim is a sufficient consideration to support an express promise to pay the sum agreed upon, as was determined in *Richardson v. Comstock, 21 Ark., 69*, which was similar in some of its features to the present case.

But, second, if the note had not been made, and this were an action for the price of the mill, the delivery to the common carrier, in pursuance of the directions of the defendants, was a delivery to them. *State v. Carl & Tobey, 43 Ark., 353; Benjamin on Sales, 4th Am. ed., secs. 181, 693.*

2. Delivery of goods to common carrier.

The property being after such delivery at their risk, it is unimportant to the plaintiffs' right of recovery that it never actually came to defendants' hands. That was a question between the carrier and the defendants, the determination of which could not possibly affect the plaintiff.

3. PRACTICE IN SUPREME COURT. When judgment right on whole record.

In this connection we notice that certain irrelevant evidence was introduced by the plaintiffs over objections in the shape of a transcript of the proceedings in an admiralty suit between the defendants and the steamboat Mill Boy, involving the question by whose negligence it was that this mill was lost, and in which it was determined that it was the fault of these defendants. And the court instructed the jury that they had nothing to do with the question whether the steamboat had delivered the mill at Cates' landing in proper condition or not, that question having been settled by the Admiralty Court. But a judgment which is obviously right upon the whole record will not be reversed on account of the admission of incompetent evidence, or the giving of directions based thereon, which could not have prejudiced the appellants. It was immaterial in this case whether the disaster to the mill happened through the negligence of the carrier or the negligence of the defendants. *Anon. Hempst., 215; Bozeman v. Browning, 31 Ark., 365; Wallace v. State, 28 Ib., 531; Moore v. Maxwell, 18 Ib., 469; George v. Norris, 23 Ib., 121.*

Affirmed.

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HART v. HOWARD COUNTY.

COST: *Medical attention to prisoners: Liability of county for: Commitment to another county.*

Section 3890 of Mansfield's Digest authorizing a sheriff to commit a prisoner in his custody to the jail of some other county in the same circuit when the jail of his county is unsafe, is directory; and if committed to a jail in another circuit the county from which he is carried is liable for his expenses there, including necessary medical attention, to the same extent as if committed to a jail in the same circuit.

APPEAL from *Howard* Circuit Court.
Hon. H. B. STUART, Circuit Judge.

A. B. & R. B. Williams for appellant.

Section 3883 of Mansfield's Digest is broad enough to let in the employment of a physician and the allowance of reasonable compensation in case of violent sickness. The policy of the law and the dictates of humanity have ever been to provide for prisoners and convicts. The prisoner had no estate, hence the county is liable as it is for the costs of prosecution, feeding, etc.

Section 3890 of Mansfield's Digest is directory merely. Possibly the sheriff of Hempstead might have refused to receive the prisoner, but when he did so at the request of the sheriff of Howard, Howard County became responsible. No objection was made to the payment of the sheriff's fees, and this payment is an admission of Howard's liability.

SMITH, J. One Joe Polk had been sentenced to be hanged by the Howard Circuit Court, and pending an appeal to this court, had been placed by the sheriff in the

Hempstead County jail for safe keeping, the jail of Howard being insecure. The prisoner being taken violently sick, the appellant, a practicing physician, was called in by the sheriff of Hempstead, and visited, prescribed for and furnished him medicines until his death, a period of three months.

The doctor exhibited his bill against Howard County for $356, and the county court made an allowance of $200, rejecting the remainder of the claim as excessive. The claimant appealed to the Circuit Court, and there, under the directions of the court, the jury returned a verdict for the defendant.

The bill of particulars was duly verified, as required by section 1412 of Mansfield's Digest, in the case of claims against counties, and the proof was that the services were rendered and the medicines furnished under the circumstances above stated, and that the prices charged were such as were customary in the town where the prisoner was confined; that the prisoner had no property out of which the bill, or any part of it, could be made.

The charge of the court proceeds upon the theory that the statute does not expressly make counties liable for medical attention to prisoners either before or after conviction; and that, if there is any implied liability, it does not arise where, as in this case, the prisoner was taken for safe keeping outside of his judicial circuit.

Section 3890 of Mansfield's Digest enacts that the sheriff may, where there is no jail in his county, or the jail is insufficient, commit any person in his custody to the nearest jail in some other county in the same circuit. Now Hempstead and Howard, although adjacent counties, are in different circuits. But the language of the statute is directory merely. Possibly the jailor of Hempstead was under no legal obligation to receive this prisoner. But, certainly,

if he did take charge of him at the request of the sheriff of Howard, the latter county would be responsible to the same extent as if the commitment had been to some other jail in the same circuit.

The expenses of imprisoning a convict sentenced to suffer death, and all expenses attending the execution of the sentence, are placed on the footing of costs; that is, they are to be paid out of the estate of the convict; but if he had no estate, then by the county. (Compare *secs. 3884, 2338, 2342 of Mansfield's Digest.*) This includes, of course, the cost of feeding him until the day of execution arrives. And our law would be singularly deficient in humanity if it did not also include the attendance of a physician when necessary.

The Circuit Court erred in its directions to the jury and in denying the motion for a new trial. And for these errors its judgment is reversed and the cause remanded for further proceedings.

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PETSINGER V. BEAVER.

COST: *After offer to confess judgment.*

When on appeal to the Circuit Court the plaintiff recovers less than the defendant offered to confess judgment for in the justice's court, all costs subsequent to the offer must be taxed to the plaintiff.

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

J. L. Abernathy for appellant.

All the costs after the refusal of the offer to confess should have been adjudged against the plaintiff, as he re-

covered less than the offer. *Gantt's Digest, secs. 932–3, 475–8; 23 Ark., 59; 28 Ark., 466; 36 Ib., 82.*

SMITH, J. Beavers sued Petsinger before a justice of the peace on an account for $293.57. When the case was called for trial, the defendant filed a written offer to confess judgment in the sum of $120.50; but the plaintiff declined to accept this offer. Such further proceedings were had that the plaintiff recovered judgment before the justice for the full amount of his demand and costs. But on appeal to the Circuit Court and trial *de novo*, the verdict was for the defendant. This verdict was set aside, the court being of opinion that the plaintiff was entitled to recover on one item of his account amounting to $30.38. Thereupon the defendant confessed judgment for the last named sum, but moved the court to tax the costs to the plaintiff, because,

First—The amount finally recovered was less than he had offered to confess before the justice; and,

Second—It was less than the amount for which the justice gave judgment.

But the court awarded all costs of both courts against the defendant.

This would have been correct, had there been no offer to confess judgment. *Gantt's Dig., sec. 932; Latta v. Dodd, 23 Ark., 59; Jones v. Spencer, 36 Ib., 82.*

But by section 4758 it is provided that "after an action for the recovery of money is brought, the defendant may offer in court to confess judgment for part of the amount claimed, or part of the cause involved in the action. Whereupon, if the plaintiff refuse to accept such confession of judgment in full of his demands against the defendant, and on the trial does not recover more than was

so offered to be confessed, such plaintiff shall pay all of the costs of the defendant incurred after the offer."

Reversed and remanded with directions to adjudge all costs incurred after the refusal of the offer against the plaintiff.

CALDWELL V. MESHEW ET AL.

1. PRINCIPAL AND AGENT: *Action on notes to agent: Parties.*
   Notes payable to the order of an agent in the transaction, or transferred to him, and mortgages to secure them, are the property of the principal, and are transferrable by delivery of the principal without indorsement of the agent; and the transferree may sue in equity in his own name to foreclose the mortgage and collect the debts.

2. ACTION: *On unindorsed notes: Proof of assignments.*
   Mere possession and exhibition of unindorsed notes are not evidence of ownership in the holder, but he must prove the transfer to him if denied.

APPEAL from *Randolph* Circuit Court in Chancery.
Hon. E. F. BROWN, Special Judge of Circuit Court.

W. F. Henderson for appellant.

A suit at law can be maintained by a holder and owner of an unindorsed promissory note. (*36 Ark., 501.*) Appellant alleged that he was the absolute owner and holder of the notes and mortgage. He joined the payee and all parties claiming any interest in the notes and mortgage as defendants. This was sufficient. *28 Mo., 180; 36 Ib., 493.*

If the allegations of the complaint are true, and the demurrer admits it, Meshew was a naked trustee of the title for the benefit of appellant, who succeeded to all the rights of Avandana Brothers.

Sanders & Husbands also for appellant.

The court certainly had jurisdiction, the objects of the bill being, first, to declare title to the notes and mortgage in appellant and cancel outstanding titles of Meshew and Avandana Brothers. *Story Eq., vol. 1, secs. 99, 729; Ib., vol. 2, 1039; Daniel Neg. Inst., vol. 1, sec. 744; Jones on Mort., vol. 1, sec. 813.*

Second. To state an account of taxes, etc., paid, and for trespasses, damage, etc., to the mortgaged premises. (*1 Jones on Mortg., sec. 721; 10 Cush., 99.*) Jurisdiction having attached for one purpose, a court of equity will settle all matters in one suit. *37 Ark., 286.*

Third. To foreclose the mortgage.

W. R. Coody for appellee, Meshew.

Meshew, as agent of Avandana Brothers, expended their money, taking the notes and securities in his own name. The appellant, without any assignment or transfer, seeks to enforce and collect by personal judgment and foreclosure. *It cannot be done.* A simple trust was created, in the nature of a vendor's lien, with the right in the principal to a decree of sale to reimburse the trust fund. (*Perry on Trusts, secs. 127–8, 838, 842–3, 234, 238.*) Such a trust is personal, like a vendor's lien, and *not assignable* (*Ib., sec. 238; 43 Ark., 464; 31 Ib., 728*); especially to a stranger. *Ib., 634; 33 Ib., 77; 39 Ib., 344; 23 Ib., 622; 38 Ib., 20; Perry on Trusts, sec. 836.*

The notes are not commercial paper, and could not pass by delivery. They could only pass by assignment. *10 Ark., 496; 9 Ib., 219; 33 Ib., 712; 15 Ib., 481, 536; 11 Ib., 104.*

The assignment of a mortgage does not carry the debt. (*Herman on Ch. Mort., p. 424.*) The interest of a mort-

gagee cannot be assigned or transferred without assigning the debt. *5 John. Chy., 570.*

If this was a personal action against Brown, and appellant had alleged that he was the *real owner*, then Brown would have to answer. (*36 Ark., 505.*) But the facts alleged render it impossible for appellant to be *the real owner or holder.*

SMITH, J. The bill in this case alleged that Avandana Brothers were merchants in New Orleans, and Meshew was their agent in Randolph County; that the defendant, Brown, being indebted to said firm in the sum of $298.27, made his note for the sum payable to the order of said Meshew, and secured the same by mortgage upon real estate; that Hecht, Bro. & Co., the holders of a certain other promissory note of said Brown for $374.77, also secured by mortgage upon other lands, had indorsed the same to Meshew without recourse upon them, but the consideration for said transfer had moved from Meshew's principals, the Messrs. Avandana, and the transfer was in reality for their benefit; that Meshew had afterwards delivered both of said notes and mortgages to his said principals, but without any indorsement in writing, and they had without writing sold and delivered the same to Henderson, and he had transferred them for value, but without recourse, to the plaintiff.

The bill further stated that Meshew had, at his own expense, redeemed the mortgaged lands from a tax sale, and had paid the taxes for several years, and that the plaintiff had offered to repay these advances, but his offer had been declined. And that Meshew had committed sundry depredations upon the lands by cutting timber, whereby the value of the lands was depreciated. But it was not claimed

that this deterioration had proceeded so far as to affect the plaintiff's securities for his debts.

Meshew, Brown and wife, Henderson and Avandana Brothers were made defendants to the bill. And the prayer was, that as between Meshew and the plaintiff an account might be stated, giving Meshew credit for his redemption money and taxes, and charging him with the value of the timber cut from the lands and converted to his own use, the plaintiff offering to pay into court any deficiency that might be found due by him; that the notes and mortgages might be declared to have been executed in the one case, and to have been transferred in the other, to Meshew as agent for Avandana Brothers, and to be subsisting charges upon the lands; and that the plaintiff have judgment against the maker of them for principal and interest, they being past due, and for general relief. There is no specific prayer for foreclosure, but we assume from his coming into chancery that this relief is desired.

The bill was dismissed upon a demurrer which specified that it did not show any right in the plaintiffs to maintain the suit. The action of the court is apparently based upon the idea that Caldwell could not sue because the notes were made payable to Meshew's order, and had never been indorsed by him.

If, as the demurrer admits, Meshew was but an agent in the transactions in the course of which these notes and mortgages were made or transferred to him, the securities were the property of his principals, and they could transfer them by delivery without indorsement. And it is probable that under our statute, which requires all actions to be prosecuted in the name of the real party in interest, the holder under such a transfer might sue, even at law. (*Heartman v. Franks, 36 Ark., 501.*) But certainly in

equity the assignee of choses in action must be permitted to enforce his rights in his own name.

Of course it is open to Meshew to deny his agency in the matters out of which the debts arose, and also to deny the assignment, which must then be proved. For the mere possession of the instruments unindorsed is not evidence of ownership, nor is their exhibition sufficient ground of recovery. And the plaintiff would only succeed to the rights of his assignors and recover subject to such defenses as were available against them. *1 Daniel Neg. Inst., secs. 741, 743; 1 Jones Mortgages, sec. 813.*

Reversed and remanded, with directions to overrule the demurrer and require the defendants to answer.

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ACCORD AND SATISFACTION.

1. *Payment of part of debt for whole.*

An agreement by a creditor to accept a smaller sum in satisfaction of a debt, carried into execution by receipt of the money and execution of a formal and positive instrument of release, with all other acts essential to an absolute relinquishment of his right, is a valid and irrevocable act. Gordon v. Moore. 349

2. *Part payment by third party.*

An agreement by a creditor to accept from a third person, in behalf of the debtor, money or a security for a smaller sum in satisfaction of the whole, is valid and binding and will discharge the debt. Ib.

ACKNOWLEDGMENT OF DEEDS.

See EVIDENCE.

ACTION.

See COMMON CARRIER, 2; FORCIBLE ENTRY AND DETAINER, 1; PARTIES, 2; PLEADING AND PRACTICE, 2; TRESPASS, 1.

1. *By landlord against purchaser of tenant's crop.*

An action for money had and received cannot be maintained by a landlord against one who has received and sold his tenant's crop. Anderson & Co. v. Bowles. 108

2. *Same: Statute limitations.*

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ADMINISTRATION.

1. *Order for sale of lands: Sufficiency of petition.*

The validity of an order of the probate court for the sale of lands to pay debts does not depend upon the sufficiency of the petition for the sale. The order is a judgment *in rem* of a court having exclusive original jurisdiction of the subject matter. The court passes upon the sufficiency of a petition in making the order, and if the petition be insufficient the judgment must be corrected by appeal or *certiorari*. It is not a nullity. Adams et al. v. Thomas et al. 267

2. *Order to sell land procured by fraud.*

An administrator's sale cannot be avoided by showing that the administrator procured his license to sell by fraud and misrepresentation and with the design of sacrificing the property, unless the purchaser at the sale participated in or had notice of the fraud. Ib.

3. *Same.*

Where the order to sell land is procured by fraud, in which the purchaser participated, or had notice of it, the order and sale will be vacated in chancery, unless the title has passed to an innocent purchaser for value, and without notice of the fraud. Adams v. Toomer. 271

4. *Power of probate court over estate: Granting letters, etc.*

The probate of a will authorizes the grant of letters testamentary; but until letters are ordered the court has no jurisdiction to make orders for the management or disposition of the estate. And if it grant letters of administration, generally, instead of letters testamentary, or of administration with the will annexed, the error, if any, must be corrected by appeal. It will not render the subsequent proceedings void. Jackson v. Reeve. 496

5. *Citation to administrator to file settlement.*

It is no excuse for disobedience to a citation to an administrator to file an annual account current, that he had filed an account several years before which the court had not acted on. Pearce, *Ex Parte*. 509

6. *Citation gives jurisdiction in personam.*

By the service of citation upon an administrator to render an account, the court acquires jurisdiction over his person; and any action of the court thereafter in revoking his letters of administration, re-stating or rejecting a former settlement, or ordering the distribution of the money in his hands, as shown by a former settlement, is within the jurisdiction of the court and not void. Ib.

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AGENTS.

See EVIDENCE, 1; PARTIES, 1; PRINCIPAL AND AGENT.

1. *Of county commissioner: Liability to county.*

Where the agent of a commissioner for the sale of county property delivers the commissioner's deed to the purchaser without receiving the purchase money, he thereby assumes the payment of it himself, and will be liable to the county for it. Jacks v. Phillips County. 61

2. *Public: Their contracts beyond authority void.*

The agent of a county to contract for repairs on county buildings has no power to bind the county to pay more in county warrants than the cash value of the labor and materials in United States currency; and parties contracting with such agent must take notice of the limits of his authority. Barton v. Swepston. 437

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1. WRITS: *Not running in name of the State: Amendment.*

A writ not running in the name of the state is amendable, and should be amended by the court of its own motion, or be considered as amended. Kahn v. Kuhn. 404

APPEAL.

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1. *Final decree: Alimony pendente lite.*

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2. *Final order in chancery.*

An order in chancery overruling a motion for compulsory process against a commissioner of the court to compel him to pay money in his hands into court, is not a final order from which an appeal will lie. Hamlet v. Simms. 141

3. *Final order.*

An order of the Circuit Court sustaining a demurrer to a complaint in replevin and dismissing the complaint and directing a writ of inquiry to assess the defendant's damages, is not a final order from which an appeal can be taken to the Supreme Court. Cohn & Weis v. Hamlet et al. 344

4. APPEAL FROM JUSTICE OF PEACE: *What necessary for.*

An appeal from a justice of the peace is a matter of right, and all that is necessary to obtain an appeal is for the appellant to file the affidavit required by the statute. Townsend v. Timmons. 482

5. DAMAGES: *On appeals in Supreme Court.*

The damages awarded against an appellant and his sureties in his appeal bond, on affirmance of the judgment below, are not intended as compensation to the appellee for the delay he has been subjected to. It is an award against the appellant for prosecuting an improper appeal, and where his appeal is for delay only, it is intended that he should pay the award without getting the delay. Chaffin v. McFadden. 523

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ATTACHMENTS.

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1. *Remedy against sureties on delivery bond.*

The summary remedy provided by section 355, Mansfield's Digest, against sureties on a forthcoming attachment bond is cumulative, and at the option of the plaintiff. He may waive it and bring a separate action on the bond. Chapline v. Robertson. 202

2. *Delivery bond: What is delivery.*

An attachment delivery bond can be satisfied only by delivery of the property, or by an offer to deliver it by bringing it forward, pointing it out and tendering it to the officer. To tell the officer where the property is and to go and get it, is not sufficient. Ib.

3. EVIDENCE: *Return of officer on process.*

In an action against the sureties on an attachment delivery bond for failure to deliver the attached property to satisfy the judgment in the attachment suit, the officer's return of the failure to deliver, indorsed on the special execution, is conclusive, and cannot be controverted by the defendants. Ib.

4. *Removing property out of the State.*

The removal by a debtor of a material portion of his property beyond the limits of this State, not leaving a sufficiency to pay his debts, gives cause for attachment against his property, though he had no intention to cheat, hinder or delay his creditors by the removal. Durr v. Hervey. 301

5. *Consolidating debts due and not due.*

A debt not due may be consolidated with one that is due, and an attachment be issued for the aggregate amount of both, where grounds of attachment applicable to either debt are alleged in the affidavit. Kahn v. Kuhn. 404

ATTACHMENT OF BOATS.

1. *To enforce builders' lien.*

The States cannot empower their courts to proceed *in rem* against a boat after the manner of the Admiralty courts where a maritime lien is involved; but contracts for ship building, including contracts for materials furnished, are not of a maritime nature, and the jurisdiction to enforce them is not exclusive in the Federal courts; but they may be enforced by our State courts under the regulations prescribed by our statute. Davis v. Mason. 553

ATTORNEYS' FEES.

See CONTRACTS, 1; STATUTES, 2.

1. *Not apportionable.*

An attorney's services can not be apportioned by time. Files v. Fuller. 273

AWARDS.

1. *Legality of award.*

Unless the illegality of the decision of arbitrators appears upon the face of their award, the court will not set it aside on the ground merely that the arbitrators mistook the law, or decided contrary to the rules of established practice of courts of law and equity. Kirten v. Spears. 166

2. SAME: *Conclusiveness of award.*

In general, arbitrators have full power to decide upon questions of law and fact, which directly or incidentally arise in considering and determining the questions embraced in the submission, and their decision upon such matters is conclusive. Ib.

BAILMENT.

See DELIVERY, 1.

BANKRUPTCY.

1. *New promise to pay debt.*

A promise by a bankrupt to pay a debt provable in bankruptcy, made after adjudication, is binding upon him, whether made before or after his discharge, and need not be in writing. Lannagin v. Nowland. 84

BILL OF EXCEPTIONS.

See PRACTICE IN SUPREME COURT, 3, 4, 11, 12.

BONA FIDE PURCHASER.

1. *Purchase pendente lite.*

To subject a purchaser to the notice of *lis pendens,* in the absence of actual notice, the purchase must be made from one who was a party to the suit at the time. Marchbanks v. Banks. 48

2. *Payment of part consideration: Lien for part paid.*

A purchaser, though without notice of outstanding equities, is not an innocent purchaser unless he has paid the whole consideration. Payment of part and securing the residue to be paid are not sufficient. But he has an equity to reclaim out of the property the part innocently paid. Ib.

BRIDGE.

See NAVIGATION, 1.

CERTIORARI.

1. *For correction of errors.*

The writ of *certiorari* cannot be used as a substitute for appeal for the correction of mere errors of an inferior court. Pearce, *Ex Parte.* 509

2. *Not a writ of right: Practice on.*

The writ of *certiorari* is not a writ of right. It will be granted or refused in the discretion of the court, according to the circumstances of each particular case, as justice may require; and when it plainly appears that it has been improvidently issued, it will be quashed upon motion of either party or the court's own motion, notwithstanding a return has been made and the merits gone into; but the assumption of unauthorized jurisdiction will be corrected by the writ. Ib.

COMMON CARRIER.

1. *Damages for delay in delivering freight.*

For the conversion or loss of goods, or total failure to deliver them to the consignee, a common carrier is liable only for their value and interest at six per cent. per annum. St. Louis, Iron Mountain & Southern Railway v. Mudford. 439

2. *Same.*

A common carrier is liable in damages for the negligent delay in the transportation of property; but the owner cannot on account of unreasonable delay in the transportation and delivery, refuse to receive the goods and sue as for a conversion. He can claim only the damages sustained by the delay. Ib.

COMPROMISE.

1. *Rescission of: Recognition of claim.*

The rescission of a compromise of a claim by mutual consent of the parties restores them to the positions they occupied before the compromise was made; and the claimant cannot urge the compromise as a recognition of the claim by the other party. Perry v. Little Rock & Fort Smith Railway Company. 383

2. *Consideration.*

A compromise of a disputed claim is a sufficient consideration to support an express promise to pay the sum agreed upon. Burton & Townsend v. Baird & Bright. 556

CONFUSION OF GOODS.

See REPLEVIN, 1.

CONSIDERATION.

See COMPROMISE, 2; FRAUDULENT CONVEYANCE, 1.

CONSIGNOR AND CONSIGNEE.

1. DELIVERY: *Of goods to common carrier.*

A delivery of goods to a common carrier, in pursuance of the directions of the purchaser, is a delivery to the purchaser; and he is liable to the seller for the price, though they be lost by the negligence of the carrier before they reach him. Burton & Townsend v. Baird & Bright. 556

CONSTRUCTION OF CONTRACT.

See DEEDS, 2, 3.

1. LEX LOCI: *Contracts.*

Matters bearing upon the execution, the interpretation and validity of a contract, are to be determined by the law of the place where it is made. Howcott v. Kilbourn. 213

CONSTRUCTION OF STATUTES.

See STATUTES, 1; TAXES, 2; VENDOR AND VENDEE, 4.

CONTRACTS.

See CONSTRUCTION OF CONTRACTS, 1.

1. ATTORNEY'S FEE: *Agreement to pay by assignor of note for collection.*

B owed H a debt, and as collateral security for its payment, assigned to him a note and mortgage on land to secure it, executed to B by P, authorizing H in the assignment indorsed upon the note, to foreclose the mortgage against P, and to pay his debt and the solicitor's fee for foreclosing, out of the proceeds of the sale of the land. In a contention that the agreement for payment of the attorney's fee was in the nature of a penalty, and without consideration and void: *Held, aliter:* that by the assignment B made H his agent to foreclose the mortgage and collect the mortgage debt for their mutual benefit, and the duty and responsibility assumed by H were a sufficient consideration for the agreement. Benton v. Holliday. 56

2. SUNDAY CONTRACT: *May be ratified.*

A contract of sale made on Sunday is void; but the parties to it may, on a subsequent week day, affirm or adopt its terms, and so become bound by them; and a receipt of the purchase money by the vendor on a week day, would be an affirmance of it and make it good, at least from that time. And a demand of payment on a week day would have the same effect as to the vendor, and would compel the purchaser to elect either to adopt the Sunday terms or to insist on their invalidity. McKinney v. Demby. 74

3. CONTRACTS: *Lawful where made, enforceable everywhere.*

A purchase in another State, by a citizen of this State, of articles to be sold in this State, the sale of which is prohibited by the law of this State, but not by the law of the State where purchased, is valid and binding upon the purchaser, and will be enforced in the courts of this State, unless the seller is to actively participate, or be interested in the unlawful sale in this State. Parson's Oil Company v. Boyette. 230

CONVERSION.

See REPLEVIN, 1.

CONVICTS.

1. COUNTY PRISONERS: *Corporal punishment.*

Corporal punishment by the lash can be lawfully inflicted by contractors upon county prisoners for refusal to work, or upon convicts in the penitentiary, only under rule or regulation made by the State board of prison commissioners for the discipline of convicts in the penitentiary; and if the commissioners have not authorized the use of the lash in the latter class, it cannot be used in either. Werner v. The State. 122

CORPORAL PUNISHMENT.

See CONVICTS, 1.

CORPORATIONS.

1. *Liability for services before organization.*

To make a corporation liable for services performed under contract with its promoter before it was organized, the services must be intended at the time to inure to the benefit of the future corporation, must be rendered in its behalf, and with the expectation and confidence that the company will be bound, and not the credit of individuals. Perry v. Little Rock & Fort Smith Railway Company. 383

COST.

1. COUNTY: *Liability for cost in misdemeanors.*

A county is not liable for the cost in a misdemeanor case, except when the defendant is acquitted and there is no judgment against the prosecutor for the cost. But a dismissal by *nolle prosequi* is not an acquittal. Stalcup v. Greenwood District, Sebastian County. 31

2. *Medical attention to prisoners: Liability of county for: Commitment to another county.*

Section 3890 of Mansfield's Digest authorizing a sheriff to commit a prisoner in his custody to the jail of some other county in the same circuit when the jail of his county is unsafe, is directory; and if committed to a jail in another circuit the county from which he is carried is liable for his expenses there, including necessary medical attention, to the same extent as if committed to a jail in the same circuit. Hart v. Howard County. 560

3. *After offer to confess judgment.*
When on appeal to the Circuit Court the plaintiff recovers less than the defendant offered to confess judgment for in the justice's court, all costs subsequent to the offer must be taxed to the plaintiff. Petsinger v. Beaver. 562

COUNTY.

See AGENT, 1, 2; COST, 1.

CRIMINAL LAW.

1. FELONY: *Larceny of a cow.*
The act of February 12, 1883, makes the larceny of a cow a felony, without regard to its value; and by section 1631 Mansfield's Digest, one who receives a stolen cow, knowing it to be stolen, may be punished as is prescribed for stealing the cow. Shepherd v. The State. 39

2. LARCENY: *Possession as evidence of.*
Possession of stolen property is a fact from which the possessor's complicity in the larceny may be inferred; but possession alone is not sufficient to sustain a conviction. It must appear that the property was recently stolen; the possession must be unexplained, and in some form involve an assertion of property in the possessor. Ib.

1. *Carnal knowledge of child under puberty.*
Twelve years is the age of puberty of a female child, and a party can not be convicted of "carnally knowing a female child under the age of puberty" if she be twelve years old. State v. Pierson. 265

CRIMINAL PRACTICE.

See NEW TRIAL, 1, 2.

1. EVIDENCE: *Of defendant's good character.*
In prosecutions for homicide on circumstantial evidence, the good moral character of the defendant is admissible as evidence in his behalf; but the court cannot instruct the jury as to the weight to be given to such evidence. Maclin v. The State. 115

2. *When presence of defendant necessary.*

A defendant under indictment for a felony must be present whenever any substantive step is taken by the court in his case. And to annul a verdict against him for a violation of this right it is not necessary that he show that he was actually prejudiced by the proceeding in his absence. It is sufficient if it appears that he may have lost an advantage or been prejudiced by the proceedings; but where no prejudice could by any possibility result from the action of the court, there is no reason for requiring his presence. Bearden v. The State. 331

3. *Same.*

It is no infringement of the defendant's rights for the clerk, in his absence, to place the names of the panel in a box preparatory to drawing the jury for the trial; but to swear the witnesses and put them under rule in his absence is a violation of his rights. Ib.

DAMAGES.

See APPEALS, 5; COMMON CARRIER, 1, 2; FORCIBLE ENTRY AND DETAINER, 2; NAVIGATION, 1; PLEADING AND PRACTICE, 6; PRACTICE IN SUPREME COURT, 10; RAILROADS, 5, 6, 7, 8.

1. *For breach of contract: Measure of.*

For the breach of every contract the law implies that some damages have resulted. Yet if a party seeks more than nominal damages he must prove actual or substantial loss, unless the contract furnishes a guide for the measurement of the damages. St. L., I. M. & S. Ry. v. Mudford. 439

DEEDS.

1. *Quit claim: Effect of.*

In this country a quit-claim deed is a substantive mode of conveyance, and is as effectual to carry all the right, title, interest, claim and estate of the grantor as a deed with full covenants; although the grantee has no possession of, or prior interest in the land. Covenants in a deed are no part of the conveyance. They are separate contracts, and the title passes independently of them. Bagley v. Fletcher. 153

2. *Repugnant provisions.*

A tenant by the curtesy conveyed his life-estate to his children, the remaindermen, reserving to himself the right to use, manage and control the property during his life for the education, maintenance and support of the grantees, notwithstanding their future marriage or majority. In a contention that the reservation was repugnant to the deed and void: *Held, aliter:* that the reservation was not of title or estate, but one of power: that the deed was the same, in effect, as if the father having the legal title, had covenanted to stand seized of it for the sole use of his children, and had reserved the power to exercise an active trust in their behalf for all the purposes expressed in it. Varner v. Rice. 236

3. *Construction of: Tenant for life: Remainder-man.*

Shelton conveyed to Marietta Hilburn, "and the heirs of her body that now are or may hereafter be born," a tract of land, providing in the deed that "neither the said Marietta nor her husband, nor either of her children that now are or may hereafter be born, nor any other person for them, shall have any power to sell said land during my natural life, or until the youngest child of said Marietta, now or hereafter born, shall arrive at full age." *Held:* That the deed vested in Mrs. Hilburn a life estate, and upon her death the remainder in fee in her children that survived her, and the issue of such as had died during her life, *per stirpes.* That it vested nothing in the children during the life of the mother; and they had no interest that during her life could be transmitted to her by their death, or be sold with or without the consent of the donor. Horseley et al v. Hilburn et al. 458

DELIVERY.

See ATTACHMENTS, 2; CONSIGNOR AND CONSIGNEE, 1; GIFTS CAUSA MORTIS, 1.

1. *Symbolical: Transfer of warehouse receipt.*

A warehouseman's receipt for cotton stored in his warehouse is such a document of title that its transfer, by indorsement or otherwise, clothes the transferree with the legal title and constructive possession of the cotton; and this without notice to the warehouseman of the transfer, or agreement by him to hold for the transferree. By executing the paper he consents to become the bailee of any one to whom it may be transferred, and becomes such bailee from the time of the transfer. Durr v. Hervey. 301

DIVORCE.

1. *Alimony pendente lite.*

In a suit for divorce, a Chancellor has power to award alimony *pendente lite* to the wife, whether as plaintiff or defendant, out of the husband's property, upon affidavits upon her part showing his ability; and in the absence of any proof of separate property in the wife, it is but just and reasonable to compel the husband to furnish the means for her to prosecute or defend the suit, and with necessaries suitable to her station in society and his means. Glen v. Glen. 46

2. *Custody of offspring: Permission of mother to visit.*

In divorce cases where the custody of the offspring is given to the father, it is not necessarily erroneous for the decree to give leave to the mother, though immoral, to visit it. The courts should regard the maternal instinct of the veriest trull that walks the streets, taking proper care that it do not lead to the corruption of the child. It is the strongest and holiest sentiment of humanity; the freest from selfishness or impurity, and often the last hope for the redemption of fallen nature. Haley v. Haley. 429

3. *Practice: Decree on bill and cross-bill.*

Where there is a cross-bill in a suit for divorce, the decree granting the divorce ought to state on which bill it is granted, the original or cross-bill; but the omission to do so will not be reversible error. Ib.

4. *Personal indignities.*

The indignities to the person mentioned in the statute as the cause for divorce, need not consist of personal violence. They may be unmerited reproach, rudeness, contempt, studied neglect, open insult, and many other things habitually and systematically pursued to an extent which would render a woman's life intolerable. Nor is it necessary that she be wholly blameless. Ib.

EVIDENCE

See ATTACHMENTS, 3; COMPROMISE, 1; CRIMINAL PRACTICE, 1; FRAUDULENT CONVEYANCE, 1; RAILROADS, 3, 7, 8; STATUTE LIMITATIONS, 7, 8; TRUSTS, 1.

1. AGENCY: *Declarations of agent as proof of.*

The declarations of a husband as to his agency in transacting business for his wife, are not sufficient evidence of his authority to act for her. Howcott v. Kilbourn. 213

2. SURVEYS.

A county surveyor's record of a survey made by him is only *prima facie* evidence of the correctness of the survey, and parol evidence of other surveys is admissible to prove it incorrect. Section 1182 Mansfield's Digest, providing that no survey made by any other than the county surveyor, or his deputy, shall be legal evidence in any court, means that the certificate of such survey shall not be admissible as documentary evidence of itself, without other proof. Smith v. Leach. 287

3. ACKNOWLEDGMENT: *Of title bond and assignment.*

The execution of a title bond and of its assignment must both be acknowledged as required for a deed and properly certified and recorded before they can be admitted as evidence without other proof of execution. The omission of the word "consideration" in the acknowledgment is fatal. But where the execution is otherwise proved at the trial they are admissible notwithstanding the defective acknowledgment. Greisler v. McKennon. 517

4. ACTION: *On unindorsed notes: Proof of assignments.*

Mere possession and exhibition of unindorsed notes are not evidence of ownership, but he must prove the transfer to him if denied. Caldwell v. Meshew. 564

5. *Variance from pleading.*

The materiality of a variance between the proof and the pleading is not to be determined as at common law by the incoherence of the two statements on their face. The party alleging the variance must show that he has been misled to his prejudice. Molen and wife v. Orr. 486

EXECUTION.

See SHERIFF, 1.

FEES.

1. *Tax assessor's.*

The assessor is entitled to one dollar and no more for assessing all lands of non-residents and unknown owners in each township in which there may be any of either. Bell v. Arkansas County. 493

FERRIES.

See INJUNCTION, 2.

FORCIBLE ENTRY AND DETAINER.

1. UNLAWFUL DETAINER: *When maintainable.*

The action of unlawful detainer can be maintained only where the relation of landlord and tenant exists. It cannot be maintained against one in possession of land under a written or parol contract for its purchase which he has failed to perform. He is in as owner and not as tenant. Mason v. Delancey. 444

2. UNLAWFUL DETAINER: *No damages recoverable.*

In an action for unlawful detainer where possession is delivered to the plaintiff under the writ, the only judgment he is entitled to is for cost. No damages are recoverable for detention of the premises. Poe v. Bradley. 500

FRAUD.

See PLEADING AND PRACTICE, 14.

1. *False representations: Puffing.*

The rule that commendation or puffing of an article is permissible to a vendor, without subjecting him to the imputation of false representation, applies when the purchaser has a full and fair opportunity to inspect the article and judge for himself, and not to things which are not the subject of any visible test or examination. Gaty v. Holcomb. 216

2. *Same.*

Any untrue representations made by the seller of the right to make and sell a new invention, as to the capacity of the machine or its fitness for the purposes for which he knew it was intended, would be fraudulent, if they induced the purchase and were made under such circumstances as authorized the seller to rely upon them; and in the absence of proof it would be inferred that they did induce the purchase; and to repel this inference the seller must prove either that the buyer had knowledge of facts which showed the representations to be false, or that he expressly stated in terms, or showed by his conduct that he did not rely upon them, but acted upon his own judgment. Ib.

FRAUDULENT CONVEYANCE.

See HOMESTEAD, 1.

1. *Consideration expressed in deed conclusive.*

A party claiming under a deed which is attacked as fraudulent, can not support it by showing a different consideration from that expressed on its face. Carmack v. Lovett. 180

GIFT CAUSA MORTIS.

1. *Essentials.*

To establish a gift *causa mortis*, the evidence must show not only that the person *in extremis* designated with proper distinctness the thing given and the donee, but it must also show that the property was presently to pass, and that the intention was carried into effect by an actual or effective delivery. Newton v. Snyder. 42

2. *Delivery.*

Delivery to a third person for a donee, is as effective as delivery to the donee; but delivery to an agent as agent for the giver to perform the act or make delivery only after the giver's death, would amount to nothing, Ib.

HOMESTEAD.

1. FRAUDULENT CONVEYANCE: *Homestead.*

Lovett conveyed his lands, except forty acres on which he resided as the head of a family, to his children, in fraud of his creditors. In an action in equity by a creditor to set aside the conveyance and subject the land to his debt; *held*, that Lovett could hold 160 acres, including the forty on which he resided, as a homestead. Carmack v. Lovett. 180

HUSBAND AND WIFE.

See MARRIED WOMAN, 3; PLEADING AND PRACTICE, 2.

1. *Effect of wife's conveyance of her land.*

Whatever interest the husband acquires in his wife's lands by marriage since the Constitution of 1874, is swept away by her subsequent conveyance of them; and so where a husband and wife during her infancy joined in a conveyance of her land, and after her maturity she disaffirmed and avoided the conveyance by conveying to another party, *held*, that the last conveyance swept from the first purchaser as well the husband's interest as the wife's. Bagley v. Fletcher. 153

2. *His interest in her land.*

Milwee, in consideration of marriage, conveyed to his intended wife certain town lots in Locksburg, "to her, her heirs and assigns forever, to her and their own use, benefit and behoof, with full power to her to grant, bargain, sell and devise the same at will, in as full and complete a manner as if she were sole." The marriage occurred in 1872. In 1878 they separated, and she sold him the lots on time and executed bond to convey upon payment of the purchase money. Afterwards, upon his failure to pay, she sold and conveyed to another party, who had notice of the prior sale to her husband. In an action of ejectment by the last purchaser, *held*, that her bond for title, if not a mere nullity, was voidable at her election, and whatever interest the husband acquired in the premises by the intermarriage, was swept away by the deed to the plaintiff. Milwee v. Milwee. 112

3. *Action for wife's torts: Abatement.*

Husband and wife are jointly liable, and must be jointly sued for torts of the wife committed during coverture; first, where he is absent and had no knowledge of the intended acts; second, where he is absent but the tort is done under his direction and instigation; and third, where he is present but the wife acts of her own volition. But where the act is committed in the presence of the husband and by his command and encouragement, he alone is liable. In the first three cases the wife is the offender, and if the marriage is dissolved by divorce or the death of either spouse before the judgment, the liability of the husband ceases. Kosminsky v. Goldberg. 401

4. *Husband's liability on her contracts.*

A husband is not liable on a contract made by his wife in her own name for repairs on a hotel controlled and conducted by her. Molen and Wife v. Orr. 486

INFANT.

1. *His deed: Covenants in.*

The deed of an infant will pass his estate subject to disaffirmance after his maturity; but the covenants in his deed are absolutely void. Bagley v. Fletcher. 153

2. *May avoid deed after maturity.*

A deed executed by an infant may be avoided by him after maturity, by any act unequivocally manifesting an intention to avoid it; and a reconveyance to another not in privity with the first grantee, is conclusive evidence of such intention, and disaffirms the first deed; and this, whether the last be a quit-claim deed or a deed with covenants of warranty. (Eakin, Justice, dissenting as to the conclusive effect of a quit-claim deed; holding that it should depend on intention to be ascertained from the circumstances and nature of the second deed.) Ib.

3. *Same.*

The principle that the deed of an infant may be avoided by his deed of the same property after maturity to another party, is confined to absolute deeds inconsistent with one another, whereby it becomes manifest that it was the intention of the party to disaffirm the first deed. Ib.

4. *Same: Ratification: Temporary acquiescence.*

The mere fact that one for a few months after maturity recognizes a deed made in infancy as an existing fact, and acquiesces in it, and takes no active step to disaffirm it, will not amount to a ratification of it. Ib.

5. *Release: Disaffirmance.*

An infant's release of a demand is voidable at his election; and the bringing of suit upon the demand is an unequivocal disaffirmance of the release. St. L., I. M. & S. Ry. v. Higgins. 293

6. *Same: Return of consideration.*

An infant may disaffirm his contract without restoring the consideration received for it. Ib.

INJUNCTION.

1. *None against criminal prosecutions.*

Chancery will not interfere by injunction to prevent anticipated criminal prosecutions. New Home Sewing Machine Company v. Fletcher. 139

2. FERRIES: *Infringement of franchise by private crossings.*

A ferry license under our statute does not give the grantee the right to enjoin citizens from using their own boats upon the stream for a mile above and below, in crossing themselves, their families, employes, guests, or occasionally a friend, at their will, or occasionally lending their boats to each other; but in using his banks for landings except at a public highway, and in crossing his land to reach their boats, they become liable at law as trespassers for injury to his land. Hunter v. Moore. 184

INSTRUCTIONS.

See PRACTICE IN SUPREME COURT, 3.

INTEREST.

See PRACTICE IN CHANCERY, 1.

JAILS AND JAILORS.

(Commitment to other Counties.) See COST, 2.

JUDICIAL SALES.

1. PROBATE SALES: *Irregularities in proceedings.*

Mere irregularities in the proceedings of the probate court in ordering the sale of a ward's land, which do not affect the jurisdiction of the court, afford to the purchaser at the sale no grounds for refusing to complete his purchase; and upon a re-sale at a less price than his bid, the guardian may recover from him the difference. Beidler v. Friedell. 411

2. *Inadequate price: Confirmation.*

Where due and legal notice of the time, terms and place of a judicial sale of land has been given and there is no fraud or unfairness in the conduct of the sale, confirmation of it will not be refused on account of its being at a grossly inadequate price. Fry v. Street. 502

JURISDICTION.

See ADMINISTRATION, 4, 6; JUSTICE OF THE PEACE, 1.

1. OF SUPREME COURT: *Mandamus.*

The Supreme Court has no jurisdiction to issue a mandamus to the clerk of the Circuit Court to compel him to perform a duty enjoined upon him by law, though the circuit judge, from interest in the cause, is disqualified to act. Snoddy *et al., ex parte.* 221

2. *Action against other counties.*

The Circuit Court of Sharp County, which was carved out of Lawrence County, has no jurisdiction, either of Lawrence County or of the subject matter of the suit in an action by Sharp County against Lawrence County, for her *pro rata* of the internal improvement fund on hand in Lawrence County. The original jurisdiction is exclusive in the county court of Lawrence County to audit, settle and pay the claim. Shaver v. Lawrence County. 225

3. *Same: Appeal: Change of venue.*

The county court of each county has exclusive original jurisdiction to audit, settle and order the payment of all demands against the county. If it refuses to act it will be compelled to by mandamus. If it rejects the claim or allows too small an amount, its action may be reviewed on appeal; and from the circuit court the claimant may take a change of venue to another county, if he believes he cannot get justice from a jury of the defendant county. Ib.

4. *Of Circuit Court on appeal from justice of peace.*

On appeal from a justice of the peace's court, the jurisdiction of the Circuit Court is derived from and dependent upon the appeal. It cannot put its original jurisdiction into exercise by superadding to the controversy a cause of action, or an issue that the justice of the peace could not entertain, and can render no judgment that the justice could not render. Whitesides v. Kershaw & Driggs. 377

5. *Equitable, of justice of the peace.*

A justice of the peace may apply equitable doctrines to the solution of questions in cases properly coming within his jurisdiction, but he cannot administer the flexible remedies of equiiy. Ib.

6. PROBATE COURT: *Jurisdiction: Partnership accounts.*

The probate court has no jurisdiction to adjust the partnership accounts between a deceased and surviving partner. But when their accounts have been settled and a balance struck against the partner who afterwards dies, the probate court may render judgment for this balance against his estate. Culley & Son v. Edwards, Adm'x. 423

7. OF JUSTICE OF THE PEACE:

Where the record from a justice of the peace shows that the action was upon a contract for an amount within his jurisdiction, and that the parties appeared and submitted to a regular trial, it sufficiently shows jurisdiction. Townsend v. Timmons. 482

8. LIEN: *Material-man's.*

A mechanic's or material-man's lien involves a lien on real estate, and a justice of the peace has, therefore, no jurisdiction to enforce or protect it. Cotton v. Penzel & Co. 484

JUSTICE OF THE PEACE.

See JURISDICTION, 5, 7.

1. *Jurisdiction ex delicto: Criterion of damages.*

A justice of the peace has no jurisdiction of an action for damages exceeding one hundred dollars; and the damages claimed by the plaintiff furnish the criterion of jurisdiction. L. R., Miss. R. & Tex. Ry. v Manees. 100

LANDLORD AND TENANT.

See ACTION, 1, 2; PLEADING AND PRACTICE, 2.

LARCENY.

See CRIMINAL LAW, 1, 2.

LEGISLATURE.

See STATUTES, 3, 6, 7.

1. *Power over courts and subsequent Legislatures.*
No Legislature has power to prescribe to the courts rules for interpretation, or to fix for future Legislatures any limits of power as to the effects of their action. Files v. Fuller. 273

LICENSE.

See TAXES, 3.

LIEN.

1. LABORER'S LIEN: *None without writing.*
There can be no statutory laborer's lien without writing. Gates Bros. v. Burkett. 90

MANDAMUS.

1. *Essential of.*
The writ of mandamus will not properly lie except in case of necessity, where there is no other remedy. Basham v. Carroll. 284

2. *None to control judicial action.*
A court cannot be compelled by mandamus to reinstate an action which has been stricken from its docket. The reinstatement or refusal to reinstate is the exercise of judicial functions which cannot be controlled by mandamus. Hempstead County v. Grave. 317

3. *To compel county court to adjust claim.*
If the county court of a new county refuses to ascertain and adjust its proportion of the debt of the parent county, when properly presented to it for adjustment, it may be compelled to by mandamus. Ib.

MARRIED WOMAN.

1. *Not bound by title bond.*
A married woman's executory contract to convey land, if not a mere nullity, is voidable at her election. Milwee v. Milwee. 112

2. *Her deed: Joinder of husband.*
It is not necessary that a husband join in his wife's deed of her land. It is good without him. Ib.

3. *Conveyance by attorney.*
A married woman cannot convey her lands by power of attorney. Batte *et al.* v. McCaa *et al.* 398

MASTER AND SERVANT.

1. *Injury from negligence of co-servant.*
The master is not liable to a servant for injuries resulting from the negligence of a co-servant. St. L., I. M. & S. Ry. v. Harper. 524

2. RAILROADS: *Negligence in testing boiler.*
If a railroad company omit any test of soundness in a boiler repaired at its shops that ought to be made, it will be guilty of negligence and liable for the damages to its servants resulting from its explosion. Ib.

3. *Injury to servant: Defective machinery: Fellow-servant.*
The rule of law which exempts masters from liability to the servant for injuries received from the ordinary risks of his employment, including negligence of his fellow-servants, does not excuse the employer from the exercise of ordinary care in supplying and maintaining suitable instrumentalities for the performance of the work required, whether this duty is to be performed by the master in person or by his agent. But when there is no notice to the master of defects, and no blame is imputable to him for not discovering them, he is not responsible for injuries resulting to his employe therefrom. And notice to a co-servant is not notice to the master. Ib.

4. *Some: Burden of proof: Fellow-servant.*
When a servant seeks to recover for an injury resulting from defective machinery, he must prove negligence on the part of the master in relation to the defect, or the want of such care and diligence as a prudent man would exercise under like circumstances; and where this duty of the master is deputed to another, the latter is not a fellow-servant, but stands in the master's place, and his negligence binds the employer. Ib.

5. RAILROADS: *Negligence of agent: Injury to employe.*
Both the master mechanic and foreman of a railroad company's shops, to whom is committed the supervision of repairs, and determining the necessary repairs, and how the work should be done, are, each in their sphere, agents of the company, and for their negligence, resulting in injury to a servant of the company, it will be responsible. Ib.

MORTGAGE.

1. *Of merchandise retained by mortgagor.*
Where possession of mortgaged merchandise is retained by the mortgagor or his agent, and sales continue and stock is replenished as before the mortgage, this is evidence of fraud as against attaching creditors, and conclusive if not explained; but there is no objection to the mortgagee in good faith retaining the salesman of the mortgagor for his own. Fink v. Ehrman Bros. 310

2. *Trustee is liable for sales of agent.*
The trustee in a trust mortgage is liable for the proceeds of sales made by his agent, and they will be credited on the mortgage debt whether he receives them or not. Ib.

NAVIGATION.

1. DAMAGES: *From obstruction to navigation: Bridge.*
It is the duty of the owners of a bridge across a navigable stream to use reasonable diligence to prevent such accumulation of drifts about the bridge piers, either above or below the surface of the water, as might endanger navigation; and for failure to use such diligence they will be liable for damages resulting from such obstructions to crafts navigating the river, unless there was contributory negligence in the careless and unskillful piloting of the craft. St. Louis, Iron Mountain & Southern Railway v. Meese et al. 414

NEGLIGENCE.

See MASTER AND SERVANT, 1, 2, 3, 4, 5; NAVIGATION, 1; RAILROADS, 4, 9, 10, 11.

NEW TRIAL.

See PRACTICE IN SUPREME COURT, 17.

1. CRIMINAL PRACTICE: *Impannelling a jury. Discretion of judge.*
The presiding judge at a criminal trial must of necessity have a large measure of judicial discretion in passing upon the qualifications of jurors, and the erroneous rejection of one summoned as a juror affords no sufficient ground for a new trial. Maclin v. The State. 115.

2. CRIMINAL PRACTICE: *New Trial: Separation of jury.*
The separation of a juror from his fellows pending the trial, casts upon the State the burden of proving that no improper influence was brought to bear upon the juror during his absence. In other words, the mere fact that a juror separates from his fellows without the order of the court, is *prima facie* ground for a new trial, unless it affirmatively appears that the separating juror was not subject to any noxious influence during his absence. Ib.

3. MOTION FOR NEW TRIAL: *Office of.*

It is not the province of a motion for new trial to bring upon the record irregularities that occurred at the trial. The facts constituting the error complained of and the exceptions to the ruling of the court, must be shown by bill of exceptions; and the motion for new trial can serve no other purpose than to assign the ruling or action of the court as error. Werner v. The State. 122

4. MOTION FOR NEW TRIAL: *Prejudice of juror discovered after trial.*

When a juror states upon his *voir dire* that he has formed and expressed an opinion of the prisoner's guilt, but has no prejudice against him and can give him an impartial trial, and is accepted by the prisoner without examination as to his feelings and statements, the prisoner cannot afterward urge after-discovered statements of the juror showing strong bias and belief of his guilt as a ground for new trial. Ib.

5. MOTION FOR NEW TRIAL: *Assignment of errors.*

The assignment in the motion for new trial, that "the judgment of the court is contrary to law," is too general to question in this court the correctness of the declarations of law made by the Circuit Court. Howcott v. Kilbourn. 213

NOTES AND BILLS.

See EVIDENCE, 4.

OBLIGATION OF CONTRACTS.

See STATUTES, 2.

PARTIES.

See PRACTICE IN CHANCERY, 2.

1. *Agents.*

An agent without interest, and against whom there is no charge of fraud connected with the transaction, ought not to be made a party to the suit. Shaver v. Lawrence County. 225

2. PRINCIPAL AND AGENT: *Action on notice to agent: Parties.*

Notes payable to the order of an agent in the transaction, or transferred to him, or mortgages to secure them, are the property of the principal, and are transferrable by delivery of the principal without indorsement of the agent; and the transferree may sue in equity in his own name to foreclose the mortgage and collect the debts. Caldwell v. Meshew. 564

PARTITION.

1. *None of land adversely held.*

A party claiming the legal title to an undivided interest in land cannot maintain proceedings for partition with his co-tenant while his interest is held adversely by others. He must first establish his title at law. Moore v. Gordon. 334

PARTNERS.

See JURISDICTION, 6.

1. *Their agreements for management of their business.*

Partners may make any agreements they see proper for the management of their joint affairs; but the provisions of such agreements are liable, at least in a court of equity, to be controlled or qualified, or to be held altogether waived, when the assent of all the partners may be fairly inferred from their acts and declarations in the conduct of the firm affairs. Hall v. Sannoner. 34

2. *Liability to each other for mistakes.*

One partner is not liable to another for an honest mistake of judgment as to what will be most beneficial to the common interest. Ib.

3. PARTNERSHIP: *Test of.*

The rule that participation in the profits of a business was the test of partnership as to liability to creditors, has been abandoned in England and generally in America; and now the test is whether the business has been carried on in behalf of the person sought to be charged as a partner; *i. e.*, did he stand in the relation of principal towards the ostensible traders by whom the liabilities were incurred and under whose management the profits have been made; but as between the parties themselves, the test has always been their actual intent. Culley & Son v. Edwards, adx. 425

4. PARTNERSHIP: *Dissolution: Transfer of partner's interest: Parties.*

When a partnership is dissolved and one partner assigns his interest in the partnership to the other the latter takes all the rights of the firm, and may exercise them in the firm name for all purposes necessary to their enforcement and for closing up the joint business. But an action may be maintained in his own name unless objection for want of the other as a party be distinctly made. Molen and wife v. Orr. 486

PAYMENTS.

1. APPROPRIATION OF PAYMENTS: *Right of creditor.*

The right of a creditor to make application of payments to one of several debts owing from his debtor, applies only to those debts then due; and does not apply at all where the debtor himself makes the appropriation. Gates Bros. v. Burkett. 90

PENITENTIARY.

See CONVICTS, 1.

PLEADING AND PRACTICE.

1. PRACTICE: *Special verdicts: Finding of facts.*

In finding specially whether a defendant promised to pay a debt, the jury should not be required to find, and should not find the language used by the defendant, but only the fact whether the promise was made or not. The language is mere evidence of the fact, and if stated in their verdict should be disregarded. Whether the language imports a promise is a question of fact for the jury, and not of law for the court. Lannagin v. Nowland. 84

2. TROVER: *Pleading and proof.*

A complaint in trover against a defendant for the conversion of goods deposited with him for the plaintiff, must aver that he agreed to accept the goods for the plaintiff, or to act as his agent in regard to them; and to maintain the action the plaintiff must prove property in himself, and a right of possession at the time of conversion. It cannot be maintained by a landlord against the purchaser of a tenant's crop to enforce the landlord's lien for rent. Anderson & Co. v. Bowles. 108

3. PLEADING: *To merits after demurrer overruled.*

By pleading to the merits after his demurrer to the complaint is overruled, the defendant waives all objections to the ruling except the want of jurisdiction over the subject of the action, and the failure of the complaint to disclose any cause of action. Chapline v. Robertson. 202

4. PRACTICE: *Waiving jury trials.*

Where parties appear and dispense with a jury, it is the better practice to require them to sign a stipulation to that effect, or that the record show an express waiver; but in the absence of an affirmative showing in the bill of exceptions that a jury was demanded and refused, a judgment will not be reversed because the trial was by the court. The early rulings of this court that a jury was indispensable in an action on a penal bond have been changed by statute. Ib.

5. PLEADING: *Answer of guardian ad litem.*

It is not sufficient for the answer of a guardian *ad litem* to deny generally, such of the allegations of the complaint as may be important to controvert, and submit the minor's interest to the protection of the court. The answer should be a full defense, specifically denying the material allegations, without regard to the truth of the denials as to anything which may be prejudicial to the minor. Varner v. Rice. 236

6. PRACTICE: *Trial: Opening and conclusion of argument.*

In proceedings by a railroad company to condemn land for right of way, the owner of the land is entitled to the opening and conclusion of the argument. The amount of the damage is the object of inquiry, and the burden of proof is upon the land owner. Springfield & Memphis Railway v. Rhea. 258

7. PLEADING: *Answer: Reply: Issue.*

When an answer does not contain a counter-claim or set-off, no reply is admissible. The filing of the answer puts the cause at issue, and the circuit judges should not permit the record to be incumbered with useless and improper pleadings. St. Louis, Iron Mountain & Southern Railway v. Higgins. 293

8. PRACTICE: *Misjoinder in tort.*

Where a complaint for a tort shows no liability as to part of the defendants, a general verdict and judgment against all will be arrested as to those not liable, and stand as to the others. Memphis & Little Rock Railway v. Stringfellow. 322

9. REPLEVIN: *Defense in justice of the peace's court and on appeal.*

It is not necessary for a defendant to file a written answer to the complaint or affidavit in replevin in the justice's court, or in the Circuit Court on appeal. He can defend in the Circuit Court without any answer at all in the justice's court. Texas & St. Louis Railway v. Hall. 375

10. APPEAL FROM JUSTICE OF THE PEACE: *Amendments in Circuit Court.*

In appeals from a justice's court, the Circuit Court may permit amendments and new issues to be made, excluding new causes of action and set-offs not presented in the justice's court. Ib.

11. *Pleading: Presumption.*

The presence of the husband at the commission of a tort by his wife raises the presumption that she was acting under his compulsion; and therefore a complaint alleging that it was done in his presence, states a *prima facie* cause of action against him alone, without stating that it was done at his instigation; but this presumption may be rebutted by proof. Kosminsky v. Goldberg. 401

12. PRACTICE: *Tranfer to equity docket.*

It is not imperative upon the Circuit Court to transfer a cause to the equity docket except where the answer presents some defense exclusively cognizable in equity, or where all the issues are cognizable in equity, but not exclusively so. Horseley et al. v. Hilburn et al. 458

13. PRACTICE: *Verification of answer.*

An answer cannot be stricken from the files, or its contents be refused consideration for want of verification, unless the party refuses to verify after order made to do so; and where an unverified answer has been filed, and no order made to verify it, proceedings as by default cannot be taken against the defendant on a motion in the cause because of the absence of himself and attorney when it is called up. It should be considered on its merits. Jackson v. Reeve. 496

14. PLEADING: *Fraud, how alleged.*

Fraud when relied on, must be distinctly charged, if not in direct language characterizing conduct and actions as fraudulent, at least by a clear statement of facts and circumstances which unexplained would be fraudulent *per se.* Ib.

15. PLEADING: *Amended to conform to proof.*

Where there is no demurrer to a defective complaint, and no objections to the evidence at the trial, it will, after verdict for the plaintiff, be considered as amended to conform to the proof, and a motion in arrest of judgment will be overruled. St. Louis, Iron Mountain & Southern Railway v. Harper. 524

PRACTICE IN CHANCERY.

See DIVORCE, 3.

1. *Allowing interest in trust settlements.*

It is within the discretion of the Chancellor to allow or refuse interest to a trustee on money advanced for the *cestui que trust,* according to the particular facts of each case. Turner v. Turner et al. 25

2. *Parties: Trustee and cestui que trust.*

The owner of a debt is a necessary party to a suit by a trustee to foreclose a deed of trust executed to him by the debtor to secure the debt. Boyd v. Jones. 314

3. *Dismissal without prejudice.*

When a demurrer which is general as to the merits, and special for defect of parties, is sustained generally, to a complaint which is sufficient in equity, but wanting in necessary parties, and the plaintiff refuses to amend, the court should dismiss the complaint without prejudice and not absolutely; and an absolute dismissal will be modified here into a dismissal without prejudice. Ib.

4. CHANCERY PRACTICE: *Removing cloud from title.*

A party who sues in equity to remove a cloud upon his title to land must be in possession unless his title be merely an equitable one, or the land be wild and unoccupied. Mathews v. Marks. 436

PRACTICE IN SUPREME COURT.

See NEW TRIAL, 5; PRACTICE IN CHANCERY, 3.

1. *Appeal necessary to correct errors.*

The appellee cannot have errors against him corrected in the Supreme Court without a cross-appeal either from the Circuit or Supreme Court. Turner v. Turner et al. 25

2. *Appeal from default decree.*

The only question for the consideration of the Supreme Court, upon a defendant's appeal from a default decree duly rendered against him, is, whether the allegations of the complaint are sufficient to authorize the relief granted by the decree. Benton v. Holliday. 74

3. *Bill of exceptions: Instructions.*

Unless the bill of exceptions shows that it contains all the evidence, the Supreme Court can not consider the objection that the verdict is not supported by the evidence; and an instruction which would be correct on proper evidence will be presumed to have had evidence to support it. McKinney v. Demby. 74

4. *Same: Presumption.*

Where the bill of exceptions fails to show that it contains all the evidence adduced at the trial, every intendment is indulged in favor of the action of the trial court; and this court will presume that every fact susceptible of proof which could have aided the appellee's case was fully established. Ib.

5. *Same.*

Where an instruction is given purporting to be predicated on the evidence and upon the hypothesis that certain facts have been proved, and it is not repugnant to, nor inconsistent with a case that might have been proved under the pleadings, the appellate court ought to presume in favor of the court below, that such evidence though not set out in the bill of exceptions, had been adduced at the trial, and the correctness of the instruction should be inquired into. Ib.

6. *Errors of Circuit Court must be excepted to.*

The Supreme Court will not review the rulings of the Circuit Court in excluding evidence from the jury, unless the rulings be excepted to at the time. Texas & St. Louis Railway v. Kirby. 103

7. *Judgment on supersedeas bond.*

A decree fixing a lien on land for payment of purchase money was appealed by defendant to the Supreme Court, and he gave supersedeas bond in the usual form for the payment of damages and cost, and to satisfy the decree if affirmed, or any other the Supreme Court should render against the defendant. No personal judgment was rendered against the defendant nor could have been under the facts stated: *Held*, that no judgment could be rendered in the Supreme Court against the appellant and his sureties in the supersedeas bond upon affirmance of the decree; and a judgment here against them is, on motion, set aside. Stephens v. Shannon. 178

8. *Reopening chancery causes.*

Although where a cause has been heard upon evidence, or after a fair opportunity to produce it, this court will not usually remand it solely to give either party an opportunity to produce other evidence; yet the rule is not imperative. This court has the power, in furtherance of justice, to remand any cause in equity to be opened. Carmack v. Lovett. 180

9. *Findings of a Chancellor.*

The Supreme Court will not give to the findings of a Chancellor upon the pleadings and depositions the same conclusive effect as to a verdict, or finding of a court on oral evidence, but will sustain them unless the preponderance against them be reasonably clear. Gaty v. Holcomb. 216

10. *Reversal for excessive damages.*

The Supreme Court will not set aside a verdict as excessive where it is not unsupported by proof, is not in disregard of the charge of the court, and there is no reason to suspect the influence of passion or prejudice in the jury. Springfield & Memphis Railway v. Rhea. 258

11. *Motion for a new trial: Bill of exceptions.*

When the bill of exceptions fails to show that a motion for a new trial was made, or that any exceptions were saved to the overruling of it, no errors as to the proceedings on the trial, nor proof, can be noticed by the Supreme Court, although the *record* shows that a motion for new trial was made and overruled. Beidler v. Friedell. 411

12. *Ruling on motions: Bill of exceptions: Presumption.*

The rulings of the Circuit Courts upon motions upon oral evidence will be presumed correct where there is no bill of exceptions showing the evidence adduced upon the motion. Townsend v. Timmons. 482

13. *Variance: Presumption.*

Where testimony variant from the allegations of the pleading is admitted without objection this court will presume that the parties deemed the variance immaterial, or treated the complaint as amended to admit the evidence. Molen and wife v. Orr. 486

14. *In delay cases.*

The statute regulating the practice on motions to advance delay cases does not limit the right of filing the motion, or of having it acted upon to any particular time or term, but contemplates an affirmance of a superseded judgment when the court is satisfied that the appeal is taken for delay, at the earliest practicable moment. Chafin v. McFadden. 523

15. *Judgment right on the whole record.*

A judgment, which is right upon the whole record, will not be reversed on account of the admission of incompetent evidence, or the giving of instructions based thereon which could not have prejudiced the appellant. Burton & Townsend v. Baird & Bright. 556

PRESUMPTION.

See PRACTICE IN SUPREME COURT, 4, 5.

PRINCIPAL AND AGENT.

See PARTIES, 2.

1. ATTACHMENT: *Property of principal for debt of agent.*

Property purchased by an agent in his own name for an undisclosed principal, cannot be seized for the debt of the agent unless his creditor has been misled by appearances or the conduct of the parties into giving him credit upon a false basis. Reid v. McIlroy. 346

PROBATE COURT.

See JURISDICTION, 6.

RAILROADS.

See CORPORATIONS, 3; MASTER AND SERVANT, 1, 2, 3, 4, 5; PLEADING AND PRACTICE, 6.

1. TAXATION: *Exemption from, lost by transfer, etc.*

Exemption from taxation granted to a railroad corporation is a personal privilege, incapable of transfer, and does not pass to the purchaser of the road under a mortgage. Ark. Mid. R. R. Co. v. Berry, Gov., *et al.* 17

2. SAME: *Exemption from, lost by consolidation.*

The exemption from taxation granted by charter to the Arkansas Midland Railroad Company, was lost by the subsequent consolidation of that company with the Little Rock and Helena Railroad Company, and forming the Central Railroad Company. Ib.

3. *Value of right of way: How proved.*

In testifying of the damages for the right of way for a railroad, the witnesses may give their opinion either of the difference in value of the tract of land before and after the location of the road, or directly, of the amount of damages accruing from taking the land. Tex. & St. L. Ry. v. Kirby. 103

4. *Negligence: Loss by fire.*

When a carrier contracts for exemption from liability for losses occurring by fire, the owner of goods lost by fire cannot recover for them without affirmative proof that the fire was the result of negligence. L. R., Miss. R. & Tex. Ry. v. Harper and Wilson. 208

5. *Right of way: Assessment of damages.*

Where the assessment of damages for right of way precedes the building of a road, the presumption is that it will be built with skill and proper precautions. But if the road has been completed through the land at the date of the trial, the jury may consider the state of facts then existing, and from the light of the actual construction determine what the damage has been, embracing all past, present and future damage which the location of the road may reasonably produce. Springfield & Memphis Ry. v. Rhea. 258

6. *Same: Elements of damages.*

The manner in which the railroad passing through land cuts it up, the amount and location of the land taken, the inconvenience to the owner in passing from one part of his field through which it runs to another, the absence of proper crossings, and the overflowing of the land caused by the road, are all proper elements of damages for taking the right of way. Ib.

7. *Same: Evidence.*

Evidence of damage for taking land for right of way should be directed first to the actual value of the land taken by the railroad, then to the damages resulting to the remainder. Ib.

8. *Same: Tax assessment.*

The tax assessment of land for the year succeeding the building of the road is not admissible as evidence in the assessment of damages for the right of way. Ib.

9. *Negligence: Contributory negligence.*

A railroad company in using in its trains an old car which is lower than the others, is not guilty of such negligence as to be liable to its servants who knowingly incur the risk, for an injury resulting from the coupling of such old car with another, though the danger be greater than with cars of equal height. St. L., I. M. & S. Ry. v. Higgins. 293

10. *In hands of receiver: Who liable for negligence.*

A railroad corporation is not liable for the negligence of the servant of a receiver who is operating the road. His possession is not theirs, and they cannot control either him or his employes. M. & L. R. Ry. v. Stringfellow. 322

11. *Negligence.*

This was a case of premature announcement of a station, causing a passenger to alight in the dark at wrong place. For the facts, which are too numerous for a syllabus, see the opinion.—REP. Ib.

12. *Right of Way: Elements of damages for.*

The destruction of a land owner's crop by reason of his fences being thrown down by the builders of a railroad, and the cost and annoyance of keeping the stock out of his crop are not proper elements of damages in a proceeding for condemnation of the right of way. They are an independent tort. Springfield & Memphis Ry. v. Henry. 360

13. *Damages from overflowing lands.*

If by the construction of the road-bed and ditches the surface water is diverted from its usual and ordinary course, and by means of embankments or ditches is conveyed to any particular place, and thereby overflows land which did not overflow before, the company will be liable to the land owner for the injury. Ib.

RELEASE.

See INFANT, 5; SURETY, 1.

REPLEVIN.

See PLEADING AND PRACTICE, 9; STATUTE OF LIMITATIONS, 1.

1. *Timber converted into cross-ties.*

The owner of timber taken and converted by a willful trespasser into cross-ties, may recover the ties or their value in an action of replevin, from the trespasser or his vendee with or without notice. McKinnis v. L. R., M. R. & Tex. Ry. 210

2. *Affidavit: Description of property.*

An affidavit in replevin must describe the property sued for in such manner as to identify it. But after trial and verdict on the merits it is too late to object to the insufficiency of the affidavit. Hawes v. Robinson. 308

3. *Office of affidavit.*

In a justice of the peace's court the first office of the affidavit is to procure the order of delivery. When that is accomplished it has performed its office as an affidavit and thereafter serves as a complaint. Ib.

4. *For goods intermixed.*

Replevin cannot be maintained for a mass of cotton in which the plaintiff's has been innocently mixed by the defendant, nor for an undivided share of the mass. It must be first separated and capable of identification. Hart v. Morton. 447

RES JUDICATA.

1. *Same matter but not same parties.*

Mrs. Rowland during her infancy conveyed a tract of land to Bagley, and after her maturity resold and conveyed it to Fletcher, who had notice of the prior sale to Bagley. Bagley filed his bill against Fletcher to cancel Fletcher's deed and quiet his own title. His bill was dismissed on the ground that the last deed was a disaffirmance of, and avoided Bagley's. Afterwards Bagley filed his bill against Mrs. Rowland concerning the same land, and substantially renewing the same litigation. Its object was to obtain a reformation of her acknowledgment: *Held:* That the matter of the bill was *res judicata;* his right to the land was the matter involved in the former case. Bagley v. Rowland. 165

2. *Decision of Supreme Court.*

The decision of the Supreme Court in a case is the law applicable to all further proceedings in the same case. Perry v. L. R. & Ft. S. Ry. Co. 383

SALES.

See JUDICIAL SALES, 2.

SHERIFF.

1. *Liability for failure to return execution: Defenses.*

In a proceeding by a judgment creditor against a sheriff and his securities for failure to return an execution, it is no defense that the defendant in the execution was insolvent, and the plaintiff was therefore not damaged; nor that the deputy sheriff indorsed a return upon the execution, and went to the clerk's office to file it, but the clerk was absent and he was afterwards prevented by his official duties from returning to the clerk's office, without further showing that the office remained closed beyond the life of the execution, and he returned it as soon afterwards as practicable. Atkinson v. Heer. 174

SPECIFIC PERFORMANCE.

See STATUTE OF FRAUDS, 1.

1. *Parol contract: Part performance.*

Possession of land by the purchaser, to constitute part performance of a parol contract of sale, must be taken under the contract and with a view to it and in pursuance to its provisions. Moore v. Gordon. 334

2. *Proof of the contract.*

Specific performance of a parol contract for the sale of land will not be decreed unless it be clearly proven, its terms definitely shown by a decided preponderance of evidence satisfactory to the Chancellor, not only as to the fact that a contract was made, but also as to its precise terms. Ib.

3. *Part performance: Making improvements.*

The making of improvements on land by the purchaser as owner under a parol contract of purchase is an independent ground for specific performance of the contract, unless the improvements be of a transient nature, or of so little value as to be paid for by the temporary enjoyment of the land. Ib.

STATUTES.

1. *Construction of.*

It is a rule of construction that the common law in force at the time a statute is passed is to be taken into account in construing the statute. State v. Pierson. 265

2. *Repeal of: Effect on pending suits: Obligations of contracts: Attorney's fees.*

The act of February 17, 1883, repealing the over-due tax acts of 1881, did not affect suits then pending under those acts, nor deprive attorneys of any rights to compensation for services in such pending suits. Files v. Fuller. 273

3. HEALING ACTS: *Power of Legislature to pass.*

Our Constitution does not prohibit retrospective legislation; and in the absence of such prohibition, healing laws may be passed confirming previous conveyances and curing defects which arise out of some technical informality in their execution or acknowledgment. Johnson v. Richardson. 365

4. SAME: *Acknowledgments: Dower.*

By the curing acts of March eighth and fourteenth, 1883, the Legislature intended to cure defects in the previous acknowledgments of the relinquishments of dower. It had the power to do so. It was no invasion of vested rights, but was giving to the acts of the relinquishers the effect they intended, but which, from mistake or accident, had not been effected. Ib.

5. SAME: *Affect pending suits.*

The institution of a suit does not entitle a party to any particular decision. The cause must be determined according to the law in force when it is decided. Ib.

6. *Unconstitutionally passed.*

The courts may look beyond the enrollment of an act to the journals of the Legislature to see if the act was constitutionally passed. But, if admitting all that the journals affirmatively show, the act *may* have been properly passed, the courts should so presume and sustain the act. The power to annul an act of the Legislature as unconstitutionally passed is a dangerous one, and should never be exercised in the face of a reasonable doubt. Webster v. Little Rock. 536

7. *Reading of bills in the Legislature: Change of title.*

The Constitution of 1868 did not require bills in the Legislature to be read in full. It was sufficient to read them by title; and a change of title in the House before the last reading, into another indicating the same bill, did not impair the constitutional passage of the bill. Ib.

STATUTE OF FRAUDS.

1. *Sale between tenants in common: Part performance.*

The doctrine of part performance to take a parol contract for the sale of land out of the operation of the statute of frauds, does not apply to contracts between tenants in common for the sale of one tenant's interest to the other. Each tenant is already in possession, and one cannot assume exclusive possession under and in pursuance of the contract. Their contracts with each other must be in writing duly signed. Haynes v. McGlone. 79

2. TENANTS IN COMMON: *Contracts: Equities.*

Where one tenant in common by parol contract sells his moiety of the land to his co-tenant, and afterwards repudiates the contract and conveys his interest to another purchaser with notice of the facts, the latter cannot recover it in equity from the co-tenant purchaser except upon return to him of his purchase money and half of all taxes and cost of improvements paid by him, and interest from the time of their payment. Ib.

3. *Statute of frauds.*

A promise to pay a debt without specifying time of payment is a promise *in presenti*, and not void under the statute of frauds, as a promise "not to be performed within one year from the making thereof." Lannagin v. Nowland. 84

STATUTE OF LIMITATIONS.

See VENDOR AND VENDEE, 5.

1. *Replevin.*

The statute of limitations in actions of replevin is three years, and begins at the date of the defendant's possession of the property, and not at the time of the plaintiff's demand for it. Pickens v. Sparks. 29

2. *On sealed instruments.*

The provision in the Constitution of 1874, applying the statute of limitations of ten years to sealed instruments executed after the adoption of the Constitution of 1868, extends as well to sealed instruments executed since the adoption of the Constitution of 1874. Vaughan v. Norwood *et al.* 101

3. *Against married woman.*

The decision in *Hershey v. Latham*, 42 *Ark.*, 305, that the act of April 28, 1873, authorizing a married woman to sue alone and in her own name did not repeal by implication the saving clause in the statute of limitations in her favor, was based upon the *proviso* in the act of January 4, 1851, which expressly saves to a married woman and her heirs the right to sue for land within three years after her *discoverture;* which displaced the provision of the act of December 14, 1844 (*sec.* 4130 *Gantt's Digest*) limiting the time of her action after her "*disability is removed.*" Batte *et al.* v. McCaa *et al.* 398

4. *Adverse possession.*

The statute of limitations does not move in favor of a vendor who is under obligation to convey the legal title, until he has given his vendee notice of his intention not to convey, or done some other act indicating unequivocally that he claims or holds the land adversely. Mere possession by the vendor does not indicate a hostile intention. Coleman v. Hill. 452

5. *Equitable owner in possession.*

When the owner of the equitable title is in possession, under his contract, the statute of limitations does not run against his right to a conveyance. Ib.

6. *After disability removed.*

Where seven years have elapsed since the right of action for land accrued, and three of those years have been free from disability, the right of entry or of action is barred. Chandler v. Neighbors. 479

7. *Indorsement of credit on note: Evidence.*

Proof of the indorsement of a credit on a promissory note by the holder before the note is barred, is *prima facie* evidence of an actual part payment upon the note; but such indorsement made *after* the statute bar is not proof of an actual payment unless made with the privity of the debtor. Wilson v. Pryor. 532

8. *Same.*

Section 4505 Mansfield's Digest, declaring that "no indorsement of any payment written upon any instrument by or on behalf of the party to whom such payment shall be made, shall be sufficient proof of such payment to take the case out of" the statute of limitations, applies only to bonds and instruments under seal. The digesters of 1874 and 1884 have changed the original act to conform to the supposed effect of the constitutions of 1868 and 1874, abolishing private seals. Ib.

SUBROGATION.

See VENDOR'S LIEN, 1.

SURETIES.

1. *Release of part: Effect on others.*

A release of a surety is no release of the principal; but a release of one of two sureties is a release of the other from one-half of the debt. Gordon v. Moore. 349

SURVEYS.

See EVIDENCE, 2.

SWAMP LANDS.

1. *Conflicting entries.*

A lawful entry of swamp lands before the swamp land commissioner vested in the enterer an equitable title to the land, and an absolute right to a patent; and a subsequent sale and patent to another would be vacated by a court of equity, and the title vested in the first purchaser. No negligence or mistake on the part of the agent in permitting a second entry could affect the first purchaser's rights in equity. Coleman v. Hill. 452.

TAXES.

See RAILROADS, 1, 2.

1. *On callings and pursuits.*

There is no restraint upon the power of the Legislature to authorize counties and towns to regulate or tax callings and pursuits, but the Legislature cannot tax them for the purpose of raising State revenue. Baker v. The State. 134

2. *On sewing machine companies.*

The provision in section 4 of the revenue act of 1883, for taxing sewing machine companies and their agents, applies only to companies incorporated under the laws of this or some other State, and doing business in this State, and to the general agents of such companies; and a party cannot be convicted of the offense of selling without license under that act unless he sells as the general agent of such incorporated company, or as the agent of such agent. Ib.

3. *License: Sewing machine companies.*

Sewing machine companies incorporated in other States, and doing business in this State, and their agents, are liable to the license tax imposed by section 4 of revenue act of 1883. New Home Sewing Machine Company v. Fletcher. 139

TAX TITLE.

1. *Purchase by occupant.*

One who is in possession and receiving the rents and profits of land cannot acquire a title to it by a purchase for taxes. Rodman v. Sanders. 504

TENANTS IN COMMON.

See STATUTE OF FRAUDS, 2.

TITLE.

1. *Parties claiming under same grantor.*

When both parties claim title to land under the same grantor both are estopped to deny his seizin. Griesler v. McKennon. 517

TORT.

See HUSBAND AND WIFE, 3.

TRESPASS.

See INJUNCTION, 2; REPLEVIN, 1.

1. TRESPASS ON LAND: *Possession of plaintiff.*

To maintain the action of trespass *quare clausum fregit*, the plaintiff must either show that at the time of the trespass he was in actual possession, or must prove such a state of facts and title as would imply possession. McKinney v. Demby. 74

TRUSTS.

See PRACTICE IN CHANCERY, 1.

1. RESULTING TRUST: *Proof of.*

To establish a resulting trust by parol, the evidence must be full, clear and convincing. Johnson et al. v. Richardson. 365

2. TRUSTEE: *Purchaser from: Application of trust funds.*

Robinson, as Commissioner of Phillips County, sold to Moore, on a credit of three months, certain lots in Helena belonging to the county. At different times before the payment became due Robinson drew drafts on Moore, which he paid, believing that such payments would be good in satisfaction of his purchase; and in his settlement for the lots at maturity of the debt, he was credited by Robinson with these payments, and paid him the balance in cash, but Robinson never paid the money over to the county. There was no evidence of any fraud on Moore's part, or connivance at the misapplication of the money. In a suit by the county to hold Moore as a trustee and liable for misapplication of the purchase money: *Held*, that he was not bound to see that Robinson paid the money to the county, and his payments before the money became due were not sufficient to charge him as trustee, or to make him liable to the county for the purchase money. Jacks v. Phillips County. 61

3. TRUSTEE: *What deed must make to cestui que trust.*

A trustee holding the naked legal title for his *cestui que trust* cannot be required to make any other deed to the *cestui que trust* than a deed of release with covenants against acts done or suffered by himself. Kirten v. Spears. 165

VARIANCE.

See EVIDENCE, 5.

VENDOR AND VENDEE.

1. *Suit for purchase money: Tender of deed.*

A vendor of land by title bond cannot have relief for the purchase money, where the payment of it and the making of title are to be concomitant acts, or where the execution of the conveyance is to precede the payment, unless before suit, or, at farthest, at the time of the decree, he shows himself able and willing to execute a warranty deed and tenders one. Rudd v. Savelli. 145

2. *Bond for title: Character of title to be made.*

A bond for "a deed of conveyance in fee of the legal title," means a "good and sufficient" conveyance with the usual covenants of the vendor, and not of a stranger. Equity will not in contracts of this nature compel a vendee to pay money when his vendor cannot make him a title. Ib.

3. *Action for purchase money: Tender of title.*

Where the obligations of the vendor to make title and of the vendee to pay the purchase money for land are dependent, the vendor can not sue at law for the purchase price without first tendering to the purchaser a deed in conformity to the contract; but where the suit is in equity, tender before suit is not essential, but is sufficient if made with the bill. The Chancellor will then grant the proper relief to the plaintiff and relieve the defendant from cost which might not have been necessary if the tender had been made before suit. Atkinson v. Hudson. 192

4. *After-acquired title.*

Section 642 Mansfield's Digest, vesting the after-acquired title of a grantor in his previous grantee, applies only to voluntary sales by the persons to be bound. Horseley et al. v. Hilburn et al. 458

5. STATUTE OF LIMITATIONS: *Against assignee of vendor's lien.*

Where a vendor of land would not be barred of foreclosure for the purchase money, a party who has acquired his rights will not be barred. Rodman v. Sanders. 504

VENDOR'S LIEN.

1. *Conventional subrogation to.*

The voluntary payment by a stranger of a debt due to the vendor of land, and which is a charge upon it, extinguishes the debt and the lien. And the mere lender of money which the vendee applies to payment of the purchase money for land, is not substituted to the rights and remedies of the vendor. But one who pays the debt at the instance of the debtor, is not a volunteer; and if at the time of payment he manifests an intention to keep the lien alive for his protection, and for this purpose retains the purchase note and deed in his possession, with the assent of the purchaser, he will be deemed in equity a purchaser of the incumbrance and substituted to the rights and remedies of the creditor. Rodman v. Sanders. 504

VENUE.

See JURISDICTION, 3.

VERDICTS.

See PLEADING AND PRACTICE, 1.

WIDOW.

1. *Dower: Statute limitations.*

A widow has no estate in her husband's homestead until her dower is assigned, but a mere right of occupancy. Her possession is not hostile to the heir's title, and she has nothing to convey to a stranger to the title; and if she abandons the possession the heir may enter and occupy the premises subject to her right to have her dower assigned. Padgett v. Norman. 490

WITNESSES.

1. *Disqualification of convicts: Restoration by pardon.*

Section 2859 Mansfield's Digest disqualifying convicted criminals as witnesses, applies only in *civil* and not in *criminal* trials. But such parties as were disqualified by the common law rule are still disqualified, the statute not affecting the rule; but their disqualification is removed by the pardon of the Governor, though their conviction may still be urged against their credibility. Werner v. The State. 122

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Ex. G. A. C.

ERRATA.

On page 167, eighth line from top, read *"cestui que trust."*
On page 221, tenth line from bottom, for "Crittenden" read "Craighead."
On page 222, sixth line from bottom, read "banc" for "bank."

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