REPORTS

OF

CASES AT LAW AND IN EQUITY

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF THE

STATE OF ARKANSAS,

CONTAINING A CONTINUATION FROM VOLUME XLV. OF THE CASES DECIDED AT THE NOVEMBER TERM, 1885.

By B. D. TURNER,
REPORTER.

VOLUME XLVI.

LITTLE ROCK:
UNION PRINTING COMPANY,
PRINTERS AND BOOKBINDERS.
1886.

Rec. Dec. 27, 1886

OFFICERS

OF THE

SUPREME COURT OF THE STATE OF ARKANSAS

DURING THE PERIOD OF THIS VOLUME.

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

HON. WILLIAM W. SMITH, }
HON. BURRILL B. BATTLE, } .....ASSOCIATE JUSTICES.

DAN. W. JONES.....*Attorney General.*

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

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

CHANCELLOR:

HON. DAVID W. CARROLL.

JUDGES OF THE CIRCUIT COURTS

DURING THE PERIOD OF THIS VOLUME.

1st Circuit.....Hon. M. T. SANDERS.
2d Circuit.....Hon. W. F. CATE.
3d Circuit.....Hon. R. H. POWELL.
4th Circuit.....Hon. J. M. PITTMAN.
5th Circuit.....Hon. GEO. L. CUNNINGHAM.
6th Circuit.....Hon. FRANK T. VAUGHAN.
7th Circuit.....Hon. J. B. WOOD.
8th Circuit.....Hon. H. B. STEWART.
9th Circuit.....Hon. L. A. BYRNE.
10th Circuit.....Hon. JOHN M. BRADLEY.
11th Circuit.....Hon. JOHN A. WILLIAMS.
12th Circuit.....Hon. R. B. RUTHERFORD.
13th Circuit.....Hon. B. F. ASKEW.

PROSECUTING ATTORNEYS

OF THE

SEVERAL JUDICIAL DISTRICTS

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	W. 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. SNEED.

TABLE OF CASES

REPORTED IN THIS VOLUME.

Adams adv. M. & L. R. R'y 159
Adler, Goldman & Co. adv. Richardson 43
Allen adv. Springfield & Memphis R. R. Co 217
Atkins adv. L. R. & Ft. S. R'y 423

Banks *et al.* adv. Lesser 482
Bauer v. St. L., I. M. & S. R'y 388
Birmingham v. Rogers 254
Brewer & Son v. Winston, Ad 163
Bridewell v. Morton 73
Brown v. Doneghey 497
Brown *et al.* adv. McGaughey *et al.* 25
Bush adv. Visart 153
Byrne, Adm'r, adv. Green, Adm'r 453

Caughron adv. Hecht & Imboden 132
Chaffee & Sons v. Landers, Adm'r 364
Chapman v. Hudson 489
Cogswell v. McKeogh 524
Coleman v. Frauenthal 302
Collins *et al.* adv. Rector 167
Curtis & Lane v. Flinn 70

Davis, Adm'x, adv. Fitzhugh..... 337
Davies adv. Mendell & Bro..... 420
Dodson adv. Fort Smith..... 296
Doneghey adv. Brown..... 497
Donnelly adv. Tex. & St. L. R'y..... 87
Dowell v. Tucker..... 438
Doyle & Co. adv. Gauss Sons..... 122
Driver adv. Grider..... 50
Driver adv. Grider *et al.*..... 109

Elms *et al.* adv. George *et al.*..... 260

Fitzhugh v. Davis, Adm'x..... 337
Flinn adv. Curtis & Lane..... 70
Ford adv. Hamilton & Co..... 245
Fort Smith v. Dodson..... 296
Frauenthal adv. Coleman..... 302

Gaines adv. St. L., I. M. & S. R'y..... 555
Gaines, Collector, v. Springer..... 502
Garrett Bros. v. Wade..... 493
Gauss Sons v. Orr & Lindsey..... 129
Gauss Sons *et al.* v. Doyle & Co. *et al.*..... 122
George *et al.* v. Elms *et al.*..... 260
German Bank adv. Himstedt..... 537
Green adv. Richardson..... 267
Green, Adm'r, v. Byrne, Adm'r..... 453
Grider v. Driver..... 50
Grider *et al.* v. Driver..... 109

Hamilton & Co. v. Ford..... 245
Harper adv. Hopkins..... 251
Hatchett *et al.* v. Mt. Pleasant Baptist Church..... 291

Hecht & Imboden v. Caughron 132
Hershy v. Latham 542
Hershy v. McGreevy & Yantis 498
Hill adv. Shaw *et al.* 333
Himstedt v. German Bank 537
Holcomb adv. McRae, Adm'r 306
Hollis adv. Smith 17
Hopkins v. Harper 251
Hudson adv. Chapman 489
Huff *et al.* adv. Turner 222

Jackson adv. Reeve 272
Jackson adv. State 137
Jones & Norris v. Nichols, Ad 207

LaCade adv. Lawrence 378
Landers, Adm'r, v. Chaffee & Sons 364
Latham adv. Hershy 542
Lawrence v. LaCade 378
Lee County v. Phillips County 156
Lee County adv. St. Francis County 67
Lesser v. Banks *et al.* 482
Lesser adv. St. L., I. M. & S. R'y 236
Little Rock v. Prather 471
Littleton v. State 413
L. R. & Ft. S. R'y v. Atkins 423
L. R. & Ft. S. R'y v. Worthen, Collector 312
Lowenstine adv. Malpas 552

Magnolia v. Sharman & Co 358
Malone adv. State 140
Malpas v. Lowenstine 552
Martin *et al.* v. State 38

Mathews adv. Prairie County 383
McCoy v. State 141
McGaughey *et al.* v. Brown *et al.* 25
McGreevy & Yantis adv. Hershy 498
McKeogh adv. Cogswell 524
McRae, Ad., v. Holcomb 306
Memphis & L. R. R'y v. Adams 159
M. & L. R. R'y v. Salinger 528
Mendell & Bro. v. Davies 420
Meyer v. Roberts 80
Meyer, Bannerman & Co. v. Stone & Co 210
Morton adv. Bridewell 73
Mt. Pleasant Baptist Church v. Hatchett 291

Nichols adv. Jones & Norris 207

Orr, Ad., adv. Tex. & St. L. R'y 182
Orr & Lindsey adv. Gauss Sons 129

Parker v. Sanders, Judge 229
Phelps adv. St. L., I. M. & S. R'y 485
Phillips County adv. Lee County 156
Prairie County v. Mathews 383
Prather adv. Little Rock 471
Probst & Hilb v. Weldon 405

Radcliffe *et al.* v. Scruggs 96
Rector v. Collins *et al.* 167
Reeve v. Jackson 272
Richardson v. Adler, Goldman & Co 43
Richardson v. Green 267
Roberts v. Meyer 80
Rogers adv. Birmingham 254

Salinger adv. M. & L. R. R'y..... 528
Sanders, Judge, adv. Parker..... 229
Scruggs adv. Radcliffe *et al*..... 96
Sharman & Co. adv. Magnolia..... 358
Shaw *et al.* v. Hill..... 333
Sibley, Receiver, v. Smith..... 275
Smiley adv. Stewart..... 373
Smith v. Hollis..... 17
Smith adv. Sibley, Receiver..... 275
Southerland v. Whittington..... 285
Springer adv. Gaines..... 502
Springfield & Memphis R. R. Co. v. Allen..... 217
State v. Jackson..... 137
State adv. Littleton..... 413
State v. Malone..... 140
State adv. Martin *et al*..... 38
State adv. McCoy..... 141
Stewart v. Smiley..... 373
St. Francis County v. Lee County..... 67
St. L., I. M. & S. R'y adv. Bauer..... 388
St. L., I. M. & S. R'y v. Gaines..... 555
St. L., I. M. & S. R'y v. Lesser..... 236
St. L., I. M. & S. R'y v. Phelps..... 485
St. L., I. M. & S. R'y v. Wilkerson..... 513
Stone & Co. v. Meyer, Bannerman & Co..... 210

Tex. & St. L. R'y v. Donnelly..... 87
Tex. & St. L. R'y v. Orr, Ad..... 182
Tucker adv. Dowell..... 438
Turner v. Huff *et al*..... 222

Visart v. Bush..... 153

Wade adv. Garrett Bros..... 493
Weldon adv. Probst & Hilb..... 405
Whittington adv. Southerland..... 285
Wilkerson adv. St. L., I. M. & S. R'y..... 513
Winston, Ad., adv. Brewer & Son..... 163
Worthen adv. L. R. & Ft. S. R'y..... 312

TABLE OF ARKANSAS CASES

CITED IN THIS VOLUME.

Aiken v. Peters, 45 Ark., 313 553
Allen, *ex parte*, 26–9 387
Allen v. Hightower, 21–316 527
Anderson v. Lewis, 10–304 423
Anthony v. Lawson, 34–628 64
Anthony v. Peay, 18–30 469
Ashley v. Stoddard, 26–653 21
Atkins v. Guice, 21–173 469

Badgett v. Jordan, 32 Ark., 454 554
Bagley v. Castile, 42–77 ..... 300, 335
Baker v. State, 21-405 264
Baker v. State, 44–134 479
Bellows v. Cheek, 20–424 135
Bertrand v. Elder, 23–494 551
Bird v. Jones, 37–195 310
Blevins v. State, 31–53 419
Boozer v. Anderson, 42–167 ..... 371, 372
Brewer v. Winston, 46–163 527
Brinkley v. Willis, 22–6 35
Brown v. State, 13–96 41
Brown v. Wallace, 17–451 491
Burris v. State, 38–221 527
Byrd v. Jones, 37–200 383
Byrd v. State, 15–175 95

Cain v. Leslie, 15 Ark., 312 289
Cairo & Fulton R. R. Co. v. Parks, 32–131 105
Carnall v. Duval, 22–136 73
Carnall v. Wilson, 14–487 176
Carroll v. Boyd, 30–527 21
Carter v. Cantrell, 16–164 452
Cauthron v. State, 43–128 416
Chamblee v. McKenzie, 31–155 136
Chandler v. Neighbors, 44–479 37
Chapman v. Liggett, 41–292 269
Cheatham v. Roberts, 23–651 527
Chrisman v. McDonald, 28–9 152
Christian v. Greenwood, 23–264 551
Cockrell v. Warner, 14–345 102
Collins v. Mack, 31–684 452
Conway v. Kinsworthy, 21–9 34
Crawford v. Carsen, 35–565, 579 76
Crump v. Stark, 23–131 527

Dardenne v. Hardwick, 9 Ark., 482 551
Davis v. Whittaker, 38–453 343
Dawson v. Real Estate Bank, 5–296 540
Diver v. Freidheim, 43–203 24
Dixon v. State, 29–166 41
Douglass v. Flynn, 43–398 21
Drennin v. Lindley, 15–359 151
Drew Co. v. Bennett, 43–364 364
Dunn v. State, 2–230 387
Durr v. Hervey, 44–301 413

Earle v. Hale, 31 Ark., 473 275
Edrington v. Matthews, 30–665 387
Elmore v. State, 45–243 417
Erb v. Cole & Dow, 31–554 551

Fink v. Ehrman, 44 Ark., 310 127
Finn v. Hempstead, 24–177 466
Fletcher v. Oliver, 25–289 327
Ford v. Hancock, 36–248 62
Fort v. Blagg, 38–471 264
Frellson v. Green, 19–376 49

Gaines v. Molen, 41 Ark., 232 289
Galbreath v. Cook, 30–417 551
Gardenhire v. Vincent, 39–270 554
Gardner v. Miller, 21–398 21
Gauss Sons v. Doyle, 46–122 131
Geisreiter v. Sevier, 33–534 36
George v. R. R., 34–613 194
Graham v. Roark, 23–19 527
Grubbs v. Ellison, 23–287 47
Guy, McClelland & Co. v. Walker, 35–212 306
Gwynn v. McCauley, 32–97 ..... 37, 136

Hall v. Brewer, 40 Ark., 434 468
Hall v. Bronville, 36–491 69
Hamilton v. Foulks, 16–340 289
Hanf v. Whittington, 42–491 38
Hanger v. Evins & Shinn, 38–334 248
Harkey v. Tillman, 40–555 248
Harriet v. Swan, 18–495 34
Harris v. Hanks, 25–510 269
Harrison v. Trader, 29–85 49
Hempstead v. Johnson, 18–141 551
Hill v. Bush, 19–522 347

Izard County v. Huddleston, 39–107 554

Jacobson v. Poindexter, 42 Ark., 97 214
James v. James, 41–301 35
Jarrett v. McDaniel, 32–598 73
Johnson v. Craig, 21–533, 537 214
Johnson v. State, 43–391 147
Jones v. Graham, 36–383 33
Jones v. McLean, 18–456 66
Jones v. State, 14–170 266
Jones v. Terry, 43–230 156
Jones, McDowell & Co. v. Fletcher, 42–442 120

K. C., S. & M. R'y v. Summers, 45 Ark., 295 567
King v. Little Rock, 26–479 21
Knox v. Hellums, 38–413 527
Kurtz v. Dunn, 36–648 259

Lavender v. Abbott, 30 Ark., 172 270
Lawson v. Hayden, 13–316 21
Leigh v. Armour, 35–123 554
Lemore v. Rector, 15–436 469
Little Rock v. Barton, 33–436 475
L. R. & Ft. S. R'y v. Duffey, 35–602 567
L. R. & Ft. S. R'y v. Finley, 37–562 210
L. R. & Ft. S. R'y v. Miles, 40–322 536
L. R. & Ft. S. R'y v. Pankhurst, 36–371 ..... 522, 523, 524
L. R. & Ft. S. R'y v. Townsend, 41–382 567
L. R. & Ft. S. R'y v. Turner, 41–161 551
Lund v. Fletcher, 39–325 127

Martin v. Ogden, 41 Ark., 186 127
Martin v. Tucker, 35–279 136
Martin v. Tyree, 41–314 469
Mayors v. Hendry, 33–240 ..... 270, 271

Mays v. Rogers, 37–155 ..... 376, 470
McCarron v. Cassidy, 18–34 527
McGehee v. Blackwell, 28–27 452
McKibbin v. Fort Smith, 35–352 301
McKinney v. Demby, 44–74 69
McNeill v. Gates, 41–264 32
McRae v. Holcomb, 46–306 383
Mears v. Stewart, 31–19 451
M. & L. R. R'y v. Stringfellow, 44–322 438
Meniffee v. Meniffee, 8–47 376
Meyer v. Ruetmans, 28–145 36
Miller v. Kempner, 32–573 60
Mitchell v. Etter, 22–178 198
Mock v. Pleasants, 34–63 32
Moore v. Turner, 43–243 103

Nolen v. Harden, 43 Ark., 307 310

Padgett v. Coleman, 45 Ark., 495 264
Parsons Oil Co. v. Boyett, 44–230 66
Pearce, *ex parte*, 44–515 265
Pennington v. Gibson, 6–447 135
Peterson v. Gresham, 25–380 527
Pickens v. Sparks, 44–291 492
Picket v. Mer. Nat'l Bank of Memphis, 32–346 64
Pope v. Boyd, 22–535 469
Portis v. Merrill, 33–416 60
Pryor v. Ryburn, 16–670 ..... 37, 469
Pulaski County v. Downer, 10–590 450
Purcelly v. Carter, 45–299 266

Randall v. Williams, 18 Ark., 380 387
Ray v. Light, 34–421 527
Reaves v. Sherwood, 45–520 551

Red v. St. Francis County, 17–416 387
Reed v. Ashe, 30–775 376
Ringo v. Woodruff, 43–469 34
Rison v. Farr, 24–161 325
Roberts v. Wilcoxson, 36–355 95
Russellville v. White, 45–485 299
Ryan v. Boyd, 33–778 275

Sale v. McLean, 29 Ark., 612 102
Scott v. Osborne, 21–202 269
Shall v. Biscoe, 18–142 269
Sibley v. Smith, 46–275 438
Slocumb v. Blackburn, 18–319 469
Smith v. Childres, 27–328 436
Smith v. Hollis, 46–17 69
Sparks v. Mack, 31–666 ..... 127, 412
Spencer v. McDonald, 22–476 491
Splawn v. Martin, 17–146 551
State v. Carl & Tobey, 43–353 66
State v. Marsh, 37–356 329
State v. McMinn, 34–160 146
State, use, Oliver v. Rottaken, 34–144 ..... 253, 378, 466
Steck v. Maher, 26–536 21
Stewart v. Pace, 30–594 275
Stewart v. Smiley, 46–373 470
Stewart v. State, 13–729 234
St. L., I. M. & S. R'y v. Cantrell, 37–526 437
St. L., I. M. & S. R'y v. Freeman, 36–41 524
St. L., I. M. & S. R'y v. Godby, 45–485 485
St. L., I. M. & S. R'y v. Harper, 44–529 567
St. L., I. M. & S. R'y v. Hecht, 38–357 436
St. L., I. M. & S. R'y v. Rosenberry, 45–256 438
Straughan v. State, 16–44 42
Stroud v. Pace, 35–100 270
Summers v. Howard, 33–490 ..... 118, 120

Talbot v. Wilkins, 31–411 136
Tate v. Jay, 31–576 376
Taylor, Cleveland & Co. v. Pine Bluff, 34–603 475
Tex. & St. L. R'y v. Orr, 46–182 437
Thompson v. Lemoyne, 5–312 220
Townsend v. L. R. & Ft. S. R'y, 41–382 197
Trader v. Chidester, 41–242, 247 371
Tuck v. Waldron, 31–462 362
Turner v. Miller, 6–463 59
Turner v. Vaughan, 33–454 48
Tyner v. Hays, 37–599 136

Union County v. Smith, 34 Ark., 684 21

Van DeGriff v. Haynie, 28 Ark., 270 387
Vaughn v. Kennan, 38–114 ..... 59, 61

Walker v. Swiggart, 21 Ark., 404 21
Wallis & Bro. v. Lehman, Abraham & Co., 36–569 59
Ward v. Blackwood, 41–300 197
Ward v. Carlton, 26–662 21
Washington v. State, 13–752 ..... 328, 479
Waters-Pierce Oil Co. v. Little Rock, 39–412 476
Whitesides v. Kershaw, 44–377 166
Whitlock v. State, 41–403 139
Whittington v. Simmons, 32–377 271
Williams v. Cubage, 36–307 466
Williams v. State, 42–35 146
Wilson v. Harris, 13–559 468
Winter v. Simpson, 42–410 496
Witherspoon v. Duncan, 21–240 24
Worsham v. Field, 13–448 469

Worthen v. Badgett, 32–496 80
Worthington v. Welch, 27–464 21

Yeates v. Prior, 11 Ark., 66 347
Yonley v. Thompson, 30–399 423
Young v. King, 33–745 306

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF ARKANSAS,

AT THE

NOVEMBER TERM, 1885.

[Continued from Volume 45.]

46 17
55 85
46 17
57 374
46 17
59 179
46 17
61 35
62 341
46 17
64 488
46 17
81 333
82 244
46 17
86 73
86 74
88 50

SMITH v. HOLLIS.

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

An agreed statement of the facts in the trial court must be brought to this court by bill of exceptions, or be otherwise identified by an order of the court as the veritable agreement upon which the case was tried, or it will form no part of the record.

2. SAME: *Motion for new trial, when necessary.*

A motion for new trial is as necessary in trials by the court, as in those by a jury; and as well where the facts are agreed on as where they are proved by witnesses; but is not necessary at all, when the errors complained of do not grow out of the evidence or instructions, but appear upon the record itself, without the intervention of a bill of exceptions.

3. SAME: *Same. Judgment inconsistent with facts found.*

When the judgment of the circuit court is inconsistent with the special facts found by the court, this court will reverse it, though no motion for new trial be made, nor bill of exceptions taken in the trial court.

4. SWAMP LANDS: *What are? Decision of Interior Department.*

Whether lands selected as swamp and overflowed are of that character is a question of fact; and the decision of the Interior Department of the government rejecting the selection is final and conclusive that they are not.

5. TAXES: *When lands subject to.*

Lands entered in the proper land office of the United States become subject to taxation from the issuance of the certificate of entry and payment of the purchase price, without regard to the issuance of the patent.

6. TITLE: *Government entries. Tax titles, etc.*

In 1860 A entered and paid for the land in controversy at the proper government land office. It had been selected but not confirmed to the state, as swamp land. In 1878 the commissioner of the general land office at Washington canceled A's entry as erroneously made, and refunded to him his entrance money; but before the cancellation the land had been taxed in A's name, and sold for the taxes and purchased by B; and after the cancellation B received the tax deed for it. Afterward, in 1882, the commissioner of the general land office at Washington set aside the selection of the land as swamp land, and thereafter C entered it under the homestead laws of the United States, and took possession of it, and B sued him in ejectment for it. *Held:* That the mere selection of the land as swamp land did not withdraw the land from sale, and the land not being swamp land (as must be assumed), A's entry was valid, and the land thereafter became subject to taxation, and the cancellation of A's entry and return of his purchase money did not impair the intervening tax purchase of B.

APPEAL from *Calhoun* Circuit Court.
Hon. B. F. ASKEW, Circuit Judge.

Barker and Johnson, for appellant.

If, at the time of said purchase by Yeager of said lands, they were not really swamp and overflowed lands, but dry lands, then they did not belong to the state, but to the the general government, and Yeager obtained a good title, which could not be afterward set aside by the government. *Mitchell v. Branch, 24 Ark., 431.*

If the lands were never swamp and overflowed, as the last proof shows, and upon this appellee claims title, then the entry of Yeager was good, and appellant's title should prevail; and they never passed to the state by any act of congress. *Mitchell v. Branch, supra;* and the selection by the state agent was null and void, and the entry of Yeager valid, and the government could not cancel the same, and its attempt so to do was void, unless the same was done by fraud, and no proof of fraud appears in this case. *Hill v. Plunkett, 41 Ark., 465; Bennett v. Pearl, 36 Ark., 471; Gunther v. Lawson, 31 Ark., 279.*

When the government parts with its title to its lands, it cannot cancel the same except for fraud, and the mere handing back the patent to the government of the heirs of Yeager passed no title; and besides this they had been sold to appellant for their taxes more than three years before that time; and no title remained in said heirs at the time, to pass, and the whole transaction was a nullity. The general government in such cases stands upon the footing of an ordinary individual. *Strawn v. Norris, 21 Ark., 80.*

If the lands were high and dry and not swamp and overflowed, at the time of Yeager's entry, then the sale was valid, and they at once became subject to taxation. *Cairo & Fulton R. R. v. Parke, 32 Ark., 131; Divers v. Friedheim, 43 ib., 203.*

When appellee established the fact, in 1883, that they were not swamp and overflowed, then confirmed the title of appellant, the government could not make two titles to the same land, and appellee's homestead entry was void.

H. G. Bunn, for appellee.

When Michael Yeager entered the land in controversy at the United States land office, it was then what is known as selected, but unconfirmed swamp land, and was not sub-

ject to sale or disposal in any way, and not being subject to sale, the sale thereof to Yeager was erroneous, and he had a right on discovering the error to ask that his entry be canceled, and his money be refunded; and his children and heirs had the same right after his death. This right they exercised; their father's entry was canceled and the purchase money repaid to them. The land officers had exclusive control of the matter, and their action in placing the land back on the books in its original condition—selected and unconfirmed swamp—after the repayment of the purchase money to Yeager's heirs, was such as they had the authority to take, and their action is conclusive in the premises, so far as anything appears in this case.

The land was never subject to taxation by the state authorities, simply because both the state and federal governments still had an interest therein. The taxation being wrong, of course the sale to appellant for taxes was wrong. Appellant acquired no vested rights at tax sale, for he was not an innocent purchaser, and could not be, but bought with his eyes open as do purchasers at all other execution (tax sale is an execution sale) sales.

The subsequent action of the land officers in taking proof as to the real character of the land, and holding it to be not swamp land, and subject to homestead entry by appellee, were all matters within their jurisdiction and control, and specially committed to them. Their action cannot be questioned collaterally, especially in the state courts.

SMITH, J. In this ejectment the plaintiff claimed under a tax deed based upon a sale for non-payment of taxes for the years 1874–5, and the defendant under a homestead entry. The issue was tried, by consent, before the court, without a jury, upon the title papers exhibited with the pleadings and an agreed statement of facts. The findings and

judgment were for the defendant. The plaintiff excepted to the findings, opinion, ruling and judgment; but tendered no bill of exceptions, and did not ask for a re-trial. No special declarations of law were moved, and none were given by the court of its own motion.

1. PRACTICE IN SUPREME COURT: Bill of exceptions.

A paper is copied into the transcript, marked filed by the clerk, and purporting to be an agreed statement of the facts submitted to the court; but not subscribed by the parties or their counsel. It is probable that the court accepted the facts so ascertained; but the paper itself constitutes no part of the record, not being certified to us by a bill of exceptions, nor identified by an order of court as the veritable agreement upon which the cause was tried. *Lawson v. Hayden, 13 Ark., 316; Ashley v. Stoddard, 26 ib., 653; Carroll v. Boyd, 30 ib., 527.*

2. SAME: Motion for new trial; when necessary.

Besides, no motion for a new trial was made. We cannot, therefore, inquire whether the special findings of the court are supported by the stipulation as to facts, even if the stipulation had been preserved and came to us in proper form. The necessity for such a motion, in order to have errors of this nature reviewed, exists equally in cases submitted to the court and those submitted to a jury, and as well where there is an agreed statement of facts, as where the facts are proved by witnesses. *Gardner v. Miller, 21 Ark., 398; Walker v. Swiggart, ib., 404; King v. Little Rock, 26 ib., 479.*

But a motion for a new trial is unnecessary where the errors complained of do not grow out of the evidence or instructions, but appear from the record itself, without the intervention of a bill of exceptions. *Steck v. Maher, 26 Ark, 536; Ward v. Carlton, ib., 662; Worthington v. Welch, 27 ib., 464; Union County v. Smith, 34 ib., 684; Douglass v. Flynn, 43 ib., 398.*

3. SAME: Judgment inconsistent with facts found

The only question, then, raised by the appeal is: Does the judgment pursue the special findings; that is, conceding the facts to have been correctly found, does the legal consequence, deduced by the court, follow?

The court found that the lands in controversy were selected and unconfirmed swamp lands, not subject to entry, and as such were entered at the United States district land office at Champagnolle, Arkansas, in which district the same were situated, by one Michael Yeager, for the price established by law, as follows, to-wit: The northeast quarter of northwest quarter of section two, township fourteen south, of range sixteen west, on the 20th day of May, 1860; and the west half of northeast quarter of said section, on the 11th day of June, 1860; and that said entries were canceled as having been erroneously made, by the commissioner of the general land office of the United States, at Washington, D. C., in the year 1878; and that previously thereto the said lands had been taxed and forfeited and sold to plaintiff as the property of Michael Yeager, for the non-payment of the taxes thereon, under the laws of the state of Arkansas, as shown by exhibit "A" to the complaint. That subsequent to said cancellation plaintiff received his tax deed, said exhibit "A," upon which he based his claim herein, and subsequent to said cancellation the administrator of said Michael Yeager, then deceased, received from the United States government, through its proper officer, repayment of the purchase money paid by said Michael Yeager originally, as aforesaid. And that the selection of said lands as swamp and overflowed lands, under act of congress 28th of September, 1850, was duly set aside and canceled by the said commissioner of the general land office, on the 8th of June, 1882, and that said lands thereby and thereafter became subject to disposal accord-

ing to the laws of the United States, and the rules and regulations of the general land office thereof; and being so subject to disposal, the defendant, W. T. Hollis, at the United States district land office at the town of Camden, in the state of Arkansas, the same being the proper land office for that purpose, did enter all of the aforesaid lands, being all of the lands in controversy, under the homestead laws of the United States, and received the receipt of the receiver of said district land office, showing the same, dated the 29th day of September, 1883, which receipt is filed with the answer herein as exhibit "A"; and by virtue of this said entry the defendant immediately took possession of said land, and was in possession of the same at the date of the commencement of this action.

And the court, upon consideration, was of opinion that the defendant, W. T. Hollis, by virtue of his said homestead entry, is the owner of said land as against all the world, save and except the United States, and is entitled to the possession of the same.

4. SWAMP LANDS: What are? Decision of Interior Department.

The validity of the plaintiff's title depends on the liability of the lands to taxation in the years 1874–5. And that again depends upon the fact whether at the time of the assessment for taxes, they were the property of the general government, or of an individual. The court declared that the lands were not subject to entry in 1860; but this is a conclusion of law, not the statement of a fact. It must be assumed that the greater part of the two tracts was dry land, and therefore that the tracts were not included in the grant made to the state by the swamp land act. For otherwise, neither of the parties, plaintiff or defendant, has the shadow of a title, but the lands belong to the state. In fact the decision of the Interior Department in 1882, rejecting the selection of these lands as swamp and overflowed, is final and conclusive. The char-

acter of the lands, whether wet or dry, was a question of fact; and the act itself devolves upon the secretary of that department, the duty of determining the question. *Johnson v. Towsly, 13 Wall.; 72; French v. Fyan, 93 U. S., 169.* And if the greater part of the two subdivisions was dry, at the date of the grant, the mere selection of them as swamp lands by the agents of the state, did not have the effect to withdraw them from sale. It only amounted to a claim that the lands were of the description granted by the act; which claim, upon investigation, proved to be unfounded. While it would have been eminently proper for the general land office to withdraw from the market lands so selected and reported, until such selections were either confirmed or rejected, yet this did not prevent the government from selling its lands. The state by compact entered into on its admission into the union, covenanted not to interfere with the primary disposition of the soil by the United States, nor with the regulations adopted by congress for securing titles to purchasers.

5. TAXES: When lands subject to.

It follows that the entries of Michael Yeager were valid. And as soon as he paid the price and received his certificates, the contracts of purchase became complete, the lands were segregated from the main domain and became private property, and therefore taxable. It is of no moment that the patent had not issued. The government held the naked legal fee in trust for the purchaser who had the equitable title. *Witherspoon v. Duncan, 21 Ark., 240;* affirmed on error, *4 Wall., 210; Diver v. Friedheim, 43 Ark., 203; Carroll v. Safford, 3 Howard, 441.*

We are not aware that the power of canceling entries is lodged in the commissioner of the general land office, or in any other officer, except where the land had been previously sold, or reserved from sale, by the United States. Neither of these causes existed here, as it appears, but only

a supposed conflict with a prior selection as swamp land. We may infer that the cancellation was with the consent or acquiescence of the legal representatives of Yeager. But this would not destroy the intervening title of the purchaser at tax sale. The administrator and heirs of Yeager had themselves no interest in the premises in 1878, unless it was a right to redeem from the tax sale.

Judgment reversed and cause remanded, with directions to enter judgment for the plaintiff upon the special findings.

McGaughey et al. v. Brown et al.

1. Trust: *Purchase of trust estate by trustee.*

Where one has a duty to perform as vendor and takes an interest by the purchase, the inquiry is not whether there was or was not fraud in fact; the law stamps the act as fraudulent *per se*, and the purchase will be set aside at the instance of the *cestui que trust.*

2. Administration: *Administrator's purchase of intestate's lands.*

A purchase of an intestate's lands at an administrator's sale, by an agent of the administrator and with his means, who takes the deed in his own name and conveys to the wife of the administrator, is fraudulent; and though not void, the purchase and deeds may be avoided by any one interested in the lands.

3. Chancery Jurisdiction: *Legal with equitable relief.*

When chancery sets aside a deed for fraud it will also decree possession of the land for the plaintiff, if it is in possession of the defendant, without remitting him to his action at law for its recovery.

4. Statute of Limitations: *To actions in equity.*

Courts of equity in cases of concurrent jurisdiction consider themselves bound by statutes of limitations which govern courts of law in like cases, and this rather in obedience to the statute than by analogy.

5. Same: *As against trusts.*

The rule that the statute of limitations will not bar a trust applies only to express and positive trusts, and not to them where circumstances

46 25
54 640
46 25
55 95
46 25
59 244
46 25
58 90
46 25
61 541
61 580
61 589
46 25
68 455
68 456
46 25
74 121
h74 122
74 317
46 25
81 302
46 25
85 143
46 25
87 146

exist which raise a presumption of the extinguishment of the trust, or where there is an open denial or repudiation of the trust brought home to the knowledge of the parties in interest which requires them to act as upon an asserted adverse title.

6. SAME: *As against an administrator.*

The statute of limitations will commence against an action for the frauds of an administrator from the time of his discharge by the probate court.

7. SAME: *Suspended by fraud.*

Fraud in obtaining title to property will not suspend the operation of the statute of limitations against an action to set aside the title any longer than it is concealed from the knowledge of the plaintiff.

8. SAME: *Married women.*

Married women are not excepted from the operation of the statute of limitations as to judicial sales.

9. SAME: *Fraudulent allowances by administrator.*

The statute of limitations will set in against an action in equity by creditors to set aside an administrator's settlement for fraud in allowing and paying an illegal claim and thereby diminishing their own *pro rata*, from the time the settlement is approved by the probate court.

APPEAL from *Jefferson* Circuit Court, in Chancery. Hon. F. J. WISE, Special Circuit Judge.

STATEMENT.

At a sale of his intestate's lands made by McGaughey as administrator of the estate of Fountaine Brown, deceased, on the 2d day of March, 1868, the lands were purchased by James A. Brown upon a credit of twelve months, and afterwards the sale was reported to and confirmed by the probate court. The purchase by Brown was made for the administrator and by his procurement, and upon the expiration of the term of credit Brown paid for the land with funds furnished by the administrator and received a deed to himself, and then conveyed the lands by deed to the wife of

the administrator. On the 14th of October, 1879, the appellees, the heirs of Fountaine Brown, filed their bill against the administrator and his sureties, and the heirs of his wife, who was then deceased, setting up the fraud of the administrator, and that by his fraudulent suppression of competition in bidding the lands had been sacrificed for a greatly inadequate price; and praying that the sale and deeds be annulled and set aside, and for possession of the lands, and an account of rents and profits since the sale. The bill also charged among other frauds in the administrator's accounts, that he had taken credit to himself for large sums paid out for maintenance and education of the minor children of the deceased since the administration upon his estate; and by an amendment to the bill, filed July 14, 1883, the plaintiffs further charged that the administrator had, for a small sum paid by him, compromised with one Jordan Embree a note he held against the deceased for $7,400 for confederate money borrowed in 1863, and then suffered judgment to be rendered against him in the circuit court for the whole amount of debt and interest of the note, and then had Embree to assign the judgment to his attorney, and caused it to be allowed and classed against the estate in the probate court, and afterwards took credit in his accounts for 50 per cent. of it, the *pro rata* allowed to the creditors of the estate. This fraud was unknown to the plaintiffs until developed in taking depositions in the cause. The creditors were made defendants to the bill. All the parties answered—the administrator and sureties, and the heirs of his wife, denying the frauds and pleading the statute of limitations, and the creditors admitting the frauds in the accounts, alleging their ignorance of them, and that their *pro rata* had been greatly diminished by them, and joining in the prayer of the bill that the accounts be purged of the frauds and be restated.

The decree was in conformity to the prayers and the defendants appealed.

M. L. Bell for appellants.

Defendants plead the statute of limitations of seven and five years. The youngest heir was of age more than three years before suit, and all were barred by the statute of seven years except Mrs. Price, who was a married woman, and she was barred by the statute of five years, *sec. 4474 Mansf. Dig.*, under which there is no exception in favor of married women. This was a judicial sale. *37 Ark., 97.*

This was a suit for the recovery of land. The bill itself and the prayer shows it on its face, as it prays that plaintiffs *be placed in possession of the land;* not to *enforce a lien* as in *Phelps v. Jackson, 31 Ark.;* see *37 Ark., 109.*

But appellees cry *fraud*, and say that McGaughey was a trustee, and the statute of limitations does not apply to trusts. There is no allegation of fraud on the part of Mrs. McGaughey, and no proof of any, and her heirs are protected by the statute.

We submit therefore:

First—That the record shows a valid sale to James A. Brown, and a deed from him to defendants' ancestor and the verbal testimony of James A. Brown, after fifteen years had elapsed, should not be permitted to contradict, or overturn the records.

Second—The sale in fact was not fraudulent, but was regular, and for a fair price, and if it had been sold for the sum named by Collier, $6,500, still the heirs would not have been benefited, because the fourth and fifth claims were over $6,000, outside of the Embree judgment.

Third—There is no fraud in J. P. McGaughey's accounts; he was compelled to feed and clothe the children; they were

entitled to a homestead; he collected rents and charged himself with same, and had the court to allow his accounts, was entitled to have them paid in full, as expenses of administration out of the rents; yet the account for 1866 and the account for 1868 were placed on the fourth class of claims and he was paid the sum of forty-seven and one-half cents on the dollar. But the account of 1867 was allowed and placed on the fifth class of claims; he never received a dollar on it. Strange instance of ignorance and carelessness. But no fraud—he cheated himself out of $2,100.

Fourth—That if there was some irregularity with the administration and sale, plaintiffs are barred in this suit to recover the lands from Jim Brown, or his vendees, because they did not commence suit within five years from the date of the judicial sale, and their claim is a stale one.

The very object of the statute is to protect purchasers, not where the sale is regular and valid, but where it is invalid and void as in the case of Guinn *et al. v.* McCauley *et al.*, to cut off litigation in just such cases as at the bar.

J. M. & J. G. Taylor for appellants.

This was a suit for the recovery of land, distinguishable from *31 Ark., 292*, and plaintiffs are barred by *sec. 4474, Mansf. Dig;* see *32 Ark., 97*. Married women are not excepted. *16 Ark., 671; 32 Ark., 97; 113 U. S., 449.*

The fact that they pray *possession of the land*, negatives the idea of any *lien. 2 Wall., 87.* Defendants have held adverse possession under color of title for eleven years, and the youngest heir of Brown was of age more than three years before suit. All are barred. *15 Ill., 178; Rover Jud. Sales, 141–2; 83 Ill., 171; 3 Ohio St., 80.*

But they claim a trust. Only direct and positive trusts, not constructive trusts or such as arise by operation of law, are not barred by limitation. And even in those the statute commences when the trust relation ceases, or the adverse holding commences, or the denial of the trust or adverse claim is brought to the knowledge of *cestui que trust.* In equity limitation need not be pleaded. *94 U. S., 811; Wait Fr. Conv., sec. 289.* No reason is shown why this suit was not commenced sooner; no concealment is alleged or proved, for they knew all the facts. This is a constructive trust if a trust at all, and the statute commenced to run from the time Mrs. McGaughey took possession. *36 Ark., 400; 14 Fed. Rep., 509; 3 Jones Eq., 86; 42 Ark., 491.*

Fraud must be secret or concealed, not open, known or visible, to prevent the bar of the statute. *18 Wal., 493; 99 U. S., 201; 41 Ark., 305; 1 Dillon, 96; 115 U. S., Wallensok v. Reiher.* Notice, or facts sufficient to put one on his guard, starts the statute. *3 Mylne & K., 719; 1 Dillon, 98.* The right of action accrues when the fraud might by reasonable diligence have been discovered. *Wood on Lien, sec. 274; Wait Fr. Conv., sec. 287; 16 Wall., 401; Angell on Lien, sec. 190; 5 Ala., 90; 1 Dillon, 98.* Minors and married women are barred by laches, not by the statute, but by supine neglect. *39 Ark., 166 et seq.* Equity will not interfere after an unreasonable length of time. *19 Ark., 21; 94 U. S., 811; Story Eq. Jur., sec. 1520 a; Perry on Trusts, sec. 228; Wood on Lien, sec. 275; 17 Wall., 81; 21 ib., 185.* All were familiar with the facts in the case. *Freeman Void Jud. Sales, sec. 33.* The statute commences from the time adverse holding begins. *10 Pet., 223.* The trust ceased when Dr. McGaughey filed his final settlement and was discharged as administrator. *22 Ark., 6.* See also *Wood on Lien, secs. 212–13; Angell on Lien, sec. 174, 178, 469 to 472; 3 Sumner (Ct. Ct.), 466; 101 U. S., 135.*

The creditors were also barred. *42 Ark., 491.*

Harrison & Harrison, for appellees.

There was no necessity for the sale. No one demanded it. The rents with the amount of sale of personalty would have paid the just debts. The sale was a sham and a fraud from the beginning. McGaughey's intention from the first was to become the owner of the place. His enormous charges for the support of the children evince his design to appropriate the estate. No money was paid for the land by Brown, and none paid him by the administrator's wife. He used his influence to prevent competition in bidding, so as to get the place cheap.

The purchase by Mrs. McGaughey was the same as if it had been for McGaughey the administrator. As her husband he became possessed of the rents and profits.

It was a gross violation of his duty to be interested in the purchase, and such a fraud as for which the sale should be set aside. *2 Bro. C. C., 400; 2 Segd. Vend. and Purch., 109; 4 Kent Com., 438 (C.); 4 How. (U. S.), 503; 6 Wheat., 481; 8 ib., 421; 1 Mason, 341; 1 Story Eq., sec. 322; 1 Perry on Trusts, sec, 217; 30 Ark, 44.*

The statute of limitations has no applications. The suit was not to recover the land, but to have the fraudulent sale of it set aside. *Phelps v. Jackson, 31 Ark., 272; Rover Jud. Sales, secs. 140–145.* It does not in equity run against a fraud. *2 Story Eq., sec. 1251; 7 Johns. Chy., 122; 1 Wash., 145; 6 Wheat., 497; 4 How. & Johns., 430; Wood on Lien, 112, 413* and *note (1).*

Mrs. McGaughey, during her life and her heirs since her death, held the title and possession in trust for Brown's heirs and creditors, and the statute does not run against a trust arising from a fraud. *1 Perry on Trusts, secs. 228–230;*

Rover on Jud. Sales, secs. 143–5; 22 Ark., 1; Michod v. Girod, 4 Howard (U. S.), 503.

OPINION.

1. TRUST: Purchase of trust estate by trustee.

COCKRILL, C. J. We must regard the proof in this case as establishing the fact that James A. Brown acted as the agent of James A. McGaughey in purchasing the lands in controversy and conveying them to his wife, the mother of the principal appellants. Brown was only the instrument used to convey the title from McGaughey, as administrator, to McGaughey's wife, the consideration being paid by McGaughey. As McGaughey expected to derive a benefit from the lands through the right of his wife, the purchase was a violation of his trust. The policy of the law is to demand so strict an adherence to duty that no temptation to weigh self-interest against integrity can be placed in the trustee's way. The fact that he may seek to evade the law rather than openly violate it by causing another to appear as the purchaser, can avail him nothing. *Freeman Void Jud. Sales, sec. 33, and cases cited in notes; Davoue v. Fanning, 2 John. Chy., 252.* Where he has a duty to perform as vendor, and takes an interest by the purchase, the inquiry is not whether there was or was not fraud in fact; the law stamps the act as fraudulent *per se*, and the purchase will be set aside at the instance of the *cestui que trust. McNeil v. Gates, 41 Ark., 264; Mock v. Pleasants, 34 ib., 63.*

2. Administrator's purchase for wife.

The purchase of the estate in this case was a voluntary settlement by the administrator upon his wife, and a court of equity would have declared her a trustee for the heirs and creditors of the estate, and avoided the sale at once if any party interested had disapproved of it. But the sale was not absolutely void and the parties in interest who were *sui juris* had their election on being put in possession

of the facts to disaffirm or allow it to stand. *Jones v. Graham, 36 Ark., 383; Ives v. Ashley, 97 Mass., 198.*

Nearly twelve years were allowed to elapse from the date of the sale to the institution of this suit. The appellants who were the defendants below, denied all charges of intentional fraud on the part of McGaughey, and claimed to have been in the notorious adverse possession of the land from the date of the deed to Mrs. McGaughey in 1868, to the institution of the suit in 1879. There was no contest about the fact of possession during this period. McGaughey and wife lived upon the farm, made it their home and put valuable improvements on it, claiming it as the land of the wife. She died in 1873, and McGaughey with the appellants, her heirs, continued in the occupancy until his death, a short time after the bill was filed. The appellees alleged these facts substantially in their bills, but contended that the statute of limitations had no application to the facts of the case.

It is argued in the outset that this is not a suit for the possession of lands, and therefore that neither the act prescribing a limit of five years for actions against purchasers at judicial sale nor the general seven years statute is applicable.

There is no mistaking the object of the bill. It seeks to establish title to the lands in the appellees; and that being accomplished, to reap the advantages that follows ownership, *i. e.*, possession. The prayer is that the sale by the administrator to James A. Brown, and the conveyance by Brown to the administrator's wife "may, by proper orders and decrees, be set aside and declared void; that a master be appointed to take an account of the rents and profits; that said conveyances be removed as a cloud upon the title of plaintiffs (appellees) to the lands aforesaid, and that they be put into the possession of the same."

3. Chancery jurisdiction. Legal with equitable relief.

It was competent for equity to grant the full measure of this relief. It frowns upon a multiplicity of suits, and when the appellees had successfully invoked its aid to invest them with the legal title, it would not then remit them to an action at law to recover possession; but having taken jurisdiction of the case for its own exclusive purposes, it would retain the cause to administer the legal after the equitable relief.

4. Statute of Limitations in equity.

It is long established that "courts of equity in cases of concurrent jurisdiction consider themselves bound by the statute of limitations which govern courts of law in like cases, and this rather in obedience to the statute than by analogy." *Farman v. Brooks, 9 Pick., 212.*

The evil resulting from delay in the enforcement of legal and equitable rights is the same, and the courts of equity take the same limitation for their guide that governs law courts in analogous cases. This is illustrated in this court by the application of the statute governing actions to recover real estate to a suit to foreclose a mortgage (*Ringo v. Woodruff, 43 Ark., 469*), as well as to remove a cloud from the title, as in *Conway v. Kinsworthy, 21 Ark., 9.*

5. Same: As against trusts.

It is argued further that Mrs. McGaughey and her heirs, after her death, held the land in trust for the heirs of Fountain Brown, and that the statute will not bar a trust. Express and positive trusts are certainly within the rule contended for. But this doctrine is subject to two qualifications, namely, that no circumstances exist to raise a presumption of the extinguishment of the trust, and that no open denial or repudiation of the trust is brought home to the knowledge of the parties in interest which requires them to act as upon an asserted adverse title. *Angell on Lim., ; Wood on Lim., 212–13; Harriet v. Swan, 18 Ark., 495.*

6. SAME: As against administrator.

The rule with the exceptions was clearly stated by Judge Fairchild in *Brinkley v. Willis*, *22 Ark.*, *6*, and the benefit of the statute was denied an executor, ten years after his breach of duty, because the trust was still subsisting—the executor not having been discharged therefrom by the probate court. But this does not help the appellee's case, for if we should regard James A. McGaughey as in possession of the estate in his own right, still the facts remain that he was regularly discharged from the trust by the probate court in 1870, and the lands were held adversely for more than seven years thereafter.

The following language used in *Clark v. Boorman's executor*, *18 Wallace*, *493*, is applicable to this case: "It may be conceded that so long as a trustee continues to exercise his powers as trustee in regard to property, that he can be called to account in regard to that trust. * * * But when he has closed up his relation to the trust and no longer claims or exercises any authority under the trust, the principles which lie at the foundation of all statutes of limitations assert themselves in his favor, and time begins to cover his past transactions with the mantle of repose."

But trusts which arise from the operation of law, that is constructive trusts, are subject to the operation of the statute. The possession of Mrs. McGaughey and her heirs falls under this class, and it was incumbent upon the appellees to assert their rights within the period limited by the statute after knowing the facts in relation thereto. *Achhurst's Appeal*, *60 Penn.*, *290*, *316*.

7. SAME: Suspended by fraud.

They seek to evade the force of the statute by contending that the appellants' title originated in a fraud which no time will bar. To warrant this conclusion not only must the trust be established, but the fraud must have been successfully concealed from the knowledge of the beneficiaries. *Wood on Lim.*, *sec. 275*, *et seq.*; *James v. James*, *41 Ark.*, *301*;

Geisreiter v. Sevier, 33 ib., 534; Meyer v. Ruetmans, 28 ib., 145.

In *Marsh v. Whitmore, 21 Wall., 178*, the court quote approvingly this language from *Badger v. Badger, 2 Wallace, 95:* "The party who appeals to the chancellor in support of a claim, where there has been laches in prosecuting it or long acquiescence in the assertion of adverse rights, should set forth in his bill specifically what were the impediments to the earlier prosecution of his claim; how he came to be so long ignorant of his rights and the means used by the respondent to fraudulently keep him in ignorance, and how and when he first came to a knowledge of the matters alleged in his bill."

Neither in the original nor any of the several amended bills in this case is any reason given for not beginning this suit earlier; and no concealment of any fact by the administrator or any one acting with him, is charged. The fact that the administrator had caused the lands to be bought in for his wife was known to the heirs of Brown's estate from the outset. James A. Brown, one of their number, who was the nominal purchaser at the sale, wrote to the absent members of the family advising them of the fact and explaining that it was believed to be the only way by which the younger children could be maintained and educated, McGaughey having agreed to do that. It remained a matter of family history with the Browns, and McGaughey talked about it with one or more creditors of the estate. The fraud charged upon McGaughey in preventing competition in bidding at the sale is not sustained by the proof, and as to his accounts as administrator, there was nothing at any time to prevent the fullest investigation into all the transactions now complained of. The claims allowed in his favor by the probate court for the support and maintenance of the minor heirs of his intestate, were not proper allowances against the estate.

But no effort at concealment either from the court allowing the claims or the parties in interest was made. The accounts were itemized with the utmost particularity; they were regularly presented for allowance and appear to have been acted upon with due deliberation by the court, and remained on file subject to the inspection of all concerned. All that is now shown in reference to these transactions could as readily have been ascertained at any time since the sale. Some of the illegal claims, in favor of the administrator, were allowed after the sale, and could in no event affect it. They were put in evidence by the appellees, doubtless, to show a fraudulent disposition on the part of the administrator. This is true, also, of the Embree judgment. No effort was made to show that this was not a valid claim against the estate to the extent of some $3,900, the amount the administrator paid upon it. This being true, no one could be heard to complain of the administrator's action in paying it off except creditors of the estate who had not received a *pro rata* upon their claims as great as was paid upon it.

We do not wish to be understood as sanctioning the course of the administrator as to any of the acts complained of. But the statute prescribes a period of rest for such matters, and the parties in interest knowing, or in a position to know, all the facts, have waited supinely until time has put a quietus upon the right to complain.

Several of the heirs were minors when the sale was made, but more than three years had elapsed since the removal of the disability of the youngest, when the suit was brought and their rights are cut off. *Chandler v. Neighbors, 44 Ark., 479.*

8. SAME: Married women.

The statute of limitations protecting the purchaser at judicial sale makes no exception in favor of married women and the courts can make none. *Pryor v. Ryburn, 16 Ark., 671; Gwynn v. McCauley, 32 ib., 97; Morgan v. Hamlet, 113 U. S., 449.* This statute is a bar to Mrs. Price's claim.

9. SAME: Against administrator.

Some of the creditors of the estate were brought into the litigation and sought to surcharge the administrator's accounts upon the ground of fraud referred to. As the bill alleges the insolvency of the administrator's estate and the worthlessness of his bond, we presume that their only serious design was to effect a re-sale of the lands for the balance due on their claims, and that the other matter was thrown in as inducement to that end. What has been said of the effect of adverse possession of the lands in reference to the rights of the Brown heirs, is true also of the creditors' claim to the lands as assets to pay their debts. The statute was set in motion, however, against their right to have the accounts overhauled, from the time of their confirmation by the probate court, and it had run the full period before they saw fit to move. *Hanf v. Whittington, 42 Ark., 491.*

Let the decree of the circuit court be reversed and set aside, and the case remanded with instructions to enter a decree for the appellants in accordance with this opinion; to cause the receiver to pass his accounts, pay over the funds and be discharged, and for other proceedings that may be necessary in accordance with law and this opinion.

THOMAS MARTIN ET AL. V. THE STATE.

1. CRIMINAL PRACTICE: *Appeal from J. P. Jurisdiction.*

On appeal from a judgment of a justice of the peace in a criminal case, it is too late for the defendant to object in the circuit court to the jurisdiction over his person.

2. SAME: *Change of venue, order for.*

The order for a change of venue in a criminal case, from one justice to another, need not set forth the ground of the removal. That appears from the affidavit therefor, which is part of the record.

3. SAME: *Change of venue before J. P. Jurisdiction.*

It is not necessary to the jurisdiction of a magistrate to whom a cause is transferred, that a supporting affidavit for the change of venue was filed before the change.

4. SAME: *Appeal to circuit court, objection to jurisdiction.*

On appeal to the circuit court an objection to the jurisdiction of the magistrate who tried the cause for want of a supporting affidavit for change of venue to him from another magistrate, is waived by not making the objection before the trial justice.

5. SAME: *On appeal, trial is on merits.*

On appeal to the circuit court, the trial is on the merits, and technical objections to the forms of procedure in the justice's court are futile.

6. SAME: *Separate appeals from J. P. Joint trials in circuit court.*

On trial of two defendants before a justice of the peace upon a charge of assault with a deadly weapon, and also of assault and battery, they were separately tried and convicted; one for assault and battery, and the other for an aggravated assault, and they appealed, giving a joint bond for the fine and cost. *Held:* That the circuit court might try them jointly.

7. SAME: *Verdict, uncertainty of.*

A general verdict of guilty, and a fine of one dollar against a defendant who is charged with an aggravated assault, and also an assault and battery, will be presumed in this court, from the smallness of the fine, to apply to the lowest grade of offense, and is not uncertain.

ERROR to *Benton* Circuit Court.
Hon. J. M. PITTMAN, Circuit Judge.

E. P. Watson, for appellant.

First. The affidavit charges three separate offenses in one charge and is bad. *Mansfield's Digest, sec. 2108.*

Second. No affidavit for change of venue of some creditable person was filed; nor did the order of removal specify the cause; nor was it definite as to what justice the case was sent to. Wasson, J. P., therefore had no jurisdiction, and the circuit court none on appeal. *Mansfield's Digest, sec. 2379; Wells on Jurisdiction, p. 122.*

Third and fourth. The charge in the warrant was *assault with deadly weapon.* No battery was charged, but John Martin was convicted of *assault and battery.*

Sixth. The demurrer should have been sustained, as no one could tell from the warrant for what appellants were being tried.

Seventh. It was error to try appellants jointly and render a joint judgment for costs. *36 Ark., 222; 41 ib., 408.*

Eighth. The verdict is indefinite. It does not state what defendants were found guilty of.

Ninth. It was error to render judgment for the full penalty of the bond. *Mansfield's Digest, sec. 2435.*

Tenth. No judgment should have been rendered against the surety.

Dan W. Jones, Attorney General, for appellee.

The appellants were charged with assault with intent to kill. The warrant served its purpose in bringing them before the officer, and was of no further moment. *Watson v. State, 29 Ark., 299.* It was not necessary for the affidavit to allege the locality in which the offense was committed. *Sec. 2113, Mansfield's Digest.* It was discretionary with the court to try them jointly or separately. *Sec. 2216, ib.*

To obtain a change of venue from a justice in a criminal case, to a different township, the affidavit need not be against the township. *Sec. 2378, ib.* The two appellants were jointly charged and each made affidavit, thus complying with the law substantially. Any justice residing in the county in which the misdemeanor was committed, may take jurisdiction, and when the first justice released the appellants the second obtained jurisdiction.

The judgment was to be as much as $200, only in the event that the fine and costs amounted to so much. It is a matter that may be settled by the court without trying the case anew. The costs may at any time be adjusted by a motion to re-tax.

SMITH, J. The plaintiffs in error were charged by affidavit, before a justice of the peace, with an assault upon one Davidson, with a deadly weapon, and also with an assault and battery committed upon him. The warrant of arrest specified the first named offense. They made an application for a change of venue, grounded upon the prejudice of the justice who issued the warrant, but not supported by the affidavit of any third person, as *sec. 2379 Mansfield's Digest* requires. Their petition was, however, granted and the cause sent to a justice in another township.

Upon separate trials, Thomas Martin was convicted of an aggravated assault, and John of an assault and battery. Both appealed and entered into a joint bond, with one Rutherford as their surety, in the sum of $200, conditioned for the payment of the fine and costs.

In the circuit court a demurrer was filed to the affidavit upon which the warrant issued and to the jurisdiction of the court. The demurrer was properly disregarded. The justice and the circuit court on appeal, certainly had jurisdiction to inquire into the truth of the charge; and it is too late on appeal to raise the question of jurisdiction over the person of the defendants. The order for a change of venue needed not to set forth the ground of removal. This appears from the affidavit therefor, which is part of the record. *Dixon v. State, 29 Ark., 166.*

Nor was it necessary to the jurisdiction of the magistrate, to whom the cause was transferred, that a supporting affidavit should have been filed before the order of removal was made. This was an objection which was waived by not being taken advantage of in the court of the justice who tried the case. *Brown v. State, 13 Ark., 96.*

The affidavit and warrant were not subject to demurrer.

They had served their purpose in bringing the defendants before an officer and were of no future moment. No written information or pleadings are required in a justice's court. *Mansfield's Digest, sec. 2367.* When the case is carried by appeal to the circuit court, it is there for trial on its merits, and technical objections to the forms of procedure in the lower court are futile.

The defendants were put upon trial jointly. This was in the discretion of the circuit court. *Mansfield's Digest, sec. 2216.*

The jury returned a general verdict of guilty, and assessed the fine of the defendants at $1 each. Thereupon judgment was rendered against them for said fine and costs, and also against their surety, the same as to him not to exceed the penalty of his bond. It is urged that the verdict should not have been received and recorded on account of its uncertainty; that there were several offenses or degrees of the same offense, of which the defendants might have been convicted, and it is impossible to say of which one the jury intended to find them guilty; therefore no valid judgment could be entered thereon.

In the absence of a bill of exceptions, showing what took place at the trial, it will be presumed, from the fine imposed and in favor of the verdict and judgment, that the jury meant to convict of the lowest grade of the offense.

It is no ground of reversal that the judgment for costs is against both defendants jointly. The verdict and judgment against them are several; that is, they fix the fine to be paid by each. *Straughan v. State, 16 Ark., 44.*

The statute authorizes a judgment against the surety in the appeal bond, on conviction of the principal, without further notice. *Mansfield's Digest, sec. 2435.*

Affirmed.

46 43
55 58
46 43
57 184
46 43
65 42
65 45

RICHARDSON V. ADLER, GOLDMAN & CO. AND RICHARDSON V. SAME.

1. EXEMPTION: *When must be claimed.*

   Quere. Can a judgment debtor claim his exemption of attached property after judgment of condemnation in the attachment suit?

2. SAME: *Of partnership property.*

   The members of an insolvent firm are not entitled to the exemptions allowed by law, out of the partnership property, after it has been seized to satisfy the demands of the creditors of the firm.

3. SAME: *Right of must exist at commencement of lien.*

   The right to exemption as head of a family must exist at the time the creditor's lien attaches. To become a head of a family after an attachment is levied on the property, will not exempt the property from sale under a judgment of condemnation. The judgment lien relates to the levy of the attachment, and perfects the inchoate charge created by the levy, and cannot be displaced by any change in the status of the debtor.

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

Clark & Williams, for appellant in the J. B. Richardson case.

It is by no means necessary that a man should be married or have children to be the head of a family, although the having a wife is possessing a family. *42 Ark., 532; Thompson H. & Ex., secs. 44–5, and 72; 31 Tex, 680; 21 Ill., 40–5; 6 Bush., 11; 27 Ark., 658.*

Is a married man to be cut off from his homestead, whenever his wife dies, in case he has no children? If so, then if the husband die, the wife without children or dependents, also loses her right. *33 Ark., 762; 6 Allen, 71.* A homestead once acquired and still occupied, is not de-

feated by loss of wife and children. *Supra*, and *12 Allen, 34; 56 Geo., 392; Thomp. H. & Ex., sec. 72 and note.*

But Richardson was re-married and the head of a family before the execution was levied. An unmarried man keeping house, with persons dependent on him for support, is the head of a family; nor is it necessary that he be legally bound to support them; if morally bound, it is sufficient. *Thomp. H. & Ex., secs. 58, 59, 60, 61; 42 Ark., 532.* A temporary removal has never been held an abandonment. *37 Ark., 283.*

The possession of the land, and the building of the house, under the verbal agreement, took the case out of the statute of frauds, and he could have compelled his brother to convey. *9 Wall., 1; 43 N. Y., 34; 3 Gill., 157; 1 Binn., 378; 9 Pet., 221; 45 N. Y., 419; 35 Iowa, 512; 3 Washb., 235.* Nor is it material that the improvements were paid for out of partnership funds. The money was charged to him and became his own, but if not the firm gave it to him, and it does not alter the case. An equitable title will support a homestead. *Thomp. H. & Ex., sec. 170–174.*

(*In the J. R. Richardson case.*)

Appellant kept house with a widowed sister dependent on him for support. This gave him a right to homestead. *Thomp. H. & Ex., sec. 69; 20 Mo., 75; 27 Ark., 658; 32 Wis., 391.* Also to his exemption of personal property. We concede that he could claim no exemption in the partnership property.

Robert Neill, for appellees, Adler, Goldman & Co., in J. B. Richardson's case.

Appellant was not the *owner* of the land—he had neither legal nor equitable title. The land belonged to J.

R. Richardson, and the house paid for out of partnership funds. The agreement was upon a contingency which never happened, and never could happen now, and is too vague and indefinite for a court of chancery ever to have enforced it.

It is clear appellant was not entitled to exemption in the partnership property. *Thomp. H. & Ex., sec. 194, and cases cited; 3 Dillon, 290.*

(*In the J. R. Richardson case.*)

The sister was *not* dependent upon him for support. She had real estate and personalty of her own, and had an income; she also had other relatives keeping house in the county. He was not entitled to a homestead merely from the fact she *resided* with him. *42 Ark., 541.*

SMITH, J. Adler, Goldman & Co. recovered a judgment against J. R. Richardson & Bro., a firm composed of John R. and Joseph B. Richardson, for $3,559.59. An attachment, which had been previously levied upon all the property of the firm, as well as the individual property of the partners, was at the same time sustained.

Upon the issue of a special execution for the sale of the attached property, the said John R. and Joseph B. filed, in the office of the clerk of the court from which the execution issued, their separate schedules under the exemption laws, setting out all the partnership assets, as well as their own private property, and claiming the exemptions which pertain to heads of families, viz.: a homestead and $500 worth of personal property, which they selected. The clerk granted a supersedeas as to all of the property so claimed as exempt. And the judgment creditor moved the circuit court by petition to quash the supersedeas. The grounds of the several motions were that part of the

personal property claimed by each of the defendants was partnership property; that John R. was not at any time a married man, nor the head of a family; nor was Joseph B. such at the time the attachment was levied; and moreover that Joseph B. was not in any sense the owner of the house and lot claimed by him as a homestead.

The evidence tended to show that John R. had been living in a house built by him on his own land, and had been keeping house there for a number of years before this controversy arose. He had no wife nor children; but a widowed sister, who was in feeble health, and measurably dependent on him for support, resided with him.

The residence claimed by Joseph B., as a homestead, had been built with partnership funds on a lot of four acres in the town of Melbourne, which belonged to John R., and had been occupied by Joseph B., his wife and her sister, for several years. But his wife having died, the establishment had been broken up before the attachment was levied, the house was rented, and the sister in-law sent off to board. But he had married again after the rendition of the plaintiff's judgment and was living in the house when he filed his schedule.

There was no contract in writing between the partners in relation to the lot, but a parol understanding that, when the partnership should be wound up, Joseph B. was to take the house and some ground as part of his share of the assets of the firm. He claimed one acre around and near the house.

The circuit court found the facts to be: That John R. Richardson was a resident of Arkansas, was the head of a family, and was entitled as such to hold the property claimed as a homestead, as well as all the personal property, except a mule and planing machine and fixtures,

which he could not hold as exempt because it was partnership property.

The supersedeas was therefore quashed as to the partnership property, and sustained as to the other personal property and the homestead. From its judgment both parties appealed.

In the other case the court stated the facts to be:

First. That Joe B. Richardson was not a married man, nor head of a family at the time of the levy of the attachment and the rendition of the judgment.

Second. That the land upon which the said residence claimed as homestead was situated, was, at the date of the schedule filed, the property of John R. Richardson, and that appellant had no title, legal or equitable, thereto. That the residence thereon was partnership property. And it declared the law to be that appellant was not entitled to claim the homestead, nor the partnership personal property above named. That of the property attached he was entitled to claim as exempt the amount of two hundred dollars' worth, and no more, but discharged the supersedeas in toto. Richardson appealed.

1. Quere. When must exemption be claimed.

It is doubtful whether, after a judgment of condemnation in the attachment suit, it is still competent for the defendant to set up his claim of exemption out of the property attached. The safer course is to move the court, while the suit is pending, to quash so much of the sheriff's return as shows a levy of the writ upon exempt property; as was done in *Grubbs v. Ellison, 23 Ark., 287.* Compare on this point, *Drake on Attachment, sec. 244 a; Waples on Attachment, pp. 164–7; Thompson on Homesteads and Exemptions, sec. 826; State v. Manly, 15 Ind., 8; Perkins v. Bragg, 29 ib., 507; Haas v. Shaw, 91 ib., 385; State, ex rel. Kahoon v. Krumpus, 13 Neb., 321; Close v. Sinclair, 38 Ohio St., 530; Willis v. Matthews, 46 Texas, 478;* with

the reasoning of the court in *Turner v. Vaughan, 33 Ark., 454; Miller v. Sherry, 2 Wallace, 237; Haynes v. Meek, 14 Iowa, 320.*

But since the creditor has not pleaded the previous adjudication in bar of the debtor's subsequent claim to hold a portion of the property as exempt, nor insists here upon any benefit thereof; since, moreover, section 3006 of Mansfield's Digest is somewhat ambiguous in regard to the time and manner of claiming and ascertaining exempt property which is attached; and since the parties and their counsel and the court below have acted upon the supposition that the claim may be preferred at any time before the property is actually sold, we pass this question without determining it.

2. EXEMPTION: None of partnership property.

The members of an insolvent firm are not entitled to the exemptions, allowed by law, out of the partnership property after it has been seized to satisfy the demands of creditors of the firm. This proposition is well settled both upon reason and authority. The interest of each partner in the partnership assets is his portion of the residuum after all the liabilities of the firm are liquidated and discharged. Property belonging to the firm cannot be said to belong to either partner as his separate property. It is contingent and uncertain whether any of it will belong to him on the winding up of the business and the settlement of his accounts with the firm. "Joint property is deemed a trust fund, primarily to be applied to the discharge of partnership debts, against all persons not having a higher equity. A long series of authorities has established this equity of the joint creditors, to be worked out through the medium of the partners; that is to say, the partners have a right *inter sese*, to have the partnership property first applied to the discharge of the partnership debts, and no partner has any right, except to

his own share of the residue, and the joint creditors are, in case of insolvency, substituted in equity to the rights of the partners, as being the ultimate *cestuis que trust* of the fund to the extent of the joint debts." *Story's Eq. Jur., sec. 1253; Pond v. Kimball, 101 Mass., 105; Gaylord v. Imhoff, 26 Ohio St., 317; Giovanni v. First Nat. Bank of Montgomery, 55 Ala., 305; In re Handlin, 3 Dillon, 290.*

3. Right to exemption must date with lien.

To sustain the finding of facts, that John R. Richardson was the head of a family at the date of the levy of the attachment, while Joseph B. was not—the record contains abundant testimony. The subsequent marriage of Joseph B. had no effect on the rights of the parties. The lien relates back to the levy of the attachment, creating from that moment an inchoate charge, which was perfected by the rendition of judgment and which could not be divested by any change in the status of the parties. *Frellson v. Green, 19 Ark., 376; Harrison v. Traden, 29 ib, 85; Huxly v. Harold, 62 Mo., 516.*

Furthermore, Joseph B. Richardson was not the owner of the house and lot claimed by him as a homestead, within the meaning of section 5, of article 9, Constitution of 1874. The legal title of the tract of four acres, of which it formed a part, stood in the name of his partner, who had, very recently before, treated it as his own by executing a deed of trust upon the whole of it. And the house was built with partnership funds. The verbal contract between the partners was too loose and indefinite to give any rights which a court of justice would protect and enforce. No price was mentioned, and the dimensions of the lot were not fixed. The consummation of the purchase depended upon two conditions: First, a settlement of the partnership; and second, that upon such settlement something should be due Joseph B. as his share of the assets. Neither of these contingencies has arisen. No

settlement of the partnership has been had; nor are there any effects to be divided between the partners, the concern being largely in debt.

The judgments in both cases are in all things affirmed.

---

46 50
55 270

46 50
70 19

46 50
74 250

46 50
86 27

GRIDER v. DRIVER.

1. USURY: *Taking new note for principal and interest of old one.*

It is not usury to add the interest on several notes to the principal, and then add to this sum the interest on it at 10 per cent. per annum for one year, and then take a new note for this last sum payable one year after date, with interest at 10 per cent. per annum after maturity, in payment of the old notes.

2. SAME: *Selling property on credit.*

It is not usury for one to sell property on a credit for a higher price than he would have sold for cash, with legal interest added; but if the sale be really made on a cash estimate and time be given to pay the same, and an amount is assumed to be paid greater than the cash price with legal interest would amount to, this is an agreement for forbearance that is usurious.

3. SAME: *Relief in equity.*

A plaintiff will not be relieved in equity from a usurious contract except upon condition that he pays the principal and legal interest.

4. SAME: *Presumption of laws of another state.*

Although it will be presumed in many cases, in the absence of a contrary showing, that the laws of other states are the same as our own, the presumption will not be indulged where our laws impose a penalty or work a forfeiture as in the case of usury.

APPEAL from *Mississippi* Circuit Court in Chancery. Hon. J. G. FRIERSON, Circuit Judge.

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

Having procured all these claims, appellee Driver proceeded to secure them in a very singular way. He did not, like any one else would have done, take a mortgage with interest from date until paid. He calculated the interest on all the claims at the rate of 10 per cent. up to the date of the execution of the mortgages, and added this interest to the principal. He then calculated the interest on this gross sum up to the date of the maturity of the mortgages, added this to his former amount, and then made the mortgages, with all these accumulations of interest upon interest, to bear interest from maturity until paid at the rate of 10 per cent. This, of course, amounted to a contract to pay interest upon interest subsequently to accrue; and when we consider that many of the notes going to make up the amounts of the trust deeds had been originally taken in this very ingenious manner, it will be seen that the practical operation has been to extort the most enormous rates of interest.

In cases of this kind, where there is evidently power and oppression on one side, and weakness and suffering upon the other, courts of equity delight to interfere, and to see that the oppressor gets only even-handed justice.

It was settled at a very early day, and has been confirmed by numerous subsequent decisions, that equity will not uphold transactions such as that of the defendant in this case. It is not usurious, according to the more recent decisions, to compound interest, provided the rests are not so frequent as to indicate an intention of evading the usury laws. But the compounding must be upon interest already accrued. The parties cannot stipulate that interest subsequently to accrue shall be compounded. Such a stipulation is in the nature of a penalty, and will be deemed void in equity. The damages allowed by law for a failure to pay

money when due is the lawful interest, and any promise to pay more than that is regarded as an extortion on the part of the creditor, and will be held invalid. *Tyler on Usury, p. 241; 11 Paige, 231; 1 Barb., 632; 1 Johns. Chy., 14; 17 Conn., 247, 4 Rand., Va., 408; 6 Johns. Chy., 313; 21 Mo., 432; 2 La. Ann., 241; 17 How. Pr., 255; Mowry v. Bishop, 5 Paige, 101.*

Second—Driver, who was not a merchant, and who only kept a little store-house on his plantation for the supply of his own hands, bought goods for Miss McGavock. They were ordered by him from parties in Memphis and St. Louis, and were shipped directly to her. The bills were sent to Driver. He added 20 per cent. to them, and put them into the mortgages. The real effect of the transaction was, that Miss McGavock borrowed the amount from Driver, giving him by way of interest 20 per cent. of the sum. This was usury.

The same vice tainted the simulated purchase by Miss McGavock of a lot of scrip worth 80 cents on the dollar, but which Driver put into the trust deeds at par.

Parties are very ingenious in their devices to cover usury, and one of their oldest and best known shifts is a sale, or pretended sale, of property at an extravagant profit. All such proceedings are condemned in equity. *Ford v. Hancock, 36 Ark., 248; Tyler on Usury, 300.*

Third—The evidence is conflicting as to whether the claim of Shoemaker, Joplin & Co. has been paid or not. If the rule laid down in *Johnson & Goodrich v. Anderson, 30 Ark., 745,* and *Hughes v. Johnson, 38 Ark., 285,* that payments are to be imputed to the earliest items of the account, be followed, then the debt which Shoemaker, Joplin & Co. undertook to assign to Driver had been satisfied.

Greer & Adams, also, for appellants.

What is usury? It is the taking of more interest for the use of money than the law allows; or the extortion of a sum beyond what is lawful. *Tyler on Usury, 35.* The policy of usury laws is to protect necessity against avarice. *Tyler on Usury, 58.*

Driver alleges, and attempts to prove, that if he exacted more than the legal rate of interest, it was unintentional; but the supposed right to exact more than the legal rate of interest is no excuse, and makes the taker guilty of usury. *Tyler on Usury, 275; Bank v. Butts, 9 Mass., 49; German Bank v. DeShon, 41 Ark., 331.*

The note discounted must be a present subsisting liability, and if the rate of discount be greater than allowed by law, it will be usury. *Tyler on Usury, 282–3–4; Hall v. Earnest, 36 Barb. (N. Y.), 585.*

And if a money lender discounts a note for a greater rate than allowed by law and holds the indorser bound, it is usury. *Tyler on Usury, 338–39 to 350; Ruffin v. Armstrong, 2d Hawks (N. C.), 411; Bellinger v. Edwards, 4th Ird. Eq. (N. C.), 449; Newell v. Doty, 33 N. Y., 83–94–5.*

Ten per cent. interest payable *semi* annually is usurious. *22 Ark., 413.* All parties who participated in the original consideration can never be considered innocent holders. *17 Johns. (N. Y.), 176; 5 ib., 55; Dan. Neg. Inst., sec. 750–1, vol. 1, 1st ed.; 8 Cow. (N. Y.), 689; 41 Ark., 331.* If the original transaction was tainted with usury, no matter how many renewals, it carries its death wound with it. *Tyler on Usury, 346, 347; 32 Ark., 346.*

The testimony also shows that some of the Edrington notes were not merged in the deeds of trust until after they were due; and whilst they bore 10 per cent. interest on their face from date, they do not specify that they should draw that rate of interest until paid. Consequently, after

due they only drew 6 per cent. interest, and Driver had no right to charge 10 per cent. interest, which he did after maturity. *Gardner v. Bennett, 36 Ark., 476; Newton v. Kennedy, 31 Ark., 626; Pettigrew v. Sumners, 32 Ark, 571; Woodruff v. Webb, 32 Ark., 612.*

The deed of trust executed on the 19th day of April, 1881, was given to secure, among other items, about $400 in Mississippi county scrip, worth at the time about 80 cents on the dollar, which Mrs. Grider agreed to pay for at par on consideration of an extension of time, or in other words at the maturity of the deed of trust. No provision is made for repayment in scrip, but on the contrary, it was agreed that Mrs. Grider was to pay in money, dollar for dollar. This device is frequently resorted to by "hard-fisted" usurers, and is unquestionably usurious. *Gregory v. Bewly, 9 Ark., 22; Ford v. Hancock, 36 Ark., 248.*

Another item in said last-named trust deed is an *open* account for plantation supplies, which was, in fact only, $1,729.50. To this was added 20 per cent., and 10 per cent. interest. This is usury on usury. If interest is charged on a bill of goods from date of sale, when the sale is made on time, it is usury. *85 Ark., 52.*

The Shoemaker deed of trust was paid in cotton. It was a sale of specific property for a specific debt, and the proceeds could not be diverted without the consent of Mrs. Grider in writing by an instrument of equal dignity as that of a deed. *Johnson v. Anderson, 30 Ark., 745; Hughes v. Johnson, 38 Ark., 285; Price v. Dowdy, 34 Ark., 285; Williams v. Williams, 11 Heisk., 95; Hooper, ex parte, 19 Vesey, 477; Whiting v. Beebe, 12 Ark., 428; Nolley v. Rodgers, 22 Ark., 227; Benjamin on Sales, 148.*

The law will not sanction any combination whereby more than 10 per cent. is exacted. *18 Ark., 456.* The act

of February 9, 1875, p. 146, is unconstitutional. *41 Ark., 331.*

O. P. Lyles & H. M. McVeigh, for appellees.

Usury is charging *unlawful* interest, or a *greater rate* than is allowed by law. *36 Ark., 484.* The *compounding* of interest is neither *usurious* nor contrary to law, as for instance:

A new note, with interest at 10 per cent., for several small notes, with interest calculated and included *is not* usury. *6 Ark., 463; 2 Parsons Bills and Notes, 423; 1 Cold., 223.* Nor a note for an account and 10 per cent. interest, with 10 per cent. interest from date. *36 Ark., 569.*

Six years' back interest added in face, is not usury. *4th Pick., 173; Tyler on Usury, 155.*

Our own courts compound interest in the rendering of their judgments and decrees, by giving judgment for the principal and interest to date of judgment, and then interest on the aggregate amount from the date of the judgment until paid.

Now, nowhere have appellants produced one particle of proof throughout the whole of their voluminous testimony to establish any usury in any of the transactions or items of indebtedness embraced in any of said six several trust deeds.

Compound interest is not usury. And the fact that Driver bought some of these claims from third parties, that went to make up his indebtedness, *at a discount*, certainly cannot taint his transactions with usury. See *Tyler on Usury, 126, 127; 2 Parsons on Bills and Notes, 426, 407.*

The only two semblances of usury made out by appellees in their whole case, are:

First—In the matter of the Sue J. McGavock and C. L.

Moore note (balance) for $133.32, that went into the consideration of the trust deed of September 14, 1880; and,

Second—In the matter of the 20 per cent. profit charged by appellee in the trust deed of April 19, 1881, for the advances made by him to the appellants.

Properly examined, however, neither of these transactions contain any usury. *Parsons on Bills and Notes, 407; ib., 132.*

As to the 20 per cent. profit on the goods charged, it was his *profit* for making advances and forbearance in selling on credit. It is not usury to sell goods on credit for a higher price than they would bring for cash and legal interest added. *36 Ark., 248; 8 Hump., 489.*

Mrs. Grider induced Driver to purchase the Edrington note and the Shoemaker, Joplin & Co. note. She must have known whether the notes were usurious or not. She encouraged Driver in the purchase, and if there was usury she concealed it from him, and she is therefore estopped. *1 Greenleaf on Ev., par. 207, 208 and 22; McLean v. Cutler, 5 Ark., 13; Walker v. Johnson, 13 Ark., 522, 533.*

BATTLE, J. This action was brought by appellants, Sue M. Grider and W. H. Grider, her husband, in the Mississippi circuit court, to restrain John L. Driver, as trustee, from foreclosing six several deeds of trust given by appellants on a large body of land in Mississippi county, to secure certain debts mentioned in the deeds.

1. Not usury.

On the 1st day of May, 1879, James D. Driver was the owner of five notes executed by Sue M. Grider, then Sue M. McGavock, to different parties and for different amounts. All of these notes were bearing interest, except one for the sum of $3,133.35, which was due on the 1st day of October, 1879, and bore 10 per cent. interest from maturity until paid. He loaned her $233. According to an agreement

made with her, he calculated the interest on all these notes then bearing interest down to the 1st day of May, 1879, and then added all the principals of the notes then bearing interest, and the interest so calculated thereon and the $233 cash loaned, and on the sum total thereof calculated interest at 10 per cent. from the 1st day of May, 1879, to the 1st day of May, 1881, and calculated the interest on the note for $2,133.35 from the 1st day of October, 1879, the day when it commenced bearing interest, down to the 1st day of May, 1881, and added this interest, and the $2,133.35, said sum total and interest calculated thereon, making the sum of $5,514.57; and Miss McGavock executed her note to Driver for this amount, due the 1st day of May, 1881, and bearing 10 per centum per annum interest from maturity until paid, and executed the first of the six deeds of trust to secure the payment thereof. This deed in trust and the note secured thereby were delivered to, and received and accepted by Driver in payment and satisfaction of the notes held by him, which were surrendered to Miss McGavock.

Not usury.

On the 17th day of February, 1880, James D. Driver held and was the owner of a note executed by Miss McGavock, now Mrs. Grider, to Stowell & Heintz for $224.40, bearing 10 per cent. interest from the 1st day of June, 1879, until paid. Miss McGavock was also indebted to Driver for cash loaned on the 19th day of September, 1879, in the sum of $225. He loaned her the further sum of $1,000, and paid for her $6 for conveyances made by her. He then calculated the interest on the Stowell & Heintz note, and the sums of cash loaned and paid, at the rate of 10 per cent., in the same manner he did in taking the first deed in trust, making the amount due thereon, on the 17th day of February, 1881, $1,628.59; and Miss McGavock executed her note for this amount, bearing date the 17th day

of February, 1880, due on the 17th day of February, 1881, and bearing 10 per cent. interest from maturity until paid, and executed the second of the six deeds in trust to secure the payment thereof. This deed in trust and the note secured thereby were delivered to Driver, and all the evidences of the indebtedness incorporated in the new note were by him delivered to Miss McGavock.

Not usury. On the 20th day of March, 1880, appellants borrowed of James D. Driver the sum of $2,500 for one year; agreed to pay him for the use thereof interest at the rate of 10 per cent. per annum, and executed to him their note for the sum of $2,750, the amount of the sum loaned and one year's interest thereon, due on the 20th day of March, 1881, and bearing 10 per cent. interest from maturity until paid, and executed the third of the six deeds in trust to secure the payment thereof.

Not usury. On the 14th day of September, 1880, James D. Driver held and was the owner of four other notes of Miss McGavock and one of W. H. Grider. These notes were executed to different parties and for different amounts. According to an agreement with appellants, he calculated the interest on these five notes in the same manner he did in taking the first deed of trust, making the amount due thereon, on the 1st day of January, 1882, $2,769.78; and appellants executed their note for this amount, bearing date the 14th day of September, 1880, due on the 1st day of January, 1882, and bearing 10 per cent. interest from maturity until paid, and executed the fourth of the six deeds in trust to secure the payment thereof, and delivered the same to Driver, which he accepted in satisfaction of the five notes then held by him, which he surrendered to appellants.

Appellants contend that the notes secured by the first four deeds in trust, in so far and to the extent appellants,

or either of them, thereby undertake to pay interest on the interest to accrue after the respective dates thereof, are void. They insist that while it is not usurious, according to the more recent decisions, to compound interest, provided the rests are not so frequent as to indicate an intention of evading the usury laws, the compounding must be upon interest already accrued; that the parties cannot stipulate that interest subsequently to accrue shall be compounded; that such stipulation is in the nature of a penalty, and will be deemed void in equity, and that the damages allowed by law for a failure to pay money when due is the lawful interest, and any promise to pay more than that is regarded as an extortion on the part of the creditor, and should be held invalid.

The statutes of this state expressly say: "The parties to any contract, whether the same be under seal or not, may agree in writing for the payment of interest not exceeding 10 per centum per annum on money due or to become due." *Mansfield's Digest, sec. 4733.*

In *Wallis & Bro. v. Lehman, Abraham & Co., 36 Ark., 569,* it was held by this court that a promissory note given for the aggregate amount of an account for advances and 10 per cent. interest thereon to date of the note, and bearing 10 per cent. interest from its date, is not usurious.

In *Turner v. Miller, 6 Ark., 463,* the plaintiff holding several small notes against the defendant, by agreement with him, calculated the interest due on each note, and adding it to the principal, took a new note for the whole sum, bearing 10 per cent. interest, and this court held that the new note was not a usurious contract.

In *Vaughan v. Kennan, 38 Ark., 114,* appellants executed their promissory note for $875, dated the 5th day of February, 1873, payable on the 1st day of September, 1874, and bearing 10 per cent. per annum interest from date, and

stipulated therein that if the interest was not paid annually, it should become principal and bear the same rate of interest; and this court held "that the note itself continued to bear interest at the rate of 10 per cent. after maturity as before, and that the unpaid interest due at maturity became interest-bearing at the same rate, together with the successive annual installments of interest as the failure to pay them occurred on each anniversary of the maturity of the note; not, however, so as to compound the interest on the amounts in default, which should each bear simple interest alone at the contracted rate."

In *Portis v. Merrill, 33 Ark., 416*, Portis was sued on a note executed by him to Merrill for $475.79, dated the 28th day of June, 1874, due on or before the 28th day of November, 1874, and bearing 5 per cent. interest per month from due until paid, and he endeavored to avoid the payment of the 5 per cent. per month interest by a plea in equity that it was an agreed penalty intended to stimulate him to pay the note promptly at its maturity; and this court held that this interest could not be avoided by any such plea. Chief Justice English, in delivering the opinion of this court, said: "It was a hard bargain, and the creditor may have been over-exacting, but appellant must abide by the face of his written contract, as we held in *Miller v. Kempner, 32 Ark., 573*. We cannot make new contracts for parties, or alter their plain meaning by construction. * * * * A sane man has no claim upon a court of law or equity to relieve him from a hard bargain, when it is voluntarily entered into, and no fraud is practiced upon him."

It is not proven that there was any fraud practiced upon appellants, or either of them, in the execution of the first four deeds of trust, and the notes respectively secured thereby. In the giving and taking the notes mentioned

interest was not compounded so often as to indicate an intention to evade the usury laws. The maker thereof had a right, under the laws of this state, to contract to pay any rate of interest not exceeding 10 per centum per annum on moneys due or *to become due.* The interest to accrue on these notes was as much money to become due as the principals. The note sued on in *Vaughan et al. v. Kennan, supra*, and the notes secured by the first four deeds in trust in this case, stand upon the same principle. The only difference is in the form of the contract. In one case it is stipulated that the interest when due shall become principal and bear 10 per cent. interest; and in the other case the interest down to the maturity of the notes is made parts of the principals and together with the principals bear 10 per cent. interest from the maturity of the notes. The effect in both cases is the same; and the notes in both cases are valid in law and equity.

2. Usury. Selling property on credit. When usurious.

On the 19th day of April, 1881, appellants executed to James D. Driver their note for the sum of $1,524, for an indebtedness then contracted by them with him and for corn before that time sold to them, dated the day of its execution, due on the 1st of January, 1882, and bearing 10 per centum per annum interest from date until paid; and Driver agreed to advance to them moneys, goods, wares and merchandise to the amount of seventeen hundred and sixty dollars during the year 1881. To secure this note and advances to be made they executed the fifth of the six deeds of trust.

Under his contract with appellants for advances, Driver furnished them with Mississippi county warrants to the amount of $377.31, worth at the time eighty cents on the dollar, and with supplies amounting in the aggregate, including 20 per cent. added to the cost thereof, to the sum of $1,352.27. Driver testified that it was agreed and under-

stood that he should be paid dollar for dollar in currency for the county warrants in consideration of his agreeing to wait until the end of the year for his pay; that he sold the county warrants to appellants at their face value on a credit; and that it was agreed he should be paid the costs and 20 per cent. thereon for the supplies; and that the 20 per cent. was added to pay him for his risk and trouble had and incurred in furnishing them. W. H. Grider testified that the difference between the value of the county warrants and the amount for which the same was issued was allowed as interest.

Appellants insist that the contracts under which these county warrants and supplies were furnished is usurious and void. Are they correct?

In *Ford v. Hancock*, *36 Ark.*, *248*, this court said:

"It is not usury for one who sells a piece of property on credit to contract for a higher price than he would have sold it at for cash. If the intention be, in fact, to sell on credit, he has a right to fix a price greater than the cash price, with legal interest added; but if the sale be really made on a cash estimate, and time be given to pay the same, and an amount is assumed to be paid greater than the cash price, with legal interest, would amount to, this is an agreement for forbearance that is usurious."

Mr. Tyler says:

"The rule is, therefore, well established by the ancient authorities, and the same is recognized at the present day, that where usury is disguised under a sale of merchandise, the property in the goods passes to the vendee, but the excess of price over the just value is considered as a premium for the forbearance of the debt, founded on a presumed loan of so much of the purchase money as is equivalent to the cash value of the commodity sold. It will be observed, however, that the object with which the person

taking the goods entered into the transaction was the immediate means of supplying his wants, and that the sale adopted was only colorable, and not in the common course of trade.

"The same rule applies to a sale or exchange of choses in action, or credit, or where a part only of the consideration is a transfer of chattels, when the real object is a loan of money, although, in fact, no money is received by the borrower. The law, looking at the substance of the transaction, converts the substitute agreed upon by the parties into money according to its cash value. So that, in every instance where the object of the parties is a loan of money, and something else, under the form of an exchange or sale, is substituted for it, the principal of the loan, and consequently of the debt contracted by the nominal vendee, will be the value in money of the substitute received by him; and any consideration paid or reserved to the vendor beyond that will, in general, be considered as interest for its forbearance; and, if exceeding the legal rate, will be regarded as excessive and usurious." *Tyler on Usury, 300.*

Driver was a planter. He kept plantation supplies in his dwelling and smoke-house to sell to his employes. He did not keep them to furnish planters. He, however, sometimes sold to persons other than his employes, but this was not his business. He was not a merchant and did not hold himself out to the world as such. He was a man of considerable property; had money to invest in good notes, and sometimes loaned it. He had loaned appellants various and large sums of money on several occasions. He was to purchase the goods furnished appellants as they needed them. It was not expected that, in furnishing them, he would do more than order and pay for them. He ordered them from parties in Memphis and St. Louis, and they were shipped directly to appellants. The bills were

sent to Driver. The real effect of this transaction was, that appellants borrowed the amount paid for the supplies and agreed to pay him 20 per cent. for the use thereof for a period of time less than one year. The manifest intention of the parties to this merchandise transaction, as shown by the whole evidence and the dealings of Driver and appellants, was to borrow and loan money, under the disguise of a pretended sale of merchandise, at a greater rate of interest than 10 per cent. per annum. The same is true of the county warrant transaction. The preponderance of evidence sustains Grider's statement and understanding as to that.

3. SAME: Relief in equity.

But "he who seeks equity must do equity." Upon this principle it is well settled that one who goes into a court of equity for relief against a usurious contract can obtain none, except on the condition he pays the principal and legal interest. *Pickett v. Merchants National Bank of Memphis, 32 Ark., 346; Anthony v. Lawson, 34 Ark., 628.* Appellants in this case will, therefore, be required to pay eighty cents on the dollar for the county warrants and 6 per cent. interest on the value thereof at eighty cents on the dollar from the time the same were furnished, and the amount paid for the goods and 6 per cent. interest from the time when Driver paid for them.

Shoemaker, Joplin & Co. were commission merchants, having an office and doing business in the city of Memphis, in the state of Tennessee. Miss McGavock was the owner of a large plantation and following the occupation of a planter in the county of Mississippi, in this state. During the year 1878 Shoemaker, Joplin & Co. furnished her with plantation supplies and advanced her moneys. She shipped to them a portion, if not all, of her cotton crop of that year. On the 19th day of April, 1879, in the city of Memphis, they had a settlement of accounts, and for the balance

due Shoemaker, Joplin & Co. she then and there executed a note to them, giving the same for the sum of $2,375.89, due on the 1st day of January, 1880, and payable at Osceola, Arkansas, and Shoemaker, Joplin & Co. agreed to furnish and advance to her, during the year 1879, moneys and plantation supplies to any amount she might desire not exceeding one thousand dollars, and she agreed to ship to them her cotton crop of 1879; and to secure this note and future advances she executed the sixth deed in trust. They continued to advance moneys and supplies to her, during the year 1879, and she shipped to them a portion of her cotton crop of 1879. On the 11th day of September, 1880, they had a settlement, and it was ascertained that she was indebted to Shoemaker, Joplin & Co. on account, in addition to the note for $2,375.89, in the sum of $110.54, for which appellant W. H. Grider executed his note, due the 15th day of December, 1880, and bearing 6 per cent. interest from date. James D. Driver purchased both the notes executed to Shoemaker, Joplin & Co. after the maturity of the larger and before the maturity of the smaller. The smaller note was incorporated in the note secured by the fourth deed in trust.

Appellants insist that the accounts of Shoemaker, Joplin & Co., settled by the notes executed to them, were usurious on account of illegal commissions and interest charged therein; that the proceeds of the sale of the cotton of 1879, shipped to Shoemaker, Joplin & Co., should have been appropriated to the payment of the note for $2,375.89 and the earliest items of the account of Miss McGavock with them, instead of appropriating them entirely to the payment of the account, so far as they would extend, as was done; and that the appropriation made, as it should have been, would have satisfied the sixth deed of trust, the pro-

ceeds being large enough to pay the indebtedness secured thereby.

4. Laws of other states. Presumption as to.

The accounts of Miss McGavock with Shoemaker, Joplin & Co. were made and contracted in Memphis, in the state of Tennessee, and their validity and the amounts due thereon depend upon and are determined by the laws of Tennessee. *State v. Carl & Tobey, 43 Ark., 353; Parsons Oil Co. v. Boyett, 44 Ark., 230; and Jones v. McLean, 18 Ark., 456.* There was no evidence introduced to prove what the laws of Tennessee are or were. In many cases it will be presumed that the laws of a foreign state, nothing being shown to the contrary, correspond with our own; but this presumption should not be indulged in when our laws impose a penalty or work a forfeiture, as in the case of usury. Our statute of usury is highly penal. It forfeits the entire debt, and did when these accounts were made. We are not, therefore, to assume that the laws of Tennessee correspond with our own, and visit the transaction with the same penal consequences. On the contrary, if the appellants intended to avail themselves of the benefit of the Tennessee statute of usury, they should have alleged in their complaint that the accounts were usurious by the laws of Tennessee, and should have sustained this averment by proof at the hearing. As the case now stands, we must assume that the accounts were not usurious. *Hull v. Augustine, 23 Wis., 383; Cutler v. Wright, 22 N. Y., 472; Greenwade v. Greenwade, 3 Dana, 497; and Forsyth v. Baxter, 3 Ill., 9.*

Appellants lost the right to have the proceeds of the sale of the cotton of 1879 appropriated in any particular manner, by the settlement made with Shoemaker, Joplin & Co., by the execution of the note for the balance of $110.54 found due on said settlement, and incorporating that note into another and securing the same by a deed in trust.

The decree of the court below is reversed, and this cause is remanded, with instructions to the Mississippi circuit court to enter a decree herein dissolving the injunction granted in this suit, except in so far and to the extent it inhibits and restrains the sale of lands under the fifth deed of trust to pay any amount for county warrants and goods, wares and merchandise in excess of eighty cents on the dollar on amount of county warrants furnished appellants and 6 per cent. interest on the value thereof, estimating it at eighty cents on the dollar, from the time Driver furnished it to appellants, and in excess of the amount paid by Driver for the goods which he furnished to appellants and 6 per cent. interest thereon from the date of the payment thereof, and making the injunction perpetual as to such excess and forever restraining the collection thereof; and to render judgment against James D. Driver, one of the appellees herein, for one-sixth of the costs of the court below and against appellants for the remainder thereof. Judgment will be rendered here against James D. Driver for the costs of appeal.

St. Francis County v. Lee County.

1. Practice in Supreme Court: *When judgment of trial court presumed right.*

Where all the facts are not before the appellate court, the presumption is that every fact susceptible of proof which could aid the appellee's case was established by the evidence.

46 67
58 401
46 67
74 553

APPEAL from *Lee* Circuit Court.

Hon. M. T. Sanders, Circuit Judge.

Weatherford & Estes, Sanders & Husbands, for appellant.

J. P. Brown, J. M. Hewitt, for appellee.

COCKRILL, C. J. St. Francis county instituted proceedings in the manner pointed out by the act of March 17, 1873, which created Lee county, to ascertain and fix the *pro rata* of the indebtedness of the old county to be borne by the new, for the territory derived by the latter from the former. The demand of St. Francis was resisted, and the matter went by appeal into the Lee circuit court, where judgment was rendered adjusting the matter to the satisfaction of both counties, except as to the railroad debt of the mother county. As to that, judgment was rendered in favor of Lee, the judgment record reciting that the cause was submitted to the court upon the pleadings and evidence, and that the court found the fact to be that no portion of the indebtedness of St. Francis county arising upon the subscription to stock, or the issue of bonds to the railroad, was a debt of Lee county. As the sixth section of the act provides that Lee shall share the burden of the debt of the mother counties existing at the date of its creation, the finding of fact set forth in the judgment was tantamount to finding that St. Francis was not indebted on the account stated at the time Lee was created.

After the court had made a special finding of facts and declared the law thereon, but before judgment was entered, the counsel for St. Francis county filed a motion asking for time to bring in additional proof. The court refused to grant the request, the judge stating to counsel in doing so, that if the evidence of the facts stated in their motion were before him, the court would adhere to its conclusions upon the law of the case. St. Francis county brought this motion upon the record by bill of exceptions, and set forth the action of the court above recited. The bill of exceptions contained none of the evidence referred to in the judgment, and no reference is made to it; it contains no finding of facts, no declarations of law, no motion for a

new trial, no exception saved to any ruling of the court except as to the motion first mentioned.

The court had jurisdiction of the subject-matter and of the parties, and no error appears upon the face of the record proper; nothing is therefore presented for our consideration except the refusal to grant the appellant further time to present testimony. *Smith v. Hollis, ante, 17*, and cases there cited; *Hall v. Bronville, 36 Ark., 491.*

It is not contended that the court abused its discretion in overruling this motion, but it is argued that the judge treated the case as though the omitted evidence had been actually introduced, and the facts stated in the motion embodied in the findings of fact made; and that we should consider it in that light. If we should conclude that this was the intention of the circuit judge, and should adopt the practice indicated, it would not aid the appellant's case.

We cannot presume the new evidence offered covered the entire ground of the proof in the case. It is not pretended that it does, and if the matter presented by the motion were treated as proved, the presumption would still prevail that the judgment was sustained by the evidence. Where all the facts are not before the appellate court, the presumption is that every fact susceptible of proof in the proceeding sought to be reviewed which could aid the appellee's case, was established by the evidence. *McKinney v. Demby, 44 Ark., 74; Mansf. Rev. St., sec. 5160 and note (h. h. h.); Hague New Trial and App., p. 685.*

Affirm.

46 70
55 569
46 70
f68 258

CURTIS & LANE v. FLINN, TRUSTEE.

1. MORTGAGE: *Certainty in description of debt.*

Though usual, it is not necessary that a mortgage state the amount of the debt to be secured, or that it is evidenced by a note or any other instrument. If it contains a general description, sufficient to embrace the liability intended to be secured, and to put a person examining the records upon inquiry, and to direct him to the proper source for particular information of the amount of the debt, it is sufficiently certain.

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

Geo. Sibley, for appellants.

First—The mortgage is void for ambiguity and uncertainty in the description of the place where the cotton was to be grown and the indebtedness to be secured. It was only intended to secure, and only secured, the $100 in supplies to be advanced, and not previous indebtedness. Haley certainly *had the right*, and did elect, to appropriate the proceeds of the two bales of cotton to the payment of the mortgage, and having tendered the balance, the lien is extinguished. *2 Pars. Cont. (2d ed.), 141–3 and notes; ib. (6th ed.), 632 and note "y," 633, note "e," 631, note "w;" 26 Ark., 513; 32 ib., 665; 28 ib., 440; 30 ib., 745; 41 ib., 70–496; Smith Merc. Law, 668.*

John C. & C. W. England, for appellee.

The testimony shows that the two bales were to be applied *on account* and not on the mortgage debt. The appropriation by the debtor must be made at the very time of payment, and he must state the particular debt to which

he desires the payment appropriated. If he fails to do this, the law appropriates it, in the absence of an appropriation by the creditor, to the first items of the account. *30 Ark., 745; 33 ib., 285.*

The mortgage sets out that Haley is justly indebted to Stallings & Hunt, and *exclusive of the aforesaid indebtedness*, etc., and was intended to secure the antecedent debt as well as future advances, and is sufficiently certain and definite to secure both.

It is not necessary to set out the amount to be secured. If the description is definite enough to put one on inquiry and direct him to the proper source to obtain the necessary information as to amount secured, it is sufficient. *Jones Ch. Mort., sec. 86.* This will secure advances beyond the amount limited, if necessary, as between the parties. *Ib., sec. 94; 32 Ark., 645.* Also as against any other person unless they show an intervening right or lien.

The description of the property mortgaged is sufficiently definite if third parties, by inquiry, can ascertain what is included and intended to be conveyed. *Jones Ch. Mortg., secs. 55 and 69.*

COCKRILL, C. J. This is a contest between two mercantile firms over a bale of cotton. One Robert Haley mortgaged the entire crop to be raised by him on a given farm during the year 1883 to Flinn as trustee for the benefit of Stallings & Hunt, merchants. Haley was indebted to Stallings & Hunt upon a running account for supplies in the sum of $60 or $65, when he executed the mortgage in May of 1883. Stallings & Hunt furnished supplies to Haley for the year, their account aggregating one hundred and ninety odd dollars. He delivered two bales of the mortgaged cotton to them with instructions, as he testified, to credit the proceeds on the mortgage debt. After this, he tendered to

Stallings & Hunt the amount in cash he understood to be due for advances made by them after the mortgage was executed, and demanded the surrender and satisfaction of the mortgage. This was done upon the advice of the appellants, to whom he was also indebted, and whose theory was that the mortgage did not cover the indebtedness due at the time of its execution, and that the payment and tender would discharge the lien. Stallings & Hunt declined to surrender the mortgage; the appellants purchased the bale of cotton, the trustee recovered it in an action of replevin against them, and they appealed.

The mortgage was properly acknowledged and recorded, and the amount due under it after deducting the credits and the amount tendered by the mortgagor, was greater than the value of the bale of cotton, provided the debt due at the time of its execution was secured by it. The amount of this debt is not specified in the mortgage. The object of the mortgage is described in the following language: "Whereas, the said Robert Haley is justly indebted to the mercantile firm of Stallings & Hunt, and, exclusive of the aforesaid indebtedness, the said Stallings & Hunt may make advances to the said Robert Haley in money, goods or supplies during the present year to the amount of $100; and the said Robert Haley, being desirous of securing the full and prompt payment of what he now owes or may hereafter become indebted to the said Stallings & Hunt, this conveyance is now made."

1. MORTGAGE: Description of the debt.

It is usual for the mortgage to set forth the amount of the debt to be secured and to recite that it is witnessed by a note, a stated account or other evidence of debt, but the neglect to do either or both does not necessarily invalidate the mortgage security. If the mortgage contains a general description, sufficient to embrace the liability intended to be secured and to put a person examining the records

upon inquiry, and to direct him to the proper source for more minute and particular information of the amount of the incumbrance, it is all that fair dealing and the authorities demand. *1 Jones Mortg., secs. 70, 343–4; Jones Chat. Mortg., sec. 86; Herman ib., sec. 57; Carnall v. Duval, 22 Ark., 136; Jarrett v. McDaniel, 32 ib., 598; Fetes v. O'Laughlin, 62 Iowa, 532; Lashbrook v. Hathaway, 52 Mich., 124; Michigan Ins. Co. v. Brown, 11 ib., 265; Page v. Ordway, 40 N. H., 253; Machette v. Wauless, 1 Col., 225.*

Enough is given by the mortgage here to satisfy this rule as to the account subsisting at the time the mortgage was executed, as well as to the indebtedness thereafter contracted to the amount of $100 at least. It becomes wholly immaterial then how the credits are appropriated, as the balance due upon the mortgage debt will be greater than the value of the cotton in dispute. The right to maintain replevin under the circumstances is not open to dispute in this state.

The appellants were not prejudiced by the judgment or any ruling of the trial court, and the judgment is affirmed.

BRIDEWELL v. MORTON, COLLECTOR.

1. TAXES: *Lien of on personal property.*

   The taxes assessed on personal property are a lien on the property which follows it into whosesoever hands it may be found, without regard to the ownership when assessed, or when seized for sale. But the taxes of each class of personal property are a lien only upon the property of that class, the whole taxes of each class being a lien upon every item of that class.

2. INJUNCTION: *Against taxes in part illegal.*

   A sale of property for taxes which are illegal in part will not be enjoined where there is no offer to pay the part which is legal.

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

C. W. Cox, for appellant.

First—The court of chancery had jurisdiction, and once having taken jurisdiction, will retain it and enjoin the sale of personal property. *30 Ark., 128; Mansfield's Digest, sec. 3731; 34 Ark., 603; 39 Ark., 412; 38 ib., 271; 98 Ill., 205; 105 ib., 224; 47 Conn., 294.*

Second—No lien is given by the statute on particular articles for the specific tax on such article. The statute is silent on the subject. *Sec. 5712, Mansfield's Digest.* No lien can exist for the payment of taxes unless expressly given by statute, and such a statute is strictly construed. *3 Metc. (Ky.), 148; 27 Cal., 613; 9 Pick., 412; Cooley Tax, 202.*

Personal property is listed in a lump (*Mansfield's Digest, sec. 5620*), and there is no specific lien on any specific article for the tax thereon. See *98 Ill., 216; 23 Ill., 420; 27 Pa. St., 49.* An innocent purchaser then takes the property discharged of the lien, or at least if a general lien attaches no method of enforcing it is pointed out. The lien itself can give no power to enforce the lien, and there can be no right to distrain unless the statute confers that authority. *7 Wait Ac. and Def., 215; 3 Metc. (Ky.), 148.*

Under *sec. 5746, Mansfield's Digest*, the property levied upon must belong to the party owing the taxes. *23 Ill., 419; 7 Hun. (N. Y.), 371.*

See also *secs. 5751-4-6.* No mention is made of following the property into the hands of third persons, but the intention is to follow the person owing the taxes and distrain any property *belonging to him.*

In this case no lien was created, as the listing, assessment and equalization and levy of taxes were illegal. *1 McCrary, 1; 6 Wheat, 119; 9 Cranch., 64; 4 Pet., 349; 4 ib., 403; 16 How., 618; 4 Wheat., 77; 4 McLean, 213; Hilliard on Tax, 291.*

COCKRILL, C. J. The appellant sought to restrain the collector of taxes for Cleburne county from selling a portable engine, boiler and saw mill, which had been seized for overdue taxes. It is alleged in his complaint that this property was listed for taxation in the years 1882 and 1883 as personal property by one Smith, who was then the owner of it; that some time in the year 1883, Smith, who had not paid the taxes charged upon his personal property, sold the mill, engine and boiler to a firm of merchants, from whom the appellant purchased without knowledge of the fact that Smith's taxes were unpaid; that Smith had also listed other personal property for taxation in the same years, and that the taxes charged against him for those years on account of personalty amounted to the sum of $90, which amount included the taxes charged upon the property owned by the appellant and described above; that in the spring of 1884, after the time for paying the taxes of 1883 had expired, the collector distrained the property described and was proceeding to sell it to pay the full $90 charged against Smith.

The court, after issuing a temporary restraining order, sustained a demurrer to the complaint and dismissed it for want of equity.

1. Lien of taxes on personal property.

It is contended for the appellant that the state has no lien for taxes upon personal property in the hands of a purchaser from the person to whom the property was assessed; but that if such lien exists each specific article

is liable only for its due proportion of the taxes, and that no summary remedy is given for its collection.

Conceding the jurisdiction of equity to interfere by way of injunction in this class of cases under *section 3731, Mansfield's Revised Statutes*, we may consider the points stated.

The right of the state to any lien under the case presented and the power of summary enforcement of it must be prescribed by statute. It does not exist otherwise. *Crawford v. Carson, 35 Ark., 565, 579.*

The right to the lien upon personal property is found in the following provisions of the revenue law: *Sec. 5712, Mansfield's Digest:* "Taxes assessed upon real or personal property shall bind the same and be entitled to preference over all judgments, executions, incumbrances or liens whensoever created, and all taxes assessed shall be a lien upon and bind the property assessed from the first Monday in February of the year in which the assessment shall be made, and shall continue until such taxes, with any penalty that may accrue thereon, shall be paid. *Provided*, that as between grantor and grantee said lien shall not attach until the first Monday in July in each year."

Ssc. 5714: * * * "The taxes shall be a charge upon the real and personal property taxed, and when sold shall vest the title in the purchaser without regard to who owned the land or other property when assessed or when sold."

After so clear a declaration that taxes are a charge upon personal property, and that the lien thus created can be discharged by payment alone, the intention of the legislature to except any one, however innocent his purchase, from its operation, must be found in the act itself. The courts can engraft no exception upon the statute. If the lien was not intended to bind the property in the hands of whomsoever found, the provisions were unnecessary as far as they relate to personalty, for other provisions of the

statute authorize the distraint of any or all of the personal property owned by the delinquent at the time of seizure, regardless of the fact whether it was ever assessed or taxed. If it was not the design of the statute to enable the state to follow this class of property, wherever found, why is the lien made to relate to the first Monday in February, when the tax is not due until October? Why is the provision inserted for a sale without regard to ownership at the time of sale? Besides this, the proviso to the first of these sections contemplates that, in the absence of an agreement between the parties, the vendee purchasing before the first Monday in July is under the legal obligation to pay the taxes, or a part of them in any event, that are a charge upon the property purchased, or at least shall make no claim upon his vendor for indemnity. *Crowell v. Packard, 35 Ark., 348.* It is apparent that when the lien attaches it is paramount and remains a charge without regard to change of ownership. *2 Desty Tax, p.p. 732, 739; State v. Rowse, 49 Mo., 586; Anderson v. State, 23 Miss., 459, 475.*

In the creation of the lien the statute makes no difference in terms between real and personal property, but it is elsewhere expressly provided that each tract of land is separately responsible for the taxes due upon it and no more. No similar provision exists in regard to personal property, and the confusion of terms used in declaring the lien does not leave it clear whether the legislature intended to extend the lien for all the taxes due for personalty from an individual to all the personal property listed by him, or to give it a more restricted extent. It is declared that "*taxes assessed* upon real or personal property shall bind the same;" and again, "all taxes assessed shall be a lien upon and bind the property assessed."

To assess property is simply to place a value upon it. To assess taxes is to fix or settle an amount to be levied or raised upon the property. *Valle v. Fargo, 1 Mo. App. R., 344.* Now the statement or list of personal property which the statute requires the tax payer to furnish the assessor must distinctly set forth the several classes of property specified in the statute with the value of each class; as so many horses, so many neat cattle, so much merchandise, etc., with the value of each class. *Mansf. Rev. St., sec. 5620.* These classes, with the value of each, are carried forward into the tax-books by the clerk. He states the total valuation of each individual's personal property and the aggregate only of his personal taxes; and if we are to regard this sum as the taxes assessed upon the personal property as a whole, then the lien for the whole tax would extend to each item of property in any given list. But this construction would burden personal property with secret liens to an extent to be abhorred, and would be a restraint upon the free exchange and alienation of personal property that ought not to be drawn from the statute, when the meaning is not clearly manifested. We are inclined to the view that the amount is assessed in gross by the clerk for the convenience of the collector merely in collecting and receipting for taxes in the ordinary mode. Property is taxed according to its value by a uniform rate, and the amount of taxes assessed upon any particular piece of property when its value is shown, is found by multiplying the value by the rates of taxation. If then the taxes are a lien upon the property as it is assessed or valued, as seems to be contemplated in the second provision last above quoted, we must look to the *assessment of the property* for the extent of the lien. As each class, whether comprised of one or more articles or items, is valued as a whole, the taxes assessed upon this value are the extent of the lien or

charge upon the class; but the taxes being assessed upon it as a whole, each several part is liable *in solido* for the taxes of the class to which it belongs, just as they would be if all were included in a mortgage or condemned by decree of court. The intent of the legislature to give the lien this extent is clear. To seek to limit it further and confine it to each article as though assessed and taxed alone, would lead to inextricable confusion. The officer seeking to enforce the lien could not segregate a part from the whole and determine for himself its proportion of the assessed value. In the absence of an express declaration to that effect, we cannot presume the legislature designed to impose such difficulties upon the collection of the revenue. *Hill v. Figley, 23 Ill., 418; Binkert v. Ry., 98 ib., 205; Mesker v. Kotch, 79 Ind., 68.*

After the 10th of February, in any year, the collector is authorized to proceed to collect the taxes due upon personal property by distraint. Any personal property belonging to the delinquent tax payer is liable to be seized and sold for taxes due upon personalty. *Sec. 5764, Mansf. Rev. St. Section 5713* provides that no property shall be exempt from distress "for taxes due thereon," and the section following, which is quoted above, contemplates a sale of the property upon which the tax is a charge without regard to who owns it at the time of sale. The process of distraint is in the nature of an execution; any property to which the lien of the taxes due attaches may be taken in satisfaction, just as the officer holding an execution may take property to which the lien of the judgment or of the execution attaches, regardless of the claim of ownership.

2. Injunction when taxes illegal in part.

The appellant was entitled to no relief upon the case made. We have not overlooked the allegations in the complaint, that the lien for taxes for one of the years above mentioned did not attach because of irregularities in the

assessment and levy for that year. The demurrer confesses the allegations, it is true, but if this would otherwise entitle the appellant to relief, it cannot affect the correctness of the decree rendered. No attack is made upon the regularity of the taxes for the other year named, and no offer or tender of the taxes which were a valid charge was ever made. This is sufficient ground for the denial of relief upon the maxim, that "he must do equity who seeks it." *Worthen v. Badgett, 32 Ark., 496; Mesker v. Kotch, 76 Ind., supra.*

Affirm.

46 80
54 202
46 80
65 607

MEYER V. ROBERTS.

1. STATUTE OF FRAUDS: *Parol contracts not to be performed in a year.*

A parol contract for personal services for a longer period than one year is within the statute of frauds and no action can be maintained on it; and if the employe enter upon its performance and is afterwards discharged, the employer is liable only for his wages for the time he served. And it makes no difference that a contract for more than a year is subject to determination sooner on a given event.

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

J. M. & J. G. Taylor, for appellant.

The contract sued on was made prior to October 13, 1882, and was for the balance of 1882 *and* the entire year of 1883. No contract is alleged to have been made at any time in 1883, and being in *parol*, was within the statute of frauds. *13 R. I., 480; 55 Mo., 97.* This distinction is clearly settled: While if performance of the contract within a year is possible, it is not within the statute, yet if it was possible to

defeat or end the contract January 1, 1883, which was within one year from the making thereof, it was not on that account without the statute and valid. No contingency can take a case out of the statute unless it be of a nature to accomplish instead of defeating it. *2 Harr., 27; Smith's Lead. Cas., 432–436; 96 U. S., 424.* It was possible for Roberts to end the contract on January 1, 1883, but it was never possible for him to perform it within a year from October, 1882. See *16 Come., 246; 1 B. & Ald., 723; 1 C. U. & R., 20; 9 Bush., 460; 2 Hilt., 116; 65 Me., 302; 11 East., 143; 11 Vt., 428; Wood Mast. & Serv., 371–2.*

The contract *ex vitermini* was only good to January 1, 1883. *L R., 9 Exch., 57; 8 C. B. N. S., 208; 2 Camp., 573.*

A discharged employe is not bound to accept employment of a different or more menial kind, but he is bound to accept the same employment at less wages, and his remedy is to sue for the difference. *Wood Mast. & S., 243, et seq.*

N. T. White and *U. M. & G. B. Rose*, for appellee.

First—The exceptions to instructions being general, they are not before the court. *28 Ark., 9; 32 ib., 223; 38 ib., 528; 39 ib , 337.*

Second—The contract sued on was not within the statute of frauds. It was a contract for hiring from year to year. The supervision, making and gathering of a cotton crop is one continuous act, embracing the entire year, and the plaintiff's employment was annual, though he was to be paid by the month. When he entered upon the task of controlling the plantation, a contract of hiring until the expiration of the year arose by implication of law. There was the same difference between the plaintiff's labor and

that of an ordinary domestic servant, that there is between the renting of a house in town and of a farm in the country. The seasons have nothing to do with the contract of the domestic servant or of the town lessee; and hence the presumption is that they hire or rent by the month. But a man who is employed to superintend a plantation, or a tenant who rents a piece of land for the purpose of raising a crop, impliedly, from the nature of the occupation, contracts for a year's service or a year's possession. It is always understood that managers of plantations are to be employed by the year. *Wood on St. Frauds, sec. 273; 4 Bing., 309.*

Third—While the discharged employe must seek employment, he is not bound to accept a mere pittance, and in no case is he bound to accept employment from the master who has wrongfully discharged him. He must use reasonable efforts to secure labor *elsewhere. Wood Master & S., sec. 125.*

OPINION.

SMITH, J. Roberts complained that, on the 13th of October, 1882, he had been employed by Meyer, as a manager of his plantations, for the remainder of that year and also for the following year, provided neither of the parties should object on the 1st day of January, 1883, to the continuance of the arrangement; that his stipend was to be $100 per month, besides being furnished with a house to live in and his horse to be fed at his employer's expense; and that he continued to serve without objection until the 1st of May, 1883, when he was discharged without cause, to his damage $600.

The answer alleged that the hiring was only from month to month, and set up the statute of frauds.

The jury returned a verdict of $400 for the plaintiff.

The exceptions to the charge of the court being general, not designating the objectionable portions, we confine our review to the sufficiency of the testimony to support the verdict, discarding all of the evidence adduced which tended to sustain the defendant's version of the contract.

Roberts testified that Meyer wished to engage his services for five years, but that he declined on the score of health to enter into so extended an engagement. The parties finally came to terms on the 13th of October, 1882. It was orally agreed that he should undertake the superintendence of the defendant's planting interests until the 1st of January ensuing, and that if his health permitted and the defendant was satisfied, he should continue in his employment for the year 1883, for the compensation mentioned in the complaint. When the 1st of January arrived, Meyer expressing no dissatisfaction and no communication or additional understanding having been had then or afterwards between them in relation to such employment, he continued to serve in the same capacity. In the latter part of April, Meyer, by letter, dismissed him from his service, assigning as a reason his inability to pay such high wages. Meyer paid him down to the 1st of May, but the plaintiff notified him that he considered himself hired for the year and that he stood upon his legal rights and the terms of the contract. Being thrown out of employment in the middle of the season, the plaintiff had been unable to obtain a place until the 10th of September, when he secured a situation at $75 per month. Another witness swore that, in the beginning of the year 1883, he had intended to propose to Roberts a co-partnership in farming, but received information from both the parties to this action that he was engaged for the year by Meyer.

1. STATUTE OF FRAUDS: Contracts for more than one year.

Sec. 3371 of Mansfield's Digest enacts that no action shall be brought to charge any person upon any contract that is not to be performed within one year from the making thereof, unless the contract or some memorandum, or note thereof, shall be made in writing and signed by the party to be charged or his agent.

The decisions upon this clause of the statute cannot all be reconciled. But ever since the case of *Peter v. Compton, Skinner, 353; S. C., 1 Smith's Lead. Cas., 8th ed., 614*, it has been considered settled that the statute applies only to agreements which appear from their terms to be incapable of performance, or such as the parties never contemplated should be performed, within the year. Consequently, where the duration of the agreement depends upon a contingency, as the death or marriage of one of the contracting parties, a note in writing is not necessary; for the contingency may happen, and thus the contract be fully performed, within a year from the time it is made. So a contract determinable at any time by either party, is a contract which is to last during the pleasure of the parties or so long as they are mutually satisfied.

But a contract for personal services to continue and hold the parties together for a longer period than one year is plainly within the statute. Thus, if at Christmas I orally hire a servant for a year, to begin from New Year's day, when he presents himself at the time appointed in fulfillment of that contract, I am not legally bound to receive him into my service; and if I do receive him, may afterwards discharge him without incurring any other liability than the payment of his wages for the time he actually served. *Bracegirdle v. Heald, 1 Barn. & Ald., 721 (4 E. C. L. R.), 342; Snelling v. Lord Huntingfield, 1 Cr. Mes. & Ros., 19; Hill v. Hooper, 1 Gray, 131; Tuttle v. Swett, 31 Me., 555; Sutcliff v. Atlantic Mills, 13 R. I., 480; Kelly v. Terrell, 26*

Ga., 551; Amburger v. Marvin, 4 E. D. Smith, 393; Nones v. Homer, 2 Hilton, 116.

Nor does it make any difference that the contract, if for more than a year, is subject to determination sooner on a given event. This is illustrated by the case of *Dobson v. Collis, 1 Hurl. & Nor. 81*, where a traveling agent was employed for two years, with a proviso that the contract might be determined on three months' notice. Pollock, C. B., stated that the object of the statute was to prevent contracts, not to be performed within the year, from being vouched by parol evidence, when at a future period any question might arise as to their terms, and that a contract was not the less a contract not to be performed within a year because it might be put an end to within that period. And Alderson B. observed: "When once the contract exceeds the year, the circumstance that it is defeasible will not make it other than a contract for more than a year. See the absurdity of holding otherwise; at the end of two years and a half one of the parties might claim a right to put an end to a parol contract for five years by giving three months' notice; but the very subject of dispute might be, whether or no he had a right to give such notice. That shows that this is a contract within the statute."

Here was an absolute agreement to take charge of the defendant's business from October 13, 1882, to the end of the calendar year; and a further conditional agreement for the year 1883, which might have been annulled by either party on the 1st of January, 1883. If not annulled, the agreement could not possibly have been performed within a year from the making of it.

Beeston v. Collyer, 4 Bing., 309 (13 E. C. L., 517), relied on by the plaintiff, is distinguishable. There a clerk had been hired by an army agent for a year, beginning on the 1st of March, but had remained in service for more than

twenty years. He was dismissed without cause on the 23d of December, and it was held that his salary must be paid until March. This was upon the ground that the original hiring having been by the year, and the parties having gone on for a long time without any new arrangement, the law would imply from the circumstances a fresh contract for the same length of time at the commencement of each year. But in the present case there was an express contract for the year 1883; and the law does not readily imply contracts between parties when they have covered the same subject matter by their express agreement,

Moore v. Fox, 10 Johns., 243, was an action by the minister of a church to recover from one of his members for two years' services as a minister. The proof was that the defendant, about six years before, had verbally promised to pay the plaintiff $2 a year, and had continued to pay at that rate, in semi-annual installments, until the last two years. And a recovery was allowed. But the action was brought on a bygone or executed consideration, and the statute did not apply. The plaintiff had continued to preach in the same church and to the same congregation. The defendant had enjoyed the benefit of his ministrations, although apparently he had not profited by them. The acceptance of a benefit, even under an invalid contract, obliges the party to pay for it.

There is, however, a case in *19 Hun., 234* (*Smith v. Conlin*), decided by a divided court, which, if correct, would lead to an affirmance of the judgment. In October, 1876, the plaintiff entered into a verbal agreement with the trustees of a school district to teach a school for the year, ending October 1, 1877, at a fixed salary, and for a further term of one year, at the same salary, to begin on the last-mentioned day, if no notice to the contrary should be given by either party, at least two weeks prior to that date. Such

notice not having been given, the plaintiff continued his services for a few weeks into the second year, when he was discharged. He claimed and was permitted to recover his salary for the entire year.

This is certainly contrary to the rule established in England by a long course of decisions, that an option to determine at any time a contract for a designated period exceeding a year, has no effect in taking the case out of the statute of frauds.

As the plaintiff's contract extended over a period of more than a year, and could not, in the nature of things, have been completed within a year from the time it was made, and as it was not manifested by any writing, there is no competent evidence to warrant the verdict.

Reversed and remanded for a new trial.

46 87
54 556
46 87
64 17

Texas & St. Louis Railway Co. v. Donnelly.

1. Evidence: *Relevancy of.*

Donnelly sued the T. & St. L. R. R. Co. for work done in the construction of the road under an alleged contract with the company. The company denied the contract, alleging that they had previously contracted with Hibbard for the construction of the road, and that Donnelly was sub-contractor under Hibbard; and on the trial, after proving by parol that they had contracted with Hibbard, they offered to read the contract as evidence, but the court refused it. *Held:* That the issue was whether they had contracted with Donnelly, and that the terms and stipulations of the contract with Hibbard were not relevant to the issue.

2. Same: *Same.*

Donnelly contracted by parol with the chief engineer of a railroad company to build two different sections of the road. Afterwards the contract for building one of the sections was reduced to writing and signed by Donnelly, in which it appeared that he was contracting with Hibbard, to whom the construction of the whole road had

been previously contracted by the company. When the original contract was made, the engineer did not disclose Hibbard as his principal; Hibbard paid for the construction of the section embraced in the written contract, and Donnelly sued the company for the construction of the other. The company claimed that the contract was with Hibbard, and not with the company, and upon the trial offered the written contract as evidence, but the court refused it. *Held:* That the written contract was not relevant to the issue—that a subsequently written contract could not control a parol contract previously made in regard to a different subject matter.

3. WITNESS: *Impeachment of.*

A witness may be impeached by introducing his pleading under oath in another case which is in conflict with his testimony.

4. CONTRACTS:

A contract for work is not void because the contractor has previously contracted with another party to do the same work. He only makes himself liable to both parties.

5. INTEREST: *When to be included in verdict.*

In an action upon an account where the prayer is for judgment for the amount of the account, "and for his cost and other relief," interest may be added to the amount found due, from the time it was payable to the time of the trial.

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

L. A. Byrne and *Barker & Johnson* for appellant.

The written contract with Hibbard should have been admitted in evidence. It was part of the *res gesta*, and showed the terms, specifications and conditions, and who were the contracting parties. *Wharton Ev., vol 3, sec. 1014, 15–16; Parsons Cont., vol. 2, 517–18–19; 18 Ark., 65; 1 Paige, 13; 8 Pick., 56.* The two contracts, as to terms and conditions, were one and the same. *7 Ark., 321; 1 Phil. Ev., 185, 201,* and note, and for the refusal of the court to admit it in evidence the judgment should be reversed. *2 Whart. Ev., secs. 1103 and 259.*

Stephens never had any authority to bind the company, but was acting for Hibbard. An agent cannot bind his principal beyond the scope of his authority. *Story Agt., secs. 147, 155, and note 165; 3 Ark., 227; 23 ib., 32; 52 Iowa, 633; 61 ib., 380.*

The contract with Hibbard to build the entire road should have gone to the jury, to show that appellant nor Stephens could have made a valid contract with appellee for the work, Hibbard having the entire contract. *Rowland v. Ry. Co., XL Am. and Eng. R. R. Cases, 47; 61 Iowa, 380.*

The answer to the garnishment was not germain to the contract of appellee, and was a matter in no way connected with this suit, and it was wholly immaterial what Stephens answered.

H. G. Bunn and *Montgomery & Hamby* for appellee.

First—There was no error in the ruling of the court below in excluding from the jury the written contract for the work north of Camden, for while a contemporaneous written contract about the same subject matter may sometimes be admitted in evidence to show the mere *specifications* of a verbal contract, yet it will not be admitted to show anything more—the parties and their contract—liability, or rather want of liability—as in this case sought to be shown by the defendant in court below, there being no controversy as to the specifications. *Byrd v. Bertrand, 7 Ark., 321.*

Second—The laws of Arkansas do not permit a railroad corporation to shirk responsibility for constructing and operating its road to the citizens of the state, by substituting an individual without her borders and the jurisdiction of her courts in its place. *Mansfield's Dig., secs. 5405, 5506, 5507.*

Third—The interests of a railroad company and of a contractor to construct its road are antagonistic, and so much so that the chief engineer of the one, whose duty it is to lay off, and measure, and examine the work to be done by the other, cannot consistently act as the agent of both in respect thereto. *Story on Agency, 3d ed., secs. 210, 212, 214.*

Fourth—It was notorious that Stephens was the chief engineer and agent for the company charged with the location, survey and construction of the road; and it does not appear that Hibbard, as a chief contractor, or as anything, was ever heard of in the regions through which this road was run, except among the favored few.

The plain truth is, Hibbard never cut any important figure as its agent in letting these contracts, and did nothing to lead the public to believe otherwise. It is therefore responsible. *Jacobson v. Poindexter, 4 Ark., 97.*

A principal cannot limit (and, of course, cannot altogether avoid) his liability by secret instructions (or secret arrangements) with his general agent. *Jacobson v. Poindexter, supra; Walker v. Skipwith, 33 American Decisions, 161; Lobdell v. Baker, ib., 35.*

The case of *Rowland et al. v. Central M. & A. R. Co. et al., 61 Iowa, 380*, cited in appellant's brief, as a case exactly in point, differs somewhat from the case now under consideration, in several particulars, as will be shown by the syllabus of the case which seems to be a correct one.

Cockrill, C. J. Donnelly sued the railroad company for work done by him in the construction of the road, under a contract made, as he claimed, with the company. As to whether there was a contract with the company, was the chief matter of dispute on the trial of this case, the company contending that the contract to build the road

through Arkansas had been let by it to one Hibbard, and that Donnelly had contracted with him to build a part of the road, and should look to him for payment.

1. EVIDENCE: Relevancy of.

The undisputed facts were that Donnelly entered into a contract with C. F. Stephens, who was the chief engineer of the railroad company, to do certain work on the line of the road east of Red river, and also certain other work east of Camden. The contracts were oral, and were entered into at one and the same time, and after the contract was let by the company to Hibbard to construct the entire line in this state. When the contracts with Donnelly were entered into, the engineer of the company who was in charge of the construction, and was letting contracts to build the road in sections, did not disclose Hibbard as his principal.

After work had begun under the oral contract on the line of the road east of Camden, the terms of this contract were reduced to writing, or more properly, the appellee signed a printed form in which Hibbard appeared as the principal contractor, and the appellee's contract by its terms is with him and not the company. No controversy arises about the work done under this contract. It was paid for, the appellee receipting to Hibbard for the money paid. Similar receipts were given by him for money received on account of work done under the Red river part of the contract. As far as this record discloses, however, the only active duty performed by Hibbard under his construction contract was to draw money from the president of the company for the purpose of causing it to be disbursed to contractors employed by the company's engineer.

The jury under direction of the court, made a special finding of facts which amounts to this; that Stephens, the company's engineer, was authorized by the company to let contracts for the construction of the road; and that

the company, and not Hibbard, had paid the appellee the money received by him on the contracts made with Stephens. They returned also a general verdict for the appellee, awarding him $4,514.68. As the motion for a new trial does not question the sufficiency of the evidence to sustain either the general or special verdict, it does not become necessary to inquire into the evidence upon any of the points specially found. They must be taken as established by the proof.

The company offered in evidence a contract purporting to be made between it and Hibbard for the construction of the road, the terms, conditions and specifications of which run through many pages of the transcript. The court permitted the company to show by Stephens, its engineer, that such a contract existed, but refused to let the contract itself be read in evidence. This is assigned as error.

Clearly the appellant was not prejudiced by the action of the court. The issue for the jury to determine was whether there was a contract between the company and Donnelly, and the terms and specifications of a contract between the company and some other party, did not tend to throw light upon that issue. The utmost that the company could claim to prove was the fact that a contract with another to build the road existed, as a foundation for proof that Donnelly's work was done under a sub-contract with the principal contractor. The company was permitted to show this much, as we have seen, and more than this would have tended to divert the minds of the jury from the issue.

The court excluded also the written contract entered into by Donnelly for the construction of the east Camden work.

2. Same. The agreement as to both pieces of work was in the first instance oral, and the parties agreed in their testi-

mony upon the trial, and the jury found specially, that the terms of the agreement for both pieces were the same. Afterwards the engineer and Donnelly saw fit to enter into a written agreement as to the east Camden work, but the Red river contract, about which the controversy arises, was left in parol. Upon no principle can it be said that a subsequently executed written contract should control and govern a parol contract previously entered into in regard to a different subject matter. But the appellant contends that the written contract was made in pursuance of the parol agreement, and that inasmuch as the former was between Hibbard and the appellee, it was a circumstance to show that the appellee had contracted with Hibbard in the first instance. The court permitted the company to show the fact by parol, and instructed the jury that this fact was to be taken into consideration in determining with whom Donnelly had contracted. This is as much as the appellant could have required if the contract had been read *in extenso* to the jury.

But if other reasons were wanting, the action of the court was right, because the contract was not offered in apt time. It was offered upon the cross-examination of the appellee, the plaintiff below, before the close of his evidence and before laying any foundation for its reception. No subsequent effort was made to put it in evidence, the appellant being satisfied apparently with introducing parol evidence as to the facts of the contract.

3. WITNESS: Impeachment of.

The appellee for the purpose of impeaching the statement made by Stephens, that all of the contracts for labor on the road were made by him for Hibbard, and not for the company, introduced an answer under oath made by Stephens on behalf of the company, in a garnishment proceeding against the latter, in which the company acknowledged itself indebted to one Nelson on account of work

done in constructing its road under one of Stephens' contracts. This was not error. The answer tended not only to contradict Stephens, but to show the scope of his authority.

4. Contracts with different parties.

The theory of the company seems to be that when it was proved that a contract had been made with Hibbard to build the road, the fact was established that the power to contract about the same subject matter was exhausted, and that any subsequent agreement entered into by it for the like purpose was void. If there was a binding contract with Hibbard, the company could not affect his rights under it simply by entering into a contract with another in reference to the same subject matter; but if the company saw fit to disregard the Hibbard contract, and enter into another with the appellee, the consequence would be not to enable the company to avoid the latter contract, but to render itself liable to Hibbard for a breach of the contract with him. No question arises between Hibbard and Donnelly, and the company cannot shield itself behind Hibbard for the purpose of avoiding liability incurred under a subsequent contract made with Donnelly. The jury, however, from their special findings, appear to have believed that the Hibbard contract was a sham, and determined the case, in a measure, on that hypothesis.

The case of *Rowland v. Ry., 61 Iowa, 380*, relied on by the appellant, does not sustain the position taken. That was an action by a contractor to get the benefit of the laborer's or mechanic's lien on the railroad, under the Iowa statute, and the question was whether the plaintiff was a contractor or sub-contractor, his rights depending upon the position he occupied in that respect. The company had let a contract to another to build the road, and the plaintiff afterward entered into a contract with an officer of the company to perform the work for which he

claimed the lien. The officer had no authority from the company to bind it by contract, and his action was never ratified or the contract adopted by the company. This is expressly stated in the opinion, and the judgment is made to turn upon the fact of the entire absence of authority in the officer to bind the company. The unavoidable inference is, that if the company had undertaken to clothe the officer with authority to act for it, the plaintiff would have been regarded as a principal contractor, notwithstanding the company had actually paid the first contractor for the work done by the plaintiff.

It is not necessary to note the charge to the jury in detail. The court instructed them substantially in accordance with the views above expressed.

5. INTEREST: When to be included in verdict.

The appellee's claim was based upon an account for $4,275, due some two years before judgment was rendered. He prayed judgment for this amount and for "his costs and other relief." The court directed the jury to add interest to the amount they might find due, from the time it was payable, under the contract, to the date of trial, and they brought in a verdict for $4,514.48. It is said that this is more than is claimed in the complaint. The complaint alleges that the amount was due and was unpaid, and the rule is that money due by contract shall bear interest from the time it is payable. *Roberts v. Wilcoxson, 36 Ark., 355.* The complaint contained all the data necessary to reach the conclusion arrived at by the jury. The contract was set out in it, the time when interest began to accrue was embraced within the issue, and the prayer for general relief was sufficient to indicate the intention to claim it. *Harrison v. Perry, 2 Bush. (Ky.), 101; Lane v. Glauckauf, 28 Cal., 288; Cassacia v. Phœnix Ins. Co. ib., 628; Green Pl. & Pr., sec. 677; Bliss Code Pl., sec. 165; Byrd v. State, 15 Ark., 175.*

In an action sounding in tort where damages are claimed *eo nomine*, the judgment cannot exceed the demand stated. See *Cohn v. Hoffman*, *ante*.

Affirm.

---

46 96
54 667

46 96
55 84
55 198

46 96
56 95

46 96
61 41
61 43

46 96
64 307
65 603

46 96
71 25

46 96
74 388
75 308
77 326
77 576

46 96
181 166

46 96
186 35

RADCLIFFE ET AL. v. SCRUGGS.

1. CHANCERY JURISDICTION: *Conferred by cross-bill.*

If to a bill in equity which contains no matter of chancery jurisdiction, the defendant files a cross-bill founded on matter clearly cognizable in equity, this supplies the defect of jurisdiction, places the court in possession of the whole case, and imposes the duty of granting relief to the party entitled to it,—the original and cross-bill being but one cause.

2. DONATION DEEDS: *As evidence of title*

Donation deeds are *prima facie* evidence of good title in the donees, and that the land they purport to convey had been regularly forfeited by the previous owners.

3. PRACTICE IN SUPREME COURT: *Allegata and probata must correspond.*

It would be unjust to parties to adjudicate their rights upon issues never made in the court below. A plaintiff cannot recover upon a case not made in his bill. The *allegata* and *probata* must correspond.

4. TAX SALES: *Power of legislature.*

The legislature cannot enact a statute which will transfer one man's land to another under the guise of a tax sale for non-payment of taxes when there has been no assessment or levy of taxes. Nor can it prescribe any period within which the owner must make his objections for such fundamental defects, he remaining in possession and being, in the instance supposed, in no default for not paying his taxes.

5. SAME: *Same.*

The legislature has power to cure any illegality or irregularity in a tax sale which consist in a mere failure to observe some requirement imposed, not by the constitution, but by the legislature itself, and the non-observance of which does not deprive the former owner of any

substantial rights. And it may limit the time within which objections for such failure must be made or be barred.

6. SAME: *Limitation of action against.*

The limitation prescribed by sec. 138, Act of April 8, 1869, to actions to test the validity of tax sales, begins to run from the day the property is stricken off by the officer making the sale. All technical objections to the sale not actually prejudicial to the former owner must be made in two years or be barred.

7. SAME: *Failure to make improvements.*

Upon the failure of a donee under a donation deed to make the required improvements on the land, it reverts to the state. And perhaps no individual can have such interest in the matter as to entitle him to be heard when he complains of the fraud against the state.

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

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

Mrs. Tate had a clear and undisputed title to an undivided fourth of the south half of the tract, claiming under her patent and tax deed. She was a tenant in common, and as such had a right to the possession. *Freeman on Cot. & Part., sec 87; 1 Bouv. Inst., sec. 1881; 1 Wash. R. P., 4th ed., 656.* Being thus rightfully in possession she could not maintain ejectment, and must sue in equity. *36 Cal., 321.* If the court has jurisdiction for one purpose, it will proceed to do full justice as to all questions in the case. *14 Ark., 50; 30 ib., 278; 36 ib., 612; 37 ib., 286.*

The appellee claiming under a tax title, could not acquire the rights of an innocent purchaser. *Cooley on Tax, 328.* Mrs. Tate's title is ample to secure the entire tract unless Scruggs has acquired a better one through the donations.

No evidence was introduced but the commissioner's deed, and it was *prima facie* evidence of a good title. *Mansf. Dig., sec. 530; 18 Ark., 423.*

The donation deeds were void, because the forfeitures were void, for the following reasons:

First—The assessments were not verified. *53 N. Y., 435; Burroughs Tax, p. 232.*

Second—The delinquent list was not sworn to. *Blackwell Tax Tit., 4th ed., 204, marg. p. 181; 4 McL., 138; 9 Ohio, 93.*

Third—The donations of the Kerr's were each for an undivided interest. *Sec. 4249, Mansf. Dig.*

Fourth—The requisite improvements were not made. *Sec. 4255, ib.; 24 Ark., 37; 40 ib., 244; 43 ib., 399.*

Fifth—The donees never resided on the lands. *Sec. 4253, ib.*

Sixth—Two donations were made on one improvement.

Seventh—Until the swamp land patent issued to Mrs. Tate, the title was in the state, and the land not subject to taxation. *17 Ark., 440; 31 ib., 279.*

There is no question of limitation. Scruggs was only in possession about a year before suit, and possession is necessary to set the statute running. *43 Ark., 520.* Besides, the statute does not run against a co-tenant. *1 Wash., R. P., 4th ed., p. 656, marg. p. 417.* And until the issue of the patent to Mrs. Tate, the title was in the state, and the statute did not run. *12 Wall., 93;* and Mrs. Tate is a married woman. *42 Ark., 305.*

Ratcliffe & Fletcher for appellee.

The evidence shows clearly that the Kerrs and Scruggs were in actual open and notorious possession. No actual residence necessary. *27 Ark., 47; 30 ib., 640; 34 ib., 598; 1 Peters., 41;* and their possession extends to the bounds called for in their deeds. *27 Ark., 95; 34 ib., 547; 40 ib., 243.*

A court of chancery has no jurisdiction to remove a cloud or quiet title where the lands are held adversely, nor will an injunction be granted to restrain a mere trespass. *11 Ark., 304; 24 ib., 97; 27 ib., 233; 30 ib., 643; ib., 579.*

If Mrs. Tate had the better title, her remedy was ejectment. *31 Ark., 353; 36 Cal., 249.*

The deed from Winston does not attempt to convey the land in controversy. Scruggs was not a party to the suit to devise Winston's title, and not affected thereby—he was in possession and had valuable improvements thereon when the suit began.

The assessor's certificate to the list was sufficient. *Gantt's Dig., sec. 5221.*

Whether the lands were regularly forfeited or not, or the deeds were regular or not, does not affect Scruggs' title under the limitation of two years. The statute was not to protect *valid* sales and *valid* titles. *Gantt's Dig., secs. 4117, 5217; 20 Ark., 508; ib., 508; 22 ib., 178.*

There is nothing in the statute prohibiting the donation of undivided interests, or the making of joint improvements. If there were, *the state alone could complain.* Even if the donation deeds were void, Scruggs has title by seven years' adverse possession. *12 Ark., 822; 34 ib., 547.* The statute began to run when Kerr took possession, and the statute ran against Radcliffe as trustee and the *cestui que trust. Hill on Trusts, marg. p. 504; 2 Perry on Trusts, secs. 858–9, et seq.; 1 Metc. (Ky.), 498; 3 ib., 167; 17 B. Mon., 381; 31 Ark., 364.*

No residence on the land was required. *Gantt's Dig., sec. 3894–5.*

SMITH, J. The bill states that Mrs. Tate, through Radcliffe, her trustee, is the owner of and in the possession of the west half of east half of section 5, township 1 north,

range 10 west. That she claims title through the following chain of conveyances: 1. Certificate of purchase from the state to John A. Winston, dated November 18, 1856. 2. Warranty deed from Winston to Albert Rust, dated December 17, 1868. 3. Deed from a chancery commissioner to James T. Pace, conveying all Rust's interests, dated February 7, 1874. 4. Deed from Pace and wife to Radcliffe, as trustee for Mrs. Tate, dated March 3, 1874. 5. Swamp land patent to Radcliffe as trustee of Mrs. Tate, dated December 10, 1879, based upon and relating back to Winston's original entry. 6 and 7. Deeds from Radcliffe and wife to Mrs. Tate, dated January 26, 1876. 8. A deed from the commissioner of state lands to Mrs. Tate, dated February 1, 1879, for an undivided one-fourth interest in west half of southeast quarter of said section, based upon a previous forfeiture for taxes.

The bill further states that the defendant, Scruggs, holds under two donation deeds from the auditor of state, executed in 1875, one to M. N. Kerr, conveying the undivided three-fourths of the west half of northeast quarter of said section; and the other to E. W. Kerr, conveying the undivided one-fourth of the tract last mentioned and the undivided three-fourths of the west half of southeast quarter of said section. The Kerrs, in 1879, sold and conveyed to Scruggs. That the state acquired her title by the forfeiture of said lands, a part of them, for the taxes of 1868, a part for the taxes of 1869. That the defendant has no claim whatever to the undivided one-fourth of the west half of the southeast quarter of said section, for that is not included in his donation deeds. That the forfeitures under which defendant claims gave him no title, for the reason that the assessment and delinquent lists were not sworn to, and the taxes levied for 1869 were in excess of the legal limit. That the donations are void for the further reason that while at

the time of their execution all the tract had been forfeited to the state, the said deeds purport to convey only undivided interests. Said deeds are also void because no improvements have ever been made under them, and they were obtained by fraud and misrepresentation. That nevertheless the defendant constantly asserts said land to be his own, impairing thus its market value, constantly trespasses upon it, and by his trespasses and menaces is about to drive the plaintiffs' tenants out of possession. Prayer, that the defendant be enjoined, and that plaintiffs' title be quieted, and for general relief.

The defendant filed an answer and cross-bill, denying the ownership of plaintiffs and their possession. Denies that Winston ever claimed said lands, or ever pretended to convey them. States that the duplicate certificate was procured from the land commissioner by fraud, and that Winston never assigned his certificate of purchase to any one. That plaintiffs' tax deed is void, for the lands were not subject to sale. That the Kerrs donated said lands as stated in the bill, and went into immediate possession, and made the required improvements. That they procured from a justice of the peace the required certificate, showing their improvements, and on that obtained the donation deeds. That from the time of their donation to February 12, 1877, the Kerrs remained in the peaceable possession of the land, and then sold it to defendant. Thereupon defendant took possession, and has been in possession ever since. That defendant and his grantors have paid taxes thereon to the amount of $80, and have placed improvements thereon to the value of $600. The prayer was that his title be quieted.

The plaintiff answered the cross-bill, denying its allegations specifically.

The proofs showed that Scruggs had put into cultivation fifteen or eighteen acres on the north end of the tract in

controversy; and that Mrs. Tate had built a house on the south end of it and had placed a tenant in possession, who proceeded to make a small clearing. The chancellor at the hearing dismissed the bill on the ground that Mrs. Tate's possession was litigious and merely colorable, having been wrongfully acquired and incapable of being used as the basis of a suit to quiet title; her remedy being ejectment. This was error. Mrs. Tate was in the peaceful possession of a part of the tract. She had the right to enter, if not under her chain of title, which extended to the entire tract, yet by virtue of her purchase from the state of an undivided one-fourth interest in the south half of the tract, to which Scruggs had no claim at all. This made her a tenant in common with Scruggs.

1. Chancery jurisdiction conferred by cross-bill.

But even if Mrs. Tate was not in a situation, by reason of being out of possession, to maintain a bill of this nature, yet when Scruggs filed a cross-bill founded on matters clearly cognizable in equity, this supplied any defect of jurisdiction, placed the court in possession of the whole cause and imposed the duty of granting relief to the party entitled to it—the original and cross-bill being but one cause. *Cockrell v. Warner, 14 Ark., 345; Sale v. McLean, 29 ib., 612; Missouri v. Iowa, 7 Howard, 660.*

As the testimony was all in and the cause ripe for hearing, we proceed to consider the merits and to render such decree as should have been entered below.

2. Donation deeds as evidence of title.

It may be conceded that Mrs. Tate would have a clear title to the whole land but for the intervening tax sale. The effect of a forfeiture for non-payment of taxes, if valid, is to divest the estate of the former owner. The donation deeds were *prima facie* evidence of a good title in the donees and that the land, or the interest in them which they purported to convey, had been regularly forfeited by the previons owners. *Mansfield's Digest, sec. 4257.*

3. PRACTICE IN SUPREME COURT: Allegations and proofs must correspond.

It is argued, however, that the forfeiture for the taxes of 1868 was illegal because the proofs show that the assessment roll was not returned until February 18, 1869; whereas section 26 of the act of July 23, 1868, required it to be returned on or before December 31, 1868, on which day, by section 29 of the same act, the county court was to hold a term and sit for three days as a court of appeals to hear grievances and correct assessments. Of this argument it is sufficient to say that no such issue was made or tendered by the pleadings. The tax title of Scruggs was not attacked for this reason, but for other and different reasons. The proofs taken were not directed to this point. But the county clerk attached to his deposition an extra-official certificate of the assessor for the year 1868, which bears the date of February 18, 1869. And the date of this paper, it is argued, fixes the date of the filing of the assessment list, in the absence of evidence to show the true date; according to the presumption, to which force was given in *Moore v. Turner, 43 Ark., 243.*

It would be an injustice to parties litigant to adjudicate their rights upon issues that were never raised in the court below. A plaintiff cannot be permitted to recover upon a case not made by his bill. The *allegata* and *probata* must correspond.

An inspection of the levies made for county purposes in 1869 fails to disclose that they exceeded the limits prescribed by sections 115–6 of the act of April 8, 1869. One mill was levied for road purposes, two mills for bridges and for rebuilding certain bridges that had been washed away, and two mills for the support of the poor. A levy of three and one-half mills was made to defray ordinary county expenses; and this was not excessive, provided the taxable property of the county did not amount to more than $4,000,000. There is nothing in the record to show

what the amount of taxable property in Pulaski county then was. Six and one-half mills were levied for payment of county indebtedness, principal and interest. It is probable that the rate of taxation for the last mentioned purpose would be governed by the law that was in force when the debts were contracted. But at all events that levy does not violate the provisions of the act of April 8, 1869. For, while this act contemplates that a levy of ten mills on the dollar will ordinarily suffice for the current expenses of county government, yet it distinctly provides that for the payment of debts already contracted, the rate of taxation may be increased 50 per centum. So that the true limit of taxation for county purposes, in the case of a county burdened with an outstanding indebtedness, was not ten, but fifteen mills.

This leaves to be considered only the objection that the assessment roll for 1869 was not sworn to. Section 60 of the act of April 8, 1869, directs the assessor to return in tabular form the extent, description and value of real property in his county subject to taxation. This return is to be verified by an affidavit of its correctness and that the assessor has not appraised any tract or lot of land at less than its true value in money. The question is not so much whether this is a mandatory provision, as whether Mrs. Tate can, at this distance of time, take advantage of the omission of the required affidavit. For section 138 of the same act reads as follows:

"All actions to test the validity of any proceeding in the appraisement, assessment or levying of taxes upon any land or lot thereof, and all proceeding whereby is soughts to be shown any irregularity of any officer, or defect or neglect thereof, having any duty to perform under the provisions of this chapter, in the assessment, appraisement, levying of taxes, or in the sale of lands or lots delinquent

for taxes, or proceedings whereby is sought to avoid any sale under the provisions of this chapter for irregularity or neglect of any kind by any officer having any duty or thing to perform under the provisions of this chapter, shall be commenced within two years from the date of sale, and not afterwards."

What effect, if any, has this provision? Taken in connection with section 140, which undertook to give to the recitals of the tax deed the force of conclusive evidence that each and every act and thing required to be done in order to constitute a valid tax sale had been done, the intention of the legislature undoubtedly was to cut off all defenses against the title after the lapse of two years, except that the land was not taxable, or that the taxes had been paid before sale, or that the sale had been redeemed from. Later acts allowed the further defense that the owner labored under the disabilities of coverture, infancy, insanity or imprisonment.

4. TAX SALES: Power of legislature.

But in this sweeping enactment the legislative department transcended the boundaries of its powers. It could not, under the constitution of 1868, or any similar constitution, enact a statute which should transfer one man's property to another, under a guise of a sale for non-payment of taxes, when there had been no assessment or no levy of taxes. This would not be due process of law. Neither could it prescribe a short period of time, nor indeed any period, within which the owner must make his objections for such fundamental defects, he remaining in possession and being, in the instance supposed, in no default for not paying his taxes.

This two years statute came before this court in *C. & F. R. Co. v. Parks, 32 Ark., 131.* The substantial defense in that case was that the county court had attempted to levy a school tax without being thereunto authorized by a

vote of the qualified electors of the school district. It was decided that the statute had no application to such a case. And the decision was sound, since the objection went to the jurisdiction of the county court to levy the tax. It was not a question of irregularity, but of power.

But the reasoning of Mr. Justice Walker leads inevitably to one of two conclusions: Either that the statute is inoperative for any purpose, or else it only begins to run from the expiration of the period of redemption. The reporter, who was counsel for the successful party, has drawn the last mentioned conclusion and in his head note has stated it as a point decided. But this is a mere inference or deduction, and is not justified by any announcement of the result reached contained in the opinion itself.

On the other hand, Mrs. Tate's counsel contend that the case decides that the statute was void for the reason that no limitation could run in favor of a tax claimant without actual possession. Certainly succeeding legislatures have not considered the effect of that decision to be to wipe out this section. For we believe it has been re-enacted in terms in every subsequent revenue law we have had. Neither the validity nor the construction of this statute has been settled by previous decisions of this court further than that it does not operate to deprive the former owner of any meritorious defense. And by meritorious defense we mean any act or omission of the revenue officers in violation of law and prejudicial to his rights or interests, as well as those jurisdictional and fundamental defects which affect the power to levy the tax, or to sell for its non-payment.

But while the act cannot have the free course that its framers intended, it is still our duty to give it such effect as may be consistent with legal and constitutional principles. And this may be best accomplished by restricting its operation to mere irregularities or informalities on the part of

officers having some duty to perform in relation to the assessment, levy of taxes, or sale. Our legislation and previous decisions have always distinguished between this class of defects, which have no tendency to injuriously affect the tax payer, and substantial defects, such as go to the jurisdiction of the levying court to levy a particular tax, or to the power of the officer to sell for non-payment, or the omission of any legal duty which is calculated to prejudice the land owner. Thus the revised statutes of 1838 provided that no exception should be taken to any tax deed except such as applied to the real merits of the case. And this continued to be the law down to 1868. *Rev. Stat., chap. 128, sec. 97; Gould's Dig., chap. 148, sec. 131.*

5. Power to cure irregularities, etc.

We have no doubt of the power of the legislature to cure any irregularity or illegality in a tax sale, which consists in a mere failure to observe some requirement imposed, not by the constitution, but by the legislature itself, and the non-observance of which does not deprive the former owner of any substantial right; such as the failure of the collector to give bond (*Powers v. Fenny, 59, Miss., 5*); or the failure of the assessor to take the oath of office, or to verify his assessment list by affidavit. The legislature might have dispensed with one or more of these requirements, as was done in the revenue act of July 23, 1868. So it might provide that a failure to comply with any or all such formal requirements by any officer who was charged with any duty in the proceeding, from the assessment to the execution of the tax deed, should be cured after two years from the sale.

6. Limitation to action.

We further hold that the limitation begins from the day the property is stricken off by the officer who conducts the sale. All technical objections to the sale, not actually prejudicial to the former owner, must be brought forward

within two years under penalty of not being afterwards regarded when the tax title is assailed.

In *Waln v. Shearman*, *8 Serg. & R.*, *357*, and in *Eldridge v. Kuehl*, *27 Iowa*, *160*, "date of sale" in similar statutes was construed to mean the completed sale, when the purchaser received his deed. But in *Mitchell v. Etter*, *22 Ark.*, *178*, where the five years limitation statute in regard to judicial and tax sales was under discussion, such construction was declared to be at war with both the letter and spirit of the enactment. And whatever may be thought of the correctness of that decision on the main point involved—the running of the statute against all defenses in favor of the tax purchaser, whether he be in or out of possession—yet the case authoritatively fixes the legal signification of such language, and any future legislature, using the same language, will be presumed to have used it with reference to this judicial exposition of it.

The affidavit in question appears to have been intended to protect the interests of the state, rather than of the tax-payer, by guarding against an under valuation of property. And no owner of real estate could have been injured by its omission.

7. DONATION: Failure of donee to make improvements.

Again: it is claimed that the donations were void by reason of the failure to make the required improvements. This, if it were so, would not benefit the plaintiff. The land would simply revert to the state. No doubt the improvements made by the Kerrs were of the most flimsy description. The act then in force was by no means stringent as to the character of the improvements. But the evidence shows that some ten acres of land were cleared and fenced by the two donees. The nature and extent of the improvements were certified by a justice of the peace of the township in which the lands lay, to the auditor; and the state has made no complaint of their insufficiency.

Perhaps no individual has such interest in the matter as to entitle him to be heard when he complains of the fraud practiced upon the state.

The decree is reversed and a decree will be entered here quieting the title and possession of the plaintiff, to and of an undivided one-fourth interest of the west half of south-east quarter, and of the defendant in and to the remaining three-fourths of that tract, and to all of the west half north-east quarter, as against all claims of each other. The appellant will recover the costs of this court; and the costs in the lower court are to be divided equally between the parties.

---

46 109
55 99

SUE M. GRIDER ET AL. v. DRIVER.

1. ESTOPPEL: *Against claim for improvements on land.*
   Where a party knows, or ought from the circumstances to know, that one who claims his land under a fraudulent purchase, is in possession and making valuable improvements upon it, and makes no objection nor asserts his rights within a reasonable time, he can not in a suit in equity for the land and rents avoid an allowance for the value of the improvements not exceeding the rents.

2. APPLICATION OF PURCHASE MONEY: *Duty of purchaser to see to.*
   A purchaser from a trustee who knows that the trustee is committing a breach of trust in making the sale, is a party to the breach and is bound to see to the application of the purchase money.

3. IMPROVEMENTS: *Rents on, when made by occupant on another's land.*
   The occupant of another's land under a void purchase is not chargeable with rents or improvements made by himself, however fraudulent his purchase, except from the time his use and enjoyment of them has compensated him for making them.

APPEAL from *Mississippi* Circuit Court in Chancery. Hon. W. H. CATE, Circuit Judge.

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

First—The court decided that Driver was under no obligation to pay the plaintiff rent upon the improvements made by himself.

In *42 Ark.*, *442*, this court decided that a mortgagee in possession was under no obligation to pay rent on improvements made by him. But there the possession of the mortgagee was rightful. Here the possession was wrongful. The sale was void absolutely; he bought at private sale; there was no appraisement, the order was made in vacation, and without advertisement or notice. He was an intruder and a wrongdoer. He was not entitled to be put in *statu quo*. The rule of *statu quo* is this: The parties are to be placed as nearly as possible in the position they were; but the wrongdoer is not to make a profit from his injustice, nor is the innocent party to sustain any loss by reason of the act avoided. *15 Ark.*, *290*; *17 ib.*, *606*; *20 ib.*, *438*; *25 ib.*, *204*; *36 ib.*, *353*. In the latter case, *the value of the rents on the place as improved* are taken, and the occupant allowed the expenses of putting them in fit condition.

Second—The court erred in charging the appellant with improvements made during her minority in excess of the rents. *33 Ark.*, *490*.

Third—The plaintiff is charged with the taxes upon the property as improved, when, if the defendant is not charged for the rents on his own improvements, she was only bound for such taxes as would have been imposed upon the land in its unimproved state. *33 Ark.*, *490*.

Fourth—The plaintiff is charged with the purchase money paid, without any proof that she ever received any benefit therefrom, or that there was any necessity for the sale of the property. *Perry on Trusts, sec. 800*; *4 Mylne & Cr.*, *437*; *2 Sim. & St.*, *199*; *1 Lead. Cas. in Eq.*, *p. 109*.

Greer & Adams for appellants.

The sale to Driver was absolutely void. *Gantt's Dig.*, *secs.*, *3073–4–5*, *3067–8*, *176–7*; *33 Ark.*, *89*; *32 ib.*, *97*.

A minor has seven years after becoming of age to bring suit for the recovery of land. *31 Ark.*, *376*; *15 Ohio*, *195*; *10 ib.*, *134*; *5 ib.*, *252*; *17 Wend.* (*N. Y.*), *119*; *Wait's Ac. & Def. Infancy*, *sec. 8*; *17 Tex.*, *355*; *28 Mich.*, *184*; *52 Miss.*, *574*; *40 Am. Rep.*, *801*; *1 Yerger*, *360*.

It was error to allow Driver credit for improvements in excess of the rents. *Jones on Mortg.*, *sec. 127*; *18 Ark.*, *34*; *31 ib*, *334*; *33 Ark.*, *490*; *Waterman Trespass*, *2 vol.*, *599*; *2 Pick.* (*Mass.*), *505*; *15 N. H.*, *525*; *51 Me.*, *576*; *6 Paige* (*N. Y.*), *405*; *8 Wheat.* (*U. S.*), *1*.

Nor was Driver entitled to be allowed the purchase money paid, unless he can show that it went to the support of the minor or to pay debts of the ancestor. *33 Ark.*, *490*; *51 Miss.*, *680*; *21 Pick.* (*Mass.*), *106*.

Driver was not entitled to improvements further than as a set-off against rents. *12 Ark.*, *218*; *15 ib.*, *682*; *24 ib.*, *109*; *28 ib.*, *211*; *39 ib.*, *357–364*; *42 Ark.*, *118–20*; *3 Head.*, *673*; *10 Yerg.*, *478*; *1 ib.*, *361*; *12 Heisk.*, *566*; *2 Rand.*, *Va.*, *6*; *1 A. K. Marsh*, *246*; *4 Bibb* (*Ky.*), *346*; *39 Miss.*, *796*; *51 Miss.*, *680*; *3 S. & M.*, *715*; *4 Dana* (*Ky.*), *Hawkins v. Beal*.

H. M. McVeigh and *O. P. Lyles*, for appellee.

As to the irregularities of the sale and the effects thereof, see *Rodgers v. Wilson*, *13 Ark.*, *507*; *Bennett v. Owen*, *ib.*, *177*; *Sturdy v. Jackson*, *19 Ark.*, *516*.

The sale of a guardian is presumed to be good. See *Redman v. Anderson*, *18 Ark.*, *449*.

The infant must elect within a reasonable time after he is of age, whether he will affirm or disaffirm his contract made

during his minority; the plaintiff's letter to the defendant Driver was equal in equity to making the sale herself. See *Thompson v. Strickland*, *52 Miss.*, *574*.

If the sale was for her benefit, she is bound by it. See *Lawson v. Lovejoy*, *8 Me.*, *105; Goode v. Harrison*, *5 B. & Ald.*, *147; Richardson v. Bright*, *9 Vt.*, *368; Brown v. Caldwell*, *10 Serg. & R., Penn.*, *114*. See, also, *Wait's Actions and Defences*, *138*, *139*, *141*, *142*, and authorities there cited.

It was then a sale for her benefit, and made by her consent; her residence was in sight of the land sold; she saw Mr. Driver making valuable improvements; she made no objection after she became of age. She said not a word from the time she became of age. And we submit that her long *silence* under the circumstances was a ratification of the sale. See *Vaughn v. Parr*, *20 Ark.*, *608–9; 1 Parsons on Contracts*, *295; Fetron v. Williams*, *40 Ind.*, *148; Stokes v. Brown*, *4 Chand.* (*Miss*), *39; Robertson v. Weeks*, *56 Me*, *102; Wait's Actions and Defences*, *p. 61*, and authorities there cited. *Lawson v. Lovejoy*, *8 Me.*, *405; Klein v. Bebee*, *6 Conn.*, *494; 5 Wait's Actions and Defences*, *61*, and authorities there cited. *Doe v. Abernathy*, *7 Blackf.*, *442; Clawson v. Doe*, *5 Ind.*, *300*.

The conveyance to Driver having been made at the solicitation and instance of the minor, and the court ordering the sale having jurisdiction of the subject matter, the deeds were not void, but merely voidable, and the sale could have been, and we say in fact was, ratified by her after she came of age. *Miles v. Lingerman*, *24 Ind.*, *387; Wait v. Maxwell*, *5 Pick.*, *217; Hovey v. Hobson*, *53 Me.*, *451; Dennett v. Dennett*. *44 N. H.*, *538; Zouch v. Parsons*, *3 Burr.*, *1794*, *1805*; *Kendell v. Lawrence*, *22 Pick.*, *540; Tucker v. Moreland*, *10 Pet.*, *58*.

The infant must act within a reasonable time, if he would avoid his deed. *4 How.* (*Del.*), *75; 2 Kent Com.*, *236; 8*

Ex. Ch., 181; 102 B, 935; 11 Hum., 474; 7 Wait's Ac. & Def., 144.

Driver's possession was not wrongful, and he had the perfect right to enter; true he bought at private sale, but at that time private sales were common in Arkansas, and the statute was silent as to whether a guardian's sale should be public or private. *Gould's Dig., sec. 181, 182, p. 134, act January, 1855.* By these sections the sale was to be conducted as the court might direct. At that time no appraisement was required. *Gantt's Dig., sec. 3066 to 3077,* was the first appraisement law.

The circuit court had jurisdiction. *Const. 1868, art. 5, sec. 44; Gantt's Dig., sec. 1183; Act March 16, 1871,* and *April 16, 1873.*

In this case the minor stood quietly by and permitted Driver to make improvements without asserting any claim, and he is entitled to the full value of his improvements, nor will he be required to pay rent on them, as they were his own. *Summers v. Howard, 33 Ark., 490.*

OPINION.

BATTLE, J. Sue M. Grider and her husband, W. H. Grider, filed a complaint in equity in the Mississippi circuit court on the 14th day of April, 1882, alleging in substance as follows:

That she, Sue M. Grider, was born in June, 1857; that her father died in 1862, leaving her a large estate, consisting of personalty and real estate; that among the lands inherited by her was the northwest quarter of section 18, in township 12 north, and in range 11 east. That this tract, being very fertile and protected by a levee from overflow, was worth, on the 17th day of March, 1874, $100 per acre. That in 1869 the defendant, James D. Driver, bought

the plantation in rear of the tract described; that when he purchased it, he thought the plantation included the land in controversy, and when he discovered it did not, he was much dissatisfied with his purchase, and resolved to obtain the described tract. That, at the time, W. A. Erwin, the step-father of Sue M., pretended to be her guardian. That Erwin was an exceedingly dissipated man with no business qualifications. That with a view to getting title to this tract, Driver induced Erwin to present a petition to the circuit judge, in the vacation of court, reciting therein that Sue M.'s father had died leaving considerable wild lands; that the taxes were burdensome; that the tract described was wild, of little value, and remote from the river; that Driver would give more for it than any one else, and that its sale was necessary to raise money for the education of Sue M.; and that all these statements Driver and Erwin knew to be false. That they presented the petition to the circuit judge, and procured from him, in the vacation of court, an order for the sale of the land at private sale, and that eighty acres of the land were accordingly sold, at private sale, to Driver for $800 in cash, and his note for $800 more due on the 1st day of January, 1875. That thereupon Driver took possession of the land sold, and caused the lines thereof to be so run as to include all the cleared land on the tract.

That, afterwards, on the 5th day of September, 1874, Driver induced Erwin to present to the circuit judge, in vacation, another petition for the sale of the remaining eighty acres of said tract; that the second petition contained the same false allegations as the first. That an order was made by the judge, in vacation, directing a private sale; and that the remaining eighty acres was accordingly sold to Driver for $1,000, when it was worth $8,000, at private sale, without advertisement or appraisement. That Driver

derived and received rents from this tract of land of the value of $8,400. And plaintiffs asked that the conveyances to Driver be set aside, for an account of rents and profits, and for other relief.

The defendant, Driver, answered, denying that the land, when bought by him, was worth $100 an acre, and stated that $20 an acre was its full value; denied that he thought it was included in the purchase of his plantation; that he induced Erwin to present a petition for the sale of the land, or that he had any collusion with him; and that Erwin was an habitual drunkard, but says he was a shrewd business man. He states that when he purchased the land from Erwin only thirteen or fourteen acres of it were cleared, and the remainder was covered with a dense forest and cane, and that it cost $30 an acre to clear it, which he paid. That this tract was and has not been worth as much rent as stated by plaintiffs. He stated that he took possession immediately after his purchase and has held it at all times since; that he has paid out for purchase money, taxes and improvements, including interest, $8,360.19, which he asked to be refunded to him in the event the sales are set aside; that plaintiffs, knowing of his claim to the lands and standing by while he improved the lands, without objection, are estopped from setting up any claim thereto; and pleaded the statute of limitations.

On the 19th day of May, 1883, the court below, after hearing the evidence introduced by both parties, rendered a final decree herein, setting aside and declairing void the sales by Erwin to Driver, and referred the cause to a master to state an account, instructing him to charge plaintiffs with the present value of the improvements placed upon the land by defendant, with the taxes paid by him on the land as unimproved, with interest, and with the purchase money paid by him; and to charge the defendant with the

rent of so much of the land as was improved when he took possession, with interest. And the master stated the account substantially as follows:

Due from Driver—	
Rent on 15 acres for ten years	$ 900 00
Interest thereon	295 00
Rent on 75 acres for two years	900 00
Interest thereon	108 00
Total	$2,203 00
Due to Driver—	
Purchase money	$2,600 00
Interest thereon	1,533 65
Clearing 130 acres	3,250 00
Taxes	293 17
Other improvements	475 00
Total	$8,151 82
Less amount due plaintiffs	2,203 00
Balance due Driver	$5,942 82

The plaintiffs excepted to the report of the master and the account stated by him, because there were sixty acres cleared land when Driver took possession, and not fifteen as reported; because they are allowed rent on only seventy-five acres from the commencement of the suit, when one hundred and thirty were cleared; because the account charges them with the purchase money paid by Driver, when it is not shown that Sue M. Grider or the estate of her father derived any benefit therefrom; because plaintiffs are charged with improvements in excess of the rents; and because the account fails to charge defendant with the rents on the land as improved.

Defendant excepted to the allowance to plaintiffs of rent for the seventy-five acres, and to the insufficiency of the allowance to defendant for the improvements.

On the 22d day of July, 1884, the court below heard the exceptions to the master's report and the account stated by

him, and adjudged that plaintiffs were entitled to rent on eighteen acres, instead of fifteen, as reported by the master, at the rate of $6 an acre for ten years, and interest thereon; that they should not be charged with taxes on defendant's improvements, and that $100 should be deducted from the amount of taxes allowed defendant as a credit on account of taxes paid on such improvements for the years 1882 and 1883; and that the charge for rent on seventy-five acres and interest thereon made in the account stated be stricken out, because this seventy-five acres was cleared by Driver after his purchase; and that there was due Driver $6,617.22; and ordered the master to reform and restate the account according to these rulings of the court, which he did; and the account being amended was confirmed. And the court decreed that defendant be allowed to remain in possession of the land until the amount so adjudged to be due him was paid; and that plaintiffs have and recover of the defendant the costs. Plaintiffs appealed.

The defendant having failed to appeal we can only notice such proceedings and so much of the decree of the court below as appellants insist were erroneous and injurious to them.

1. ESTOPPEL: Against claims for improvements on land.

First—Should appellants be charged with the value of the improvements in excess of the rents? Appellants say that they did not know Driver was in possession of and improving the land in controversy until a short time before the institution of this suit, and therefore should not be charged with such excess.

It was proven that Mrs. Grider arrived at the age of eighteen years on the 23d day of May, 1875. The improvements were made after this and some time before the institution of this suit, without objection from or by either of the appellants. A portion of the land was cleared and

susceptible of cultivation at the time of Driver's pretended purchase. They knew, or ought to have known, that they were in possession thereof. This alone ought to have led them to an inquiry into the facts and assertion of their rights. For eight years, however, they did nothing, and Driver remained in possession of and improved the land. They were guilty of the grossest laches. Under these circumstances equity would not allow them "to appropriate to themselves, without satisfaction or indemnification, the improvements of defendant, which, by their silence, they permitted to be made," and have enhanced the value of their property. *Summers v. Howard, 33 Ark., 490; Davidson v. Barclay, 63 Penn. St., 406; Morris v. Terrill, 2 Ran., 6.*

2. APPLICATION of purchase money.

Second—Appellants insist that they should not be charged with the purchase money paid by Driver to Erwin, without any proof that Mrs. Grider ever received any benefit therefrom.

The sales made by Erwin to Driver were unquestionably void. The order of the judge, under which the sales were made, was a nullity. Mrs. Grider was not bound or affected by any act of Erwin in making these sales. He was not vested with authority to represent her in any capacity in selling the land to Driver in the manner he did. In making the sales and placing Driver in possession of the land he violated the trust vested in him as guardian, and Driver knowing the facts, and presumed to know the law, is knowingly a party to the breach of the trust.

Judge Story, in his work on Equity Jurisprudence, says: "The rule in all these cases, that the purchaser or mortgagee is not bound to look to the application of the purchase money, is subject to an obvious exception, that, if the purchaser or mortgagee is knowingly a party to any breach of trust by the sale, or mortgage, it shall afford

him no protection. One obvious example of this is, where a devisee himself has a right to sell, but he sells to pay his own debt, which is a manifest breach of trust, and the party who concurs in the sale, is aware, or has notice of the fact, that such is its object; for in such a case they are coadjutors in the fraud." *Story's Equity Jurisprudence, sec. 1131 a.*

In the American notes to *Elliott v. Merryman, in White & Tudor's Leading Cases in Equity, vol. 1, p. 109,* it is said: "It may be considered as the prevailing doctrine in the American courts, that a purchaser from a trustee is not bound to see to the application of the purchase money, except where the sale is a breach of trust on the part of the trustee, and the purchaser has, either from the face of the transaction, or otherwise, notice or knowledge of the trustee's violation of duty; but if he has such knowledge or notice as makes him a party or privy to the trustee's misconduct, the property will be affected in his hands with the trusts which previously attached to it."

Driver was, therefore, bound to see to the application of the purchase money he paid Erwin for the land in controversy. Only a part of this money was shown to have been applied to the use of Mrs. Grider. Having failed to perform the duty imposed on him by law, appellants are not bound to return to him the remainder of the purchase money. He is only entitled to credit for so much thereof as was applied to the use of Mrs. Grider, and interest thereon from the time of the payment thereof.

3. IMPROVEMENTS: Rents on.

Third—When Driver made his pretended purchase, there were only eighteen acres of cleared land upon the tract in controversy. The remainder was wild, unimproved and covered with a dense forest. He has cleared, inclosed and put into cultivation one hundred and thirty acres of this remainder, since his purchase, and for many

years has been in possession, enjoying the rents and profits. Shall he be required to pay rent for the land cleared and inclosed by himself? This is an important question and difficult to decide.

In *Summers v. Howard, supra*, the defendant purchased, at a sale made under a void order of a court, three *vacant* lots in the city of Helena, and erected thereon a dwelling house and other improvements. It was held by this court that he was entitled to compensation for his improvements, and should not be charged with the rents and profits of the lots as enhanced by the improvements. Mr. Justice Harrison, in delivering the opinion of the court, said: "A party who is, under the circumstances of the case, entitled to compensation for improvements is only chargeable with such rents and profits as the property would have yielded without the improvements, for if charged with such as arise *exclusively* from the improvements which he has made, he would pay for the use of that which was his own."

In *Jones, McDowell & Co. v. Fletcher, 42 Ark., 442*, the land in controversy was mortgaged by the rightful owners. Rozelle took possession under the mortgagee, and expended a considerable sum of money in making lasting and valuable improvements on the land. He cleared and put into cultivation ninety-eight acres. He built houses and made many other improvements, and thereby enhanced the value of the property. This court held that it was error "to charge Rozelle, or those who claimed under him as a mortgagee in possession, for rents of land put into cultivation by himself at his own cost."

But a state of facts different from those presented in the cases cited is presented here. The lands in controversy were very fertile, and had a rental value in their wild state. Such lands in Mississippi county, as shown by the evi-

dence, could have been leased and rented in a wild state, for the purpose of being cleared and cultivated, for five years, for the clearing and putting the same into a good state of cultivation, and for the inclosing of them, and the building and putting the houses and other improvements thereon usually put on small farms in that county, the use and occupation for the term of five years being a reasonable compensation for such improvements. If cleared, put into a good state of cultivation and improved, as before stated, it would have been worth, according to the evidence, $6 an acre per annum. It is evident, therefore, that the rental value of so much of the lands as was actually cleared and put into cultivation by Driver, in its wild state, for the first five years it was used and cultivated, was the clearing and putting the same into a good state of cultivation and the other improvements mentioned, and thereafter $6 an acre per annum. It must follow, then, he is not entitled to compensation for his improvements in addition to the use and occupation of the land for five years, and that he should be required to pay $6 an acre per annum for the lands cleared by him, after the end of the first five years, for the time he has used and occupied the same exceeding five years. It is true he was entitled to compensation for his improvements, but he received that in the use and occupation of the land for five years. To allow him additional compensation for his improvements, or to hold the land cleared by him, free of rent, after he has been fully compensated for his improvements, by five years' use and occupation thereof, would be unjust and inequitable.

The decree of the court below is therefore reversed in so far as it is inconsistent with this opinion, and in other respects is affirmed; and this cause is remanded, with direc-

tions to the court to refer this cause to a master to state an account between appellant, Sue M. Grider, and appellee; and to instruct the master to charge Mrs. Grider, in such account, with so much of the purchase money as was applied to her use, with 6 per cent. interest thereon from the date of the payment thereof, and with the taxes paid by Driver, and 6 per cent. interest thereon from the time they were paid; and to credit her with the rent of eighteen acres of land at the rate of $6 an acre per annum for the year 1874, and every year thereafter, down to the time of stating the account, and with 6 per cent. interest on the rent of each year from the end of the year for which it is credited, and with rent for each portion of the land cleared by Driver in each year, for every year after the fifth year in which he cleared or cultivated the same, at the rate of $6 an acre per annum, and with 6 per cent. interest on the rent of each year from the end of the year for which it is credited; and for other proceedings necessary to the settlement and adjustment of the matters in controversy and the enforcement of the rights of the parties to this action.

GAUSS SONS ET AL. v. DOYLE & CO. ET AL.

46 122
55 78
46 122
59 263
46 122
63 53
46 122
71 441
72 394
46 122
75 58
46 122
87 625

1. MORTGAGE: *Evidence: Declarations of mortgagor.*

Neither the mistake of a mortgagor of goods, as to the legal effect of the mortgage, nor his conduct or declarations as to his right to sell them, are admissible against the mortgagees, further than they tend to show his understanding of the intention of the parties at the time of executing the mortgage.

2. FRAUDULENT CONVEYANCE: *Mortgage.*

Where there is an agreement or understanding between the mortgagor and mortgagee of a stock of goods that the mortgagor may remain

in possession of the goods and sell them as his own, the mortgage is as fraudulent and void as to other creditors as if the agreement were expressed in the mortgage; and to arrive at their true meaning, the concurrent acts, surrounding circumstances and subsequent conduct of the parties are taken together for the consideration of the court or jury trying the issue.

3. MORTGAGE: *Sales by mortgagor.*

It is against public policy for a mortgagor to remain in possession and sell the mortgaged goods, except as agent of the mortgagee.

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

B. R. Davidson, for appellants.

The mortgages in this case were not within the principle of *Lund v. Fletcher, 39 Ark., 325*, nor *Martin et al. v. Ogden, 41 Ark., 186*. It was expressly stipulated in the mortgage that nothing should be sold without the written consent of mortgagees.

The fact of leaving Bates in possession of the mortgaged property did not render the mortgage void. The rule in Twyne's case does not obtain where there are registration laws. *Lund v. Fletcher et al., 39 Ark., 325-332; Jones Chattel Mortgages, sec. 176; Herman Chattel Mortgages, sec. 72; Webber v. Armstrong et al., 70 Mo., 217.*

Had the mortgage been silent on the question of authority to sell, there would have been no implied authority from the nature of the property and his authority to retain possession. *Webber v. Armstrong et al., 70 Mo., 217.*

The sales made by Bates were wholly without authority and without knowledge of the parties. They did not invalidate the mortgage. *Yates et al. v. Olmstead, 56 N. Y., 632.*

The rule of *Lund v. Fletcher* is recognized in Massachusetts, yet the Supreme Court held the mortgage valid in a

case where the mortgagor was left in possession of a stock of groceries and provisions, and sold without consent, with a condition in the mortgage that he should not, "except with the consent in writing of the grantee or his representatives, attempt to sell or remove from said building the same or any part thereof," that he might retain possession, "use and enjoy" the property. *Sleeper v. Chapman, 121 Mass, 404–408.*

Bates was left in possession of the goods, but was prohibited from selling by the contract. He understood the language of the contract, but supposed the *legal effect* to allow him to sell for cash if he would account for the proceeds. The mortgagees did not even know he understood the legal effect in that way. Had the mortgage been written as Bates understood the legal effect to be, it would still have been valid. Our court has never gone so far as to hold that possession with power of sale necessarily renders a mortgage void, but have intimated the contrary doctrine where there is an obligation to account for the proceeds of sales. *Martin v. Ogden, 41 Ark., 186–190.* The states recognizing the rule as laid down by our court have almost universally held that when the party is authorized to sell for cash and required to account for the proceeds, the mortgage is not void. *Brackett v. Harvey, 91 N. Y., 214, 220, 221; Kleine, Heggar & Co. v. Katzenberger & Co., 20 Ohio St., 110; Hawkins v. Hastings Bank, 1 Dillon, 462; Loutham et al. v. Miller, 85 Ind., 161; McLaughlin et al. v. Ward, 77 Ind., 383; Miller v. Lockwood, 32 N. Y., 293; Conkling et al. v. Shelly, 28 N. Y., 360.*

See, also, *91 N. Y., 224–5; 18 Ark., 123; Bump. Fr. Conv., 353; 54 Wisc., 248; 72 Mo., 632; 20 Ohio St., 110–117; 58 N. H., 260; 22 Wall., 512–524; 23 Ark., 258; 31 ib., 554; 18 Ark., 123.*

The mortgage was not void upon its face, and the testimony fails to show one fact tending to prove that appellants made any contract or had any understanding outside the mortgage.

Collins & Balch, for Doyle & Co.

First—If, at the time the mortgage was executed, it was in the minds of all the parties to the mortgage that Bates should execute the mortgage on his stock of merchandise, and then continue his business, selling the same in the usual course of trade as before, or if there was a contract either expressly or impliedly to this effect, the mortgage is void. *5 Dillon, 116–117; 5 Ohio St., 1.*

Taking all the facts into consideration, it is clear there was an implied understanding that Bates was not to close his doors, but was to remain in possession and carry on his business as before.

Second—Bates' declarations are admissible against him to show the state of his mind, his intent and understanding of the transaction as a part of the *res gestæ*, but of course the mortgagees are not bound by such declarations, but they were admitted to show the mind and understanding of Bates. *Bump. Fr. Conv.*

Third—The chancellor having found the mortgages void, this court will not reverse his finding, if there was any evidence to warrant such finding.

Cockrill, C. J. The issue in this case was whether certain mortgages of merchandise given by Walter Bates to the appellants were made to hinder, delay and defraud creditors. There were two mortgages, one to each of the two appealing firms; they were identical in form and contained no provision upon which the court would seize for

the purpose of declaring fraud solely as a conclusion of law. The chancellor, however, found from the evidence that they were fraudulent in fact, and gave preference to the claim of a subsequent attaching creditor in a suit by the mortgagees against the attaching creditors and the common debtor to foreclose the mortgages.

The evidence which was mostly oral, and is preserved by bill of exceptions, presents this state of facts: Bates was conducting a general merchandise business in a small town in Washington county, and became indebted for merchandise to several non-resident firms, the appellants among the number. The appellants were pressing him for payment through their traveling agents and an attorney. They all met at the county-seat, some miles from Bates' place of business, to effect a settlement. After a parley with the agent of Gauss Sons, it was agreed that Bates should have ninety days to pay their claim, and that he should secure it by a mortgage upon his stock of goods. The attorney who held the claims of both firms was directed to draw the mortgages. They covered Bates' entire stock in trade. Nothing was said in the conference, or elsewhere, about the continuance or discontinuance of his business. The mortgages were written upon a blank form, the printed part of which contained a clause to the effect that the mortgagor should not sell or remove any part of the mortgaged property without the written consent of the mortgagees. Bates testified that in executing the mortgages he overlooked this provision, or else did not understand the effect of it; that it was not his intention to discontinue his business or bind himself not to make sales of the mortgaged goods. He continued the business as though no mortgage had been executed, sold goods as customers offered, used some of the groceries out of the stock for his family support, and purchased other goods with a part of the proceeds of sales.

When matters had progressed in this way for about two months, Doyle & Co. caused an attachment to be levied on the stock of goods. Bates protested against the right of the officer to make a levy under the attachment on account of the mortgages, and upon being taxed with making sales of the mortgaged property, replied that he had the consent of the mortgagees to do so. He testified, however, that no express consent had been given, and in this he was corroborated by the appellants' agents who had conducted the mortgage settlements.

1. EVIDENCE: Declarations of mortgagor.

Neither Bates' inadvertence or mistake as to the meaning of the written contract he entered into, nor his subsequent conduct or admissions, in reference to the property, were in themselves evidence against the appellants, further than they tended to show the understanding of one of the contracting parties at the time of the execution of the mortgages. If it was the agreement or understanding of the parties at the time the mortgages were executed that the mortgagor should remain in possession of the stock of goods and sell them as his own, it would render the instruments as ineffectual against other creditors, as though the objectionable agreement were set out in the face of them.

2. Sales by mortgagor.

It is the intent to defraud that vitiates the security in such cases, and the effect is the same whether that is shown by the written terms of the agreement, or is brought to light by other evidence; and to arrive at the true meaning, the concurrent acts, surrounding circumstances and subsequent conduct of all the parties that reflect light upon the original intention, are taken together as proper matters for the consideration of the court or jury trying the issue. *Fink v. Ehrman, 44 Ark., 310; Martin v. Ogden, 41 ib., 186; Lund v. Fletcher, 39 ib., 325; Sparks v. Mack et al., 31 ib, 666; Freeman v. Rawson, 5 Ohio St, 1; Weber v. Armstrong, 70*

Mo., 217; Brackett v. Harvey, 91 N. Y., 214, 223; Southard v. Benner, 72 ib., 424; Sleeper v. Chapman, 121 Mass., 404.

Bates thought he had the consent of the appellants from the outset for the course of dealing he pursued. There can be but one opinion about that. If the appellants were without fault, his misapprehension could not invalidate their security. But the circumstances tend strongly to sustain the conclusion of the chancellor, that Bates did not misconstrue the original meaning, however innocent the appellants' agents may have been of the intent of actual fraud upon other creditors. They knew that Bates was selling off his stock when they granted him an extension of time on his debts. There was nothing in the negotiation with him that indicated an intention to close his store in any way. There was no probability that he could liquidate the mortgage debts unless by a continuance of his business, and they must have known that at the time. It was fully contemplated and expressly agreed that he should be left in possession until default in payment or a violation of other terms of the mortgage. Nobody seems to have attached any importance to the printed clause prohibiting sales without written consent, and no consent was expressly given or refused. The attorney's duties were ended when the mortgages were drawn; and the drummers, whose duty it was to see to the interest of their houses in this territory, gave themselves no concern at any time about the property. As they had given no express consent to sell, they seem to have regarded it as immaterial whether Bates did sell or not. It appears that they had no actual knowledge of any sales, but it is not reasonable to suppose that they believed no sales would be made, and the appellants must be held responsible for the consequences, and we refuse to disturb the chancellor's finding.

An attempt was made to show that the mortgagor sold only for cash and set the proceeds of sale aside to be credited on the mortgage debts, but it is apparent that he was acting for himself and not as the agent of the mortgagees in doing this, and it is against public policy that he should be allowed to remain in possession and sell except as the accredited agent of the mortgagee. *Fink v. Ehrman, supra.* 4. Sales by mortgagor.

Affirm.

46 129
55 78
55 418
46 129
58 621
46 129
63 53
46 129
188 369

GAUSS SONS V. ORR & LINDSEY.

1. FRAUDULENT CONVEYANCE: *Benefit reserved to mortgagor.*
   A mortgage of merchandise which authorizes the mortgagor to continue the sale of the goods and reserve any part of the proceeds of sale to his own use is void as against a subsequent mortgage of the goods.

2. CONSTRUCTION OF CONTRACT: *When doubtful as to honesty or legality.*
   When an instrument is susceptible of two probable conflicting constructions, one of which imputes bad faith to either party, and the other would not, or one would render the contract unlawful and the other lawful, the latter construction should be adopted.

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

B. R. Davidson, for appellants.

Appellants rest this case on the mortgage given by Suttle to Orr & Lindsey, and insist that it is fraudulent and void. The mortgage authorized the mortgagor to retain possession and retail the goods, and did not require him to account for the sales of the first week. Nor was he required to account for the proceeds subsequently, further

than that he was to pay $50 or more (at his option) regardless of the amount he should sell. The case is clearly within the principle of *Lund v. Fletcher, 39 Ark., 325*, and *Martin v. Ogden, 41 Ark., 187-193*. There is no "continuing trust" by which the proceeds, beyond the $50, could be reached. If he may mortgage and only account for $50 each week, he may mortgage and only account for $1. If he can make a valid mortgage and reserve to himself the sales of the first week, he may make it and reserve the sales of the first month or year. It is not the amount of interest reserved to himself that renders the mortgage void. If allowed to dispose of *any part* of the stock for his own use it renders it void. *Blackeslee v. Rossman, 43 Wis., p. 116.*

L. Gregg, for appellees.

The theory of our law is that a mortgagee cannot hold a stock of merchandise for a mortgagor and allow him to retail the same for his benefit, to the injury and delay of other creditors. If these things do not appear such mortgage is valid. *Lund v. Fletcher, 39 Ark., 325; Martin v. Ogden, 41 ib., 186.*

Orr & Lindsey gave no permission to sell for the mortgagor's benefit. He was only allowed to *hold possession during the will of Orr & Lindsey* and required to account to them for *all sales* at short intervals, the second week being the time when the first account should be made. *All sales* were to be accounted for. The mortgage was valid.

COCKRILL, C. J. The appellants and the appellees each took a mortgage upon a stock of merchandise to secure the payment of debts due them. The mortgage to the appellees was prior in date and first recorded, and the ap-

peal presents the single question whether the court erred in refusing to declare the mortgage void as against the appellants' mortgage. The clause in the appellees' mortgage that gave rise to the controversy is as follows, viz.:

"It is agreed that I" (the mortgagor) "am to hold possession of my said stock of goods during the will of said Orr & Lindsey, and retail the same and account to said Orr & Lindsey each week after this week for the proceeds of sales, and to pay $50 thereof, if not more, each week until said sum" (the mortgage debt) "is fully paid; said $50 per week to be paid without regard to the amount of sales."

1. MORTGAGE: Benefit reserved to mortgagor.

It is contended that this clause conferred upon the mortgagor the power to reserve the proceeds of the first week's sales, after the execution of the mortgage, to his own use, and did not compel him to account, in any week, for more than $50, even though the proceeds should exceed that amount. If either branch of this argument is followed, it must be conceded that the mortgage is void, as far as the subsequent incumbrance is concerned. *Gauss Sons v. Doyle*, *ante*, and cases there cited.

The instrument is certainly ambiguous. The exact meaning of the contracting parties is not manifest. If the record informed us what the course of business, under the contract, was, that might throw light upon the meaning they assigned to it, and so give the basis of its correct construction.

"Tell me," says Lord Chancellor Sugden, "what you have done under a deed, and I will tell you what that deed means." *Atty. General v. Drummond*, *1 Dr. & W., Irish Chy., 353*. But we are left to the naked legal construction without extraneous aid.

2. DOUBTFUL CONTRACT: Construction.

It is one of the cardinal rules of interpretation that where an instrument is susceptible of two probable conflicting constructions, one of which imputes bad faith to either party,

while the other would be free from such taint; or, if one interpretation would render the contract unlawful and the other lawful, the latter construction should be adopted. The law does not assume that it was the intention of the parties to commit a fraud or violate the law. *2 Whart. on Cont., sec. 654; Bishop Cont., sec. 583; Best Pr. Ev., sec. 347; 2 Whart. Ev., sec. 1249; Lorillard v. Clyde, 86 N. Y., 384.*

Applying this rule to the case in hand, the meaning of the clause is that the mortgagor should sell for the mortgagees' benefit and account to them for the proceeds; that if the proceeds of sales should not reach $50 a week that sum should be paid nevertheless, and that the first settlement and account of sales should be made the next week after the mortgage was executed. The circuit court upheld the mortgage and the judgment is right. See *Gauss Sons v. Doyle, sup.*, and cases cited.

Affirm.

---

46 132
64 643
65 30
46 132
72 51
46 132
73 224
46 132
82 320
46 132
85 62
46 132
90 296

HECHT & IMBODEN v. CAUGHRON.

1. PLEADING—EVIDENCE: *Execution of contract sued on.*

When the execution of an instrument sued on and set forth in the complaint is not denied in the answer, it is admitted by the defendant and need not be proved.

2. SAME: *Written pleadings before J. P., effect of.*

When a defendant elects to file a written answer before a justice of the peace, or on appeal in the circuit court, he will be held to the issues tendered by his answer.

3. SAME: *General issue, effect of.*

The general issue is not now permissible in practice, but may be accepted by the parties as tendering an issue, and treated as a valid answer; but the scope of the issue will not be extended beyond what the answer obviously intended to make.

4. ACTION: *Right of, on promise for plaintiff's benefit.*
A party may maintain an action on a promise made to another for his benefit.

APPEAL from *Clay* Circuit Court, Western District. Hon. W. H. CATE, Circuit Judge.

J. C. Hawthorne, for appellants.

First—The unauthenticated copy of the record of an agreement between appellants and the Allendale Trust Company should have been excluded. The clerk had not attached his certificate or seal thereto. It was not proved to have been a true copy, or that it had ever been entered into or executed by appellants. *1 Greenl. Ev., sec. 501.*

Second—The first instruction was error. It assumed that if appellants received the product of the mill, they were liable for all wages of laborers. This was a summary way of enforcing laborers' liens, and does not harmonize with the decisions on that subject. *27 Ark., 564.*

Third—A general authority to transact business and to receive and discharge debts, does not confer upon the agent the power to accept or indorse bills so as to charge the principal. *3 Head. (Tenn.), 619;* nor to authorize an agent to give notes in the name of his principal. *8 Wend., 494; 37 How., 203; 6 Abb. (N. S.), 292.* It should have been submitted to the jury, whether the agreement authorized the Trust Company to issue due bills, which would bind appellants—but the second instruction assumed that it did, and was error. Appellants did not undertake generally to pay wages, but only to do so when requested by the company.

The promise to pay these due bills was within the statute of frauds. *12 Ark., 174.*

No suit can be maintained, unless by parties or privies. The promise to the Trust Company was not one to pay plaintiff.

Sanders & Husbands, for appellee.

The written contract provided that appellants should pay all employes of the mill—not when requested—but immediately. Before he purchased the checks, appellants assured appellee they would pay them. The written contract was recorded and duly certified and properly admitted as evidence.

The mill was operated solely for the benefit of appellants—they received all the proceeds and agreed to pay all the wages.

A promise made to one for the benefit of another, can be sued on by the beneficiary of the promise. *49 Mich., 366; 17 Mass., 400; Ib., 575; 1 Chit. Pl., 4; 16 Serg. & R., 237; 8 Conn, 52; 2 Gr. Ev., sec. 109; 31 Ark., 162.*

COCKRILL, C. J. The Allendale Trust Company was carrying on a saw mill business in Clay county, and became indebted to the mercantile firm of Hecht & Imboden in the sum of $1,500. Wishing to secure this amount and advances thereafter, to be made in money or merchandise by Hecht & Imboden, an agreement was entered into between the parties by which the company transferred all of its stock of saw logs and timber, and certain accounts due them, to the merchants, and agreed to carry on the saw mill business for the sole benefit, and in the name of the merchants, until the amount secured should be liquidated; the merchants upon their part agreeing to furnish the mill with logs, and to pay the wages of the employes, and other expenses of the business. The agreement was duly

executed, acknowledged and filed for record as a chattel mortgage, and the business was conducted under it. It was the custom of the company to issue due bills to the employes at the mill for their wages, payable at Hecht & Imboden's store on the 15th of each month.

The appellee was an employe at the mill and purchased due bills for wages from other employes payable at Hecht & Imboden's place of business, which the firm paid. Subsequently the appellee presented a time check due him for wages, and several others which he had purchased as before, but payment was refused, the merchants claiming that the company had no money in their hands, but was indebted to them in the sum of $1,100. The appellee sued them to recover the aggregate amount of the several due bills, obtained judgment, and the merchants appealed.

1. EVIDENCE: Execution of contract

On the trial the court permitted the appellee to read to the jury the agreement between the company and Hecht & Imboden, without proof of its execution. It purported to be a certified copy from the record, but there was no proof as to the original, and it is argued that the clerk's certificate to the copy was informal and insufficient, and that the court erred in permitting it to go to the jury.

2. PLEADING: Issues.

The action was begun before a justice of the peace, upon a formal complaint containing several paragraphs, one of which sets forth the copy of the agreement offered in evidence. What issues were made in the justice's court the record does not disclose, but in the circuit court the appellants filed a written answer. It was simply the old plea of *nil debit*. No written answer was necessary before the justice, or on appeal to the circuit court, but the appellants having elected to make their defense in writing, they must be held to the issues their answer tendered. *Pennington v. Gibson, 6 Ark., 447; Bellows v. Cheek, 20 ib., 424.*

3. General issue. Effect of.

The general issue is not now permissible in practice,

a specific denial of each material allegation of the com plaint which the defendant desires to controvert being required. The plea may be accepted by the parties as tendering an issue, and so be treated here as a valid answer, but the scope of the issue will not be extended, as was ruled in *Tyner v. Hays, 37 Ark., 599*, beyond such as the answer was obviously intended to make. The chief object of the reform system of pleading, it is said, is "to compel the adverse parties to disclose to each other the facts upon which they rely to uphold the claim upon the one side and to maintain the defense on the other, in order that each may know what he is required to establish or repel by proof upon the trial." *Newman Pl. & Pr., 523.*

It is obvious that the appellee could not have understood that the execution of the instrument sued on was denied, and he was, therefore, not called upon to prove its execution. *Martin v. Tucker, 35 Ark., 279; Tyner v. Hays, supra; Gwynne v. McCauley, 32 ib., 97.*

But it is said the appellee was not a party to this contract and had no legal interest in it. The right of a party to maintain an action on a promise made to another for his benefit, although much controverted, is now the prevailing rule in this country, and has received the sanction of this court. *Chamblee v. McKenzie, 31 Ark., 155; Talbot v. Wilkins, ib., 411; 2 Whart. Cont., sec. 785, et seq.*

One of two constructions must be placed upon the contract. Hecht & Imboden either undertake to pay the wages and supply demands of the business, in consideration of the benefit to be derived by them from the company, or they constitute the company their agent with power to bind them for the payment of these demands. In either event they are liable. In this view the instructions were not erroneous and the judgment must be affirmed.

46 137
55 388
46 137
57 212

THE STATE v. SIB JACKSON.

1. CRIMINAL LAW: *Limit of judgment of removal from office.*
In a proceeding for the removal of an officer from office the judgment extends only to removal—costs following as an incident. No fine or other punishment can be inflicted; and the cost can be collected only by execution—not by imprisonment.

ERROR to *Pulaski* Circuit Court.
Hon. F. T. VAUGHAN, Circuit Judge.

D. W. Jones, Attorney General, for appellant.

The appellee, a constable, was removed from office upon information filed by the prosecuting attorney. The court held that under an information no fine could be imposed nor could appellee be held for costs and that the prosecuting attorney was not entitled to a fee. The removal was for criminal conduct on the part of the appellee.

First—It has been held in the case of *The State v. Whittaker, 41 Ark., 486*, that a criminal information was an accusation in the nature of an indictment, from which it differed only in being presented by a competent public officer on his oath of office instead of a grand jury on their oath. The act of March 9, 1877, applies only to prosecutions for removal from office by presentment or indictment, and until a practice act is passed prosecutions by criminal information in the circuit court for removal must be according to the common law rule. In the case above cited no criminal act was charged. *Section 2325, Mansfield's Digest*, requires a removal from office in addition to the other penalties, etc. *Vide* also *sec. 2323, ib.* The same judgment should be rendered on information as on indictment.

Second—The judgment being criminal the costs follow as an incident. *Secs. 2325 and 2342, Mansfield's Digest; Hall v. Doyle, 35 Ark., 448.*

Third—The prosecuting attorney is entitled to a fee. *Sec. 3233, Mansfield's Digest.*

Blackwood & Williams, for appellee.

The court below properly decided that no fine could be imposed on appellee, nor could he be imprisoned for costs. The defendant was not charged nor prosecuted for any crime, nor does the law provide for any fine. It is only in a *criminal* case where a fine is imposed that a defendant can be imprisoned or compelled to work out costs. The costs in such cases as this are a mere debt due the officers, collectable, if at all, by execution. *41 Ark., 403 and 489; sec. 2318, Mansfield's Digest; ib., sec. 2350.*

The authority to imprison for costs is purely statutory, and must be strictly construed. *44 Iowa, 637.* See also *1 Bailey (S. C.), 375; 4 Lea (Tenn.), 742.*

SMITH, J. Upon an information filed by the prosecuting attorney, Jackson was removed from the office of constable for drunkenness and incompetency, and was adjudged to pay the costs. The court was moved to assess a fine against him, but declared that it had no power to impose a fine. The court also refused to order that, if the costs were not immediately paid, the defendant should be confined in the county jail. It further denied a motion to tax a fee of $10 to the prosecuting attorney. The state appeals.

In a proceeding to remove an officer, the judgment extends only to removal, costs following as an incident. No fine or other punishment can be inflicted, because the re-

moval may be for causes which involve no criminality. Thus, in *Whitlock's case, 41 Ark., 403*, a justice of the peace was removed because he was subject to epileptic fits, which incapacitated him from performing the duties of the office. If the removal is for criminal conduct, the crime is punishable in a separate proceeding. Nor is there any law which authorizes the imprisonment of a defendant for the non-payment of costs, except where the judgment is also for fine or imprisonment. Compare *Mansfield's Digest, secs. 2318, 2350, 1210 and 1213.* Such authority must be expressly conferred by statute and will never be inferred. The costs in a proceeding of this sort constitute a mere debt to the officers of the court, for which the defendant becomes liable upon his removal. But he cannot be made to work out such costs. The only remedy is by execution, imprisonment for debt being abolished. *State v. Erwin, 44 Iowa, 637; State v. Kenny, 1 Bailey (S. C.), 375; State v. Sibley, 4 Lea (Tenn.), 738.*

It is not customary in judgment entries to give particular directions for the taxation of costs. The presumption is the clerk knows his duties and will discharge them. But treating this as an application by the prosecuting attorney to the court below to retax the costs, upon the clerk's refusal to include his fee in such taxation, we may say that he is entitled to a fee of $5 under section 3233 of Mansfield's Digest, which allows that sum "for each judgment obtained on complaint, information or otherwise, in the name of the state or any county."

Affirmed.

STATE V. MALONE ET AL.

1. CRIMINAL LAW: *Taking timber from another's land.*
The statute of 1838 (section 1658, Mansfield's Digest), making it a misdemeanor to carry away any wood or timber that may be lying upon the ground of the owner, is not repealed by the act of March 17, 1883 (Mansfield's Digest, section 1659).

APPEAL from *Perry* Circuit Court.
Hon. J. B. WOOD, Circuit Judge.

Dan. W. Jones, Attorney General, for appellant.

The indictment charges the appellees with a trespass and defines the offense in the words of the statute. *Sec. 1658, Mansfield's Digest.*

A general demurrer was sustained to the indictment. The presumption is that the circuit court sustained the demurrer upon the assumption that section 1658, *supra*, which was a part of the revised statutes, was repealed by sections 1660–62, *ib*, which are parts of the act of March 17, 1883; but upon examination it will be observed that there is no conflict between these sections. Section 1658 makes the simple carrying away any kind of wood or timber that may have been cut down, and that may be lying on the land of any other person, a misdemeanor, without regard to the *intent* of the trespasser; whereas sections 1660 and 1662 require the act to be done "with intent to convert the same to his own use, or the use of his employer or principal."

The demurrer should have been overruled.

SMITH, J. The defendants were indicted for removing wood and timber of the value of $5.00, which had been

cut down and was lying upon the lands of another. The indictment was quashed upon demurrer.

The offense is described in the words of section 1658, of Mansfield's Digest, and the question is whether so much of that section, being a part of the revised statutes of 1838, as makes it a misdemeanor to carry away any kind of wood or timber that may be lying upon the ground of the owner, is impliedly repealed by the act of March 17, 1883 (*Mansfield's Digest, secs. 1659–63.*)

There is no inconsistency between the two statutes, for the earlier statute punishes the trespass without regard to the intent of the trespasser; whereas the later requires the act to be done with intent to convert the property to the use of the taker or that of his employer or principal. *Ib., sec., 1660.*

Again: The later act cannot be regarded as a revision of the whole law of trespass upon real estate and as intended to be a complete substitute for all previous legislation on that subject. Its title is, "An act to protect state lands, and for the regulation and protection of the timber and timber interests of this state."

Reversed and remanded, with directions to overrule the demurrer and require the defendants to plead.

McCoy v. State.

46 141
56 7
46 141
59 392
46 141
58 478
46 141
60 451
46 141
74 18
74 356
74 400
e75 576

1. Criminal Pleading: *Former acquittal.*

A plea of former acquittal of the offense charged is not sustained by proof of acquittal under a former indictment of acts of which the defendant could not have been convicted under the last.

2. Criminal Practice: *Omission to furnish copy of indictment to defendant.*

The omission of the clerk to furnish a defendant indicted for murder

with a copy of the indictment before arraignment, is no ground for arrest of judgment. It is ground only for new trial, and is waived by pleading and going to trial without claiming a copy.

3. PRACTICE IN SUPREME COURT: *Conclusiveness of verdicts.*

The Supreme Court will not interfere with the verdict of a jury for want of evidence to sustain it, unless there is a total absence of proof on a material point, or the proofs so completely fail to support it that it must have been the result of prejudice or partiality.

4. CRIMINAL EVIDENCE: *Statements of defendant after the crime.*

Evidence of the defendant s statements after the commission of a homicide, which are no part of the *res gestæ*, is not admissible for him.

5. WITNESS: *Defendant in criminal case.*

A defendant in a criminal case who becomes a witness for himself, is subject to the same liabilities on cross-examination as any other witness. His character for veracity may be impeached, though his good character may not have been previously put in issue, and his testimony may be contradicted by proof of his prior inconsistent statements.

6. INSTRUCTIONS: *Should not be repeated.*

Where the trial court has given the law correctly and with sufficient fullness on all the points arising in the case, it is no error to refuse additional instructions which simply present the same ideas couched in different language.

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

Jeff. Davis, for appellant.

First—The court erred in permitting the cross-examination of defendant as a witness, and the evidence of Tom Osborne, for the purpose of contradicting McCoy, and proving him guilty of an entirely different crime, viz.: accessory after the fact, to go to the jury. It was not only improper, but highly prejudicial to defendant. *2 Ark., 229; 37 ib., 261; 39 ib., 278; 1 Bish. Cr. Pro., sec. 1120 to 1129; 38 Ark., 221; 43 ib., 367.* All evidence tending to

prove him guilty of being an accessory after the fact was irrelevant and inadmissible, as he could not possibly be convicted of that crime under the indictment. *41 Ark., 173; 1 Bish. Cr. Law, secs. 672, 883; 2 Bish. Cr. Pro., secs. 8, 9, 10 and 11.*

Second—It was error to exclude the testimony of Eskridge as to statements of defendant to Sam Osborne while washing Osborne's wounds. It is certainly bad practice to admit one part of a conversation which is against the defendant, and exclude that which might be taken in his favor. All should be admitted or none. *43 Ark., 273; 1st Bish. Cr. Pro., secs. 1085–6 and 1125; 1 Gr. Ev., sec. 201–2 and note, and 108 and 110.*

Third—The court erred in refusing instructions 4, 6, 7 and 8. These instructions were not fully embodied in those given by the court. They announce clear propositions of law, and should have been given as asked. *16 Ark., 329; Wharton's Cr. Law, 2d ed., 264; Bish. Cr. Pro., vol. 1, sec. 1103; Bish. Cr. Law., vol. 1, secs., 967, 972, 975; 47 Ala., 603; 3 Gr. Ev., sec. 25.*

Fourth—The evidence was not sufficient to sustain the verdict of the jury; in fact, the verdict is such as to shock one's sense of justice, and should be set aside. Five witnesses swore positively that McCoy was at the house of Eskridge when the murder was committed. Reviews the evidence in detail.

Fourth—The court erred in sustaining the demurrer to the plea of former acquittal. Because the assault upon Mrs. McAllister is alleged to have occurred in the attempt to murder William McAllister by the same parties, and at the same time and place. Defendant was indicted for both offenses upon the same testimony and by the same grand jury. Defendant pleaded an *alibi* and was acquitted. See *Whart. Cr. Law, 2d ed., 199; 1 Bish. Cr. Law, secs. 801,*

1052 to 1061; 1 Green. (*N. J.*), *361; 1 Tex. Ct. App.*, *151; 3 MacArthur*, *370; 32 Ark.*, *231.* The fact of McCoy's presence was negatived by the first trial.

D. W. Jones, Attorney General, for appellant.

The demurrer to the plea of former acquittal was properly sustained, because the appellant could not have been convicted of the charge in this case on the proof in the first case. There were two distinct offenses. *State v. McMinn*, *34 Ark.*, *160.* Even though the same physical act was charged in the two cases, the appellant could be acquitted on the first trial and convicted on the second. *Morgan v. State*, *34 Tex.*, *677.*

The appellant having testified to substantially the same facts offered to be proven by Eskridge, was not hurt by his exclusion.

The *statute* (*Acts of 1885*), *p. 126*, simply makes the defendant a competent witness; he takes the stand like any other witness, and is examined and cross-examined under the same rules, and to the same extent as any other. *1 Bish. Cr. Pro.*, *1182; State v. McGinnis*, *76 Mo.*, *326; State v. Sardis*, *76 ib.*, *35; State v. Owen*, *78 ib.*, *367.* The state may discredit him as any other witness. *1 Bish. Cr. Pro.*, *1185.*

Voluntarily testifying in chief on a particular subject, he may be compelled to answer on cross-examination, although the answer may criminate him. *Cal.* (*S. C.*), *People v. Freshour; 12 Chic. L. News*, *438;* also, *8 Wash. L. Rep.*, *567; 1 Bish. Cr. Pr.*, *1183.*

The state introduced evidence tending to prove appellant guilty of being an accessory after the fact. In cases cited by appellant on this point, separate and distinct offenses were introduced in evidence to prove the offense charged. In *Dunn v. State*, *2 Ark.*, *229*, defendant was on trial for the

murder of Williams, and his declarations were admitted showing his connection with the prior murder of Earnest, and this was held admissible as tending to show a motive for the murder of Williams. While the general rule is against the admission of evidence of a separate and distinct offense, it was said that such evidence is admissible when proof has been given establishing, or tending to establish, the offense with which defendant is charged and showing some connection between the different transactions. In *Melton v. State, 43 Ark., 367*, evidence of a series of connected wrongs growing out of and identifying each other was held admissible. If the testimony proves, or tends to prove, the offense charged, it is no objection to it that it also tends to prove another. *1 Bish. Cr. Pro., 1121.*

Hogins' testimony that Eskridge, after giving testimony in the examining court, adhered to such testimony in declarations to others was inadmissible. "When a witness has been impeached, evidence that he has, on other occasions, made statements similar to what he has testified in the cause, is not admissible." *1 Greenl. Ev., 469.*

The 4th and 6th instructions were given in the 2d, and the 9th in the 5th.

The motion in arrest was properly overruled because no application for the indictment was made and no question raised until after plea and trial. *Johnson v. State, 43 Ark., 391.*

There being no substantial error in the whole case, it should stand affirmed.

1. CRIMINAL PLEADING: Former acquittal.

SMITH, J. McCoy, Bookout and Osborne, were jointly indicted for the murder of William McAllister. McCoy pleaded a former acquittal; but his plea was adjudged bad upon demurrer. The plea and the record evidence offered to sustain it, show that the offense of which he was for-

merly acquitted, was an assault with intent to kill, committed upon Mary McAllister, the wife of the deceased. The theory of the plea is, that the conflict, in which McAllister was killed and his wife wounded, was one and the same transaction, for which two separate indictments were returned; that his defense was the same in both cases, viz.: An *alibi;* and that he is protected by the previous verdict from any further prosecution growing out of the same affair. The plea sets forth, however, that it was not by the same shot that the two injuries were inflicted.

In *State v. McMinn, 34 Ark., 160*, the defendant had been previously indicted, tried and acquitted upon a charge of stealing a cow and two heifers, the property of one Carroll. To an indictment which charged him with stealing a bull, the property of one Adney, he pleaded the former acquittal in bar. But it was held that, as upon the first indictment, he could not have been possibly convicted of the offense described in the last indictment, the plea presented no bar.

A similar result was reached in *Williams v. State, 42 Ark., 35*, where the defendant was first indicted for stealing the money of Mrs. Elliston, viz.: Two greenback bills, two national bank bills and two silver certificates, of the denomination of $10 each; also ten silver dollars, ten halves and ten quarters. The defendant having pleaded not guilty, a jury was impanneled and sworn; and after witnesses were examined, and counsel had argued the case, and the court had charged the jury, a *nol. pros.* was entered. The defendant was afterwards indicted for stealing two greenback bills and two national bank bills, each of the denomination of $20, and one hundred silver dimes, and one hundred nickels belonging to Mrs. Elliston. He pleaded former jeopardy, alleging that it was all one and the same larceny. But a conviction was sustained upon

the ground that, under the first indictment, he could not have been convicted of stealing any piece of the money described in the second.

In *Morgan v. State*, *34 Texas*, *677*, the defendant had been acquitted of the theft of $8.50, alleged to have belonged to one Warwick, and to have been stolen from his dwelling-house and from his possession. He was again indicted, and this time convicted of the theft of $8.50, the money of Richard Peterson, and stolen from his house, but in the possession of Warwick. And it was ruled that the offenses were distinct.

These precedents suffice to show that there is no identity of accusation in the case at bar, and the one on which McCoy was acquitted. The injured persons were not the same; the grade and punishment of the two offenses were different. The indictments were not even founded on the same physical act; and their legal effect is different.

2. PRACTICE: Furnishing indictment to defendant.

The defendant was then put on trial, upon his plea of not guilty and was convicted of murder in the first degree. He moved in arrest of judgment, for insufficiency of the indictment and because he had not been furnished with a copy of it forty-eight hours before arraignment. No defect is perceived in the form of the indictment. The other objection is not available on motion in arrest; because, even if such a motion raises any other question than the sufficiency of the indictment (*Mansf. Dig.*, *sec. 2302*), yet the fact that the clerk had not delivered to the defendant a copy of the indictment, does not appear on the record. The utmost effect of such an omission of duty is, that if a defendant does not waive his right in this respect, and is forced to trial without a copy, it lays a foundation of a motion for a new trial. But by pleading and going to trial without insisting on his privilege, the defendant waives it. *Johnson v. State*, *43 Ark.*, *391*.

3. PRACTICE IN SUPREME COURT: Conclusiveness of verdict.

The motion for a new trial alleged that the verdict was against evidence; that improper evidence was admitted and competent evidence excluded, and that the jury were misdirected.

The testimony revealed a revolting instance of cold-blooded assassination. McAllister and his family were seated around a winter fire in their own house. It was two hours after night had set in. The busy housewife was carding wool. Upon this peaceful scene, three men, with pistols in their hands, intruded. They effected an entrance by bursting open the door of the house, and immediately began an indiscriminate firing upon McAllister. His wife, in attempting to protect him, was struck over the head with a pistol, and received a shot in her arm, which rendered amputation necessary. McAllister was killed. The three men were recognized by Mrs. McAllister, her daughter and her three sons, as McCoy, Bookout and Osborne. They were neighbors, well known to all the family, and they wore no disguise. According to their testimony, McCoy fired the fatal shot. Bookout and Osborne had a private grudge against McAllister because he had recently sworn out a warrant against them. They had made an attack upon him on the public highway, when he was compelled to take refuge in the house of a neighbor. No motive was known for McCoy's participation in the crime. He was supposed to be on friendly terms with the McAllisters. But he was a brother-in-law to Bookout and had evinced some excitement about the time that the writ was issued for the arrest of Bookout and Osborne, and had expressed an opinion that McAllister might as well select the place he wished to be buried in. In opposition to this testimony, McCoy and four other witnesses swore that he was at the house of Nathaniel Eskridge, two and a-half miles from McAllister's, at the

time the murder was committed, and indeed until Osborne was brought there wounded, he having been shot in the neck by one of his comrades in the course of the conflict at McAllisters. But the jury chose to believe the witnesses for the prosecution, and to disbelieve the defendant's witnesses. The state had in truth introduced evidence tending to prove that three of the defendant's witnesses were not of unimpeachable character.

We do not interfere with verdicts on the ground that they are not warranted by the testimony, unless there is a total absence of proof on a material point, or the proofs so completely fail to support the verdict, that, in order to arrive at their conclusion, the jury must have acted from prejudice or partiality.

4. CRIMINAL EVIDENCE: Statements of defendant.

The homicide occurred in the year 1874, but the trial did not take place until 1885, in consequence of the defendant's escape from custody and flight to Texas, where he passed under an assumed name. Several of the witnesses, who had testified in the examining court, and whose testimony had then been reduced to writing, were now dead, or out of the jurisdiction. These minutes were read by agreement. Eskridge, in his deposition, after stating that Osborne came to his house, in the night of January 26, 1874, and related how he had been shot at McAllister's, had sworn that McCoy spoke up and said, "Sam (addressing Osborne), I told you and Ben Bookout, three or four days ago, to keep away from there. I would not it was me for the whole world." These declarations of McCoy were properly excluded from the jury. They were no part of the *res gestæ*, but merely narrative of a past occurrence and hearsay.

5. WITNESS: Defendant in criminal case.

The defendant gave evidence in his own behalf. Amongst other things he stated that he dressed Osborne's wounds at the house of Eskridge; that upon an intimation by

Eskridge that he did not wish to harbor Osborne, defendant had carried him to Mrs. Bookout's, and had put him away in the corn crib; that defendant went next morning after Osborne's brother, not with any view to aid his escape, for he supposed him to be mortally wounded, but merely that his brother might come and nurse him; and that defendant did not understand until noon of that day, when he was arrested, that McAllister was dead, although Osborne had told him that he and Bookout had shot him. The defendant's attention was particularly called to his statement made in the examining court, not under oath however. The state then put in evidence this statement, in which the prisoner had given a different version of some of these transactions; and also had Osborne's brother sworn, who stated that McCoy came to him, in the morning of January 27, 1874, and informed him that his brother Sam and Bookout had killed McAllister the night before; that Sam was lying wounded in Mrs. Bookout's crib; and advised that he be gotten out of the way before the officers came. Exceptions were properly saved; and it is now contended that this line of evidence was not legitimate; that it had no tendency to prove the defendant's guilt of the crime whereof he was on trial, but only to prejudice him in the eyes of the jury by showing that he had harbored and protected one of McAllister's murderers and connived at his escape—a crime for which the prisoner was not indicted.

The answer is, that McCoy appears here in the double character of an accused party on trial and of a witness. He opened the door to this cross-examination by first testifying voluntarily to matters which occurred subsequently to the killing. And a witness may always be discredited by proving that he has made contradictory statements on a former occasion, provided he is first inquired of concern-

ing such former statement. *Drennen v. Lindley, 15 Ark., 359.*

A defendant in a criminal case takes the stand like any other witness. He is subject to the same liabilities on cross-examination as are other witnesses. His character for veracity may be impeached, though his good character may not have been previously put in issue. And he may be contradicted by proof of prior inconsistent statements. *1 Bish. Cr. Pro., sec. 1182, et seq.; Wharton's Cr. Ev. 8th ed., secs. 429, 434,* and cases cited; *Brandon v. People, 42 N. Y., 265; State v. Owen, 78 Mo., 367.*

The court refused the following prayers of the defendant for directions:

"The charge against the defendant involves his presence at the time and place of the commission of the alleged murder, and if the jury have a reasonable doubt, from the whole testimony in the case, of the defendant's presence at the time and place of the commission of the offense charged, it is their duty to acquit him."

"If the jury believe from the evidence that Ben Bookout and Sam Osborne, on the night of the 26th of January, 1874, in the county of Pope, and state of Arkansas, killed and murdered William McAllister, and that the defendant Jas. McCoy, at the time of the commission of the said murder, was at the house of Nathaniel Eskridge, or the jury entertain a reasonable doubt of that from the whole testimony in the case, they will find him not guilty."

"The law presumes the defendant innocent; and this presumption remains, and is to be considered by the jury as evidence in the case until the contrary appears from the evidence."

"It is competent for the defendant to introduce evidence of his general good character as a peaceable and law-abiding man; and this is to be considered by the jury as a circum-

stance in the testimony tending to establish the improbability of his having committed the crime charged against him."

"It is competent for the state to introduce evidence of a grudge or bad feelings existing between deceased and defendant, or any testimony that would reasonably tend to establish a motive for the defendant to do and commit the crime charged; and if the absence of motive appears from the evidence, this is a circumstance to be considered by the jury in determining the guilt or innocence of the defendant."

But the jury had already been instructed that the state was bound to prove every material allegation in the indictment to their satisfaction beyond a reasonable doubt, and the material allegations in this indictment had been pointed out. It had been explained to them that the defense was an *alibi;* and that if the proof raised in their minds a reasonable doubt as to the defendant's presence at the time and place of the killing, it was their duty to acquit. They had also been told that motive, or the absence of motive, to commit the crime, was a circumstance to be considered by them in determining his guilt or innocence; and that previous good character was also to be taken into account; but if the evidence showed his guilt, they should so find, notwithstanding his good character.

6. INSTRUCTIONS, not to be repeated.

The multiplication of instructions is to be deprecated, as tending to confuse and embarrass the jury, rather than to enlighten them. If the trial court give the law correctly and with sufficient fullness upon all the points arising in the case, it is no error to refuse additional requests, which simply present the same ideas, couched in different language. *Crisman v. McDonald, 28 Ark.; 9; Kelly v. Jackson, 6 Pet., 622; Scott v. Lloyd, 9 ib., 418; Saber v. Cooper, 7*

Wall., 565; Railway Co. v. Whitton, 13 ib., 270; Ind. R'y Co. v. Horst., 93 U. S., 291.

Judgment affirmed.

VISART v. BUSH.

1. ATTACHMENT: *Sale of attached land. Filing bond before sale. Proof of attorney's authority to appear.*

46 153
55 284
46 153
59 492

In an attachment suit before a justice of the peace against a non-resident, served by warning order, an attorney *ad litem* was appointed by the justice for the defendant, who filed an answer and made defense for him, but judgment was rendered for the plaintiff and the land attached was sold, and the purchaser brought ejectment against the occupant and recovered, and the occupant appealed to the Supreme Court, where it was held that the recital in the justice's record of the attorney's appearance and defense had reference to his authority under the appointment, and did not show jurisdiction of the defendant's person, and that the sale was void for the failure of the plaintiff to file before the sale, the bond required in such cases against defendants only constructively summoned. At the trial, after the appeal, the circuit court refused to allow evidence to prove that the attorney had also been employed by the defendant. *Held*, error: The offered proof did not contradict the justice's record, and the attorney's authority was proveable by parol evidence, and the evidence was material in showing that the justice had jurisdiction of the defendant's person by the appearance through his authorized attorney, and the bond was therefore not necessary to authorize the sale.

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

T. B. Martin and James A. Gibson, for appellant.

The agreed statement of facts showed that Freeman & Johnson were retained by Bush to defend the suit, and

they appeared and defended for him as his attorneys, and not as attorneys *ad litem*. The answer was an entering of the appearance of Bush by authority, and no bond was required before the sale. *40 Ark., 130.* The evidence was clearly admissible.

W. H. Halliburton, for appellee.

First—No bond was given as required by *sec. 5190, Mansfield's Digest*, and no exception is made by *sec. 4126, ib.*

Second—The testimony *aliunde* was not admissible to contradict the recitals of the record that Bush was *constructively* summoned, and that Freeman & Johnson were appointed attorneys *ad litem* and appeared *in that capacity.*

Justices' entries are *quasi* records and are evidence in the courts. *35 Ark., 95; 33 ib., 475.* The judgment in the attachment proceeding is a record, and cannot be impeached or contradicted by oral testimony.

Appellant is estopped by the record. *24 Howard (U. S.), 343; 18 Ark., 332–3; 19 ib., 420; 33 ib., 489.*

Cockrill, C. J. This is a continuation of the case reported in *40 Ark., 124.* As will be seen from the statement of the case then made, it is an action of ejectment, the plaintiff's title being based upon a purchase made in pursuance of a sale of the land in controversy in an attachment proceeding instituted before a justice of the peace. The attachment was sued out against Bush, as a non-resident, upon constructive service only. The justice's record recited that Freeman & Johnson were appointed attorneys *ad litem* for the defendant, and that they accepted the appointment; it afterwards recites that they appeared as the attorneys of the defendant and filed an answer and made defense for him, which was in part successful. Upon

the former appeal this court ruled that, in the absence of a showing to the contrary, the authority of the attorneys to appear in the case must be referred to the appointment by the justice, and as they could not, by virtue of such appointment, enter the appearance of the defendant so as to give the court juristiction of his person, the case was treated as a proceeding against a defendant summoned by constructive service only, and reversed the judgment (which was then in favor of plaintiff below) because no bond had been filed by him before the sale of the land as in such cases is required.

On the trial, after the appeal, the plaintiff offered to show by parol testimony that Freeman & Johnson had been retained by Bush after their appointment by the justice, and were authorized to answer and defend for him as they had done. The court excluded the evidence, and treating the attachment proceeding as this court had done, gave judgment for the defendant.

The evidence offered tended to explain and make certain what is not apparent from the justice's docket. It was a presumption of fact only, raised by a prior recital of the record, that the attorneys appeared by virtue of the appointment by the justice. The question of the capacity in which the attorneys appeared was not at issue before the justice, and was not adjudicated by him. When the attorneys appear for the purpose of filing an answer, they are described as the defendant's attorneys without qualification. Evidence that they were in fact his attorneys did not contradict the record (*Freeman on Judgments, secs. 274–5*), and we think it is indicated in the former opinion that it would be competent to show by parol the capacity in which they acted. Justice's records are not required to be strictly formal and great latitude is indulged in permitting the facts upon which jurisdiction is

based to be shown. Their affirmative recitals of jurisdiction are only *prima facie* evidence at best. *Jones v. Terry, 43 Ark., 230; Easton v. Bratton, 13 Tex., 30.*

In *Jolly v. Foltz, 31 Cal., 321*, under circumstances similar to those here presented, evidence *aliunde* the record was held competent to show that the justice had jurisdiction of the person of a defendant in an attachment proceeding, the record not disclosing the fact. *Vandeutzen v. Sweet, 51 N. Y., 381.*

It was determined on the former appeal that the bond referred to in *section 4126, Mansf. Digest*, is the bond required by *section 5190.* Now, the latter bond is required only when the proceeding is against a defendant constructively summoned. It follows that if the justice had jurisdiction of the person of Bush, the bond was not required. It was error, therefore, to exclude the testimony offered to establish that fact.

Reverse and remand for new trial.

LEE COUNTY v. PHILLIPS COUNTY.

1. TAXES: *Must be appropriated to purpose for which collected. Mandamus.*

When taxes are levied and collected in United States currency for payment of a particular debt of the county to another county, the currency must be applied to the debt and cannot be withheld by tendering in payment the county warrants or bonds of the creditor-county, or a judgment recovered against it; and the treasurer of the debtor-county will be compelled by mandamus to pay the currency.

The county court of the debtor-county is not a proper party defendant to the petition for mandamus.

APPEAL from *Lee* Circuit Court.
Hon. M. T. SANDERS, Circuit Judge.
Hewitt, for appellant.
Trieber, for appellee.

STATEMENT.

Phillips county filed in the circuit court of Lee county its petition against the county court and treasurer of Lee county, stating, in substance, that in pursuance of the act of the legislature creating Lee county and providing for the ascertainment of its share of the indebtedness of the counties out of which it was carved, the amounts due to the parent counties had been ascertained and adjusted according to the act, and that in the year 1883 there was levied and collected in Lee county, in United States currency, a tax of five mills on the dollar of the assessed value of the property of the county to pay its proportion of interest on the public debts of the parent counties; and that of the amount collected the county court of Lee county apportioned the sum of $6,500 to Phillips county for payment of said interest, which had been paid by Phillips county in United States currency, but afterwards Lee county, through her treasurer, had refused to pay said sum in United States currency, but instead, had tendered in payment, first, county warrants of Phillips county, afterwards the bonds of the county, and afterwards a judgment recovered against the county in the United States circuit court for the Eastern district of Arkansas, and assigned by the owner to Lee county. All of these tenders were at their face value of $6,500, and were, all, refused. Prayer for mandamus to compel the county court and treasurer of Lee county to pay to petitioner the $6,500 in currency which had been collected for and apportioned to

petitioner and was then in the treasury of Lee county. A demurrer to the petition was overruled and the defendant declining to plead, a peremptory mandamus was ordered as prayed, and the defendants appealed to this court.

OPINION.

COCKRILL, C. J. It sufficiently appears from the petition in this case that Lee county raised, by a tax levied for that purpose, a fund for the part payment of its indebtedness to the counties from which the territory was carved out for the purpose of its creation; and that $6,500 of the fund so raised has been apportioned, by the Lee county court, to Phillips, as one of the parent counties, for its proportion of the debt due to it. It is apparent that it was not within the power of the treasurer to divert this money from the purpose for which it was raised and subsequently apportioned by the court. *Article 11, section 16, Constitution*, provides that "no moneys arising from a tax levied for one purpose shall be used for any other purpose." If it is true, as appears from the petition, that the county court had apportioned to the several counties the amounts to be paid to them respectively out of the fund, this was a judicial appropriation of the several amounts to the counties named, and a sufficient compliance with the statute requiring an order of court authorizing the treasurer to pay out the money in his hands. *Mansfield's Digest, sec. 1410.* No additional order by the county court, as the judgment of the circuit court in this proceeding commands, was necessary, but Lee county is not prejudiced by this, and the judgment should not be reversed for that reason.

The amount held by the treasurer of Lee county is sufficient to pay only a small part of the debt due from Lee to Phillips, and the question of the effect of a tender by

the former county to the latter of the bonds or other evidence of the latter's indebtedness to third parties in payment of the debt due by Lee to Phillips, is not legitimately presented by the record.

The facts set forth, being admitted by the demurrer, it is the plain legal duty of the treasurer of Lee county to pay to Phillips the money raised for its benefit and apportioned to its use by the Lee county court, and the judgment of the circuit court is affirmed.

---

46 159
54 11

46 159
65 533

MEMPHIS & LITTLE ROCK RY. v. ADAMS.

1. EXEMPTION: *Construction of sec. 2, art. 9, Constitution of* 1874.
   Under sec. 2, art. 9, of the Constitution of 1874, a debtor who is married, though not the head of a family, is entitled to the chattel exemption of $500 therein secured, whether it be the wife or the husband. The provision is for the benefit of all of either sex, who are either married or the heads of families.

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

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

"The personal property of any resident of this state who is married or the head of a family, to be selected by such resident, not exceeding in value the sum of $500 in addition to his or her wearing apparel and that of his or her family, shall be exempt from seizure on attachment or sale on execution, or other process, from any court, on debt by contract." *Const*, *art. 9, sec. 2.*

This language is slightly ambiguous, but the meaning evidently is that the head of the family shall be entitled to

the exemptions, and that marriage shall of itself constitute a man the head of a family. It does not mean that every person married, whether the head of a family or not, shall be entitled to the exemptions. Such a construction would give to every family where husband and wife were both living, a right to two exemptions; and this was certainly not the intent of the framers of the constitution. As has been repeatedly stated by this court, the exemption laws are not intended for the benefit of the persons in whose name they are taken, but for the family as an entity. Each family is entitled to an exemption of $500, and no more.

The law is thus stated by Mr. Thompson: "But creditors are entitled to demand that a single family shall not be allowed to withhold from them at the same time two homesteads; and the courts have frequently so held under varying circumstances." *Thompson's Homesteads and Exemptions, sec. 225.*

Neither can appellee lay claim to the exemption of $200, for that is granted only to persons who are not married.

We have found no case where a provision similar to that of our constitution has been passed upon by the courts; but we think that the construction which should be put upon it is plain. The family is not entitled to double exemptions. If the husband is dead or has absconded, the wife may become the head of the family; but while husband and wife live together, he is the head of the family, in law at least, and he alone can claim the exemptions.

Sanders & Husbands for appellees.

Exemption laws are to be liberally construed. *St. L., I. M. & S. R Co. v. Hart, 38 Ark., 114.*

Evidently, *art. 9, sec. 2, Constitution*, contemplates married women as within its provisions for exemptions. The

same constitution gives her the right to hold her separate estate, both real and personal, and constitutional provisions are made with reference one to the other. *Cooley's Const. Limitations, p. 55–57.*

Almost all the authorities we have been able to find discussing the right of a married woman to exemption of personal property have been based upon laws giving the right of exemption to "the head of a family."

Our constitution says "any resident of this state who is *married*, or the head of a family," thus super-adding a provision which would necessarily embrace and comprehend any character of person who is, or may be, charged with the care and maintenance of a family. A married woman is clearly entitled to the exemption. See *48 Mich., 262; 50 Miss., 720.*

The same rule is applicable in construing exemption laws as to real and personal property. *Freeman on Ex., sec. 223; 10 Neb., 117; 10 Mich., 539; 31 Ala., 195; 41 Cal., 81.*

SMITH, J. The railroad company brought an action of debt by attachment against Mrs. Adams before a justice of the peace. She filed a schedule, claiming that the property attached, consisting of household and kitchen furniture, and wearing apparel, and amounting to $328, was exempt. A *supersedeas* was accordingly granted and the plaintiff appealed.

In the circuit court the cause was tried upon an agreed statement of facts, to the effect that the account sued on was incurred in carrying on the separate business of the defendant, who was the keeper of a boarding-house for section hands, and who had a husband living with her; and that she was a resident of this state. The court found that she was, at and before the commencement of the action, a

resident and a married woman, and that the debt sued on was a debt by contract, made in the course of business carried on by her on her sole account. And it declared the law to be, that, under the constitution of the state, she was entitled to claim and hold, free from seizure or sale under attachment, personal property not exceeding in value $500. The action of the justice, in issuing said *supersedeas*, was therefore affirmed.

The constitution allows to a resident of the state who, is not married, or the head of a family, a chattel exemption of $200, exclusive of wearing apparel, as against debts by contract; but to one who is married, or the head of a family, an exemption of $500, in addition to his or her wearing apparel, and that of his or her family. *Art. 9, secs. 1* and *2*.

The argument is, that Mrs. Adams is entitled to neither of these exemptions: Not to the first, because she is a married woman; nor to the second, because she is not the head of a family; that exemption laws, being for the benefit of the family as an entity, must be restricted to heads of families; otherwise, the same family might enjoy a double exemption, in case both parents are alive and the owners of property.

This reasoning, it will be observed, is bottomed on the assumption that the use of the phrase, "married, or the head of a family," is nothing more than an instance of the tautology so common in legislative enactments, the intention being simply to declare that marriage should, of itself, constitute a man the head of a family.

But the expressions are not synonymous, or mere equivalents the one for the other. A married person is not necessarily the head of a family; and one may be the head of a family without being married. If the debtor is either the one or the other, he or she is entitled to hold personal

property not exceeding $500 in value exempt from execution or attachment.

The provision is not for the benefit of one sex alone, but for all of either sex who are or may be charged with the care and maintenance of a family. No reason can be advanced for the protection of a portion of the husband's property from seizure and sale, which is not equally strong where the property belongs to the wife and she is the debtor.

There is no ambiguity in the language of the constitution and no room for construction. It is dangerous to interpret a statute contrary to its express words, where it is not obvious that the makers meant something different from what they have said, and where no inconvenience will follow from a literal interpretation. *Broom's Legal Max.* (*480).

If the framers of the constitution had intended to confine the privilege to heads of families, it would have been easy to say so, by omitting the mention of married persons.

The following cases have an indirect bearing upon the question: *McHugh v. Curtis, 48 Mich., 262; Partee v. Stewart, 50 Miss., 717; Davis v. Dodds, 20 Ohio St., 473; Dwinell v. Edwards, 23 ib., 603; Crane v. Waggoner, 33 Ind., 83; Brigham v. Bush, 33 Barbour, 596.*

Affirmed.

BREWER & SON v. WINSTON, AD.

1. TRANSFER OF CAUSES: *Actions originating before J. P.*

   The provisions for the transfer of causes have no application to actions originating before justices of the peace.

2. SAME: *When not objected to.*

   Error in transferring a cause is waived if the transfer is not objected to.

3. NOVATION: *When original debtor released.*

A debtor will not be released by the agreement of his creditor to accept another for his debtor unless he specially agrees to release him.

APPEAL from *Stone* Circuit Court.
Hon. W. A. BEVENS, Special Judge.

J. M. Moore, for appellants.

First—The decree is void for want of jurisdiction. There was no element of equitable jurisdiction in the defense and cross-complaint. Jurisdiction in equity cannot be conferred by the transfer of causes purely legal and containing no grounds of equitable cognizance. *Crawford, Aud., v. Carson et al. 35 Ark., 583; Apperson & Co. v. Moore et al., 30 Ark., 58; Roberts et al. v. Jacks, 31 Ark., 608.*

Second—The code of practice does not apply to causes of action originating in justice's courts.

The provisions for the transfer of causes from law to equity, or *vice versa* does not apply to that class of cases. *Whitesides v. Kershon & Driggs, 44 Ark., 377.*

Third—The finding of the court was clearly against the weight of the evidence. The burden of proof was on the defendant to show an agreement on the part of plaintiff, based on a sufficient consideration, to release him. The testimony of Stevenson, Doncaster, F. R. Winston, was mere hearsay, and inadmissible as against plaintiff. McRaven's testimony proves nothing. Contracts cannot be established by inferences and the strict construction of casual conversations in relation to the transaction after its completion.

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

The preponderance of evidence is clearly on the side of the defendant. The finding of the chancellor was clearly

sustained by the weight of the evidence, and the rule is, that unless there is a clear preponderance of testimony against the finding, it will be upheld. *Branch v. Mitchell, 24 Ark., 432; Gist v. Barrow, 42 ib., 521; Gaty v. Holcomb, 44 ib., 216.*

The cause was properly transferred to the equity docket. The defendant prayed in his cross-bill for an accounting for the rents; and there being, according to the plaintiff's view of the case, mutual accounts between the parties, it was a matter of equitable cognizance.

If there had been nothing of equitable jurisdiction, it would not have been fatal to the judgment, but only an error to be corrected by motion in the lower court. Here the plaintiff made no objection to the removal of the cause to the equity docket, and saved no exceptions, as required by *sec. 4927, of Mansfield's Digest.* The error, if any, is therefore waived. Such objections must be made in apt time in the lower court, and cannot be raised for the first time on appeal.

SMITH, J. Brewer & Son brought this action against Winston before a justice of the peace, on a promissory note and recovered judgment. The defendant appealed to the circuit court and there filed an answer, which he styles also a cross-complaint, alleging that the note is secured by mortgage on real estate; that he had sold his equity of redemption in the mortgaged premises to one Elliott, who had assumed the debt as part of the purchase price; and that the plaintiffs had consented to accept Elliott as their debtor and to release the defendant from further liability. And it was prayed that the plaintiffs be required to look to the substituted debtor and the mortgage security for payment of their debts; and that the defendant's note be surrendered for cancellation. The cause

was tranferred to equity and the court decreed for the defendant.

1. Transfer of cause originating before J.P.

The answer and so-called cross-complaint introduced no new parties to the litigation, raised no issue that is exclusively cognizable in courts of chancery, and contained no element of equitable jurisdiction. Moreover, the provisions for the transfer of causes have no application to actions originating before justices of the peace. *Whitesides v. Kershon, 44 Ark., 377.*

2. Not objected to, waived.

But as the court below did not attempt to administer any equitable relief the only effect of the transfer was to deprive the plaintiffs of a jury trial, in case they had desired a jury. And since no objections were made to the removal, nor any exceptions saved to the decision of the court in that matter, the error was waived. *Mansf. Dig., sec. 4927.*

3. NOVATION: Release of debtor.

But the judgment was wrong upon the merits. The burden was upon the defendant to prove that he had been discharged by a novation of the contract. The testimony showed the following state of facts: The mortgaged premises had a grist mill upon them and were valued by the owner at $325. Elliott was willing to purchase at the price, provided he was not pressed by the mortgage creditor, whose debt was already past due. Having received an assurance of one year's indulgences to Winston, he bought the property, agreeing to pay the mortgage debt of $240, and also a store account of Winston's amounting to $6 to Brewer & Son, and the remainder of the purchase money to Winston. Brewer & Son assented to this arrangement. They were willing to receive payment from Elliott and to give credit to Winston for any sum he might pay; but they expressly refused to give up Winston's note and take Elliott's note in lieu thereof. In point of fact, they took no obligation of any sort from Elliott. Subse-

quently the mill was washed away by a freshet. Winston is the only witness of those who were present when the transaction occurred, who swore that the mortgagees consented to accept Elliott as their debtor and to release the original debtor. The Brewers (father and two sons) and Elliott contradicted him on this point. And they are corroborated by the circumstances, and also, to a certain extent, by the account given by Winston himself of the interview.

As there must be another trial, we caution the court below that the present record contains a good deal of hearsay, which should be excluded, if offered again; such as declarations made by Winston and Elliott, before and after the consummation of their trade, in the absence of the plaintiffs.

Reversed and remanded, with directions to restore the cause to the law docket and for further proceedings.

RECTOR V. COLLINS ET AL.

46 167
60 307

46 167
71 618

46 167
75 272

1. REFORMATION OF CONTRACT: *Promissory note.*

Chancery will not reform a promissory note payable *in futuro*, with 10 per cent. interest from date, by adding the words "until paid," though the parties intended it to bear that interest after as well as before maturity, if they omitted the words only because they thought them unnecessary. A contract written as the parties intended it to be written cannot be reformed for their mistake of its legal effect.

2. INTEREST: *When excess paid not recoverable.*

Where the maker of a promissory note payable *in futuro*, with 10 per cent. interest from date, omitting the words "until paid," pays that rate of interest after the maturity of the note, he cannot recover the excess paid over 6 per cent. accruing after maturity.

APPEAL from *Sebastian* Circuit Court.
Hon. E. F. TILLER, Circuit Judge.

F. W. Compton, for appellant.

First—The court erred in refusing to reform the notes, so as to make them bear 10 per cent. interest, after as well as before maturity. Mere mistakes of law are not remediable in equity. But where an instrument is drawn and executed, which is intended to carry into effect an agreement, whether in writing or by parol, previously entered into, but which by mistake of the draughtsman, either as to facts or *law*, does not comply with, or which violates the manifest intention of the parties to the agreement, equity will correct the mistake, so as to make the instrument conform to the agreement. *1 Peters, 1; 2 Curtis, C. C., 277–9; 98 U. S., 85; 13 Ark., 129.*

Second—The court erred in crediting the amount of the stated account with the interest paid by Collins after the maturity of the note, in excess of 6 per cent. This interest was paid under a mutual misapprehension of the legal effect of the notes, and was a mere naked mistake of law. *12 Pet., 32; 1 ib., 1; 15 Ohio, 218; 34 Miss. (5 George), 528; 7 Wend., 315.*

U. M. & G. B. Rose, W. M. Cravens and *W. H. H. Clayton*, for appellees.

First—Equity will not undertake to reform a written instrument except upon the clearest evidence. *1 Ves., 317; 1 Bro., 94; 5 Mason, 577; 2 Johns. Chy., Gellaspie v. Moore; 14 Ark., 487; 15 ib., 277.* In this case it is not pretended that the notes were not written as intended by the parties. It is only alleged that there was a mistake as to their legal

effect, that both parties supposed the notes would draw 10 per cent. until paid, and that if they had understood the law they would have drawn the notes differently. In such cases equity can afford no relief. *Kerr on Fraud and Mistake, Am. ed., 428; 2 Pom., Eq. Jur., sec. 843; 41 Ark., 495; 8 Wheat., 174; 49 Ind., 434; 47 ib., 98; 18 Mich., 354; 2 Abb., C. C., 471; 1 Russ. & M., 418; 2 Mylne & K., 251; 3 Comst., 19; 45 Iowa, 322; 48 N. Y., 708; 42 Iowa, 107; 32 ib., 138; 40 Ind., 366; 2 Md., 25; 6 ib., 479; 46 Ill., 439; 98 U. S., 85.*

Second—The court properly credited Collins with the interest paid in excess of 6 per cent. This is not an action for the recovery of money paid under a mistake of law, but all it presents is the existence of a large debt due by Collins to Rector and payments by Collins from time to time on general account, and Rector had no right to apply the payments to the satisfaction of interest in excess of that not contracted for.

Third—In the account, which the court below found to be an *account stated*, the interest is computed at 10 per cent. throughout. This may have been done with knowledge of the law, or ignorance of it; but if an error of law, it is one the courts will correct. *2 Story Eq. Jur., 12 ed., sec. 524; 11 Wheat., 256; 2 Atk., 112; 7 Penn St., 305; 3 Dessan. (S. C.), 93.* But this was not a mistake of law, but of fact; not of the legal effect of the instrument, but an error as to what the instrument really was. *Pollock Cont., p 391.*

Fourth—Appellees have not appealed, but if the decree is opened the entire account will be restated. *40 Ark., 394.* Appellant should be charged rent at the real rental value of the place, not what she received. *36 Ark., 17.*

BATTLE, J. The object of this action is the recovery of a balance due on certain promissory notes executed by

James M. Collins to Elias Rector, in his lifetime, for the purchase-money of certain lands described in the complaint, which were sold by Elias Rector to Collins, and the enforcement of a vendor's lien. The complaint alleges that Rector agreed to sell the land to Collins for the sum of $21,120, to be paid in three installments, and that Collins agreed to execute to him his three several promissory notes for the purchase-money, bearing interest at the rate of 10 per centum per annum from their respective dates until paid; "and that in pursuance of such agreement, Rector executed a bond for title, and Collins executed to Rector three promissory notes, each for the sum of $7,040, bearing date respectively, one on the 23d day of November, 1866, and the other two on the 1st day of January, 1867, and payable respectively, one on the 15th day of January, 1867, one on the 1st day of January, 1868, and one on the 1st day of January, 1869, with interest at 10 per cent. per annum from their dates, but which were meant and intended by the parties to bear interest at the rate therein expressed from the dates thereof until paid, the words '*until paid*' being by mistake, omitted at the end of the interest clause; and that in the computation and payment of accrued interest on the notes, from time to time, after their execution, both parties construed the notes as bearing the same rate of interest after as before maturity, as it was understood and agreed before, and at the time of their execution, that they should."

That Collins, shortly after the execution of the title bond, took possession of the bargained premises, and remained in possession thereof until evicted in the year 1878, as hereinafter stated.

That on the 30th of July, 1878, Rector by deed of that date, conveyed all his right, title and interest in and to the said premises to the plaintiff, Jemima C. Rector, his wife,

and thereby assigned and transferred to her the said purchase note, dated the 1st of January, 1867, payable two years after date, and a certain other note bearing date the 11th of April, 1874, executed by Collins to Rector for the payment of $3,813, due one day after date thereof, and bearing interest at the rate of 10 per cent. per annum from the 1st day of January, 1874, until paid, which said last mentioned promissory note was given for the principal and interest then remaining due and unpaid on the original purchase note payable on the 1st day of January, 1868, above mentioned.

That on the 7th day of July, 1878, the plaintiff instituted an action of ejectment against Collins for the recovery of the bargained premises, and that such proceedings were thereupon had, that afterwards, on the 24th day of August, 1878, the plaintiff by the consideration and judgment of the court recovered possession of said premises with nominal damages and costs, and that since said recovery said plaintiff was put in possession of the premises and had remained in possession thereof from thence hitherto.

That on the 6th day of April, 1876, Collins, who was then greatly in want of means and hard pressed by Rector and others of his creditors, proposed to Rector that if he would join him in the execution of a note to the defendant, William G. McPhetridge, and pledge the one he held on him, Collins, for $3,813.04 heretofore mentioned, as collateral security for the payment thereof, he would borrow that amount from McPhetridge, let him, Rector, have a part of it in part payment of what he owed him on said contract of sale and purchase and give him a mortgage upon his crop then planted, and to be planted and produced on the bargained premises that year, to secure the balance of what should be found due and unpaid upon said contract

of sale and purchase, and to indemnify him against his liability on the note to be executed to McPhetridge, to which proposition Rector assented; and that he and Collins then proceeded to ascertain the amount then remaining due and unpaid on said contract of sale and purchase, after allowing all the credits to which Collins was entitled; and after stating the account between them and striking a balance, Collins was found to owe Rector the sum of $10,853.04, together with the interest thereon from the 1st day of January, 1874; and that thereupon Rector joined Collins in the execution of the note to McPhetridge, and indorsed and delivered to him the note he held on Collins for $3,813.04 as collateral security, and Collins executed to Rector a mortgage upon his crop for the purpose proposed by him as aforesaid, whereby he acknowledged that he was then indebted to Rector in the just and full sum of $10,853.04, with interest due thereon from the 1st day of January, 1874, evidenced by two certain promissory notes therein described, as follows, to-wit.: "The first dated January 1, 1867, payable two years after date to the said Elias Rector, or order, for the sum of $7,040 in current funds, with interest thereon at the rate of 10 per cent. per annum from date till paid; and the other, dated April 11, 1874, payable one day after date to the said Elias Rector, or order, for the sum of $3,813.04, with interest thereon at the rate of 10 per cent. per annum from January 1, 1874."

That there is due and owing to plaintiff, for and on account of the principal debt and interest on said contract of sale and purchase, after allowing all the credits thereon to which Collins is legally entitled, the sum of $14,422.74.

The prayer of the complaint is: "That the original purchase note described in the complaint as being for the payment of $7,040, dated 1st of January, 1867, payable two years after date, and bearing interest at the rate of 10 per

cent. per annum from date thereof, be reformed and corrected by the insertion of the words '*until puid*,' so as to make it bear interest at the rate aforesaid, from date until paid, according to the true intention of the parties thereto at the time it was made.

"*Second*—That an account be taken of the amount due and owing to her from Collins on account of said contract of sale and purchase.

"*Third*—That judgment may be rendered against Collins for the amount which may be found owing by him to her on taking said account.

"*Fourth*—That the lands be sold to satisfy the judgment, and for other relief."

Collins answered. "The answer admits the sale of the lands for $21,120, and the execution of the bond for title; alleges that for one-third of the purchase money ($7,040), Collins drew a draft on the firm of Collins & Lanigan in favor of Rector, payable the 15th day of January, 1867, which was paid; and admits that for the residue of the purchase money Collins executed to Rector two promissory notes, each for the sum of $7,040, dated January 1, 1867, the one payable twelve months after date, and the other two years after date, each with interest thereon at the rate of 10 per cent. per annum; but denies that the notes were meant or intended to bear interest at the rate therein expressed from the dates thereof until paid, or that they were ever so considered and treated by Collins in any manner whatever, or that he ever paid any sum of money as interest accruing thereon, or that he ever made or authorized any such computations of interest as was alleged in the complaint to have been made."

It denies that Collins, on the 6th day of April, 1876, the time when he executed a mortgage to Rector, owed Rector $10,853.04, as mentioned in the mortgage; and states, that

prior to that time he made numerous payments, in money and property, on the notes for the purchase money; that Mrs. Rector has been in possession of the land sold to him, and that for the time she has been in possession she should be charged with $3,520 per annum, and that the aggregate amount of such payments and rents exceed the entire amount due on the notes, computing the interest on them at 10 per cent. per annum from date until maturity, and at 6 per cent. after maturity till paid.

On the hearing the circuit court found there was no mistake made in the draft of the original purchase notes; and referred the cause to a master to state an account between plaintiff and Collins. The master stated the account. Both parties excepted. The court sustained a part of the exceptions of both parties and overruled part; and found Collins indebted to plaintiff in the sum of $1,649.67, and decreed accordingly. Plaintiff excepted and appealed. Neither of the defendants has appealed.

1. REFORMATION OF CONTRACT: Promissory note.

First—Appellant insists that the court below "erred in refusing to reform the notes for the purchase money of the bargained premises, so as to make them bear interest at the rate of 10 per cent. per annum, after as well as before maturity."

In *Carnall v. Wilson, 14 Ark., 487*, Mr. Justice Walker, in delivering the opinion of this court, said:

"The evidence upon which a written instrument or contract is altered or corrected must be clear and free from doubt. In *Henkle v. The Royal Exchange Insurance Compand, 1 Ves., 317*, Lord Hardwicke said the court had jurisdiction to relieve in respect to plain mistakes in contracts in writing. In *Ingram v. Child, 1 Bro., 94*, Lord Thurlow said, 'that a mistake creating an equity dehors the deed should be proven as much to the satisfaction of the court as if admitted.' Judge Story, in *United States v. Monroe*,

5 Mason, 577, said, 'in cases of asserted mistakes in written instruments, it is not denied that a court of equity may reform the instrument, but such a court is very slow to exercise such an authority, and it requires the clearest and strongest evidence to establish the mistake. It is not sufficient that there be some reason to presume a mistake; the evidence must be clear, unequivocal and decisive.' And in *Gillaspie v. Moore, 2 Johns. Chy.*, Chancellor Kent reviews many of the English decisions, and fully recognizes the rule, that in all such cases the mistake must be clearly and fully proven."

There was no evidence that the notes were not written as intended by the parties, or that they fail to express the real agreement between the parties made before their execution. It is, however, in evidence that there was a mistake as to their legal effect.

It is said in *Kerr on Fraud and Mistake, page 428:*

"Though the court will rectify an instrument which fails through some mistake of the draughtsman in point of law to carry out the real agreement between the parties, it is not sufficient to create an equity for rectification that there has been a mistake as to the legal construction, or the legal consequences of an instrument. The proper question always is, not what the document was intended to mean, or how it was intended to operate, but what it was intended to be. For example, where an annuity has been sold by the plaintiff, and was intended to be redeemable, but it was agreed that a clause of redemption should not be inserted in the deed, because the parties erroneously supposed that its insertion would make the transaction usurious, it was held that the omission could not be supplied in equity, for the court was not asked to make the deed what the parties intended, but to make it that which they did not intend, but which they would have intended

had they been better informed. So, also, where a party making a voluntary deed supposes that he will have a power of subsequent revocation, though no such power is reserved, the deed cannot afterwards be rectified by inserting the power; the evidence merely showing that the power had been omitted under the erroneous belief that it was not necessary to insert it, not that the power was intended to be inserted, but was left out by mistake."

In *2 Pomeroy's Equity Jurisprudence, section 843*, it is said:

"The rule is well settled that a simple mistake by a party as to the legal effect of an agreement which he executes, or as to the legal results of an act which he performs, is no ground for either defensive or offensive relief. If there were no elements of fraud, concealment, misrepresentation, undue influence, violation of confidence reposed, or of other inequitable conduct in the transaction, the party who knows, or had an opportunity to know, the contents of an agreement or other instrument, cannot defeat its performance, or obtain its cancellation or reformation, because he mistook the legal meaning and effect of the whole, or of any of its provisions. Where the parties with knowledge of the facts, and without any inequitable incidents, have made an agreement, or other instrument, as they intended it should be, and the writing expresses the transaction as it was understood and designed to be made, then the above rule uniformly applies; equity will not allow a defense, or grant a reformation or rescision, although one of the parties, and—as many of the cases hold—both of them, may have mistaken or misconceived its legal meaning, scope, and effect. The principle underlying this rule is that equity will not interfere for the purpose of carrying out an intention which the parties did not have when they entered into a transaction, but which they might, or even would, have had if they had been more correctly informed as to the law;

if they had not been mistaken as to the legal scope and effect of their transaction."

There was no error in the refusal of the court to reform the notes.

Second—In ascertaining the indebtedness of Collins to plaintiff, the court below credited Collins with the sum of $6,004.05, as so much interest paid by him, after the maturity of the notes, in excess of 6 per cent. We find no evidence on which this action of the court can be based.

The obligation given for the first installment was paid at maturity, and there is no controversy about it. Collins executed his two promissory notes for the other two installments and residue of the purchase money, each dated the 1st day of January, 1867, and maturing, the one at one year, and the other two years after date.

On examination of the two notes and the indorsement of the partial payments thereon, and of five annual statements, introduced in evidence by Collins himself, showing partial payments and the computation of interest, it distinctly appears that interest was computed on both notes at the rate of 10 per cent. per annum, after as well as before maturity, up to the 1st day of January, 1874, and was paid by Collins; and that on the 29th day of January, 1870, a credit of $2,112 was indorsed on the note last maturing, being for interest due on it at 10 per cent. per annum, up to the first day of Januuary, 1870, for which amount, together with the balance due on the note first maturing, amounting in the aggregate to $3,571.94, a new note at one day after date was executed by Collins, and the note first maturing taken up; leaving the new note for $3,571.94, and the note of $7,040, last maturing, subject to the credit indorsed thereon, as representing the entire balance of the purchase money due on the 29th day of January, 1870. From this time forward partial payments and

the computation and payment of interest at 10 per cent. per annum were continued to be made annually, to the 1st day of January, 1874, showing a total balance then due of $10,853.04, consisting of the principal of the remaining note for $7,040, the balance due on the note of $3,571.94, and the amount due on another separate note of $960, theretofore executed for accrued interest; and thereupon, the two small notes of $3,571.94 and $960 were taken up; and for the aggregate amount due thereon the note of $3,813.04, at one day after date, with interest at 10 per cent. from the 1st day of January, 1874, until paid, was executed; which last mentioned note, with the original purchase note of $7,040, and the interest thereon from the 1st day of January, 1874, constituted the amount of an account stated by and between Collins and Rector on the 6th of April 1876. The court below found that such an account was stated by and between Rector and Collins on the 6th day of April, 1876, and that it was thereby ascertained that Collins was indebted to Rector in the sum of $10,853.04, and the interest thereon from the 1st day of January, 1874, on account of these notes. It accordingly charged Collins with the $10,853.04 as of the 1st day of January, 1874, and credited him with the $6,004.05 excessive interest, as of the same date, which is an amount considerably more than Collins paid on interest, after the maturity of the original purchase notes, in excess of 6 per cent.

Was Collins entitled to any credit for any amount paid on interest, after the maturity of the original notes, in excess of 6 per cent? Appellant insists he is not.

In *Bank of U. S. v. Daniels, 12 Pet., 32*, Mr. Justice Catron, in delivering the opinion of the court, said: "That mere mistakes of law are not remediable, is well established, as was declared in *Hunt v. Rousmanius, 1 Pet., 1;* and we can only repeat what was then said, that whatever excep-

tions there may be to the rule, they will be found few in number, and to have something peculiar in their character, and to involve other elements of decision. What is this case, and does it turn upon any peculiarity? Griffin sold a bill to the United States Bank, at Lexington, for $10,000, indorsed by three of the complainants, and accepted by the other, payable at New Orleans; the acceptor, J. D., was present in Kentucky, when the bill was made, and there accepted it; at maturity it was protested for non-payment and returned. The debtors applied to take it up, when the creditors claimed 10 per cent. damages, by force of the statute of Kentucky. All the parties bound to pay the bill were perfectly aware of the facts; at least the principals, who transacted the business, had the statute before them, or were familiar with it, as we must presume; they and the bank earnestly believing (as in all probability most others believed at the time) that the 10 per cent. damages were due by force of the statute, and influenced by this opinion of the law, the $8,000 note was executed, including the $1,000 claimed for damages. Such is the case stated and supposed to exist by the complainants, stripped of all other considerations standing in the way of relief. Testing the case by the principle that a mistake or ignorance of the law forms no ground of relief from contracts fairly entered into, with a full knowledge of the facts; and under circumstances repelling all presumption of fraud, imposition or undue advantage having been taken of the party, none of which are chargeable upon the appellants in this case, and the question then is, were the complainants entitled to relief? To which we respond decidedly in the negative."

In *Samyn v. Phillips, 15 Ohio, 218*, where, under a statute of Ohio which provided that parties might stipulate in writing for interest at any rate not exceeding 10 per cent. yearly, and in case no special rate was stipulated, interest

at the rate of 6 per cent. per annum should be allowed, a promissory note was executed which contained no stipulation as to interest, and a part of the interest thereon had been paid at the rate of 10 per cent. per annum: Held, that although in a suit upon the note, payment of so much of the interest as remained unpaid, could not be enforced at a higher rate than 6 per cent., yet, the interest which had been paid at the rate of 10 per cent., was not in excess, because it was at a rate for which the parties might have lawfully contracted under the statute, *and should be allowed to stand without deduction.* The court said: "In the case before us, there is no evidence of any contract for the payment of interest at a special rate, after the maturity of the debt, except the fact that such payments were, from time to time, made. Though such payments could not have been enforced for want of a contract evidenced as the statute required, yet so long as it was in the power of the parties to make such a contract valid, by express written stipulation, it was equally in their power to make it valid by actual execution. In our judgment, therefore, the payments of interest made while the 10 per cent. law remained in force, were not in excess of the rate allowed by law at the time, and should have been allowed to stand, without deduction; and to this extent the judgment of the court below will be modified."

It was not proven that Collins paid any interest under a mistake of fact, or that he was induced by fraud practiced upon him to do so. He is not entitled to any credit for excessive interest.

Third—The court below held that the payments made by Collins after the 6th of April, 1876, should be appropriated to the satisfaction of the note for $3,813.04 so far as they will extend. This was error; for this note was deposited, under an agreement between Rector and Collins,

by Rector with McPhetridge, to secure a debt contracted by Collins, and was so deposited at the times these payments were made. Rector had no right, if he had desired, to credit Collins with them on the $3,813.04 note. They could only have been considered as part payments of the note for $7,040.

The decree of the court below is reversed, in so far as it is inconsistent with this opinion, and in other respects is affirmed; and this cause is remanded with instructions to the court below to render judgment in favor of appellant against James M. Collins for $1,925.59, and 6 per cent. per annum interest thereon from the 10th day of February, 1881, the amount due on the note for $7,040, less any rents collected by appellant for lands described in her complaint for years subsequent to 1881, and for the further sum of $3,813.04 and 10 per centum per annum interest thereon from the first day of January, 1874, till paid, less so much of the rent collected for years subsequent to 1881, as may be in the hands of appellant after the appropriation thereof as herein directed, if any; and by proper decrees and orders cause said lands to be sold and the proceeds of the sale thereof appropriated to the payment of the judgment to be rendered herein in favor of appellant against Collins, so far as the same will extend; and to adjust the costs incurred in the court below in such manner as the court, in the exercise of its discretion, may deem equitable.

TEXAS & ST. LOUIS RAILWAY v. ORR, AD.

46 182
58 131

46 182
60 111

46 182
65 257

46 182
67 540

46 182
77 10

1. NEGLIGENCE: *Burden of proof of contributory.*

If the plaintiff, in any case of personal injury, can show negligence on the part of the defendant without at the same time disclosing the inherent weakness of his own case by reason of contributory negligence, then such contributory negligence is matter of defense, in confession and avoidance, and must be established by a preponderance of testimony by the defendant.

2. RAILROADS: *Must keep platforms and grounds in repair.*

As a general rule railroad companies are bound to keep in a safe condition all portions of their platforms and approaches thereto to which the public do or would naturally resort, and all portions of their station grounds, reasonably near to the platform, where passengers or those who have purchased tickets to take passage on the cars, or those debarking from them would naturally or ordinarily be likely to go; and especially by those routes and methods which the company have established by its own customs and practice.

3. DAMAGES: *What Administrator may sue for.*

Quere: May not the administrator sue for damages which the deceased might have recovered if he had lived, under sec. 5223, Mans. Dig., as well as the pecuniary damage to the next of kin under secs. 5225; 5226.

4. NEW TRIAL: *Newly discovered cumulative evidence.*

As a general rule newly discovered cumulative evidence presents no ground for a new trial.

5. NEGLIGENCE: *Contributory. Conduct of party after the injury.*

That an injured party does not adopt the best remedies, or follow implicitly the directions of his physician, will not excuse a wrongful injury which produces as its direct effect a disease from which death ensues. The law fixes no exact standard here, and it should be left to the jury as to the reasonableness of his conduct, and whether or not the death was caused by the injury.

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

L. A. Byrne, for appellant.

First—The allegations of the complaint show that deceased was not in the exercise of due care and caution, and was guilty of such gross negligence as to contribute to his injury, and preclude a recovery. There are no allegations that the point where the trestle was located was any part of a street or public highway, or was used by the public under a lease from the company, or that deceased had no knowledge of the structure. These are necessary allegations. *80 Ind., 168; 46 Md., 193.* The *gravamen* of the complaint seems to be the want of a fence, and that in this appellant was guilty of negligence. There is no state law or city ordinance requiring railroads to fence their track. The complaint was bad on demurrer.

Second. Deceased had safe egress up one of three streets, and it was his duty to have selected one of these routes. *37 Penn., 420; 97 Mass., 275; 103 ib., 510.* The relation of carrier and passenger had ceased. *22 Wis., 681; 2 Hun., 124.*

Third—Deceased was guilty of negligence in traveling this route; it was no part of a public highway; he contributed to the injury, and there was no gross negligence on the part of the company. *36 Ark., 41; 82 N. Y., 424; 83 Ind., 319; Pierce on R. R's., pp. 323, 326; Redfield, ib., vol. 2, pp. 258, 263; 69 Ga., 370.* In the eyes of the law deceased was a trespasser, and could claim no damages, unless the injury was wantonly inflicted. *41 N. Y., 525; 125 Mass., 75; 17 Hun., 74; 7 Hurl. & Norm., 736; 44 Penn. St., 373; 51 Md., 115.* And that other persons were in the habit of using this track and trestle does not excuse deceased. *1 Hun., 417; 66 N. Y., 243.*

Fourth—There is no law in this state requiring railroads to fence their track.

Fifth—The broken leg did not cause the death of deceased, He died from *gastritis*, from drinking alcoholic stimulants.

Sixth—The rule of law is, that it must be the *proximate* cause, not the *remote*, which produces the injury to support an action for damages. *4 Gray, 395; 21 Iowa, 15; Cooley on Torts, pp. 68, 80.*

Seventh—The seventh instruction announces a startling proposition. If this be law, an injured person is not held to any degree of care after an injury is inflicted. He may, by indirect acts, cause his own death, and hold others responsible. *36 Ark., 51.*

Eighth.—It was error to exclude the testimony of Dr. Allen, that deceased was intoxicated.

Ninth—If deceased was familiar with the streets of Texarkana, this was a material fact going to show contributory negligence. *75 Ind., 490.*

Tenth—The judgment should have been for appellant on the special findings.

Scott & Jones and *B. B. Battle*, for appellee.

The law requires railroad companies to use the greatest precaution to protect their passengers and the public. "As a general rule they are bound to keep in a safe condition all portions of their platforms and approaches thereto, to which the public do or would naturally resort, and all portions of their station grounds reasonably near to the platforms, where passengers or those who have purchased tickets with a view to take passage on their cars, would naturally or ordinarily be likely to go." This rule applies as well to those leaving the train as to those going to it. *McDonald v. Chicago & Northern R. R. Co., 26 Iowa, 124; Stewart v. International & G. N. R. R. Co., 53 Tex., 289; S. C. 2 Amer-*

ican and English Railway Cases, 497; McKone v. Mich. Cent. R. R., 13 Am. & Eng. Ry. Cases, 29; Bueneman v. St. Paul, M. & M. Ry. Co., 18 Am. & Eng. R. R. Cases, 153 and n; Martin v. R. R. Co., 81 Eng. C. L., 186-7; Burgess v. R. R. Co., 95 Eng. C. L., 923; Longmore v. R. R. Co., 19 C. B. N. S., 183; S. C., 115; Eng. C. L., 183; Nicholson v. Lancashire & Yorkshire Ry. Co., 3 Hurlstone & Cottman, 534; Knight v. Portland, etc., R. R. Co., 56 Me., 234; Beard v. Com., etc., R. R. Co., 27 Vt., 377; Patten v. Chicago & N. W. Ry Co., 32 Wis., 524; Columbus & Ind. Ry. Co. v. Parnell, 31 Ind., 408; Gaynor v. Old Colony, etc., Ry. Co., 100 Mass., 211.

"The owner or occupant of land who, by invitation, express or implied," allurement or inducement, "leads others to come upon his premises, for any lawful purpose, is liable in damages to such persons—they using due care—for injuries occasioned by the unsafe condition of the land or its approaches, if such condition was known to him and not to them, and was negligently suffered to exist, without timely notice to the public, or to those who were likely to act upon such invitation," allurement or inducement. "And if he is aware that persons are in the habit of passing over his grounds, trespassers though they may be, he is liable if he leaves in their way dangerous excavations or instruments by which they are injured." *Bennett, admx., v. L. & N. R. R. Co., 1 Am. & Eng. R. R. Cases, 71 and note; S. C. 102 U. S., 577, and cases in opinion and hereinbefore cited; Railroad v. Hanning, 15 Wal., 659; Wharton on Negligence, sec. 824 a, 349, 351, and authorities cited.*

If a fence between appellant's road and Front street in Texarkana was necessary to prevent accidents such as befell the deceased in this case, it was negligence in appellant not to have constructed it, although there was and is no statute requiring railroads to be fenced. Railroad companies are

not exempt from any obligation and liability imposed on cities and individuals in like cases. *Marcott v. M. H. & O. R. R. Co., 8 Am. & Eng. Ry. Cases, 307; Beck v. Carter, 68 N. Y., 283; Woods Mayne on Dam., sec. 69; Chicago v. Hising, 83 Ill., 204; Hastinge, admr., v. C. & N. Ry. Co., 49 Wis., 358; S. C. 1 Am. & Eng. Ry. Cases, 65.*

Contributory negligence is never presumed. The burden of proving it in this case was on the appellant. *Shearman & Redfield on Neg., sec. 44; Wharton Neg., sec. 423; R. R. Co. v. Gladman, 15 Wal. 401; Indianapolis R. R. Co. v. Holst, 93 U. S., 291; Smoote v. Mayor, etc., 24 Ala., 112; Gay v. Winter, 34 Cal., 153; Kentucky, etc., v. Hochl., 12 Bush, 41; R. R. Co. v. Maryland, 31 Md., 357; Hocum v. Weitherick, 22 Minn., 152; Thompson v. N. Mo. R. R., 51 Mo., 190; White v. Concord, etc., 30 N. H., 188; Durant v. Palmer, 29 N. J., 544; Cleveland v. Crawford, 24 Ohio St., 631; Penn. R. R. v. Weber, 76 Penn. St., 157; Cassidy v. Angell, 12 R. I., 447; Texas v. Murphy, 46 Tex., 356; Knaresborough v. Mining Co., 3 Sawyer, 446; 1 Whar. Ev., sec. 361, and authorities cited.*

Appellant insists that gastritis was the cause of the death of Galloway. Suppose it was the direct cause. Yet if he was injured by the negligence of appellant, and the injury rendered his system more susceptible to gastritis and less able to resist it, and death resulted from such disease, the death is legally attributable to such negligence. If the injury developed or superinduced and contributed to the production and development of the disease which was the immediate cause of the death, or accelerated his death, or was the cause of the cause which led to his death, his death is legally attributable to the negligence of appellant. *Beauchamp v. Saginaw Mining Co., 50 Mich., 163; S. C. 45 Am. R., 30; Bat. City R. R. Co. v. Kemp et ux., 61 Md., 74; S. C. 18 Am. & Eng. Ry. Cases, 220; S. C. 61 Md., 619; T.*

H. & I. R. Co. v. Buck, 96 Ind., 346; S. C. 49 Am. R., 168; Kitteringham v. Sioux City, etc., R. Co., 62 Iowa, 285; Heine v. McCaugham, 32 Miss., 17; Stewart v. Ripon, 38 Wis., 584; Brown v. C. M. & St. R. Ry. Co., 54 Wis., 342; S. C. 41 Am. R., 41; Nagle v. Mo. P. Ry. Co., 75 Mo., 653; S. C. 10 Am. & Eng. Ry. Cases, 702.

Appellant insists that the court below erred in excluding the testimony of Allen as to the deceased being under the influence of whisky when he first saw him after the accident. It was proved that deceased was not under the influence of whisky at the time of the accident, and that soon after the accident, and before the physicians arrived, the whisky was administered. Dr. Allen arriving after this, could not tell whether, even if he could have observed the effects of alcohol, these effects were caused by whisky taken before or after the accident. The evidence excluded does not show or tend to show the extent of the influence of the whisky when Dr. Allen first saw him, or that it was sufficient to affect, materially or injuriously, the mind or action of the deceased.

The supplemental motion of appellant for a new trial, setting up newly discovered evidence to show that at one time the deceased had been appointed and qualified as a street commissioner of Texarkana, as a ground of new trial, was properly overruled. In this motion for new trial appellant alleges he used due diligence to discover this testimony, but does not show what diligence it used. It was properly overruled because it does not show what diligence was used.

S. W. Williams, Sp. J. About 3 o'clock in the morning of the 4th day of January, 1883, appellee's intestate, James Galloway, arrived at Texarkana, from some point in Texas, as a passenger on one of the appellant's regular

passenger trains, over its line of road. The weather was cool and damp, and the night was dark, and it had been raining. At the line in Texarkana, between the states of Arkansas and Texas, this train of appellant's stopped, as all its passenger trains were required to do, by a statute of Texas, thirty minutes. At this point, after a few moments delay, the engine, baggage and mail cars were uncoupled from the passenger cars, and were pulled at once up to the depot of appellant at the Marquand Hotel platform, a distance of 150 or 200 yards; at which place was the ticket office of appellant, and where baggage and mail were delivered by it, being used jointly with the Iron Mountain road. From this platform all its passenger trains started when leaving Texarkana. By direction of appellant's servants, as the testimony tended to prove, the deceased, James Galloway, and other passengers alighted at the state line, where those in charge of trains usually cried, "Change cars for all points north and east." One of the main streets of Texarkana, which city, at that time, contained about 5000 inhabitants, ran along, from the state line where appellant's train stopped, beside the track, for about half the distance between that point and the point where the accident complained of happened. At this half-way point the track diverges from the street at an angle of about forty-five degrees to the depot at Texarkana, at the Marquand Hotel, and all the intermediate space, from the point of divergence, was open and unprotected, as appears from the plat shown in evidence. Within about fifty yards of appellant's depot platform, in the track of appellant's railway, was an open and unprotected ditch and trestle. At the time Galloway got off the train there were lights ahead, on the line of railway, at the Marquand Hotel, and it does not appear that there were any on Front street, from which the track diverged. It was the usual route for

passengers, when they thus alighted, to go up to the depot of appellant along and over this road-bed and across this trestle of appellant. This usual route of traveling, and the custom of passengers to travel over it, were known to the servants of appellant, and by them permitted, and in one instance, at least, it was proved that passengers had been directed by the conductor to pass along the track. The streets of Texarkana about the 4th of January, 1883, were muddy and in bad condition. Galloway, in passing along this route, in the exercise of due care as expressly found by the jury, fell into this open trestle and ditch, or exposed pit, and broke his leg. The evidence tends to prove he received other injuries internally, from which gastritis was superinduced, and he died in three days thereafter. He was a stout, healthy man, about forty-five years of age, a working man, engaged in the saw-mill business, having just been the owner of a half interest in such mill. He lived at or near Texarkana. The direct route to his home was past and beyond the depot of appellant. When he left the cars, he started for his home by this route.

The court below gave eight instructions at the instance of appellee. Appellant objected to and complained of the first, the third, the fourth, the fifth, the sixth, the seventh and the eighth. The instructions excepted to are as follows:

First—The jury are instructed that the owner or occupant of lands who, by invitation, express or implied, induces or leads others to come upon his premises for any lawful purpose, is liable in damages to such persons, they using due care, for injuries occasioned by the unsafe condition of the land or its approaches, if such condition was known to the occupant or owner, and not to the person injured, and was negligently suffered to exist without

timely notice to the public, or to those who were likely to act upon such invitation; and one who comes upon another's land by the owner's permission or invitation has a right to expect that the owner will not dig a pit thereon so that persons lawfully coming there may receive injury. If, therefore, the jury find that for a long time previous to the accident complained of, the defendant had permitted any and all persons who came over their road from Texas, after alighting from the cars in the town of Texarkana, to travel upon their track from the place of alighting to the defendant's depot in said town, and that numerous passengers had so traveled with the knowledge and without the disapproval of the agents and employes of said company; and in fact that it had become the main traveled way for such passengers and others, and that upon said track was an open culvert negligently constructed, or negligently, by the defendant's agents, permitted to remain open and uncovered and with their knowledge, and if you further find that the deceased, having come as a passenger over defendant's road to Texarkana, in accordance with said permission, attempted to travel to the depot of said defendant along said track, and if you further find that said deceased, in so traveling, used such care as a prudent man would have done under like circumstances, and notwithstanding such due care, fell into said culvert and received injuries whereof his death was either caused or hastened, then you may find for the plaintiff.

Third—If the jury find that the construction of a fence between said defendant's road and the highway on Front street, in Texarkana, would have prevented this alleged accident, then was it negligence in said defendant not to have constructed said fence; and if the jury find that this alleged accident was caused by the negligence of defendant, unmixed with negligence of the deceased, and that this

accident caused his death, then you may find for the plaintiff.

Fourth—The jury are instructed that it is not necessary for the plaintiff to prove that the alleged accident was the sole or direct main cause of the death, but if he prove from any facts or circumstances in evidence to the satisfaction of the jury that his death was superinduced by, or the result of said accident, and that it was the result of the negligence of the defendant as aforesaid, and unmixed with ordinary negligence on the part of the deceased at the time of the accident, they may find for the plaintiff.

Fifth—If the jury believe, from the evidence, that, as alleged in plaintiff's complaint, the deceased purchased a ticket, or paid his fare over defendant's road from Pittsburg, or other point in Texas, to Texarkana, then was it a contract between defendant and deceased for carriage from defendant's main passenger depot at Pittsburg, or such other point, to their main passenger depot in Texarkana; and if, before arrival at said main passenger depot in Texarkana, the deceased was compelled by the direction of defendant's agent to change cars, or by their neglect to run the same up to said main passenger depot, to alight from said cars before their arrival, then was it the duty of defendant to furnish a safe, easy and convenient walk upon which to travel to said depot building, and if they did not so furnish said safe walk or approach to said depot building, then was it negligence on the part of said defendant; and if the jury find that from said negligence the deceased, using due care, received the alleged injury which led to or caused the death of the deceased, you will find for the plaintiff.

Sixth—The jury are instructed that, if they find for the plaintiff, the measure of damages will be such pecuniary loss as can fairly be by them estimated from the facts proven, in connection with the knowledge and experience

possessed by all persons in relation to matters of common observation.

Seventh—The jury are instructed that if they find from the evidence that the deceased received the injuries, to-wit: a broken thigh and severe shocks to the system from the negligence of the defendant, as alleged in plaintiff's complaint, and that either said broken thigh, or some shocks, caused gastritis in the deceased to be produced or accelerated, and that therefrom the deceased came to his death, then the jury will find for the plaintiff, even though they may find that the deceased did not receive the best medical attention, or receiving same, neglected or refused to follow it.

Eighth—The determination whether or not the defendant was guilty of negligence in constructing and maintaining the open culvert complained of, the jury may take in consideration the place where said culvert was located, the purposes for which defendant's track was used at the place where said culvert was located, and the further fact, if so proved, of the absence of lights or other signals at or near said culvert, to warn those lawfully using said track of any danger, if danger existed under the proof; the light some distance ahead in the depot of the defendant, and all other facts and circumstances in evidence; and if, from these, you find that defendant negligently constructed or maintained such open culvert, and that deceased, while exercising ordinary care and prudence, and while in lawful use of said track, fell into said culvert and received the injury complained of, which injuries caused or superinduced his death, then you will find for the plaintiff.

The defendant below asked written instructions. The court gave all but the third, sixteenth and eighteenth.

3. When a person receives any injury by falling through an open trestle of a railway company, from which he dies,

and neither the railway company nor its agents was the immediate cause of the fall, then the law presumes that his own negligence was the cause of his death, and before there can be a recovery in the action it devolves upon the plaintiff to show that said deceased was free from fault; so in this case it must appear by a preponderance of evidence that the deceased was free from fault.

1. CONTRIBUTORY NEGLIGENCE: Burden of proof.

This instruction was properly refused, because: *First*—In view of the facts, it tended to mislead the jury from the real issue, which was as to negligence in allowing a nuisance to exist upon its grounds, where the company had invited the public to pass for its business and profit, to a consideration of the mere incidental question whether those agents themselves, instead of the nuisance, were the proximate cause. The act of negligence was complete when the nuisance was suffered to remain, and the connection of the agents with it in the further fact, that they induced, permitted and encouraged the public to pass over it, without taking necessary precaution to protect them from injury. *Second*—This instruction shifted the burden of proving contributory negligence on the plaintiff, which, in this case, rested peculiarly upon defendant. If the plaintiff, in any case of personal injury, can show negligence upon the part of defendant, without, at the same time, disclosing the inherent weakness of his own case by reason of contributory negligence, then such contributory negligence is a matter of defense—in confession and avoidance—affirmative in its character, and the burden is upon the defendant to establish the defense by a preponderance of testimony, as in all other affirmative defenses of like nature. It is true that in Massachusetts, and perhaps some other states, the rule has been carried to the extent claimed in this instruction, but this position is not sustained by principle or the weight of authority, and the Supreme Court of the

United States has put the question at rest in the case of *Indianapolis Railroad v. Horst, 93 U. S., 291.* This question is discussed by *Shearman & Redfield*, in *sec. 44*, of their work on *Negligence.* They say parties were never required to prove negative matters of this kind, and also that it had never been held necessary in a complaint, upon negligence, to aver that plaintiff had taken due care, and they criticise a different ruling in Massachusetts. See, also, *R. R. v. Gladman, 15 Wall., 401; Smoote v. Mayor, 24 Ala., 112; Gay v. Winter, 34 Cal., 153; 12 Bush (Ky.), 41; 31 Md., 357; 22 Minn., 152; 51 Mo., 190; 30 N. H., 188; Durant v. Palmer, 29 N. J., 544; 24 Oh. St., 631; 76 Penn. St., 157; 12 R. I., 447; 46 Tex., 356; 3 Sawy., 446; 1 Whart. Ev., 361; George v. R. R., 34 Ark., 613.*

The sixteenth instruction of defendant is as follows:

16. If the jury believe from the evidence that the fall of the deceased at the trestle was the remote cause of his death, then they will find for the defendant.

This instruction was obscure and misleading, when applied to the facts of the case, and was objectionable on the same ground as the first clause of the third instruction.

The eighteenth instruction of the defendant was:

18. If the jury find from the evidence that, at the time the deceased met with the accident, he was under the influence of whisky, this is a fact that would go to establish contributory negligence.

This was properly refused: *First*—It was abstract, for the only witness who was with Galloway when the accident happened, states that he was not then intoxicated, and proves that the accident was caused entirely by the condition of the nuisance and the darkness of the night. *Second*—Intoxication would not here be evidence of contributory negligence, unless the proof showed that it tended to produce the result. Indeed, it might be doubted whether

the fact that the blind, the lame, the sick and feeble, the aged and the child, as well as the occasionally festive, were likely to pass over this route according to the custom of the company, as proved clearly, would not have imposed a higher duty of diligence on the company to have taken some method, by fencing, by lighting, by covering up, or by timely warning, to have protected the helpless; and it would be going quite too far to hold, under the facts of this case, that, after the company had maintained this nuisance there, and invited its customers to pass over it, that the being blind, lame, feeble, sick or drunk, and the undertaking, in that unfit condition, the hazardous enterprise of traversing their customary foot route to the depot, in ignorance of its dangers, was of itself contributory negligence. The company owed a high duty here to all, who, as its licensees, passed over this route. As a general rule, railroad companies are bound to keep in a safe condition all portions of their platforms and approaches thereto, to which the public do, or would naturally resort, and all portions of their station grounds reasonably near to the platform, where passengers, or those who have purchased tickets with a view to take passage on the cars, or to debark from them, would naturally or ordinarily be likely to go; and especially by those routes and methods which the company have established by its own customs and practice, as here. This is well established. *McDonald v. Chicago and Northern R. R. Co., 26 Iowa, 124; Stewart v. Int. & G. N. R. R., 53 Tex., 289; 2 Am. & Eng. R. Cases, 497; McKone v. Mich. Cent. R. R., 13 Am. & Eng. R. Cas., 29; Buneman v. St. P. & Ry., 18 Am. R. R. Cases, 153 and note; Martin v. R. R., 81 Eng. C. L., 186–7; Burgess v. R. R., 95 Eng. C. L., 923; Longmore v. R. R., 19 C. B. N. S., 183; S. C. cited in 115 Eng. C. L., 183; Nicholson v. Lancashire, etc., R. Co., 3 Hurl. & Cott., 534; Knight v. Portland, etc., R. R.,*

2. Railroads must keep platforms and approaches in repair.

56 Me., 234; Beard v. Con., etc., R. R., 27 Vt., 377; Patten v. Chicago and N. W. Ry., 32 Wis., 524; Columbus and Ind. Ry. v. Farrel, 31 Ind., 408; Gaynor v. Old Colony, etc., Ry, 100 Mass., 211

Some of these cases are much like this in some features. In McKone's case, above cited, McKone was not a passenger, but had, at night, gone to the depot to meet his wife, who was coming in on a night train; having occasion to step aside, the regular urinal having been destroyed by fire, to get out of sight of passengers alighting from the train, he stepped four to eight feet beyond the sidewalk, on to a part of the railroad company's premises that were used by the company and its patrons as a part of the station grounds, and fell down into a deep hole and was seriously injured. Held, that the plaintiff was entitled to recover, and was not a trespasser.

Before leaving the defendant's instructions, we will say here that the court below gave, at the instance of defendant, liberal and fair instructions upon every point involved, and the whole case was fairly presented to the jury, and as favorable to the defendant as the evidence warranted; and the fifth and fourteenth instructions for defendant were more liberal than the law warranted. They were to the effect that if, by law, the train was stopped at the state line, and Galloway voluntarily debarked there, without any inducement being offered to him to do so, and that he had gone 100 yards before the accident happened, then the relation of carrier and passenger had ceased, and the company was not liable for any injury by deceased in the capacity of carrier. This presented a totally immaterial issue. Under the facts of the case, the real issue here was: Did the company negligently permit a nuisance to exist, at or near their platform? Was Galloway lawfully there? Did the injury

occur in consequence of it without fault on Galloway's part? These were the true issues, and the instructions were misleading, under the facts of the case, especially the fourteenth, which went the length of directing that defendant was not liable in that contingency. There were some other instructions given for defendant that limited the issue unduly favorable to it.

3. What damages administrator may sue for.

The seventeenth instruction: "If the jury believe from the evidence, that deceased died from a disease known as gastritis, or inflammation of the stomach, and not from the effects of the fractured thigh or other injury, then they will find for defendant."

This instruction was given, and the instruction number six given for plaintiff, all indicate that on both sides the theory seemed to be, at the trial below, that if there was no death there could be no damage. The above instruction need not be discussed here, as no point is made upon it. But the question would arise here on the instructions, special findings and motion for judgment on them, whether an administrator may not sue for damages which the deceased might have recovered, had he lived, under *sec. 5223, Mansfield's Digest*, as well as the pecuniary damage to the next of kin under *secs. 5225, 5226, Mansf. Dig*, the act of March 6, 1883.

These two statutes must sooner or later be construed, and the question must be determined, how far, if at all, the later trenches upon the former act, or whether the one is cumulative of the other. As counsel have not raised the question, or given us the benefit of their assistance in its solution, we deem it safer to pass it for the present. *Ward v. Blackwood, 41 Ark., 300;* and *Townsend v. L. R. & F. S. Ry., 41 Ark., 382,* present the two phases of the question, and in the latter case, as it arose before the passage of the act of 1883, though this question was raised

and discussed by counsel, this court decided that the case was controlled by the act of 1875,—still another and different act—providing for suits by administrators, in case of death caused by negligence of a *railroad* company.

The court amended and added to the fifth, sixth, ninth and fourteenth instructions. As to the fifth, sixth and fourteenth the instructions as asked were, as to voluntarily leaving the train by deceased, an immaterial issue, and might well have been refused. The court qualified them, as asked, to the effect that if deceased left the train at the state line, under inducements produced by the conduct of defendant's agents, the relation of carrier did not cease then. The ninth instruction asked that the jury should be instructed that by the laws of this state, the defendant was not required to fence any part of "*their*" road-bed, and a failure to do so is not negligence. To this the court added "*ordinarily*," which was proper under the facts of this case; for the instruction, as asked, might have mislead the jury to believe that the defendant could leave an open culvert on its track, in a few feet of a public highway, on or near its depot grounds, and invite and allow its passengers to use its track as a foot-path. And if not its duty to fence, it was not to light it at night, nor to give any warning to those who might travel over it. This qualification was proper. If fencing, at the place, was the only reasonably sure mode of preventing their passengers from passing over it, then it was as much their duty to fence it, as to take any other reasonable precaution to prevent injury to its patrons. While it was not, ordinarily, negligence not to fence the road-bed, it was a question to be left to the jury, here, whether this, or some other precaution, should not have been used to prevent injury to its passengers.

There was a general verdict for plaintiff for $2,500 damages, and certain special findings. The defendant moved to set aside the general verdict and render judgment upon the special findings.

First, Because they showed that Galloway died from gastritis, and not from injury; and second, That Galloway contributed to his own injury in the selection of the route he was traveling, when he received the injury.

The jury found specially: 1. That the train stopped at the state line in obedience to the laws of Texas. 2. That the deceased did not leave the train there of his own accord, without inducement or solicitation of defendant's servants, while they were stopped at the state line. 3. That had he remained on the train until the thirty minutes were out, deceased would have been delivered at the platform of the Iron Mountain depot by the defendant's employees. 4. That deceased would have avoided the danger if he had remained on the cars until he was delivered at the Iron Mountain depot at the Marquand Hotel. 5. That the route he took was not the safest, but the usual route for the passengers. 6. That Galloway was not under the influence of whisky at the time he met with the accident. 7. That deceased acted with due prudence and caution in attempting to pass up the track of defendant, and in attempting to cross the trestle through which he fell. 8. That deceased, at the time of the accident, was not sufficiently familiar with the streets of Texarkana, so that he might know the safest route to travel after leaving defendant's cars. 9. That deceased died from gastritis, caused by the accident.

The evidence in the case supported these special findings, and in every material particular they support the general eral verdict, and this motion was properly overruled. The defendant then moved for a new trial, setting out

nine grounds, which was overruled. The first and second grounds are the usual ones—verdict contrary to evidence—contrary to law. The third ground was for giving the first, third, fourth, fifth, sixth, seventh and eighth instructions of plaintiff. Fourth, in refusing to give the third instruction for defendant, which the court refused, and the remaining grounds to the ninth were for refusing to give the instructions, as asked, and amending them.

The ninth ground was that the court had refused to permit defendant to prove by Dr. Allen, that, when he came to the deceased, a short time after the accident, he found him in a state of intoxication. This point can be disposed of in a few words. Dr. Allen came to see the deceased after he was hurt, the same night, having been sent for. He did not see him at the time he was hurt, nor immediately after; and had not seen him immediately before, and could not until after he had been carried to the Marquand Hotel, and had called for and drunk whisky; and the witness, who was with him when the accident happened, and saw it, and helped him to the Marquand House, where he called for spirits and drank, before the doctor came, says he was not intoxicated at the time of the accident. And Charles Wilson, the hostler of defendant, and George McDonald, the yard-master, helped the deceased out of the trestle. The former says nothing of his drinking. The latter said, from the smell of his breath and his actions, he thought he was drinking at the time. These witnesses of defendant had helped to carry deceased from the trestle to the Marquand Hotel. So that this testimony could not have cast any additional light upon his condition when the accident occurred. Besides, the use of spirits at the Marquand House, that night, and his condition there, is amply proved by other testimony, and was even drawn out of

Dr. Allen on cross-examination, so that if it was an error to exclude it, it was harmless; for the facts—as it was stated Dr. Allen would prove them, after the fact—got before the jury in a prolix form, even, in the investigation of deceased's stomach, for which purpose his after drinking, from the time he reached the Marquand Hotel, was proved.

4. NEW TRIAL: Newly discovered cumulative evidence no ground for.

The defendant filed a supplemental motion for a new trial, on the ground of newly discovered testimony; that on the 23d of August, 1881, Galloway was, by the city council of Texarkana, elected street commissioner, which position he held until the 11th of April, 1882, and as such had the supervison of the streets. There was attached to this motion the affidavit of the recorder of the city to the fact of his office holding. The attorney swears to this motion, and that he used *due diligence* to prepare the defense, and did not know this fact. He does not show what diligence he used. Here, in the town where this attorney resides, where this matter was of record, where, if Galloway acted as such officer, so as actually to have given him the necessary knowledge, which was the material inquiry here, the fact must have been generally known in this city, where the defendant had an office, where it was served with process, and, if the knowledge derived of the streets of Texarkana, two years before the accident, would have had any weight in law or fact in this case, there is a total want of diligence. Besides, this testimony is cumulative. The defendant had examined witnesses as to Galloway's knowledge of this open trestle over a ditch twelve or fifteen feet wide and five or six deep, and had submitted a special proposition upon it to the jury. It is true that it had failed to show such knowledge to the satisfaction of the jury; but it was a necessary question on the trial, and as a general rule newly discovered cumulative evidence presents no ground for a new trial. It was proved

that it was the first time Galloway had been out on this road; that he lived on the opposite side of the city; that the route he took was the nearest way to his home; that he had lived in the town nearly all the time for two years prior to the accident. There was no affidavit, or offer, to prove that Galloway ever performed the duties of the office actively, or that those duties would have led him off the streets on to defendant's track, which they proved was not a part of the highway, though near it. The court properly overruled this motion for a new trial.

The plaintiff's instructions—the third ground for new trial—alone remains to be considered. The first instruction was properly given, as shown by the authorities presented above, in connection with the defendant's instructions. We will add to them here: *Bennett, admr., v. L. and N. R. R., 1 Am. and Eng. R. R. Cases, 71, S. C., reported in 102 U. S., 577.* In 1876 the deceased was a passenger on the cars of the Louisville and Nashville Railroad Company from Vernon to Danville, in Tennessee. At Danville he left the train for the purpose of taking passage on a boat belonging to the Evansville and Tennessee River Packet Company, engaged in the navigation of that river. Its customary place of landing for Danville and immediate vicinity, on that side of the river, was a wharfboat, moored at or against a lot within a few hundred yards of the railroad station. Between the railroad company and the packet company there was, at the time, an arrangement, or contract, by the terms of which each party enjoyed a community of interest—in what proportion was not stated—in the freight and passenger traffic at that point. They were mutually at liberty to sell through tickets, and give through bills of lading, over their respective lines. Both the wharf and lot were owned by and were under the exclusive control of the railroad company. The wharf

was used by the company and the public for storing freight, and for convenient place for landing steamboats navigating the river. The company had a shed on this wharf, where goods were drawn up the bank by an engine, by means of ropes attached to flat-cars run on a rail track. These cars were pulled up the bank into spaces left in the floor of the depot. These hatch-holes reached from the river side of the depot nearly to its center, and were about eleven feet in width. The customary and, indeed, the only safe, available and convenient route, for persons passing from Danville to the steamboat landing, was along a plank-way, on each side of which the ground was low and marshy, put down by the railroad, terminating at or near the northern end of the depot, thence up a flight of steps to this depot and across it towards the southern end; thence down a flight of steps, located between two of these hatch-holes, to the wharfboat, over a macadamized way, made by the railroad company for the convenience of its passengers and business, for those going upon business to or from the steamboat landing. The custom of travelers passing the railroad station at Danville and the steamboat landing, to use as a foot-way the plank road, the depot floor, and this macadamized way leading to the wharf-boat, was not only a necessary one, but was known to and permitted by the company. The deceased reached Danville by the cars of the company, and stopped at a hotel to await the coming of the boat. That night, some time after midnight, the steamboat reached the vicinity of the landing, and by whistle signaled for landing at the wharf-boat. Deceased started from the hotel for the boat, for the purpose of prosecuting his journey, taking with him a lighted lantern. The depot had no light. The deceased did not know of the hatch-holes, and fell into one of them, breaking limbs and receiving some injuries, which confined

him for a long time. The suit was revived in the name of Bennett, his administrator. The Supreme Court of the United States, by Harlan, J., says: "The facts disclosed by the pleadings, and by the demurrer conceded to exist, seem to bring this case within the rule founded in justice and necessity, and illustrated in many adjudged cases, in the American courts, 'that the owner or occupant of land who, by invitation, express or implied, induces or leads others to come upon his premises, for *any lawful purpose*, is liable in damages to such persons, they using due care, for injuries occasioned by the unsafe condition of the land or its approaches, if such condition was known to them and not to him, and was negligently suffered to exist without timely notice to the public, or those who were likely to act upon such invitation.'" Citing *R. R. Co. v. Hanning, 15 Wallace, 649; 99 Mass., 216; 10 Allen, 368; Wharton on Negligence, secs. 349, 352; Cooley on Torts, 604-607*, and several English cases.

The third instruction of plaintiff is correct. Under the facts of this case it was the duty of the defendant, under the rule announced in *Bennett v. The Railroad, ubi sup.*, either to remedy the "unsafe condition of the land" over which it induced the public to pass, or to take some other steps to warn or notify those passing of the danger, if it was not covered or lighted at night, nor warning given, nor fenced so as to warn and prevent. Any one of these methods of prevention might have been submitted to the jury hypothetically, as was correctly done in the eighth instruction of plaintiff. If to place a red lantern light at the ditch would have prevented, then was it negligence not to do that. Of course it was negligence not to do anything to guard against the accident. Now, if the defendant had covered the ditch, or put a light there, or taken any other similar precaution to avoid accident, and fencing had

been proposed as an alternative and better precaution, then the question which appellant's counsel argues here with ability and force would have arisen. But where no precautionary method was adopted by appellant to prevent accident, any one or all of the preventive methods might have been presented hypothetically to the jury, as was done in the third instruction as to fencing, and in the eighth as to other preventive methods. There are authorities for the method by fencing, but it is not material to the real question. In *Marcott v. M. H. & O. R. R. Co., 8 Am. & Eng. R. R. Cases, 307*, an instruction like this was approved by the Supreme Court of Michigan, where there was no statute requiring railroads to fence their track. See for this point *page 309*. In *Beck v. Carter, 68 N. Y., 284*, a land owner, who had lands on an alley adjoining a hotel, had, for a long time, allowed his grounds as a public pass-way. On commencing to build, he had left a cellar which was dug, preparatory to building, uncovered and unfenced, and one passing over it, at night, was hurt. The court of appeals held that the owner was liable for the damages resulting from the injury, though the alley had never been accepted as a highway, but was simply used by the public, and had been so used, in connection with the adjoining open ground, by the public as a pass-way, to and from the United States Hotel, which had been burned down at the time of the accident.

The fifth instruction presented an immaterial question in this case, and was harmless, even if wrong. The authorities above cited upon other points, and especially the Bennett case in *102 U. S.*, shows that it was perfectly immaterial here whether the relation of carrier and passenger existed between deceased and defendant at the time of the accident; the sole question being the lawfulness of Galloway's presence at the time and place of the accident. The

fifth instruction, as well as the modification of the defendant's instruction upon this point, were not erroneous.

The fourth, sixth and seventh of plaintiff may be considered together, as they pertain to kindred subjects. The sixth gave a correct rule of damage as far as it went, and taken in connection with the seventeenth given for defense, and the special propositions submitted to the jury as to the death and its cause, the jury could not have understood the instruction to refer to anything but damages resulting from the death, which was perhaps more narrow than the law warranted, so that the only particular in which the instruction is vague is cured by the seventeenth instruction of defendant, and is an error, if it be one, to appellant's advantage, in narrowing the measure of damages.

5. CONTRIBUTORY NEGLIGENCE: Conduct of party after the injury.

The fourth instruction was properly given, and the seventh had better been omitted. The last clause of it is somewhat ambiguous, and might, taken alone, tend to mislead, in view of the testimony. But when taken in connection with the second, twelfth and seventeenth instructions of defendant, as to contributory negligence and as to the cause of death, that clause of the seventh instruction could not reasonably have been construed by the jury to mean that Galloway might have superinduced gastritis or produced his own death by neglect, after the accident, and his administrator have the right to recover for it. That the injured party does not follow the best remedies, or that he may not implicitly follow what his physician may direct, would not excuse a wrongful injury, which produced, as its direct effects, a disease from which death ensues. One man, knowing his own constitutional idiosyncrasies, might prefer to avoid medicine, another to take it. The law lays down no exact standard of duty here. It should be left to the jury as to the reasonableness of conduct, and whether

or not death was caused by the injury, and it was fairly done in this case.

Finding no error, judgment affirmed.

Hon. B. B. BATTLE did not sit in this case.

JONES & NORRIS v. NICHOLS.

46 207
57 22

1. BILL OF EXCEPTIONS: *Must contain all instructions.*

Unless the bill of exceptions contain the entire charge of the court, this court will presume that instructions which were refused, though proper in themselves, were properly refused because the jury had already been sufficiently instructed on the points covered by them.

2. NEGLIGENCE: *Stock falling in pit on neighbor's premises.*

The defendant dug a pit under his cotton gin for a cotton press, near the public highway, and left it unenclosed, and corn and cotton seed scattered about it. The plaintiff's cow fell into the pit and was killed. *Held:* That the defendant was guilty of negligence and must pay the value of the cow; and that the plaintiff was not guilty of contributory negligence in turning his cow out on the commons remote from the gin.

APPEAL from *Logan* Circuit Court in Chancery.
Hon. R. B. RUTHERFORD, Circuit Judge.

C. A. Leevers for appellant.

The common law is in force here, and cattle running at large that go upon the lands of another are trespassing, and their owner is liable for the trespass. The owner is guilty of contributory negligence, and must take the risk of such injuries as may occur to them, if not proximately and directly the result of the unlawful act of the land owner. *Cooley on Torts, p. p. 337–8–9; ib., 654–5–6–7–8–9, 660–1–81,*

690; 34 N. J., 467; 16 Ark., 308. An action for damages will not lie, unless the party charged owed some duty to the party damaged and committed a breach of that duty. *Cooley on Torts, p. p. 659–60–61; Waterman on Trespass, vol. 2, p. 295, secs. 873–4, p. 294.* The owner of land owes duty only to persons or property lawfully on his premises, not to trespassers. *Cooley Torts, p. 660 and note 2.* As to the obligation of land owner to enclose it so as to bar out trespassers, see *ib., p. p. 337–8–9–40; Waterman on Trespass, vol. 2, sec. 878 and * note.*

T. C Humphry for appellee.

Appellants dug the pit and left it unenclosed, uncovered and unguarded, and are liable. *Wharton on Neg., secs. 782, 786, 789.* By leaving the mill and gin unenclosed, where cotton seed and corn were scattered, which would attract stock, they will be held to greater care and diligence. *Ib., secs. 143–786.*

The cow was not trespassing when upon the unenclosed land of another. *37 Ark., 562.* Verdict sustained by evidence and will not be disturbed. *40 Ark., 168.* The judgment is in accordance with scripture. *Ch. 21, Exodus, v. 33–4.*

Cockrill, C. J. The appellants were the owners of a cotton gin and grist mill combined. The building was set upon posts, leaving the space beneath open. In this open space they dug a pit for their cotton press. The appellee's cow fell into the pit and was killed. He sued the appellants and obtained judgment for $40, the value of the cow. The appeal is prosecuted to reverse this judgment.

It seems that the bill of exceptions does not contain the entire charge of the court to the jury, but only such parts as the appellants saw fit to except to, together with their requests for instructions which were rejected by the court.

1. BILL OF EXCEPTIONS: Must contain whole charge.

The entire charge should be set out. It would be manifestly unfair, in many instances, to judge the charge by an isolated part of it; and in order to determine correctly whether it was error to refuse to instruct the jury as requested, we should be informed what instructions were given. It often happens that a request to charge the jury is properly refused, though in itself unobjectionable, because the same phase of the case is already covered in the intended charge. It is not error to refuse to multiply instructions on a single point, and as every reasonable presumption is indulged in favor of the action of the trial court, we infer, in a state of record like this, that the court declined to give the instructions asked, if they are in them unobjectionable, because the jury were already sufficiently instructed on the points touched by them. Error to reverse a judgment must appear affirmatively, otherwise everything is presumed to have been righfully done.

It is not necessary, however, to indulge in any presumptions in order to affirm the judgment in this case. The pit, which the appellants dug and into which the cow fell, in the night time, was close to the highway; it was unenclosed and was without signal of warning or protection; moreover, cotton seed and corn had been left by the appellants scattered in the neighborhood of it, so that, in the language of one of the witnesses, it was not only a stock trap, but was actually baited for the game. The court instructed the jury in effect, that if they should find such a state of facts from the proof, the appellants were guilty of negligence which would render them liable for the injury done. This proposition cannot be controverted.

2. NEGLIGENCE.

The appellee was not guilty of contributory negligence in turning his cow out upon the commons remote from the gin (*L. R. & F. S. Ry. v. Finley, 37 Ark., 562*), and there was no testimony upon which to base the instructions asked upon that point.

No objection was made at the trial to the introduction of any testimony, and the point now pressed cannot be made here for the first time.

Let the judgment be affirmed.

MEYER, BANNERMAN & CO. v. STONE & CO.

1. AGENCY: *When agent to sell has authority to collect.*

   The rule that the authority of an agent to sell goods imports the authority to receive the proceeds of the sale is limited to cases where there are circumstances or appearances which give color to the belief in the purchaser that the authority exists.

2. SAME: *Same.*

   An agent to sell goods who has possession of them and delivers them to the purchaser, has authority to collect the purchase price; but if he is merely employed to sell, and has no possession of the goods, he has no authority to receive the price; and payment to him will not discharge the purchaser unless there is a known usage of trade or course of business to justify him in making it.

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

B. R. Davidson, for appellants.

Barry was a special agent, authorized to solicit orders, by sample, for appellants. He was paid a commission on all orders taken. He did not handle the goods; had no control over them. The orders were taken in the name of

the firm; the goods were shipped directly to the purchaser, and a bill sent, showing the amount of goods and indebtedness to the firm. Barry had no authority to collect. *30 Amer. Rep., 795; 68 Mo., 298; 30 Penn. St., 513; 32 N. J. Law, 249; 51 Mo., 89; 56 Mo., 434; 34 N. Y., 417; Dunn v. Wright, 51 Barb.*

Where one is intrusted with the goods, a power to sell implies authority to collect at the time, but not subsequently. *Story's Agency, p. 102, n. 5.* Barry not only had no authority to collect, but he discounted the bill and collected it some days subsequent to the sale.

Appellees were allowed to introduce testimony, over objection, tending to show a local custom for drummers to collect for their houses. This, we think, was clearly error. When it is shown that an agent has power to sell by sample, with no possession or control over the goods, and is forbidden to collect, it is simply a question of commercial *law* whether a payment made to such an agent would be binding on the principal. To hold that a custom of this kind could be shown, is to introduce interminable confusion. We would have the same drummer authorized to collect for his house in one village and not authorized to collect in the next, and the house that would send a salesman out with limited powers must acquaint itself with the local customs of each hamlet. Such was never the law. *8 N. Y., 190; 34 N. Y., 417–422; 2 Greenl. Ev., secs. 248–252; 1 W. Bl., 299; 2 Burr, 1216.*

Witness Lewis was allowed to testify that he, at one time in the state of Missouri, bought goods of another salesman of this house, and made payment to him. Taylor also was allowed to testify to payments he had made to Barry that Barry had sent in, and he had received credit for, before he was notified that Barry had no authority to collect. This was all clearly inadmissible. The fact that Barry

had collected and remitted, without authority, from Taylor, could not have affected Stone, or induced him to make a payment, as he knew nothing of the transaction. The fact that Lewis had paid some drummer in the state of Missouri, who either had or had not authority to collect, could not have enlarged Barry's authority, or have induced Stone & Co. to make the payment, but the court received and considered this testimony.

Barry discounted this bill for cash some days after delivery of the goods by appellants. It is not claimed he had any express authority to collect or discount bills for cash. On the contrary the testimony shows he was expressly prohibited from collecting.

L. Gregg for appellee.

Appellants claim that Barry was their agent to sell these goods, but was not such to receive pay for them.

First—Appellee insists that Barry, when this transaction was had, September, 1883, was appellants' agent to sell and collect.

Second—That appellants sent Barry out with the appearance of a general agent, and they are bound by his acts in the line of his business.

The scope of business to be done by an agent depends upon the custom in his line of business, except by agreement with or notice to the customers.

Third—Appellants, being merchants, knew the custom of merchants and traveling agents in their line, and, without notice to their customers, must be governed by the general customs of the country in dealings had in their line.

1 Pars. on Cont., 40; ib., note, p. p. 61 and 41 and 42-44; 29 La. Ann., 126; 122 Mass., 484; 76 Ind., 381; Paley

Agency (Lloyd), 194–200–201, 3d ed.; 11 Am. Law Register, N. S., 658; Story Ag., sec. 102–106; 22 Wend., 348–361; 7 Baxter (Tenn.), 269; 24 Minn., 269; 65 Geo., 630; 5 Sneed (Tenn.), 469.

Usages in business often determine agencies, where the terms are not made known to customers. *Story Ag., secs. 79, 92, 96–7, 105–6; 1 Pars. Cont., 61; 9 Mo. App., 359; 53 Vt., 402; 38 Am. Rep., 682.*

COCKRILL, C. J. The appellants are merchants in the city of St. Louis. Their salesmen visit merchants in this state and elsewhere, and solicit orders for merchandise, and when successful forward the orders to their principals in St. Louis to be filled. The appellees who are merchants in the town of Fayetteville, in this state, purchased a bill of goods of the appellants through W. T. Barry, one of their traveling salesmen, the order being taken in the usual way, and the goods shipped by the St. Louis merchants to the appellees with an itemized account showing the indebtedness to them. A few days after the goods were received by the appellees, Barry called upon them for payment, and upon the receipt of the amount of the account, less a small discount, receipted the account in full in the name of his principals. The money thus received by Barry never, in fact, reached the appellants, and they sued the appellees upon the account. The latter relied and succeeded upon the plea of payment.

1. When agent to sell may collect price.

No declarations of law were made or refused by the court, and the question presented is: Does the record disclose authority in Barry to receive payment for the goods and discharge the debt? It is not contended that he had express authority to do so, but it is contended that the authority to sell goods imports the authority to receive the proceeds of sales. The rule is frequently stated thus

broadly by the authorities, but an examination of the cases will show that it is properly limited to a state of case where there are circumstances or appearances which give color to the belief in the purchaser that the authority exists; and when this is true, it is immaterial as to third persons whether the authority has been actually conferred or not, for as to them, apparent authority is real authority. *Jacobson v. Poindexter, 42 Ark., 97.*

The most usual instance of the principal being bound, in this class of cases, by the act of his agent, beyond the authority conferred, is where the agent contracting for the sale, has possession of the property and delivers it to the purchaser, collecting the purchase money contrary to instructions. In that case, the possession and delivery of the property clothe the agent with the *indicia* of authority to receive the purchase price, and if the purchaser is not apprised of the limit placed upon the agent's authority, payment to the agent is payment to the principal. This incidental authority does not exist, however, if the agent is merely employed to negotiate a contract without possession of the property. The distinction is that long established between the authority of a factor and a broker. *Hill v. Crosby, 39 Ohio St., 100; Higgins v. Moore, 34 N. Y., 417; Berning v. Corrie, 2 B. & Ald., 138; Graham v. Duckwall, 8 Bush., 12.*

The Supreme Courts of Illinois, Missouri, Wisconsin and Michigan, have held that salesmen employed by commercial firms to travel and solicit orders, or sell goods by sample, have no implied authority, where nothing more appears, to collect the purchase money due their principals. *Clark v. Smith, 88 Ill., 298; Divessey v. Kellogg, 44 ib., 114; Butler v. Donnan, 68 Mo., 298; McKindley v. Dunham, 55 Wis., 515; Koseman v. Donham, 24 Mich., 36;* see, too, *Johnson v. Craig, 21 Ark., 533, 537; Seiple v. Irwin, 30*

Penn. St., *513*; *Law v. Stokes*, *32 N. J*, (*Law*), *249*; *Dunn v. Wright*, *51 Barb.*, *244*; *Puttock v. Warr*, *3 Hurl. & N.*, *979*.

The case of *Hoskins v. Johnson*, *5 Sneed* (*Tenn.*), *469*, which is perhaps the earliest reported case upon the authority of a "drummer" to collect the purchase price of goods sold upon orders solicited by him, is not reconcilable with the doctrine of the foregoing cases. According to it, the authority to collect the purchase money is an incident to the power to negotiate the sale. It has been followed in *Collins v. Newton*, *7 Baxter* (*Tenn.*), *269*, and the case of *Putnam v. French*, *53 Vt.*, *402*, appears to be in accord with it; but it seems clear, upon principle, that where goods are received by a purchaser from the vendors with a bill thereof payable to themselves, the bare fact that the order for the goods had been procured by an agent of the vendors, whose general duty it was to solicit such orders, would not raise the presumption that the agent was authorized to collect the purchase price. In such a case payment to the agent is no defense to an action by the vendors for the purchase money. But full validity may be given to the act of the agent in receiving payment, if there be a known usage of trade or course of business to justify the purchaser in making it. *Story Agency*, *secs. 98*, *413*, *429*; *Lawson Usages and Customs*, *sec. 20*, *p. 49*; *sec. 142*, *p. 284*.

In that case the presumption is that the agency was created with reference to the custom or course of business, and the ordinary reach of the agent's authority is thereby enlarged so as to cover the usual incidents of such an agency.

The proof in this case developed the fact that it was a general custom for commercial agents, traveling like Barry, to solicit orders, to collect the purchase money for the

goods sold by them, for their principals, and the proof was specifically directed to the custom of St. Louis agents. Isolated exceptions to the rule were proved, but in such instances the firm making the limitation indicated the fact in their bill or letter heads that payment must be made to them directly. Proof was had of the fact of two other of appellant's salesmen traveling at the same time as Barry, both of whom were in the habit of making collections as Barry did, in this instance, and remitting to the appellants. Barry, himself, it appears, made collections from other customers of this house, and remitted the money to his principals from time to time, and no complaint was made by them of this exercise of authority, until his failure to remit the money paid him by the appellees. They did not before that time inform him or any one else that he had no authority to collect. Proof of the custom referred to was admissible, not for the purpose of enlarging the scope of Barry's agency, but in order to interpret his power under it, and the specific acts of payment by other merchants to Barry and the appellants' other agents, tended to show their usual course of dealing with this class of agents, and to establish an actual knowledge on their part of the usage in this respect.

The jury, or rather the court acting in that capacity, was justified also in finding that the discount allowed the appellees was in accordance with the terms of sale made by the parties; that is, that the purchaser had the option to retain the agreed price until the expiration of the term of credit without interest, or to deduct the customary discount if paid before. *Heisch v. Carrington, 5 C. & P., 471; S. C. 24, E. C. L., 660.*

Affirm.

SPRINGFIELD & MEMPHIS RAILROAD COMPANY v. ALLEN.

46 217
56 43

46 217
62 347

46 217
74 272

46 217
82 109

1. EVIDENCE: *Receipt given under protest.*

A receipt is only *prima facie* evidence of what it imports, and may be explained or contradicted by the party signing it; but a settlement and receipt in full of an unliquidated demand, when made with a complete knowledge of all the circumstances, is a bar to a subsequent action upon the demand, although the creditor accepts the amount paid under protest and threats of suit for a balance claimed to be due him.

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

Caruth & Erb, for appellants.

A written receipt in full is evidence of the highest and most satisfactory character, and when given with full knowledge of the facts and circumstances, and there is no fraud, misrepresentation, mistake or imposition, it will bar a recovery, though given for a less sum than the party claims. *89 Ill., 212.* The burden of proof invariably rests on the party seeking to explain it. *44 Ill, 425.*

A receipt in full, in settlement of a disputed claim, with full knowledge of the circumstances, and no fraud, imposition or mistake, is a bar to an action. *1 Esp., 172; 1 Camp., Alner v. George; 9 Conn., 401; 42 Ark., 61.*

Robert Neill, for appellee.

The only instruction given for plaintiff was certainly the law. All the declarations asked by appellant were given, and they were as favorable as the law warranted. The jury evidently believed Allen, and the evidence was sufficient to sustain the verdict; and where there is any evidence to sustain it, this court will not reverse.

COCKRILL, C. J. While the work of constructing the Springfield & Memphis Railroad was in progress, the appellee furnished meat to the laborers under a contract with Patrick & Reid, the chief contractors. He was to be paid 7 and 8 cents a pound according to quality, payments to be made monthly by Patrick & Reid upon orders drawn upon them by the sub-contractors for the meat furnished to them. It was a part of the original agreement that these orders should be discharged by Patrick & Reid at the end of each month by the payment of 10 per cent. less than their face; and this course of settlement was uniformly pursued. Patrick & Reid, however, subsequently surrendered their construction contract to the railroad company, and assigned all of their sub-contracts to it. One Luyster assumed control of the work of construction on behalf of the company, and conducted affairs just as Patrick & Reid had been doing. He and Allen had a conference about the contract to furnish meat, but it turned out when a settlement was to be had, that they disagreed about the terms of the contract, Luyster contending that the terms of Allen's contract with him were the same as the terms of the contract with Patrick & Reid, and that the company upon the payment of the meat account was entitled to a discount of 10 per cent. Allen contended that the latter condition was not in the new contract. Luyster declined to pay anything on the account unless the discount was made, and Allen refused to sign a receipt in full upon the payment of less than the face value of his claims. He was in debt, however, and anxious to secure a speedy payment, so he returned in the afternoon of the same day to Luyster's office, submitted to Luyster's demand for the discount, accepted an amount less than he claimed, and signed a receipt for the full amount, protesting that it was less than was due and threatening to sue the company for the discount. This was in October, and suit

was instituted by him in the following March, and he obtained judgment.

Luyster and one of the firm of Patrick & Reid, who were the only witnesses sworn besides Allen, gave a much more favorable version of the whole matter for the company than that above detailed, both stating that it was expressly agreed between Allen and Luyster that the discount should be made; that the company would pay no more than Patrick & Reid had done, and that Allen's only objection in the end was that he was not making money on his contract. Reid testified that he was present when a settlement was made between Luyster and Allen in September before the final settlement, and that Allen acceded, as he had formerly done, to the discount; and Luyster says that at the final settlement, when the money was paid and the discount in controversy retained, Allen made no protest but appeared satisfied and signed the receipt without demur, his claim for the allowance of the benefit of the discount having been asked and refused before that time. It was the province of the jury, however, to weigh the testimony, and if, in any view of it, the appellee is entitled to recover, the verdict and judgment will not be disturbed.

EVIDENCE: Receipts under protest.

It is certainly true that a receipt is only *prima facie* evidence of what it imports, and may be explained or contradicted by the party signing it, and if that were all of this case, it would be apparent that Allen's action was not barred by the receipt he signed. But here was a claim or several claims, the justice of which was denied, and the amounts due upon them were in dispute. The debtor, in effect, said to the creditor: "I will pay you a certain sum on your disputed claims provided you will take it in satisfaction of the whole." While the offer stood in this form, there was but one of two courses open to the creditor—either to decline the proffer or accept it with the condition attached.

It was competent for him to receive the amount in discharge of his debt, and the receipt that he executed is presumptive evidence that he did so. A settlement and receipt in full of an unliquidated demand, when made with complete knowledge of all the circumstances, is a bar to a subsequent action upon the demand. *Bristow v. Eastman, 1 Esp., 172; Alner v. George, 1 Camp., ——; Fuller v. Critten, 9 Conn., 401; Thompson v. Lemoyne, 5 Ark., 312.* The bar does not rest upon the written receipt, but upon the acceptance of the sum paid and received, the writing being only one of the modes of showing the intention of the parties.

After the voluntary adjustment of a matter in dispute, the contest is ended and the disputed question cannot again be raised by the parties. Compromises avoid litigation and are encouraged by the law, and, when legally made, they are binding and are not disturbed by the courts.

Settlements under protest

The settlement, in this case, was made without intimidation, fraud or concealment, and Allen's protest could not have the effect to qualify the absolute surrender of his claims, and to abrogate the acceptance of the condition upon which the money was paid. It required the assent, express or implied, of Luyster to effect this. *McGlynn v. Billings, 16 Vt., 329; Miller v. Holden, 18 Ib., 337.* But it does not appear that Luyster ever occupied any attitude but that of offering Allen the sum paid in full satisfaction of his demand. The receipt made a *prima facie* case against Allen, and the burden of proof was upon him to overturn it. *McGlynn v. Billings, sup.*, is in point.

In *U. S. v. Adams, 7 Wall., 463*, a party who received from the government a less amount than was actually due him on a disputed claim, and gave a receipt in full for the amount, under protest, was held to be barred by the act, notwithstanding his protest. In *Savage v. U. S., 92 U. S.*,

382, where legal-tender notes were accepted by the holder in lieu of gold in payment of treasury certificates, payable in gold alone, a protest and threat of asserting claim in the courts for the difference in value of the two mediums of payment accompanying the act, the court say the protest was a mere *ex parte* act, without legal efficacy to qualify the voluntary surrender of the treasury notes and acceptance of the legal tender. The same may be said of the surrender of his claims by Allen, and the acceptance of money offered him in satisfaction.

Duress.

That his pressing necessities did not amount to duress, is clearly stated in the language of Judge Miller, under circumstances similar in that respect to this: "Authorities are cited to show that where, under peculiar circumstances, property is withheld from the owner and he is forced to pay some unjust demand to obtain possession of it, he can afterwards maintain a suit for the money so paid. But no case can be found, we apprehend, where a party who, without force or intimidation, and with a full knowledge of all the facts of the case, accepts on account of an unliquidated and controverted demand, a sum less than what he claims and believes to be due him, and agrees to accept that sum in full satisfaction, has been permitted to avoid the act upon the ground that it was duress. If the principle here contended for be sound, no party can safely pay, by way of compromise, any sum less than is claimed of him, for the compromise will be void for duress. The common and praiseworthy procedure by which business men every day sacrifice part of claims, which they believe to be just, to secure payment of the remainder, would always be duress, and the compromise void." *U. S. v. Child, 12 Wall., 232.*

Viewing the testimony in the light of the principles announced, the verdict has nothing to rest upon, and the

judgment must be reversed and the case remanded for a new trial.

TURNER v. HUFF ET AL.

46 222
60 380

46 222
78 321
81 136

1. COMMON CARRIERS: *Delivery of goods.*

A carrier by water may deliver goods on the wharf, but generally the consignee is entitled to notice of their arrival, that he may remove or safely store them. Notice, however, may be waived by the previous course of dealing between the parties.

2. SAME: *Same.*

A carrier by water is not responsible for the loss of goods delivered at the landing-place at which the consignee receives his goods, though there be no warehouse there and the consignee have no notice of their arrival, if it be the uniform usage and course of business of carriers in the same trade to leave goods at the landing-place without notice, and the manner of the delivery conform to the custom of the locality; and this, whether the shipper or consignee knew of the usage or not.

3. AGENCY: *Proof of.*

An agency can not be proved by the declarations of the agent *in pais*, in the absence of the party to be affected by them.

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

Rogers & Read and *Geo. W. Williams*, for appellant.

The appellee contracted to "*deliver*" the goods. The bill of lading is a contract in writing, to be construed like all others, according to the legal import of its terms, and all antecedent agreements are merged and extinguished. *Lawson on Cont. of Car., sec. 112; 16 Ohio, 421.*

Custom and usage cannot be resorted to to vary and contradict the terms of a bill of lading, but only to explain it

when the contract is silent. *55 N. Y., 200; 23 How., 49; 25 Barb., 16; Sandf. (N. Y.), 7; 30 Ala., 608; 5 ib., 498; 13 Ind., 518; 50 N. Y., 76; 51 ib., 166.*

Where actual delivery is not made, *notice must be given* to the consignee. *2 Pars. Cont., *p. 194; 15 Johns. (N. Y.), 42.* The mere putting ashore is not delivery, and in case neither consignee nor agent can be found, the goods should be stored in some safe place or kept on the boat. *6 Watts & Serg. (Pa.), 62; 32 Mo., 258; 7 Hun. (N. Y.), 133; 49 N. Y., 442; 2 Hilt. (N. Y.), 150; 4 Rob. (N. Y.), 474; 4 Sickles (N. Y.), 445; 15 Ill., 474; 3 La. An., 224; 2 Pars. Cont., note "y," *p. 194; 2 Curtis C. C., 256.* Usage and custom will not excuse notice. *2 Head. (Tenn.), 492; 2 Kent Com., *p 605 and note "c."*

The appellees failed to establish a binding custom or usage. *114 Mass., 110; 106 ib., 424–5.* On this subject see *15 Ill., 567; 14 ib., 326; 15 How., 539–45; 2 Head. (Tenn.), 488.*

The witnesses disagreed so widely as to what was the custom that the evidence fails to establish any. *76 Pa. St., 411; 7 Ohio, 54; 24 Md., 520; 7 Cush., 417.*

To bind appellant, he must have known the custom and contracted with reference to it, and the burden was on the appellees to show this. *Angel on Car., sec. 301.* Isolated instances do not make a custom or usage of trade. *17 Ark., 428; 17 Mich., 99.* The custom must be known, and the contract made in reference to it. *5 Duer., 29; 1 Metc. (Ky.), 562.* See, also, *7 Cush. (Mass.), 417; 34 N. Y., 425; 100 U. S., 691; 5 Wall., 663; 19 How., 312; 2 Sum., 567; 1 Blatch., 175; 2 Curt. C. C., 21; Chase's Dec., 126–7; 14 Gray, 210; 8 How., 83.*

The court erred in excluding evidence of Bray's agency. *42 Ark,, 99; 57 Cal., 465; 114 Mass., 110; 106 ib., 424; 2 Head., 492; 4 Metc. (Ky.), 125.*

Sanders & Husbands, for appellees.

The contract was to deliver *on the levee*, and the box was so delivered. There is nothing in the bill of lading about *notice*. The evidence established the fact that it was the uniform and universal custom and usage to deliver on the bank *without notice to any one*.

In all the cases cited by counsel for appellant the contract was to deliver to the *consignee*, without specifying any particular place of delivery.

The question of the *custom* to deliver on the bank without notice to any one was fairly submitted to the jury, and they found that such *was* the usage. This was properly submitted to the jury. *38 Iowa, 100*. The custom being *uniform and general*, appellant is presumed to take notice of it, and to have contracted with reference to it. *Hutchinson on Car., p. 294; 16 Vt., 52; 18 ib., 131; 23 ib., 186; 120 Mass., 139; 69 Penn., 374; Lawson Us. and Cust., secs. 85–88.*

But appellant was notified, and the box was lost after notice.

SMITH, J. Turner sued the owners of a steamboat for the value of a box of dry goods, which they had undertaken to carry, but had never delivered, as it was alleged. He recovered judgment before the justice of the peace, where his action was begun, but, an appeal having been taken, was defeated in the circuit court.

The bill of lading shows a contract of affreightment for the transportation of five boxes of boots and shoes, one package and one box of dry goods, from Fort Smith to Childer's Station, in the Cherokee Nation, to be delivered to Turner on the levee. As Childer's Station is four miles distant from the river, and as goods destined for that point must be hauled in wagons from the river, counsel agree

that the obligation upon the carrier was to deliver at the nearest landing, which was Bray's, upon the river bank. In ascending the river to Webber's Falls the boat put off at Bray's the rest of Turner's freight, but carried on the box, which gave rise to this controversy. However, on its return trip next day, the box was carried ashore and deposited by the side of Turner's other goods, which had not yet been removed. Turner was not notified, on either occasion, by any officer or agent of the boat, of the arrival of the goods, but received information from a teamster, on the Sunday that the boat passed up, that his goods were at the landing. Next day the same teamster saw the missing box on the landing with the rest of Turner's freight; in fact it was pointed out to him by Bray. There was no warehouse at Bray's, nor did the boat have any agent there. The testimony conduces to prove that there are no warehouses, wharf-boats or facilities for storing freight on the upper Arkansas, but that the custom is to blow the whistle to warn the neighboring settlers of the boat's approach and to discharge the freight for a particular landing on the bank of the river, without notice to the consignee. Bray lived near the landing and sometimes sheltered goods left there by the different boats that navigated the river, when the weather was threatening; and was sometimes entrusted with the collection of special bills. He was usually requested to look after the freight and notify owners; but on this occasion was absent from home. This box of goods had never actually come to the hands of the plaintiff, and the main question was whether a delivery had been made according to the tenor and effect of the contract.

1. CARRIERS Delivery of goods.

A carrier by water may deliver goods on the wharf; but as a general proposition the consignee is entitled to actual notice of their arrival, that he may have an opportunity to remove or safely store them. The necessity of notice may,

however, be waived by the previous course of dealing between the parties. Here it was in proof that the plaintiff had previously received several consignments of freight by this same boat, which had been delivered on the bank of the river, without any notice to him, and no complaint had been made.

2. Notice of delivery. Usage.

Moreover, it may be shown that the uniform usage and course of business of carriers in the same trade, is to leave the goods at the landing place without notice; and that the manner of delivery adopted in the particular instance conformed to the custom of the locality. And this, whether the usage was known to the shipper or consignee, or not. Every person who contracts with another for services in his special trade, is understood to contract with reference to the usages of that trade. *Hutchinson on Carriers, sec. 366*, and cases cited in note.

Turner must have known the precise character of Bray's Landing, the custom of the boats in delivering freight, and the want of facilities for the proper care and custody of it, after it was left on the bank. He was a merchant trading in the vicinity, and this was his shipping and receiving point. If, therefore, he was unwilling to be bound by the delivery in accordance with the custom of the landing, he should have attended in person to receive his freight, or have designated an agent for that purpose.

In the case of *The Mill Boy, 13 Federal Reporter, 181*, Caldwell, J., in discussing the question, when is the carrier discharged from liability, when the contract is to carry to a neighborhood or way-landing where there is no wharf and no warehouse, and where the consignee does not reside and is not to be found, uses this language:

"Such landings are not uncommon on the rivers of the southwest. They are established, or rather named, by the settlers living in the vicinity for their own convenience,

and to avoid the labor, expense and delay of traveling to some established wharf or landing, where the usual facilities for storing goods may be found. It is a well-known fact that on the Arkansas and other rivers in the southwest, the distance between the towns or established ports where there are warehouses or wharfboats is often very great. The necessities and conveniences of the settlers imperatively require that their goods should be delivered on the bank of the river, as near their homes and plantations as practicable, regardless of wharves and warehouses. The practical sense and generous spirit of good nieghborship which characterized these settlers very soon devised means for accomplishing the desired ends.

"It was perceived at once that the rules governing the rights and duties of carriers by water, where the contract is to carry to some established port having a wharf or warehouse, and where the consignee resided or might be found, or where he could be speedily notified by telegraph or otherwise, could have no application to these country or way-landings. It was seen that a boat could not be required to lay at each one of these landings until the consignees appeared to receive their goods, or until notice of their arrival could be sent to them. To impose such an obligation on a boat would protract her voyage unreasonably and indefinitely, and no boat would receive goods consigned to a way-landing, if such an obligation had to be incurred. Accordingly, some spot deemed most favorable for a boat-landing would be fixed by the settlers and given a name. Some settler living at or near the landing, for the accommodation of his neighbors, would take it upon himself to notify them, by some of those casual methods usual among people in the country, when goods were put off at the landing for them, and would assume such care and oversight over the goods in the meantime as

good neighborship and the necessities of the case seemed to require. And the usage and custom has been uniform that, when the boat put off goods at such a landing in good order and condition, and the person living at or near the landing was notified of the fact, and requested to look after them and notify the consignee, the liability of the boat was at an end. And the person in whose charge, in a very general sense, the goods may be said to be left at these landings, and who is expected to notify the consignee, is, as between the carrier and consignee, to be regarded as the agent or bailee of the latter, and not of the former, although no such relation may exist in fact between him and the consignee, or certainly none other than that of a bailee without award.

"The usage and custom relating to the delivery of goods at these landings is shown to have prevailed, and to have been generally known and uniformly acted upon, ever since boats have navigated the Arkansas river, now more than half a century. It is a reasonable usage, and contracts of affreightment will be presumed to have been made with reference to it. Persons consigning goods to such landings must, therefore, be held to know their character, and the usage and custom relating to the delivery of freight thereat."

The only remaining question in the case relates to the exclusion of certain evidence. One theory upon which the plaintiff claimed to recover was that Bray was the agent of the defendants, and that it was by his inattention that the goods were lost. In support of this theory the plaintiff offered, but was not permitted, to put in evidence a letter addressed by Bray to Turner, before the loss happened, proposing to take charge of his freight in the future for a reasonable compensation. This letter was accompanied by a freight bill, signed by Bray as agent, for

goods which had arrived on another boat running in the same trade.

The evidence was properly rejected. An agency cannot be proved by the declarations of the agent *in pais*, and in the absence of the party to be affected by them. *2 Wharton on Evidence, sec. 1183.* Morever, full proof that Bray was agent for the last-mentioned boat would have no tendency to prove that he was the agent of the defendant's boat. The two boats had no apparent connection, and did not, so far as appears, belong to the same owners. In fact, we may fairly infer, from all the evidence, that they were rival and competing packets. Bray testified that he was never the agent of any boat in the river. And there was no evidence to the contrary. Hence the court properly refused a request to submit to the jury the question of agency or no agency.

Affirmed.

PARKER V. SANDERS, JUDGE.

46 229
69 459

46 229
f75 126

46 229
82 194

46 229
83 456

1. CIRCUIT COURTS: *Fixing terms of. Power of the legislature.*

By act of February 13, 1885, the legislature fixed the terms of the circuit court of Monroe county on the fourth Mondays after the third Mondays in February and August in each year. By act of 3d of April, 1885, it divided Prairie county into two districts, and fixed the terms of one of the districts on the 3d Mondays of March and September in each year. Both counties are in the same judicial circuit, and have the same circuit judge. *Held:* That the time fixed for the spring term of the court in Prairie county being the same fixed for the spring term in Monroe county, the last act repealed the first and deprived Monroe county of its spring term, and that the repeal was not unconstitutional.

2. CIRCUIT COURTS: *Power of legislature to reduce terms of.*

The constitution does not prohibit the legislature from reducing the annual terms of the circuit court of any county to one.

PETITION for *Mandamus.*

H. A. Parker and *Geo. H. Sanders*, for petitioners.

A constitution is framed and adopted in contemplation of, and with reference to the political sub-divisions of the state, and "the law of the land," as it thus exists. *Cooley's Con. Lim., 1st ed., * p. 60, 64; ib., * p. 353, et seq.; James v. Reynolds, 2 Texas, p., 251; Batton v. Albertson, 55 N. Y., p. 54; People v. Porter, 90 N. Y., p. 71.*

The constitution of 1874 recognized the political division of the state into counties, etc., and established circuit courts in each county, and provided for the holding two terms in each county each year. The makers gave to the legislature the power to fix the times and places for holding the courts, but gave them no power to lessen the terms contemplated by the constitution. An act which takes from a county the privilege of having an equal number of *terms* of her circuit court, as all other counties in the state, as found by express or implied authority from the constitution, is a law in conflict with "the law of the land," as set out in *sec. 21, art. 2, Con., 1874.*

For, first, it is not a uniform system of administering the law. *Cooley's Con. Lim., p. 354, et seq.; Durber v. City of Janesville, 28 Wis., p. 464;* and for the same reason is in violation of *sec. 13, art. 2, Const.*, because a *certain* remedy is not afforded to every person; and also in violation of *sec. 3*, same article, which recognizes the "equality of all persons before the law;" and in violation of *sec. 18, art. 2, Const.*

All of the above constitutional provisions are simply declarations of the organic law to have and maintain a *uniform* system of administering the law. *Cooley's Con. Lim., * p. 389* (unequal and partial legislation).

Every county in the state has had two terms of the circuit court, per year, since the organization of the state government, and of this fact the court will take judicial knowledge; also of the fact that all the counties in the state still have two terms each year, except Monroe county. The number of terms in a year were fixed by the constitution with reference to the right of subjects to have "a speedy and impartial trial," and "a certain remedy," and to have rights determined "by the law of the land," and of these rights the legislature must take notice, and cannot controvene this right by legislation. *Walley's heirs v. Kennedy, 2 Yerger, 554; 18 Am. Law Reg., note to p. 684; Davis v. Pierce, 7 Minn., p. 13; Stanly Goodin v. Thoman, 10 Kan., 197; Leavenworth v. Miller, 7 Kan., 489.*

Sec. 18, art. 2, Con., operates inversely, and it is as much a violation of the provision to take from one class a privilege enjoyed by all other classes as it would be to give the privilege to all except one.

The fact as to a law being constitutional does not depend upon the intent of the legislature, but upon the effect of the law. *2 Yerger, 554; 28 Wis., 466.*

BATTLE, J. Petitioner, H. A. Parker, states that Hon. M. T. Sanders, judge of the first judicial circuit and of the Monroe circuit court, refuses to and will not hold the circuit court of Monroe county on the fourth Monday after the third Monday in February, 1886, unless required to do so by this court, and asks that he be so required by mandamus. Sanders responds to the petition and admits the truth of this allegation.

1. CIRCUIT COURTS: Fixing terms of.

On the 13th day of February, 1885, the general assembly of this state fixed the time for holding the circuit court of Monroe county on the fourth Mondays after the third Mondays in February and August of each year. On the 3d

day of April, 1885, it passed an act dividing the county of Prairie into two districts, naming them respectively the northern district and the southern district, and fixing the times of holding the circuit court in the southern district on the third Mondays of March and September of each year, and of the circuit court for the northern district on the second Mondays after the third Mondays in February and August of each year. According to these two acts, the spring terms of the circuit courts of Monroe county and of the southern district of Prairie county are required to be begun and held on the same day.

Monroe and Prairie counties are component parts of the first judicial circuit of this state. Under the constitution and laws of this state it is the duty of the same judge to hold the circuit courts of both counties. It is evident, therefore, that so much of the act of the 13th of February, 1885, as fixes the time of holding one term of the Monroe circuit court on the fourth Mondays after the third Mondays in February of each year, has been repealed, unless so much of the act of April 3, 1885, as requires a circuit court to be held in and for each district of Prairie county, and prescribes the times when the terms thereof shall be held, is unconstitutional.

Petitioner contends that every county in this state is entitled, under the constitution, to at least two terms of the circuit court in each year; and that the act of April 3d is unconstitutional to the extent it would deprive Monroe county, if enforced, of one term in each year, and leave her only one annual term.

In the constitution of 1874, it is ordained: "The circuit courts shall hold their terms in each county at such times and places as are, or may be, prescribed by law." It does not expressly guaranty to any county more than one annual term of the circuit court. The power of fixing the times

when the circuit court shall be held in such county is vested by the constitution in the general assembly. Is there any limitation, expressed or implied, on the exercise of this power?

Judge Cooley says: "Where the power which is exercised is legislative in its character, the courts can enforce only those limitations which the constitution imposes; not those implied restrictions which, resting in theory only, the people have been satisfied to leave to the judgment, patriotism and sense of justice of their representatives. * * * Nor can a court declare a statute unconstitutional and void, solely on the ground of unjust and oppressive provisions, or because it is supposed to violate the natural, social or political rights of the citizen, unless it can be shown that such injustice is prohibited or such rights guaranteed or protected by the constitution. * * * The moment a court ventures to substitute its own judgment for that of the legislature, in any case where the constitution has vested the legislature with power over the subject, that moment it enters upon a field where it is impossible to set limits to its authority, and where its discretion alone will measure the extent of its interference. * * * * Nor are the courts at liberty to declare an act void, because in their opinion it is opposed to a *spirit* supposed to pervade the constitution, but not expressed in words. When the fundamental law has not limited, either in terms or by necessary implication, the general powers conferred upon the legislature, we cannot declare a limitation under the notion of having discovered something in the *spirit* of the constitution which is is not even mentioned in the instrument." *Cooley Con. Lim., p. p. 157, 200, 203, 208.*

It is contended that the act fixing the times of holding circuit courts in Prairie county is unconstitutional, because

it deprives the accused in criminal prosecutions in Monroe county of a speedy trial, and violates *section 10* of *article 2* of the constitution, which says: "In all criminal prosecutions the accused shall enjoy the right to a *speedy* and public trial by an impartial jury of the county in which the crime shall have been committed." The same right was guaranteed to the accused in prosecutions by presentment or indictment by the constitution of 1836. In *Stewart v. State, 13 Ark., 729*, a speedy trial, as used in the constitution of 1836, is defined to be "a trial conducted according to fixed rules, regulations and proceedings of law, free from vexatious, capricious and oppressive delays, manufactured by the ministers of justice." Having been so defined in the constitution of 1836, it is to be presumed they were used in that sense in the constitution of 1874.

Again, it is said, that so much of the act in question as fixes the time of holding the circuit courts of Prairie county is unconstitutional, because it violates *section 13* of *article 2* of the constitution, which says: "Every person is entitled to a certain remedy in the laws for all injuries or wrongs he may receive in his person, property or character; he *ought* to obtain justice freely, and without purchase, completely and without denial, *promptly* and without delay, *conformably to the laws.*" But does the act in question take from the people of Monroe county any remedy in the laws for injuries or wrongs to person, property or character? It does not. The latter clause of this section of the constitution means nothing more than every one ought to obtain justice freely and without purchase, according "to fixed rules, regulations and proceedings of law, free from vexatious, capricious and oppressive delays, manufactured by the ministers of justice," or, as expressed in the constitution "*conformably to the laws.*"

No one has a vested right to any particular remedy. "This is the general rule; and the exceptions are of those peculiar cases in which the remedy is part of the right itself. As a general rule "the state has complete control over the remedies" of suitors in its courts. "It may give a new and additional remedy for a right or equity already in existence. And it may abolish old remedies and substitute new; or even without substituting any, if a reasonable remedy remains." Whatever belongs to the remedy, may be altered according to its will, provided the alteration does not impair the obligation of contracts; and it does not impair it, provided it leaves the parties a substantial remedy, according to the course of justice as it existed at the time the contract was made. It has, accordingly, been held that laws changing remedies for the enforcement of legal contracts will be valid, even though the new remedy be less convenient than the old, or less prompt and speedy." *Cooley Con. Lim., p. p. 350, 351, 448.*

"A state," says Mr. Chief Justice Taney, in *Bronson v. Kinzie, 1 How., 315*, "may regulate at pleasure the modes of proceeding in the courts in relation to past contracts as well as future. * * * And, although a new remedy may be deemed less convenient than the old one, and may in some degree render the recovery of debts more tardy and difficult, yet it will not follow that the law is unconstitutional. Whatever belongs merely to the remedy may be altered according to the will of the state, provided the alteration does not impair the obligation of the contract."

The general assembly is vested with the power to change, control, modify and abolish remedies in the manner and to the extent the state can do so, subject to the limitations on that power, if any, contained in the constitution of the state. It is true, every person is entitled to a certain remedy for all injuries or wrongs to his person, property

or character; but to the legislature belongs the power to determine and provide the remedy. He ought to obtain justice freely and without purchase; promptly and without delay; but it is the duty of the legislature to provide the mode and proceedings in which it shall be administered. In the absence of constitutional limitations, the courts have no right to interfere with the exercise of this power.

Section 13 of *article 2* of the constitution is an abstract declaration of right, and is not a limitation on the power of the legislature. It is too uncertain and indefinite to form rules for judicial decisions, and serves rather as an admonition addressed to the judgment and the conscience of all persons in authority than a limitation. *Cooley on Constitutional Limitations, 213.*

2. Power of legislature to limit term.

We have failed to find any limitation in the constitution prohibiting the legislature from reducing the annual terms of the circuit court of any county to one. The prayer of the petition is denied.

---

46 236
56 428
46 236
58 417
46 236
73 117
74 600
46 236
82 359
46 236
83 505
46 236
90 144

St. L., I. M. & S. Ry. v. Lesser.

1. Railroads: *Liabilities as carriers of live stock.*

Carriers of live stock are liable as common carriers and as insurers to the same extent as carriers of merchandise, except as to injuries caused by the animals to themselves or to each other; losses that are caused by their inherent vices and propensities.

2. Same: *Contracts for exemption from liability, etc.*

A common carrier cannot lawfully stipulate for exemption from responsibility for the negligence of himself or his servants, or the insufficiency of his cars for the transportation of the freight deposited in them.

3. Same: *Damages measured by special contract.*

When the shipper of live stock, in consideration of reduced rates, contracts with the carrier that in case of a total loss of any of the stock,

the valuation of any animal should not exceed a specified sum, then in case of a partial injury the damages will be the proportion of that sum the animal was lessened in value by reason of the injury.

4. SAME: *Exemption from liability. Onus of proof.*

Whenever a common carrier seeks to avoid liability for losses on account of a contract limiting his liability, he must prove, as a general rule, not only that a limited contract was made, but also that the loss in question arose from a cause excepted in the contract.

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

Dodge & Johnson, for appellant.

First—The verdict was contrary to the evidence. There was *no* evidence showing *any* negligence whatever on part of appellant. The defendant was treated as an *insurer*, when by the contract his liability was limited to that of a *forwarder* or *private carrier*.

Second—The verdict was contrary to the instructions of the court.

Third—The court erred in refusing the first instruction for appellant. Plaintiff took upon himself the duty of seeing that the car was safe and secure, and defendant could not be held liable for any want of safeness or soundness of the car. The duty imposed was not an unreasonable one. The contract speaks for itself, and by it the jury were to be governed in arriving at their verdict.

Fourth—The court erred in refusing defendant's fifth instruction, and in modifying it. *8 Pac. Rep., 465.* Common carriers may limit their liability as such to a certain extent, if the shipper understand and assent thereto. They may not exempt themselves from liability for loss occasioned by their own negligence or misconduct, but they may stipulate for exemption from the extreme liability

imposed by the common law, if such stipulation is just and reasonable, and does not contravene any law or sound public policy. *63 Mo., 314; 65 ib., 629; 21 Wall., 264; 76 Mo., 514; 16 Am. & E. R. Cases, 259 and note; 100 Mass., 505; 39 Ark., 149, 523.* If negligence of the carrier is relied on to defeat such a stipulation, the burden of proving it is on the plaintiff.

BATTLE, J. The defendant, St. Louis, Iron Mountain & Southern Railway Company, transported a car-load of horses and mules for plaintiff, Julius Lesser, under a special contract, over its railway, from St. Louis to Marianna, Ark. One of the horses was badly injured in the course of transportation. Plaintiff sued the defendant in the Lee circuit court for the damages suffered by reason of the injury.

So much of the contract as affects the matters in controversy is in the words and figures following:

"Live Stock Contract executed at St. Louis station, September 13, 1884.

"This agreement, made between the Missouri Pacific Railway Company, of the first part, and Julius Lesser, of the second part, witnesseth, that whereas the Missouri Pacific Railway Company transports live stock as per above rules and regulations, all of which are hereby made a part of this contract by mutual agreement between the parties hereto; now, therefore, for the considerations and the mutual covenants and conditions herein contained, the said first party will transport for the said second party live stock, and the persons in charge thereof, as hereinafter provided, from St. Louis station to Marianna, Ark., station, at the rate of tariff per car, the same being a *special rate* lower than the regular rates, or a rate mutually agreed upon between the parties hereto, for and in consideration of which

the said second party hereunto covenants and agrees as follows:

"*First*—That he hereby releases the party of the first part from the *liability of a common carrier* in the transportation of said stock, and agrees that such liability shall be only that of a *mere forwarder* or *private carrier* for hire; and also hereby agrees to waive and release, and does hereby release said first party from any and all liability for or on account of any delay in shipping said stock after the delivery thereof to its agent, and from any delay in receiving the same after being tendered to its agent.

"*Second*—The said second party hereby agrees to accept, and does accept, for the transportation of his said stock, the cars tendered him by the said first party, and agrees that he will see that they are in good and safe condition, and that they are securely fastened so as to prevent the escape of said stock therefrom; and that he will not hold said first party responsible for any loss or damage which may result from neglect or failure on his part, or of his agents or employes to do so; and also agrees to assume, and does hereby assume, all risks of injury or loss to his stock because of any defect in said cars, of their being wild, unruly, weak, or maiming each other or themselves, or of heat, suffocation or other results of being crowded in the cars, or of being injured or destroyed by fire on any account whatever, and especially because of burning hay, straw or other materials used for bedding the cars or feeding the stock, or for any other purpose.

"*Seventh*—The said second party further agrees, for the considerations aforesaid, that *in case of total loss* of any of his said stock from any cause for which the said *first party will be liable to pay* for the same, the *actual cash value at the time and place of shipment, but in no case to exceed $100 per head*, shall be taken and deemed as a full compensation

therefor; *and in case of injury or partial loss, the amount or damages claimed shall not exceed the same proportion.*" * *

There was no evidence introduced in the trial of this action to show how the horse was injured, except that plaintiff testified that the agent of the defendant told him that when the mules and horses were first put into a car at St. Louis, they were put into a car which was too small and was full of nails. The wound received by the horse was made, as shown by evidence, after he was received by defendant for shipment, and before his arrival at Marianna. The horse was worth, before he was wounded, $150, and after $70.

First—The defendant asked the court, among other things, to instruct the jury as follows:

1st. "If the jury find from the evidence that the plaintiff entered into a special con[illegible]th defendant, and that one of the conditions of sai[illegible]contract was, that the plaintiff should himself see that the car in which the horse in question was, was in good and safe condition, he cannot recover for any injury accruing from a bad or unsafe car, provided plaintiff had an opportunity to inspect said car." The court refused to give the instruction and defendant excepted.

1. Carriers of live stock: Liability.

Carriers of live stock are liable as common carriers, and as insurers to the same extent as when engaged in the transportation of general merchandise, except as to injuries caused by the animals themselves, and to each other; losses that are caused by their inherent vices and propensities.

2. Contracts for exemption from liability.

In *Railroad Company v. Lockwood, 17 Wall., 357*, Mr. Justice Bradley, in a very able opinion, after discussing at length the right and extent to which common carriers can limit their liabilities, by special contract, announced the

conclusions, to which, among others, the court came to, as follows:

"*First*—That a common carrier cannot lawfully stipulate for exemption from responsibility, when such exemption is not just and reasonable in the eye of the law.

"*Second*—That it is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants."

In *Railroad Company v. Pratt, 22 Wall., 124*, the court held, that "if a common carrier by rail is negligent in furnishing cars, and so furnish cars unsuitable for the case, even though they be cars for cattle, which cars the owner himself sees, and which cattle the owner himself attends, the carrier is not relieved from responsibility, even though there has be[illegible]reement that he shall not be liable."

In *Welsh* [illegible]*tsburg, Fort Wayne and Chicago Railroad Company, 10 Ohio St., 65*, the plaintiff entered into a contract with the defendant for the transportation by the defendant of certain car loads of live cattle, in the words and figures following:

"The undersigned hereby contracts, agrees and binds himself, for himself and the owner of the cattle shipped in Nos. 233, 231, 1,000, 207, 14, on the Pittsburg, Fort Wayne & Chicago Railroad, at $39 per car, on the 27th day of September, 1856, to be transported to Allegheny, Pa., by the Pittsburg, Fort Wayne & Chicago Railroad Company, in consideration of the said company agreeing to transport the said cars at $39 per car, at a rate by the car load, less than the maximum rate charged on pound freight for the full capacity of the car (18,000 pounds), to load, unload, feed, water and attend to the stock himself, and having examined the cars, to assume all the risks of transportation, both as to the live stock, and as to the individuals who

may travel with such stock, to attend to it; being all risk arising from any defect in the body of the car, imperfect doors and fastenings, overloading, or from vicious and restive animals, delays, or from any other cause or thing not resulting from defective tracks, wheels or axles.

"Signed at Bucyrus this 27th day of September, 1856.

(Signed), "W. S. WELSH."

Before signing the contract plaintiff examined the cars. He found the doors to the same imperfect and the cars insecure. Notwithstanding this he loaded the cattle and fastened the doors as well as he was able with the means furnished him by defendant for that purpose. In running twelve miles, with ordinary and proper care, six of the cattle escaped or were lost, because of the defective doors dropping out. Another door, thus defective, dropped out soon afterward and six more cattle were lost. "These defects," says the court, "in the doors and their fastenings, were well known to both the parties when the cattle were loaded, and the plaintiff expressly agreed to assume the risk arising therefrom." The court held, that "a common carrier of live stock cannot, by special contract, procure exemption from responsibility for losses arising from its own neglect of the duties incident to such employment;" that in furnishing defective and unsafe cars, the defendant was guilty of negligence, and was liable for the damage resulting from such cars, notwithstanding his express contract to the contrary; and that plaintiff was entitled to judgment against defendant for such damages.

In *Rhodes v. Louisville & Nashville Railroad Co., 9 Bush, 688*, the defendant undertook the transportation of cattle under a special agreement, by which the plaintiff, the owner of the cattle, assumed all injury, loss or damages which might be occasioned in certain contingencies, including the escaping of the cattle and possible injury to them by

fright or their own viciousness, as well as any other injury which might happen to them incidental to railroad transportation, not caused by the fraud or gross negligence of the railroad company. The court held that, "while this special contract devolved on the owner the personal care of the cattle, with the duties and risks connected with it, including the risk of their escaping or being injured in consequence of their own restiveness or viciousness, it did not exonerate the company from responsibility for damages resulting from a failure to provide a suitable and safe car for the carriage of the cattle."

The instruction was properly refused.

Second—The defendant asked the court to instruct the jury as follows:

3. Damages measured by special contract.

"5th. If the jury find from the evidence that the plaintiff entered into a contract with the defendant that even in case of loss or damage occurring through the defendant's 'gross negligence,' plaintiff bound himself to place no higher value upon any single animal shipped than $100; then for a partial loss the measure of damages is, what proportion of $100 said horse was lessened in value by reason of the injury."

But the court, against the objection of the defendant, gave the jury the instruction with the addition of the following words: "Provided the jury find the valuation was agreed on in consideration of special rates."

There was no evidence to disprove the statements made in the contract that the rates agreed to be paid for the transportation of the stock were less than the regular rates. "It must be presumed from the terms of the bill of lading, and without any evidence on the subject, and especially in the absence of any evidence to the contrary, that as the rate of freight expressed is stated to be on the condition that the defendant assumes liability to the extent of the

agreed valuation named, the rate of freight is graduated by the valuation." *Hart v. Pennsylvania Railroad Co., 112 U. S., 337.*

4. Burden of proof.

The defendant was entitled to the instruction as asked, and it was error to refuse it. *Hart v. Penn. R. Co., supra.*

Third—Whenever a common carrier seeks to avoid a liability for losses on account of a contract limiting his liability, the burden of proof, as a general rule, is upon him not only to show that a limited contract has been made, but also that the loss in question arose from a cause excepted in the contract. And this fact must be established with reasonable certainty and not rest upon conjecture or possibility. But it is unnecessary to apply that rule in this case. We think the evidence was sufficient to authorize the jury to find that the injury in question was caused by the negligence of defendant's employes.

The jury returned a verdict in favor of plaintiff for $80 damages. They evidently took the difference between the value of the horse before and after he was injured as the measure of damages. According to this standard, the verdict should have been for $53.33, the proportion of $100 the horse was lessened in value by the injury.

If appellee shall enter a remittitur here of $26.67, the difference between $80 and $53.33, within the next fifteen days, according to the rules of this court, the judgment of the court below will be affirmed; otherwise it will be reversed, and this cause will be remanded with instructions to the court below to grant defendant a new trial.

HAMILTON & CO. v. FORD.

46 245
55 47

1. REPLEVIN: *Changed to detinue. Possession and demand before suit.*
When the order of delivery in an action of replevin is quashed and the action is prosecuted as detinue, neither proof of the defendant's possession of the property at the commencement of the suit, nor of demand by plaintiff before suit, is necessary.

2. SALE OF GOODS: *Delivery, title, fraud.*
Upon the sale and delivery of goods, with the intention of passing the title to the purchaser, the title vests in him, though the sale was procured by his fraud, practiced on the vendor; the fraud rendering the sale not void but only voidable.

3. FRAUD: *False and fraudulent representation.*
A vendor has no right to rescind and avoid a contract of sale for fraudulent representations of the vendee inducing it, unless the representations were not only false and fraudulent, and made with intent to mislead the vendor, but could have been discovered to be such by reasonable care and diligence of the vendor; and that he not only did rely on them, but had a right to do so, in full belief of their truth.

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

L. A. Byrne for appellant.

First—There must be a *wrongful detention after a demand*, not a wrongful possession at any time. *34 Ark., 93; 40 ib., 555.*

Second—The first, second and third instructions for plaintiff are too broad and general, and calculated to mislead. They proceed on the theory that no title to the goods passed, but only the possession; and they exclude the proposition that it was necessary for Ford to restore Hamilton in *statu quo*, before Ford could rescind. *15 Ark., 286; 17 ib., 603; 20 ib., 424; 23 ib., 196.*

Third—When a party seeks to avoid a contract for fraud, he must place the party in *statu quo*, by returning any consideration or benefit received. *54 Cal., 189; 29 La., 245; 33 ib., 786; 36 Wisc., 439; 75 Ill., 205; 64 Me., 477; 52 N. H., 232.* And he must rescind in a reasonable time after the fraud is discovered. *17 Ark., 228; 51 Miss., 412; 18 Ind., 183.*

Fourth—The judgment cannot be enforced, as there were many articles and the value of each is not found and stated by the jury. *37 Ark., 544.*

Montgomery & Hamby for appellee.

First—After the affidavit and order of delivery were quashed, the case stood for trial on the merits, as though none had been made. *10 Ark., 53.*

Appellants having pleaded property in themselves, no demand was necessary. *35 Ark., 169.*

Second—The moving of the goods by appellants after the agreement that they should remain boxed as the property of Ford, until reinvoiced, was a wrongful taking and conversion. *Wells on Replevin, sec. 341*, and no demand necessary. *11 Ark., 249; Wells Repl., sec. 367.*

Third—The verdict is good; it follows the description set out in the the complaint. *Wells on Repl., sec. 114.*

Hon. W. C. Ratcliffe, Sp. J. Richard B. Ford commenced his action for the recovery of possession of certain specific personal property, in the Lafayette circuit court on the 29th day of July, 1869. An affidavit was filed, and an order of delivery issued. The property in controversy consisted of a remnant of a stock of merchandise in a store in Mar's Hill, in said county of Lafayette. The complaint contained a list of the articles claimed, as

did also the affidavit and order of delivery. The value of each article was not set out in the affidavit. The aggregate value of the goods was placed at $2,000.

Colby A. Hodges and William E. Hamilton were made defendants. Each filed his separate answer, setting up by way of defense that the goods were not the property of appellee, but the property of appellants, Hamilton & Co., a firm composed of said William E. Hamilton, William B. Hamilton and Elias F. Carnall. Afterwards Hamilton & Co. made themselves parties defendants, and were substituted as such. Hamilton & Co. also filed their answer, setting up property in themselves, and also alleging certain facts in connection with said ownership, which were afterwards struck out by the court on its own motion—a demurrer to the answer having been overruled. No further action was had in the case for a period of fifteen years, except the filing of some unimportant motions, and of a substituted complaint on the 4th day of October, 1880, which was substantially the same as the original—the original complaint being afterwards found and placed upon the record.

On the 11th day of August, 1884, a motion was made by appellants to quash the affidavit and order of delivery, which was sustained, and judgment against appellee for all costs in that behalf expended. Appellee did not except to the ruling of the court. Appellee then filed his motion to quash certain depositions of appellants, which was overruled by the court, exceptions noted, but the depositions are not brought upon the record. The death of Elias F. Carnall was suggested, admitted, and the cause revived and directed to proceed against William E. Hamilton and William B. Hamilton as surviving partners. Under this state of the pleadings the case stood as the ordinary action of

detinue, with issue as above stated. *Harkey v. Tillman, 40 Ark., 555.*

It was tried as such and judgment for appellee. There was a motion for a new trial, which was overruled, exceptions noted, bill of exceptions filed, and appeal prayed and granted.

1. REPLEVIN Possession and demand before suit.

The judgment is substantially correct in form. It was not necessary that appellants should have been in possession at the time suit was brought; nor was a demand necessary, and any matters connected with these questions will not be further considered.

2. Sale, Delivery, Title, Fraud.

The proof is as follows: Appellee, on the 21st day of January, A. D. 1868, was the owner of a stock of goods at Mar's Hill, Lafayette county; the appellants were merchants, doing business at Shreveport, La. Appellee was indebted to appellants on a note for $5,249.54, dated November 9, 1867, and due at date. William E. Hamilton, representing the appellants, entered into negotiations with appellee for a settlement thereof, and it was finally agreed that the stock of goods and certain notes and accounts should be turned over in payment of the said note—the goods first to be inventoried at their cost at Shreveport, with transportation added. An inventory was made by William E. Hamilton and Colby A. Hodges. The appellee was to be present, but owing to sickness in his family was prevented, and he told the other two to proceed with the inventory, as he had confidence in them. The goods were inventoried at $2,000. After the inventory was made appellee came to the store, when Hamilton told him that the same was correctly taken; that the original cost invoice and the inventory he had taken were in the store, and he should examine for himself. He did not go in to examine them, saying he relied on what Mr. Hamilton told him in reference to them. The settlement was then completed,

the note turned over to appellee, and the goods and certain notes and accounts turned over to appellants, and appellee executed to them his note for $193.63 in settlement of a balance and for an additional $100 advanced for him afterwards at his request.

The title to the goods vested in appellants. If any fraud entered into the transaction the sale was *voidable* only, but not *void*. *Benjamin on Sales, sec. 633; Bishop on Contracts, sec. 198.*

3. FRAUD: False representations.

The appellee seeks to divest title on the ground that the inventory was fraudulently made, and thereby he was deceived into making the settlement. Without noticing further the testimony, reference is had to instruction No. 1, given for appellee, excepted to by appellants, and made a ground for the motion for a new trial. It is as follows:

"If you believe from the evidence that the plaintiff was the owner of the goods in question on or about the 21st day of January, 1868, and that he agreed to sell the same at that time to the defendants, or to Hamilton & Co., with the understanding that W. E. Hamilton was to make a fair inventory or invoice of said goods at the prices which the same cost at Shreveport, with the cost of transportation added, and said W. E. Hamilton made an inventory of said goods in the absence of the plaintiff, and did not make said invoice in the manner agreed on, but put the values of the goods at a less sum than said original cost and cost of transportation, and induced the plaintiff to settle with him at the representation of said Hamilton & Co., and the plaintiff did so settle, under the impression that said goods had been fairly invoiced as agreed on, when they had not, and delivered said goods into the possession of said Hamilton & Co. under that impression, you are instructed that Hamilton & Co. did not thereby acquire any property in said goods, or the right to possession of the same, and you

may find for plaintiff, unless you further find, upon the evidence, that the plaintiff thereafter sold said goods to the defendants."

This instruction seems to be based on the fact that appellee had been induced to part merely with the possession, which is inconsistent with the evidence. The contract was executed and the goods delivered to the appellants with the intent on part of appellee that the title should pass. It is claimed that appellee had the right to rescind, on the ground that it was procured by fraudulent representations on the part of appellants. If so, the representations must not only have been false and fraudulent, and with intent to mislead, but must have been such as could not have been discovered by ordinary care and diligence. Also that appellee "not only did in fact rely upon the fraudulent statement, but had a right to rely upon it in the full belief of its truth." *Parsons on Contracts, vol. 2, sec. 773; Hanger v. Evins & Shinn, 38 Ark., 334.* None of these elements enter fully and distinctly into said instruction, and were material to the issue. The instruction should not have been given without modifications conforming to these principles.

The giving of the third instruction asked by appellee is also made a ground for the motion for a new trial. It is as follows:

"If you believe from the evidence that the plaintiff and W. E. Hamilton, on or about the 12th day of April, 1868, agreed that the goods in question should be reinventoried or reinvoiced, and that said goods should remain boxed up and unused by Hamilton & Co. until the same were reinvoiced, and should be the property of the plaintiff, and that Hamilton & Co. thereafter and before the commencement of this suit, without having said goods reinvoiced,

and without the consent of the plaintiff, took possession of said goods, then you will find for plaintiff."

This instruction is based, also, on the theory that the sale to appellants was never consummated and no title vested in them. It also involves the idea that possession was redelivered to appellee. Neither of these propositions is sustained by the evidence, and the instruction is misleading.

Without commenting further on the law and testimony, it may be proper to remark that, in the opinion of the court, the verdict of the jury is wholly irreconcilable with the evidence and the instructions, taken as a whole.

Reversed and remanded, with directions to grant appellants a new trial.

Hon. B. B. BATTLE did not sit in this case.

HOPKINS, AD., v. HARPER ET AL.

46 f87 251 231

1. APPEAL FROM J. P.: *Waives irregularities before justice.*

Tillar, Stanley & Co. sued the defendants before a justice of the peace on a note executed by them to Hopkins as administrator of Harrell. On the day set for trial the administrator was allowed to prosecute the suit, and filed a formal complaint. The defendants appeared and insisted that Tillar, Stanley & Co. were interested, and should be made parties, which was done, and defendants afterwards answered, and judgment was rendered against them and they appealed to the circuit court, and there moved to dismiss the action because Tillar, Stanley & Co. had no interest. They offered to withdraw, and the administrator insisted on prosecuting the action alone, but the court dismissed the action. *Held*: Error. That the filing of the complaint by the administrator was a new action, and after the voluntary appearance of the defendants and appeal to the circuit court, the case was there for trial *de novo* on the merits, and Tillar, Stanley & Co. should have been allowed to retire as parties.

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

McCain & Crawford, for appellant.

The filing of the amended complaint was the bringing a new suit. *34 Ark., 144.* Defendants *voluntarily* appeared and went to trial on the merits. Tillar, Stanley & Co. were made parties on their motion. It was too late to object in the circuit court, and move to dismiss for want of jurisdiction. *4 Ark., 70; 14 ib., 234; 35 ib., 276; 25 ib., 99; 2 ib., 195.*

The case stood for trial *de novo* in the circuit court. If there were any defects, they should have been remedied by amendment. If a party refused to amend, it would be time enough to dismiss. *44 Ark., 377; 35 ib., 445; 44 ib., 482; 35 ib., 276.*

X. J. Pindall, for appellees.

Hopkins had no authority to assign the note. *29 Ark., 500.* Tillar, Stanley & Co. then had no interest in the suit, and they could not bring it and transfer it to another.

To allow a party to bring a suit, who had no right to bring it, and then transfer it to another, is a *very liberal* construction of our amendment laws. See *34 Ark., 144.* The note either passed by the assignment, or it did not. If it passed, Hopkins had no interest; if it did not, Tillar, Stanley & Co. had none.

COCKRILL, C. J. Tillar, Stanley & Co. sued the appellees before a justice of the peace upon a promissory note executed by them to Jerry Hopkins, as administrator of

the estate of Jesse Harrell, deceased, alleging that it had been assigned to them. On the day set for trial, the plaintiffs, through their attorneys, asked and were granted leave to permit Hopkins, as administrator, to prosecute the action upon the note. A formal complaint was thereupon filed, by Hopkins, as administrator, against the appellees. The appellees appeared to this action, represented to the court that Tillar, Stanley & Co. were interested in the note, and procured an order directing them to be made parties. Tillar, Stanley & Co. then joined the administrator as plaintiffs, the case was continued for trial until a day in the next month, when the appellees answered, a trial was had and judgment rendered for the plaintiffs. The appellees carried the case, by appeal, to the circuit court, and there moved to dismiss the action, because Tillar, Stanley & Co. had no interest in it. The administrator insisted upon prosecuting the action irrespective of the presence of Tillar, Stanley & Co., but the court would not permit it, and dismissed the action. This was error. The filing of the complaint before the justice, by the administrator was the institution of a new suit, and not a continuation of the action begun by Tillar, Stanley & Co. *State v. Rottaken, 34 Ark., 144.* The appellees voluntarily appeared, and when the case was carried by appeal to the circuit court, it was there for trial *de novo*, upon the merits, rather than for the correction of errors committed by the justice of the peace. The presence of Tillar, Stanley & Co. did not affect the jurisdiction of the court. They are neither necessary nor proper parties to an action by the administrator; they came into the suit at the defendants' instance, and when the defendants subsequently manifested disapproval of their presence, they offered to retire from the action. We think they should have been

allowed to do so, without embarrassment to the administrator.

The judgment must be reversed, and the case remanded, with instructions to reinstate it, and let it proceed as an action by Hopkins, as administrator, against the appellees.

BIRMINGHAM V. ROGERS ET AL.

46 87 254 427

[This case was decided at the May Term, 1885, and should have been reported in Volume 45.—REP.]

1. LANDLORD AND TENANT, OR CROPPER: *Construction of contract.*
An agreement between a land owner and laborer for the cultivation of a crop by the latter upon the land of the former, will be construed to create the relation of landlord and tenant, unless the intention to make them partners or tenants in common of the crop be clear and unmistakable. [See in the opinion the contract construed in this case.—REP.]

2. APPEALS FROM J. P.: *Amendment in circuit court. New debt added.*
Upon an appeal from a justice of the peace, the plaintiff may amend his action in the circuit court by adding a claim against the defendant which was not included in the original action before the justice.

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

T. C. Humphry and *C. A. Levers* for appellant.

The written instrument was the best evidence to establish the relationship existing between the parties. *5 Ark., 651; ib., 672; 8 ib., 204; 13 ib., 125; 1 Gr. Ev., p. p., 82 102.* It clearly created the relation of *landlord and tenant.* See *31 Ark., 435; Taylor Land. & T., p. 19, and note 5 on p. p. 19–20; 34 Ark., 179.*

Under the code plaintiff could join the note with his claims for rent. *Gantt's Dig., sec. 4550; 33 Ark., 107.*

EAKIN, J. Birmingham, as landlord, sued out from a justice of the peace an attachment against John A. and R. E. Rogers, claiming a lien upon a crop of onions and potatoes, in their possession, for rent. He states in his affidavit that he is the landlord, and is entitled to receive, as rent, a half of three acres of onions, worth $100, and a half of six acres of potatoes, worth $150. That said crops are upon his lands, and the onions should have been delivered; that the potatoes would soon be ready for gathering and delivery. He charges that defendants have removed a portion of the crop without his consent, and therefore prays an attachment. There was a warning order against R. E. Rogers, as a non-resident, and the attachment issued on the 11th of October, 1881, and was levied on the crop, which was afterwards, by order of the justice, turned over to the plaintiff. This seems to have been done to enable him to save it by gathering, the articles being of a perishable nature in the fields, and upon this point no question is made. He filed an account of his claim for $240, in accordance with his affidavit. Afterwards, on the 13th of December, 1881, he filed an amended account, in which the value of the half crops, due him as rents, was set down at $93.65, with additional charges for damages incurred by the failure of defendants to gather the crops, and by improper cultivation of the lands, etc., amounting to $109; and charges upon contracts independent of rent amounting to something over $50, making a total of $229.

The defendant denied the facts set forth as grounds of attachment, to-wit.: That plaintiff was their landlord, and entitled to rents, as such, upon the crops; or that they had removed a portion of the crop without his consent; or had

done anything else to justify the attachment. They aver that they were owners of the crop in common with plaintiff, without any relation between them of landlord and tenant, and say they were damaged by the writ of attachment to the amount of $260, for which they pray judgment and that the attachment may be dissolved.

Upon the issues the defendants demanded a jury, which found that the attachment should be dissolved, and the defendants have damages in the sum of $125, and that plaintiff should keep all the crop which had been turned over to him, and recover the rest. The justice entered judgment accordingly, and the plaintiff appealed to the circuit court. There he was allowed to amend his affidavit and state the value of the half crop of onions and potatoes to be $72.15. He also added that the defendants were about to remove the crop raised upon the land without paying the rent. Upon motion of the defendants, the court struck from the account that had been filed the additional claims for damages on the part of plaintiff, and the item of a promissory note due him from defendants, on the ground that they had not been filed at the commencement of the suit, and because the claim for damages was inconsistent with the nature of the action.

There was then a trial by jury of the issues made on the grounds of attachment, and a verdict for damages in favor of defendants for $81.65. After a motion for a new trial had been made and overruled, a bill of exceptions was filed and the plaintiff obtained an appeal from the clerk of this court.

The right of the plaintiff to one-half the crop was conceded throughout. The whole contest was upon two points: *First*—Whether, in suing to recover that, he was entitled to a landlord's lien; and, *second*, whether he had truly alleged grounds for an attachment.

1. TENANT OR CROPPER.

The plaintiff offered to establish the relation of landlord by the introduction of a written contract between himself and R. E. Rogers, executed in 1880. The court refused to allow this, upon the ground that the proffered instrument constituted the parties common owners of the crop, and so instructed the jury. This was a fundamental ruling, inasmuch as it decided the very question in issue, leaving nothing to the jury but the assessment of damages. For, if there were no relation of landlord and tenant, nor landlord's lien, then the attachment was improperly sued out.

Construction of contract.

The instrument offered is inartificially drawn, and somewhat prolix, but sufficiently certain. It was executed in September, 1880, to be in force for the year 1881. It expresses that R. E. Rogers "rents" certain lands described, and agrees to put it all in cultivation next year, in such crops as might meet the approval of plaintiff, and that in no case would he allow weeds to go to seed upon it whilst in his care. It stipulates that said Rogers was to receive for cultivating this the half of what he might make; except of the corn, all of which he was to deliver to plaintiff at the rate of 25 cents a bushel. Plaintiff, in addition to furnishing the land, was to furnish seed, and to allow Rogers to use the tools on the place. The plaintiff's share was to be delivered to him in the crib, or place furnished to receive it, in good merchantable order. Rogers agreed not to "sub-rent," or to sell, or try to sell, any of the crop until it should be gathered and divided, nor "rent any more land, nor undertake any other work than this contract without consent of plaintiff." The land "now rented" to be broke in the fall and cross-broke in the spring. He agreed to do certain outside work in order to get the use of plaintiff's oxen.

It is tolerably plain from the words used, that the parties contemplated a contract for renting. None of the provisions, on the other hand, are such as might not be made between landlord and tenant, to insure proper care and cultivation of the land. Subject to these restrictions, the land by the contract passed under the control of the tenant, as tenant. His co-defendant, John A. Rogers, came in to assist him in making the crop on a contract between themselves, with the landlord's concurrence.

In doubtful cases, if this were doubtful, we are not disposed to extend the doctrine applied in some cases, that where one makes a crop upon the land of another upon an agreement to receive a portion of it as compensation for his labor, he becomes a mere cropper, and part owner of the crop, as distinct from a tenant, but the intention should be clear and unmistakable. It is the policy of the state, and the prosperity of the people as a whole requires it, that land owners, without the force or capital to work their own lands to their full capacity, should be encouraged to let them to those wno can furnish their own labor, at least, if no more. By this system the aggregate products of the state will be brought to the highest point, and the general prosperity increased by the impetus thus afforded to all other industries. This is the policy which has dictated the legislative provisions for the landlord's lien, and it will be very materially neutralized, if the courts should lean to constructions of contracts, which destroy the relation of landlord and tenant. If cropping contracts for division of products as in case of partnership, be intended, they are valid; but it is certainly desirable that they be clearly expressed, as land owners may conclude that it is better to to hold their lands for speculative purposes, than to risk being entrapped into lettings under which their security

for rents would rest only upon the fidelity and *bona fides* of the laborer.

We think the Hon. Circuit Judge erred in holding that this contract made the plaintiff and defendants owners in common of the crops, and that it did not tend to establish the relation of landlord and tenant. There were other errors growing out of this fundamental one, which are not likely to occur upon the correction of this, and need not be discussed. The fundamental error swept away all idea of a lien in any case, and made the verdict of the jury a foregone conclusion, save as to the amount of damage, without any necessity for considering whether the other facts authorized the specific attachment, or were true if they did. For this reason and for errors in instructions proceeding upon this basis, the court erred in overruling the motion for a new trial.

2. Amending in circuit court—adding new debt.

As the case must go back, we deem it proper to remark upon another point. After the commencement of the action, the plaintiff before the justice amended the account filed by adding a claim upon a note against defendants, having no connection with the landlord's lien. This the court, on motion of defendants, struck out; not, it seems, because the plaintiff might not have joined it at first. This he might clearly do, as decided in *Kurtz v. Dunn*, *36 Ark.*, *648;* although the lien of the attachment would extend to the rent only. The court struck it out because it was not originally set forth as part of the cause of action. This was a matter subject to the sound discretion of the court, but generally such amendments are allowable in furtherance of justice, and should be allowed when no unfair advantage may be taken of the defendant. The plaintiff, in all cases, may have a personal judgment for the full amount to which he may be entitled, although his lien may only secure a part.

For the error above indicated, reverse the judgment and remand the cause for new trial on the issues controverting the grounds of the attachment; and for such further proceedings as may be had consistently with law and this opinion.

---

46 260
63 225
46 260
71 604
46 260
80 309
46 230
85 250

GEORGE ET AL. v. ELMS ET AL.

1. STATUTE OF LIMITATIONS: *On administrator's bond.*
   A cause of action does not accrue on an administrator's bond until his accounts are finally settled in the probate court, and an order made by the court directing him to pay the amount found due to the parties entitled to it.

2. ADMINISTRATION: *Jurisdiction acquired by service of citation.*
   The probate court acquires jurisdiction of the person of an administrator for the settlement of his accounts by service of citation and order of attachment on him.

3. SAME: *Judgment of probate court conclusive.*
   The adjudication of the probate court in the final settlement of an administrator's accounts as to the amount of his liability, is conclusive evidence against his sureties in an action upon the bond.

4. SAME: *Who must sue for interest of deceased heir.*
   The administrator of a deceased heir, and not his widow or heirs, must sue on the administrator's bond for his distributive interest.

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

Jacoway & Jacoway, for appellants.

Plaintiff's action accrued more than eleven years before suit brought, viz.: on the day of the approval of the fifth and final account. They are barred. *Gantt's Dig., sec. 4127; 33 Ark., 658; 39 ib., 142; 23 ib., 93. It certainly ac-*

crued when the court, at the instance of the guardian of the only minor heir, ordered a distribution in April, 1873. *Gantt's Dig., secs. 157 to 168; 5 Ark., 468; 21 ib., 408 and 450.*

The final account (the fifth) not being excepted to, and having been finally approved, it was not thereafter subject to investigation, except in chancery for fraud. *Gantt's Dig., sec. 128; 14 Ark., 122; 8 ib., 270; 20 ib., 527.* After the lapse of the term the judgment became final, and passed beyond the control of the court. *6 Ark., 100, 282; 14 ib., 203, 568; 22 ib., 176.*

It could not be reopened or reconsidered. The issuance of the citation and attachment, and the subsequent sixth account under the *compulsory process* of the court, and all proceedings subsequent to the approval of the fifth account, are *coram non judice* and void. *6 Ark., 282.*

The order of distribution made in April, 1873, was *final;* the court had jurisdiction of the *subject matter* and *person,* and the order concluded all matters that *might have been litigated. Freeman on Judg., 3d ed., sec. 249 and 319 a; 14 Ark., 203; 1 English, 92; 7 ib., 95; 38 Ark., 457.*

No notice was given of the application for the second order of distribution, and the administrator being a resident of Kansas was *functus officio. Gantt's Dig., sec. 17; 38 Ark., 393.*

Appellant's principal had paid in full three of the heirs, yet the court ordered him to pay them again.

The proper parties plaintiffs were not before the court. The representatives of James M. Elmers and the deceased minor should have been joined as plaintiffs.

L. C. Hall, for appellees.

An administrator's bond requires him to file annual accounts current until his administration is *closed* and he is

discharged. The last one is the *final* account, and should state the *cash* balance in his hand; and payment of that balance should be included so that nothing remains to be done in his fiduciary character. *28 Ind., 421; 51 Cal., 151.*

The fifth account was not *final.* The balance was not in cash, but mostly in *notes to be collected. Schouler, ex. and ad., sec. 526.* No order was made for him to make distribution; nor was he discharged. No suit could be maintained on his bond until such order was made. *5 Ark., 473; 11 ib., 12; 4 Eng., 226; 21 Ark., 405; 38 ib., 475; 25 ib., 471.*

A settlement out of court with heirs is not presumed to intend dispensing with accounting. *Schouler, ex. and ad., sec. 522.* He may be cited to appear and compelled to account. The question of what credits for payments to heirs was tried by the court; no appeal was taken, and the judgment became conclusive. *38 Ark., 458.* Lapse of time and neglect is no cause for not accounting. *22 Ark., 1.*

The order to pay *one* of the heirs was void. No notice was given to the others. *Gantt's Dig., 169; 19 Pick., 167; 3 ib., 128; Schouler, ex., etc., sec. 527, and notes.* But if valid it could not be complied with—the guardian discharged, and there was no one to receive payment. No demand was made. The assets were in notes, not cash, and were not available. *Schouler, ex., etc., sec. 506.*

The administrator was not ordered to pay until 1882, and no suit could be brought till then. Plaintiffs are not barred.

The widow of James M. Elms was entitled to receive amount due her late husband. The complaint so charged, and is not denied in the answer.

STATEMENT.

On the 29th day of January, 1867, Squire Davis was appointed administrator of the estate of Garrett Elms, deceased, by the probate court of Yell county, and filed his bond as such with W. P. George and Alfred Sloan, as his sureties, and the bond was duly approved by the court. The administrator filed his settlements with the probate court from year to year, and on the first day of October, 1872, he filed what he termed his final account, showing a balance in his hands of $559.73, due the estate. This account was approved by the court in October, 1872. At the succeeding (April) term of the probate court, Cameron Adams, as guardian of *one* of the minor heirs of Garrett Elms, deceased, asked and obtained from the court an order requiring the administrator to pay him the distributive share of the assets of the estate due his ward. No demand was made upon the administrator for payment, however, and at the July term, 1873, the guardian was discharged from his trust, and the minor died soon after, and before coming of age. No further steps were taken in the administration until the April term, 1875, when citation was issued commanding the administrator to present his account for settlement. The citation was duly served, but the administrator failed to obey the order of the court, and having afterwards removed to another county, it was not until the October term, 1880, after having been attached, that he again appeared in the probate court and made settlement by filing his sixth account, as administrator of said estate. In this account he takes credit for items and interest, with which he was charged in his fifth, or so-called final account. He had also during the interval between the filing of the fifth and sixth accounts made private settlements with some of

the heirs, and he filed the receipts he had from them as so much paid on account, as vouchers with his sixth account. The receipts purported to be in full settlement with the parties signing them. Exceptions to this account were filed and the matter was referred to the clerk of the court, who restated the account, charging the administrator with the amount shown to be in his hands by the last previous settlement, and disallowing items claimed as credits which were charged against him by the court in former settlement. The account, as restated, was approved by the court October 11th, 1882, and Davis, the administrator, was ordered to pay to the heirs of the estate their respective shares of the amount found to be due. The administrator was represented by attorney at every stage of the proceeding. The order directing the distribution of the assets was not complied with, and this action was brought against the sureties in the administrator's bond by the surviving heirs of Garrett Elms, deceased, the widow of one of the deceased heirs joining with them. Before the final disposition of the sixth account current, the administrator removed from the state and his sureties alone are parties to this proceeding. There was judgment against them for the full penalty of the bond.

OPINION.

1. Statute of limitations on administrator's bond.

COCKRILL, C. J. The appellants rely upon the statute of limitations as a bar to the action. A cause of action did not accrue upon the bond until the administrator's accounts were finally settled and an order made by the court directing him to pay the amount found due to the parties entitled to receive it. *Fort v. Blagg, 38 Ark., 471; Baker v. State, 21 ib., 405; Padgett v. Coleman, 45 ib., 495.*

The inference from the record is that such an order might have been procured by the administrator or the distributees as early as 1872, but a different course seems to have been thought advisable by all the parties, except the guardian of a minor heir of the deceased. He procured an order for the payment of his ward's distributive share in 1873, but the order was never acted upon; the administrator did not seek to be discharged from his trust, and continued in its discharge, apparently for the purpose of collecting some notes due to the estate before making a final distribution. The order for payment to the guardian made in 1873, did not profess to be a general or final distribution. It was made upon the *ex parte* application of a single distributee, and does not purport to apply to any interest other than the petitioner's. It does not designate any particular part or *pro rata* of the assets to be delivered or paid to him, and whatever efficacy, if any, it may have had as to him, it is apparent it did not affect the rights of the other distributees. No action could have been maintained by them until October, 1882, when the administrator's account was finally adjusted and an order for a general distribution made.

2. Jurisdiction by citation.

It is argued that these orders are void for want of notice to the administrator, that they would be applied for. Aside from the fact that he appeared, by attorney, at every step in the proceeding, the court acquired jurisdiction of his person by the service of the citation and order of attachment. *Pearce, ex parte, 44 Ark., 515.* If he was entitled to credits for disbursements or payments made to distributees, he should have established the fact when his account was passed upon. He then had his day in court, and the opportunity of showing why an order for the distribution of the assets, or any part thereof, should not be made (*Pearce ex parte, sup.*),

and having neglected to do so, the correctness of the orders cannot be questioned now. The adjudication by the probate court of the amount of his liability, is conclusive evidence against his sureties in this action. *Jones v. State, 14 Ark., 170.*

3. Probate court order conclusive.

4. Who must sue for interest of deceased heir.

James Elms, one of the heirs at law of Garrett Elms, deceased, died before the institution of this suit, and his widow joined with her deceased husband's co-heirs as plaintiff to recover his distributive share of the assets. The interest of the deceased minor heir is not specifically claimed by any one, though the appellees seem to lay common claim to it as his heirs at law. The court awarded them, including the widow of James Elms, the full penalty of the bond, thereby permitting them to recover the distributive shares going to the estate of James Elms and the deceased minor. That this was error has been frequently decided by this court. The administrators of the deceased heirs are alone entitled to recover for their interest. *Purcelly v. Carter, 45 Ark., 299.*

If we had a sure guide by which the interests of James Elms and the other deceased distributee could be eliminated from the judgment, we would affirm as to the other interests; but the order of distribution made by the probate court merely directed the amount due to the estate to be paid *in solido* to the parties in interest, and we are unable to determine what amount should be adjudged to any individual. The judgment must therefore be reversed for the error indicated, and the case remanded with leave to the plaintiffs to bring in necessary parties.

RICHARDSON v. GREEN.

46 267
55 544

1. VENDOR AND VENDEE: *Lien for purchase money. Waiver.* Richardson sold and conveyed to Green, in trust for his wife, a tract of land, and for part of the purchase price Green executed to Richardson his note, on which Richardson recovered judgment, and afterwards filed a bill in equity to inforce his lien upon the land for payment. *Held:* That neither the acceptance of Green's personal note, nor the recovery of judgment on it, was a waiver of the lien—that Green was not a stranger to the purchase, the taking of whose note would be a presumed waiver of the lien.

APPEAL from *Bradley* Circuit Court in Chancery.
Hon. J. M. BRADLEY, Circuit Judge.

C. V. Murry and *H. G. Bunn*, for appellant.

The appellee, Marshal W. Green, in all his transactions in relation to the land, acted as the agent of his wife; he held the land in trust for her benefit at the time of the purchase from appellant. Now appellant comes into court and only asks that this land be subjected to the payment of this unpaid purchase money note, which was given for a part of the consideration for which the trust deed was executed.

If appellant has no vendor's lien on this land for this unpaid purchase money, then we must admit that the mission of a trust is not always to do the thing that is right between the beneficiary and other interested parties; but that "A," by his shrewd promises, may induce "B" to take the note of "A" for the purchase money of valuable property bought of "B" by "A," and through and by the instrumentality of a trustee not only claim his constitutional exemption against the collection of said note, but may take possession and hold and enjoy the rents and

profits of the very property for which the purchase money is due and unpaid, and absolutely defy "B" to enforce his vendor's lien, which no court denies him in the absence of the trust conveyance. If the deed had been made to Marshal W. Green for his own use and benefit, a vendor's lien as against him, privies and purchases with notice would not be denied by any lawyer. See *Swan v. Benson, admr., 31 Ark., 728*, and *Chapman v. Leggett, 41 Ark., 292*, and *Shall, admr., et al. v. Biscoe et al., 18 Ark., 142;* also, *Story's Equity, sec. 1217*. If the deed had been made individually to M. W. Green, and the note of a third party taken for the purchase money, appellant's lien would then have been good, unless the proof went to show a waiver, and the burden would have been on the vendee to show that the lien was waived, and that by the express instruction of the vendor at the time of the execution of the deed and the taking of the note. See *Lavender, admr., et al. v. Abbott, admr., 30 Ark., 172. Story's Equity, at section 1224*, says: "Generally speaking, the lien of the vendor exists, and the burden of proof is on the purchaser to establish that in the particular case it has been intentionally displaced or waived by the consent of the parties. If under all the circumstances it remains in doubt, then the lien attaches." Appellees are in possession of the land bought of appellant, and they will not be permitted to hold and enjoy the rents and profits thereof without paying to appellant the unpaid purchase money.

COCKRILL, C. J. Richardson filed his complaint in equity against Green and wife to enforce payment of the purchase money of lands which he had conveyed to Green in trust for Green's wife. The consideration, it was alleged, was $3,350, of which the sum of $2,687.50 was paid in cash, the husband executing his note for the residue. There

had been a suit at law, it was alleged, on the note, which resulted in a judgment *in personam* against Green, but nothing could be made upon it owing to the defendant's insolvency.

The defendants demurred to the complaint upon the grounds, 1st, that the plaintiff's deed to Green as trustee was absolute in form; 2d, that the note executed by Green was not in his trust capacity, but to bind him personally; 3d, that a judgment had been rendered against him on the note; and, 4th, that there was no equity in the bill. All the grounds set forth in the demurrer are properly embraced in the last cause assigned; but the court, to quote the language of the judgment, found that "the demurrer as to the several grounds was well taken," and the bill was dismissed.

The deed executed by Richardson is not exhibited with his complaint, and it does not appear from the allegations whether the deed recites payment of the purchase price or not. That, however, is immaterial, as the question arises between the parties to the deed. It has always been the rule in this state, that an acknowledgment in the body of the deed of the receipt of the whole purchase money, if it has not in fact, been paid, is not a discharge of the lien. *Shall v. Biscoe, 18 Ark., 142; Scott v. Osborn, 21 ib., 202; Harris v. Hanks, 25 ib., 510; Chapman v. Liggett, 41 Ark., 292.*

Nor is the right to resort to the lands for payment affected by the fact that the vendor takes the note of the vendee for the unpaid purchase money. When the deed recites payment and is prematurely delivered, the vendor, so far from manifesting an intention to abandon his right, moves rather for the protection of it, in taking written evidence to countervail the acknowledgment of payment contained in the deed.

But it is alleged that the deed was executed to Green, as trustee, and that the note is his personal obligation; and it seems from the demurrer to be argued from this that additional security was thus taken by the vendor and his right to a lien consequently waived.

In the absence of an express waiver of the lien, or some conduct or act which should be regarded as manifesting the intention to waive it, the vendor's equitable right against the land, remains. It arises as an implication of law without an express contract to sustain it. The acceptance of personal security, however, other than the note of the vendee, is considered *prima facie* evidence of the intention not to rely upon it, and casts upon the vendor the burden of showing that such was not the intention. *Lavender v. Abbott, 30 Ark., 172; Mayors v. Hendry, 33 ib., 240; Stroud v. Pace, 35 Ark., 100; Cordovers v. Wood, 17 Wall., 1; Mackreth v. Symmons, 1 White & T. Lead. Cas. in Eq., 447.*

If Green were a stranger to the purchase, in the case presented, then the fact that the note for the deferred payment of the purchase money was executed by him, would raise the presumption that the vendor intended to look to him instead of the land for payment. But for aught that appears from the record, Green was, in fact, the purchaser. It is true his wife takes the beneficial interest in the estate by the conveyance, but the whole negotiation, as far as the complaint develops, was with the husband, and it is not alleged that the wife made the purchase and paid the money that was received by the vendor. Under these circumstances, the husband, in equity, should be regarded as the real purchaser as far as the vendor is concerned, and it would follow that accepting a note from him for the deferred payment would raise no inference of an intention to waive the lien. This is held to be

true even where the deed is made directly to the wife, the husband executing the note without becoming a party to the conveyance. *Hunt v. Marsh, 80 Mo., 396; Davenport v. Murray, 68 ib., 198.*

The general doctrine relative to the equitable right of the vendor, "rests upon the postulate that it is not equitable for one to absorb the wealth of another without recompense; and, therefore, as between grantor and grantee, the court will intend that the purchased estate was to be held for the unpaid purchase money, unless circumstances are found which repel the presumption." *Hiscock v. Norton, 42 Mich., 320.*

Here the husband, who executes the note, is himself the grantee in the deed. It is not material what interest in the estate the conveyance may vest in him—accepting a note from the grantee cannot alone be said to evince the intention to abandon the lien. The vendor seems to have done only what it was most natural for him to do from the nature of the transaction, and the relationship existing between the maker of the note and the *cestui que trust* in the deed.

It has sometimes been held necessary for the vendor to proceed at law for his debt and exhaust his remedy there, before equity would grant him relief against the lands, but it has never been regarded that obtaining judgment upon the note given for the purchase money was presumptive evidence of the abandonment of the equitable right. The allegation as to the judgment at law and Green's insolvency were unnecessary and were harmless surplusage in the complaint. *Mayers v. Hendry, sup.; Whittington v. Simmons, 32 Ark., 377.*

Let the decree be reversed, and the case remanded with instructions to overrule the demurrer.

46 272
71 487
272
16 426

46 272
80 344

REEVE ET AL. V. JACKSON.

1. PLEADING AND PRACTICE: *Defenses, how and where made.*
A defendant can not now, as under the former practice, let judgment go against him at law upon a legal liability and then enjoin it in equity upon an equitable defense which was known before the judgment. He must make all his defenses, legal and equitable, in the action at law, and, if necessary, transfer the cause to the equity docket.

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

W. G. Whipple for appellants.

The appellee in this suit seeks to litigate over again the *very same issues* decided in the ejectment suit. The cause is *res judicata.*

The sale *in solido* was for the best interests of the estate; it was regular, legal and fair, and no fraud or undue advantage is shown. Fraud must be specifically alleged and proved. *34 Ark., 71; 44 ib., Adams & Thomas; 41 ib., 378.* Unless fraud is shown in the probate proceedings, the decree should be reversed. *39 Ark., 256; 42 ib., 136; Adams v. Thomas. 44 ib.; Greely B. Gro. Co. v. Graves, 44 ib.*

R. A. Howard for appellee.

SMITH, J. This bill was filed to enjoin the execution of a judgment rendered by the Pulaski circuit court, in an action between the same parties, and afterwards affirmed by this court. See *Jackson v. Reeve, 44 Ark., 496.* A general demurrer to the bill was overruled, and upon the hearing the decree was for the plaintiff.

1. PLEADING AND PRACTICE: Equitable defenses where made.

The demurrer should have been sustained. *Section 4932 of Mansfield's Digest* provides that "a judgment obtained in an action by proceedings at law shall not be annulled or modified by any order in any action by equitable proceedings, except for a defense which has arisen or been discovered since the judgment was rendered." This is a plain provision of the code. It precludes the defendant in a judgment, when the alleged matters of defense were within his knowledge at the time the judgment was rendered, from bringing a separate suit in equity to obtain relief against the judgment; thus abrogating the old chancery method which was recognized in *Hempstead & Conway v. Watkins, 6 Ark., 317*, and many subsequent cases in our reports. Such is the construction placed by the court of appeals of Kentucky upon the same provision in their code. *Chinn v. Mitchell, 2 Metc., 92; Ross v. Ross, 3 ib., 274; Moss v. Rowland's ex'r, 1 Duval, 321; McCown v. Macklin's ex'r, 7 Bush, 308; Emmerson's admr. v. Hevriford, 8 ib., 229.*

Under the present system of procedure, "the defendant may set forth in his answer as many grounds of defense, counter-claim or set-off, whether legal or equitable, as he shall have." *Mansfield's Digest, sec. 1503.* "Under the head of equitable defenses are included all matters which before would have authorized an application to the court of chancery for relief against a legal liability, but which at law could not have been pleaded in bar." *Dobson v. Pearce, 12 N. Y., 156.* And for the trial of equitable issues the cause may, upon motion, be transferred to the appropriate docket, to be there heard as a chancery cause. Provision is also made for bringing in all necessary new parties and for filing cross-complaints against co-defendants and others. *Mansfield's Digest, secs. 929, 945–6, 5040.*

The effect of all this is practically to modify and, to a certain extent, render obselete the ancient jurisdiction of equity over proceedings at law. A defendant who has an equitable defense to an action being now authorized to interpose it by answer, is bound to do so. The purpose is to compel parties to litigate the whole controversy between them in one action. This is the rule; and if there are any exceptions to it they will be found to be few in number and to stand upon special circumstances. *3 Pomeroy Eq. Jur., sec. 1368, et seq.; Erie Ry. v. Ramsey, 45 N. Y., 637; Winfield v. Bacon, 24 Barb., 154.*

The former action was ejectment, Reeve claiming the premises under a purchase at administrator's sale, and Jackson claiming as devisee by the will of the deceased owner. Jackson filed an answer, which he prayed might be taken as a cross-bill, containing substantially the same allegations that are set forth in the present bill. He moved a transfer of the case to the chancery court, and demanded affirmative relief, to the extent of vacating all the proceedings had in the administration of the estate, and of perpetually enjoining Reeve from prosecuting an action of ejectment for the premises. The motion to transfer was denied; and this court, on appeal, said that the answer tendered no issues which required to be tried in a court of equity. After the determination of the case in the circuit court, Jackson seeks to reopen the litigation by filing the present bill. There is no suggestion that he was deprived of his defense to the action at law by surprise, accident, mistake, casualty, misfortune or fraud; nor that he was ignorant of the important facts material to his defense. On the contrary, he had interposed the very same defense in the ejectment suit, and it had been disregarded; not because it was exclusively cognizable in equity; for, under the code, that is no reason at all for not entertaining

an equitable plea; but because, in the opinion of the court, it was not a substantial defense. A court of equity does not sit as a court of errors upon the proceedings of the courts of common law.

This decision does not contradict *Stewart v. Pace, 30 Ark., 594;* for there the plaintiff in the injunction suit was not a party to the legal proceeding; nor *Ryan v. Boyd, 33 ib., 778*, for in that case the defendant was not served with process, and this constitutes an exception to the rule. But the remark of Mr. Justice Walker, in *Earle v. Hale, 31 Ark., 473*, recognizing the old rule that a defendant, claiming to have an equitable defense, must first submit to judgment and then go into chancery to restrain the enforcement of the judgment, is misleading.

The decree is reversed and the bill dismissed.

SIBLEY, RECEIVER, ET. AL. v. SMITH.

46 275
60 486

1. PRACTICE: *Discovery. Personal examination of party for personal injury.*

Where a plaintiff in an action for personal injuries alleges that they are of a permanent nature, the defendant is entitled, as a matter of right, to have the opinion of a surgeon upon his condition, based upon personal examination; and the court should, upon demand of the defendant, compel the plaintiff to submit to such examination. But where the evidence of experts is already abundant, the court must exercise its sound discretion in compelling or refusing the examination; and its action is subject to review in case of abuse.

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

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

First—The court erred in refusing to require plaintiff to submit to an examination of his person by competent experts. *47 Iowa, 375; 60 How. Pr., 143; 24 Am. Law Reg., 527; 29 Kans., 466; S. C., 44 Am. Rep., 659.* The rule deduced from these cases is, that where the plaintiff in an action for permanent injuries alleges that they are of a permanent nature, the defendant is entitled, as a matter of right, to have the opinion of a surgeon upon his condition—an opinion based upon personal examination. If expert testimony has already been introduced, it is within the sound discretion of the court to order the examination.

J. M. Rose also for appellant.

S. P. Hughes, for appellee.

The court below held that there was no *necessity* for a personal examination, and that it had no power to order it. Such an examination is in the sound discretion of the court, and was properly exercised here. *53 Mo., 515; 24 Am. Law Reg., 527.*

Argues upon the merits.

SMITH, J. Sandy Smith sued the receiver of a railroad corporation to recover damages for being forcibly ejected from a moving train. His complaint alleged severe external and permanent internal injuries, and he recovered a verdict and judgment for $2000.

The testimony for the plaintiff tended to show that he was a colored man, above sixty years of age—one of a party of emigrants that included his wife and step-children,

besides others; that they had bought tickets from Dyersburg, Tenn., to Surrounded Hill, in this state; that after leaving Memphis on the road operated by the defendant, it being now dark, the conductor demanded the plaintiff's ticket, which was surrendered; but the conductor said it was not good, although the rest of the party were permitted to ride on similar tickets, purchased at the same time and place; that the plaintiff had been compelled, by threats and intimidation, to jump off the train, and was thrown to the ground with great violence, sustaining contusions upon the head, right arm, shoulder and hip, and also being internally hurt, evidenced by frequent hemorrhages, and derangement and obstruction of the bowels; and that his health and capacity to labor had been seriously impaired by the fall. It did not appear that any medical man had been called in, until a long time after the injury was received; nor was any medical testimony given as to the nature and extent of the injuries.

After the plaintiff had rested, the defendant moved the court that the plaintiff be required to submit to an examination of his person by experts chosen in equal numbers by the parties, whose fees the defendant offered to pay, with a view to ascertain the character, extent and permanency of the plaintiff's hurts. This motion was denied.

The earliest reported case on this subject, to which our attention has been called, is *Walsh v. Sayre*, *52 Howard's Practice Rep.*, *334*, decided by the superior court of New York in 1868. That was an action for malpractice against a surgeon, it being alleged that he had unskillfully performed an operation on the plaintiff, a child of seven years. The defendant asked that the plaintiff be required to appear and submit to a personal inspection of the affected part by himself and such other competent surgeons as he might name, under the direction of a referee to he appointed for

that purpose. And it was held that the power of the court in the premises was analagous to the power to compel the discovery of books, papers and documents, in a case where a party to the litigation, knowing or having the means of knowing material facts, seeks to obtain an undue advantage by withholding and concealing the sources of information. And the judge who delivered the opinion after adverting to the natural delicacy which disposes the mind to shrink from such an examination, when the discovery asked is of a portion of the human body, proceeds to show that such investigations are not unusual in cases of mayhem, of divorce for impotency, and of alleged pregnancy.

This case was approved in *Shaw v. Van Rensselaer, 60 Howard's Pr. Rep., 143.* And the right of the court to order an examination, in an action for personal injuries, was considered unquestionable in *Harrold v. N. Y. R. Co., 1 Hun., 268.*

An important authority upon the subject is the case of *Schroeder v. C. R. I. & P. P. Rd. Co., 47 Iowa, 375.*

Upon this question the court says:

"The issues of the case involved the extent of the injuries inflicted upon the plaintiff, and their effect upon his health and strength. He testified upon the first trial that he was so far disabled that he could not engage in labor requiring the exercise of common strength and activity. The testimony was to the effect that his hip and back were the seat of great pain, that the injuries had impaired his nervous system, and that his limbs and some of his internal organs were, to an extent, paralyzed.

"After the jury were impanelled, and before the introduction of any testimony, the defendant filed a written application asking that a proper order of the court be made, requiring the plaintiff to submit to an examination by physicians and surgeons, that they might determine the

true condition of his health, and the character and extent of his ailments, to the end that it might be known whether, indeed, he was suffering from any disability, and, if so found, whether it originated from the injuries sustained by the timbers falling upon him, as claimed by him in his petition and testimony. The defendant in its application asked that such an examination should be made by a proper number of physicians, to be selected, in equal numbers, by plaintiff and defendant, and it was proposed by the defendant that its own medical officer should not be one of the number, and that the expenses of such an examination would be paid by the defendant.

"Whoever is a party to an action in a court, whether a natural person or a corporation, has a right to demand therein the administration of exact justice. The right can only be secured and fully respected by obtaining the exact and full truth touching all matters in issue in the action. If truth be hidden, injustice will be done. The right of the suitor, then, to demand the whole truth, is unquestioned; it is the correlative of the right to exact justice.

* * * * * *

"To our minds the proposition is plain that a careful examination by learned and skilled physicians and surgeons would have opened a road by which the cause could have been conducted nearer to exact justice than in any other way. The plaintiff, as it were, had under his own control testimony which would have revealed the truth more clearly than any other that could have been introduced. The cause of truth, the right administration of the law, demand that he should have produced it.

* * * * * *

"But it is urged that the court was clothed with no power to enforce obedience of the plaintiff had such an order

been made. Its power, in our judgment, was amply sufficient to coerce obedience. The plaintiff would have been ordered by the court, by submitting his person to examination, to permit the introduction of testimony in the case. His refusal would have been an impediment to the administration of justice, and a contempt of the court's authority. He would have been subject to punishment as a recusant witness who refused to answer proper questions propounded to him. Should such recusancy too long delay the court, or prove an effective obstruction to the progress of the case, the court could have stricken from the pleadings all the allegations as to permanent injury, and withdrawn from the jury that part of the case. The plaintiff, by voluntarily withdrawing his claim for such injury, would have been relieved from the necessity of such examination, and proceedings as for contempt would have been suspended. When it is remembered that plaintiff was a witness before the court, that the examination of his person would have had the effect to elicit testimony from him, the power of the court over him is readily understood.

"It is said that the examination would have subjected him to danger of his life, pain of body, and indignity to his person. The reply to this is, that it should not, and the court should have been careful to so order and direct. Under the explicit directions of the court, the physicians should have been restrained from imperiling, in any degree, the life or health of the plaintiff. The use of anæsthetics, opiates, or drugs of any kind, should have been forbidden, if, indeed, it had been proposed, and it should have been prescribed that he should be subjected to no tests painful in their character. As to the indignity to which an examination would have subjected him, as urged by counsel, it is probably more imaginary than real. An examination of the person is not so regarded when made for the purpose

of administering remedies. Those who effect insurance upon their lives, pensioners for disability incurred in the military service of their country, soldiers and sailors enlisting in the army and navy, all are subjected to rigid examinations of their bodies, and it is never esteemed a dishonor or indignity. The standing and character of the physicians who should have been appointed to make the examination would not only have secured the plaintiff from insult, or indignity, but would have been a guaranty that nothing would have been attempted which would have endangered his life or health.

* * * * * *

"It is the practice of the courts of this state, sanctioned by more than one decision of this court, to permit plaintiffs who sue for personal injuries to exhibit to the jury their wounded or injured limbs, in order to show the extent of their disability or suffering. If for this purpose the plaintiff may exhibit his injuries, we see no reason why he may not, in a proper case and under proper circumstances, be required to do the same thing for a like purpose upon the request of the other party. If he may be required to exhibit his body to the jury, he ought to be required to submit it to examination of competent professional men."

White v. Milwaukee City Ry. Co. 61 Wis., 536, S. C. 24 Am. Law Reg., 527, was an action for personal injuries by a female. The defendant moved for an examination of the plaintiff's person by competent physicians, and the application was refused, the judge remarking that he had no authority to grant the order.

The Supreme Court of Wisconsin thereupon use the following language:

"It will be seen that the court denied this request on the sole ground that it had no authority to compel the

plaintiff to submit to an examination against her will. On principle and authority we are satisfied this was error. The then condition of the injured limb had a most important bearing upon the question whether the plaintiff's injuries were permanent, and an examination at that time, the results of which would have been put in evidence before the jury, would in all probability have greatly aided them in determining the extent and consequences of the injury. It would, or might have been, more satisfactory and conclusive evidence on that subject than the statements of the plaintiff, or the opinion of the medical witnesses."

The case of the *Atchison, Topeka and Santa Fe R. Co. v. Thul, 29 Kansas, 466; S. C., 44 Amer. Rep., 659,* is also in point. It is there said:

"The tendency of modern adjudications and of modern thought is to open the door as wide as possible to the introduction of all evidence that may throw light upon the particular subject then undergoing investigation. All the obtainable evidence and instruments of evidence, within certain limitations, may be presented to the jury for their inspection and consideration, and all proper modes of investigation or inspection may be resorted to for the purpose of enabling the jury to arrive at just and correct conclusions. Many instruments of evidence, however, can be examined only by the aid of experts, and in such cases the aid of experts is not only allowable, but may be demanded as a matter of right by the party needing such aid.

"It was shown in the present case by the testimony of Dr. Williams that the nature, the extent, and the permanency of the injury to the plaintiff's eyes could not be determined with any reasonable degree of accuracy except by a careful examination, made by some oculist or person who had made diseases and affections of the eyes a special

study; and we would naturally suppose that such would be the case, independently of the testimony of Dr. Williams. Hence it would seem that in a case like the present the evidence of some such expert who had made such an examination would be an almost indispensable necessity; but such evidence in many cases could not be obtained unless the plaintiff were first compelled by an order of the court to submit himself to a personal examination by some such expert."

Bryant v. Stillwell, 24 Pa. St., 317, was a suit on a building contract and the defense was that the house had been improperly constructed. Before the trial the plaintiff sent a person to examine the house, so that he might be able to testify how the work was done. The defendant refused to let him go through the house for the purpose. Judge Black, in the course of his opinion, said: To smother evidence is not much better than to fabricate it. * * * It ought to be understood that where one party has the subject matter of the controversy under his exclusive control, it is never safe to refuse the witnesses on the other side an opportunity to examine it, unless he is able to give a very satisfactory reason. Here there was no ground to believe that the witness would misrepresent what he might see. If the defendant had felt such a suspicion, he could have shown the house to as many others as he chose, and overwhelmed the one perjured man by a host of honest ones."

The only case that militates against these views, that we are aware of, is *Lloyd v. H. & St. Joe R. Co., 53 Mo., 509*, where it is said: "The proposal to call in two surgeons and have the plaintiff examined during the progress of the trial, as to the extent of her injuries, is unknown to our practice and to the law. There was abundant evidence on this subject on both sides; any opinion of physicians or

surgeons at that time would have only been cumulative evidence at best, and the court had no power to enforce such an order."

The refusal may have been proper enough in that case, as it appears that expert testimony had already been introduced, which, in the opinion of the court, was sufficient. But upon the question of power, and the means of enforcing obedience to the order, the decision seems not to have been well considered. Courts have very efficient remedies in their hands for the punishment of recusant witnesses or parties to suits.

The rule.

The rule to be deduced from these cases is that where the plaintiff in an action for personal injuries alleges that they are of a permanent nature, the defendant is entitled, as a matter of right, to have the opinion of a surgeon upon his condition—an opinion based upon personal examination.

In refusing to order the examination, as it may do when the evidence of experts is already abundant, the circuit court must exercise a sound discretion; and its action is subject to review in case of abuse.

There could not be a more flagrant instance of the evils resulting from such a refusal than the present case affords. The plaintiff was an uneducated man, incapable of estimating the consequences of his injury, except by the pain and inconvenience which it had caused him. He was able to walk five or six miles the day after the injury, and, indeed, then stated that he had not been hurt at all. No physician attended him or testified on the trial. His claim for damages was based principally on alleged internal injuries, which could only have been understood and properly estimated by a physician. The verdict must have been largely founded upon such injuries; for there were no visble wounds which the jury could appreciate. And yet the plaintiff was allowed to testify to great and permanent in-

juries, without the possibility of successful contradiction, the only means of ascertaining the real facts being denied to his adversary.

It was not disputed that the plaintiff leaped from the train while it was in rapid motion. The court referred it to the jury, under appropriate instructions, to say whether he acted voluntarily, or from a fear, generated by the conduct of the conductor, that worse consequence might befall him if he attempted to remain in the car.

For the error aforesaid, the judgment is reversed and cause remanded for another trial.

SOUTHERLAND v. WHITTINGTON.

1. SPECIFIC PERFORMANCE: *Contracts concerning public lands.*

Whittington, by virtue of his claim, occupancy and improvement of a lot in Hot Springs, applied to the commissioners appointed under the act of congress of March 3, 1877, to dispose of the lots there, to purchase it; but afterwards conveyed all his interest in the lot to Mrs. Southerland, who was his tenant upon it, with the agreement that she should apply to purchase, and if successful would, for a sum agreed on, reconvey a designated part of it to him; and she bound herself by bond for title to perform the agreement; but after she had purchased and obtained title to the lot she refused to execute it, and he filed his bill in equity for its performance. *Held:* That parties in possession of government land may make valid contracts concerning the title, formed upon the hypothesis of a future acquisition of title, unless restricted by congress, and that the contract was based on a valid consideration, and should be enforced.

APPEAL from *Garland* Circuit Court in Chancery.
Hon. J. B. WOOD, Judge of the Circuit Court.

J. M. Harrell, for appellant.

Agreements entered into to evade a public statute, or against public policy, are void. *34 Ark., 762; 1 Dillon, 280.* There was no consideration for the bond for title, and courts of equity do not enforce *nude facts. 2 Story Eq. Jur., secs. 787, 973, 987.*

R. G. Davies, for appellee.

The law of this case is stated in *Gaines v. Molen, 41 Ark., 232.*

BATTLE, J. The lot in controversy is a part of the Hot Springs reservation. For a long time previous to, on and after the 24th day of April, 1876, Hiram A. Whittington held a claim on and occupied and improved it. On the 1st day of February, 1877, Francis B. Southerland rented of the receiver appointed by the United States court of claims to take charge of the Hot Springs reservation, a part of it, for the term of one year, and took possession thereof and built a residence thereon, of the value of $250 or $300. When the Hot Springs board of commissioners were appointed and qualified under the act of congress of March 3, 1877, Whittington filed before it, within six months after its first session, his claim to purchase it, at its valuation to be fixed by the board, in preference to all other persons. On the 26th day of October, 1877, Whittington conveyed to Mrs. Southerland all his interest in the lot, with the understanding and agreement that she would file before the board her petition to purchase the lot at the appraised value thereof, in preference to and exclusion of all others; that if the board should adjudge she was entitled to the relief asked for in her petition and granted it, she would re-

convey to him the lot, except a certain part thereof, by quit-claim deed, containing covenants of warranty against all claims and demands of herself, or of all persons deriving title by or through her, on condition that he paid to her the sum of $400 and the appraisement of the portion to be reconveyed within twenty days after the board should grant her petition and issue to her a certificate of that fact. The price or consideration of this conveyance of Whittington to Mrs. Southerland was $500. She executed her note to him for the $500 and afterwards only paid thereon $100. On the 27th day of October, 1877, she executed her bond for title to Whittington, and thereby bound herself to perform the agreement entered into by and between her and Whittington, as before stated. Whittington then withdrew his petition from before the board and she filed hers, within the time prescribed by law, stating therein how Whittington had claimed, occupied and improved the lot previous to the 24th day of April, 1876, and thereafter conveyed his interest therein to her, and she had rented and improved it, and was still in possession, and asked that she be allowed to purchase the lot, in preference to others, at the valuation to be fixed thereon by the board; and, afterwards, proved the truth of the allegations of her petition. On the 2d day of December, 1879, the board decided she was entitled to purchase at the appraisement and gave to her a certificate to that effect. Whittington then offered to perform his part of their agreement and she refused to perform hers; and, thereupon, on the 6th day of July, 1881, he instituted this action to compel her to do so. On the 2d day of August, 1881, she paid to the United States the appraisement of the lot, which was, at first, $600, and afterwards reduced to $240, the last amount being the sum paid. On the 30th day of March, 1882, she received a patent to the lot. On the 20th day of December, 1883,

on the final hearing in this action, the court below decreed she should perform her contract, and she appealed.

Mrs. Southerland acquired title to the lot in controversy under and by virtue of the act of congress of March 3, 1877. This act provided for the appointment, by the president, of "three discreet, competent and disinterested persons" to constitute a board of commissioners, and imposed upon them various duties. Among other things, it required them, under the direction and subject to the approval of the secretary of the interior, to designate a tract sufficiently large to include all the hot or warm springs on the land, embracing what is known as the Hot Springs mountain, which tract was declared to be reserved from sale; and to lay out the residue of the land into convenient squares, blocks, lots, avenues, streets and alleys, the lines of which were to correspond with existing lines of occupants of the reservation as near as might be consistent with the interests of the United States. It also provided that they should, by a map prepared for that purpose, show the metes and bounds of the parcels or tracts claimed by reason of improvements thereon, or occupied on the reservation; should hear proofs offered by claimants and occupants in respect to the lands and improvements, and finally determine the right of each claimant or occupant to purchase the same, or any portion thereof, at the appraised value fixed by the commissioners; and to issue to each claimant a certificate, setting forth the amount of land the holder was entitled to purchase, and its valuation, and also the character and valuation of the improvements. It declared that claimants and occupants should file their claims before the commissioners, within six months after the first session of the board, or that their claims should be barred; and that no claim should be considered which had accrued after the 24th of April, 1876.

It is evident, therefore, that Mrs. Southerland derived her right and was allowed to purchase the lot in controversy through the deed executed to her by Whittington, and that her bond for title to him is based upon a good and valuable consideration.

There was no law forbidding claimants and occupants of the Hot Springs reservation to make contracts concerning their possessory rights, and concerning the title thereto to be acquired by them in the future from the United States. Such contracts are valid as between the parties to the contract. "The right of the United States," says Mr. Justice Miller, in *Lamb v. Davenport, 18 Wal., 314*, "to dispose of her own property is undisputed, and to make rules by which the lands of the government may be sold or given away is acknowledged; but, subject to these well-known principles, parties in possession of the soil might make valid contracts, even concerning the title, predicated upon the hypothesis that they might thereafter lawfully acquire the title, except in cases where congress had imposed restrictions on such contracts." *Hamilton v. Fowlkes, 16 Ark, 340; Cain v. Leslie, 15 Ark., 312; Thredgill v. Pintard, 12 How., 24; Gaines v. Molen, 41 Ark., 232.*

The contract evidenced by the bond for title executed by Mrs. Southerland to Whittington is a legal and valid contract and is based on a valuable consideration, and should be enforced.

The decree of the court below is substantially correct, but is, in some respects, vague, indefinite and uncertain. This cause is, therefore, remanded with instructions to the court below to reform its decree by entering a decree herein ordering and directing appellant to execute a quit-claim deed to Whittington, when he shall pay or tender to her the sum of one hundred and seventy-one dollars and fifty cents, his proportion of the valuation of the lot in

controversy, and the note executed by her to him, or a sum equal to the amount due thereon, and thereby convey to Whittington that part of lot six, in block one hundred and thirty-three, in the Hot Springs reservation, lying southwest of a line running from Whittington avenue back through said lot, parallel with and fifty feet southwest of the southwestern boundary line of the land awarded to James O. Fox, by the Hot Springs board of commissioners, and running parallel with and fifty feet southwest of the northeastern boundary line of said lot, the fifty feet being the part of said lot reserved by her in her bond for title, and covenant against all claims and demands of herself, and of all persons deriving title by or through her; and in the event she shall refuse to accept such tender and execute the deed, authorizing Whittington to deposit the money and note so tendered with the clerk of the Garland circuit court, and ordering and directing a commissioner, appointed by the court, when such deposit shall be made, to execute the deed; and allowing appellant ninety days within which to move her improvements off that part of the lot to be conveyed to Whittington, she having reserved that right in her bond for title; and by entering a judgment in favor of Whittington against her for the costs incurred in the court below. Judgment will be entered here against appellant for the costs of appeal.

HATCHETT ET AL. V. MT. PLEASANT BAPTIST CHURCH ET AL.

1. INJUNCTION: *To restrain deposed pastor and adherents from use of church.*

Where a minister of a congregational church is dismissed by the action of a majority of the church, and he thereafter usurps the pastoral office and attempts to exercise its functions, such majority are entitled to an injunction to restrain him, and to prevent him and his adherents from occupying and using the church without the consent of the majority.

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

Blackwood & Williams, for appellants.

First—In case of division of a religious corporation, the title to the church property will remain with those who retain their connection with and continue to conform to the usages and discipline of the organization with which they have been before connected, although they may constitute only a minority. *Lewis v. Watson, 4 Bush (Ky.), 228; McGinnis v. Watson, 41 Pa. St., 9; Winnerbrenner v. Cruder, 43 ib., 244; Ferrario v. Vasconcelles, 31 Ills., 1.*

Second—A majority of a church congregation may direct and control in church matters *consistently* with the particular and general laws of the organization or denomination to which it belongs, *but not in violation of them. Sutler et al. v. Trustees of First Dutch Reformed Church, 43 Pa. St., 511; 3 Grant (Pa.), 336; Boulder v. Alexander, 15 Wall, 140.*

Our contention here is that the decree of the chancery court is erroneous:

First—Because it overlooks the fact that the use or occupation of the church-house was involved, and was a property right.

Second—That to enable the chancellor to enjoin one faction in favor of the other he must look into the acts of the two factions, and see which is acting in accordance with the rules, regulations and usages of the church; that where the civil courts will not review the action of the church on ecclesiastical matter, yet in dispute between two factions, each claiming to be the church, the courts will inquire into the regularity of their proceeding to see which is acting in accordance with the rules, etc., of the church, as was done in *Boulder v. Alexander, 15 Wall., 140.*

In the case of *Sharman v. Frost et al., 3 B. Mon., 253*, the decision is based upon the fact that Sharman *et al.* were excommunicated by a vote of *the church. See page 258 of the opinion.*

In the case at bar the chancellor has gone upon the idea that the party *claiming* to be the church were the church; that because plaintiffs came first, and without notice to appellants, obtained an injunction, and claimed that they were the church, that therefore they were the church.

W. T. Tucker, for appellees.

Are the minutes as recorded in the church record true? If true, the court has no power to review them.

The Supreme Court of Kentucky says: "This court having no ecclesiastical jurisdiction, cannot revise or question ordinary acts of church discipline. Our only judicial power in the cases arises from the conflicting claims of the parties to church property, and the use of it. *We cannot decide* who ought to be members of the church, *nor whether the excommunicated have been justly or unjustly, regularly or irregularly, cut off from the body of the church (undeserving vine.)*" *Shannon v. Frost, 3 B. Mon. (Ky), 253*, the leading case. Supreme Court of South Caro-

lina affirms the same doctrine, and says: "But the civil tribunal tries the civil right, and no more, taking the ecclesiastical decisions out of which civil right arises as it finds them." *Homan v. Duber, 1 Spier's Equity (S. C.), 87.*

All of the authorities hold, that where a matter is purely of spiritual cognizance, it is conclusive on the civil courts, which are bound to accept as final the decisions of ecclesiastical bodies as to questions of ecclesiastical right or relations. *Watson v. Jones, 13 Wall., 679.* Also, see, *Watson v. Farris, 45 Mo., 183; Gibson v. Armstrong, 7 B. Mon. (Ky.), 481; John's Island Church Case, 2 Rich. (S. C.), 215; McGinnis v. Watson, 41 Penn. St., 14, 20 and 26; German Reformed Church v. Seibert, 3 Bow., 211; Robertson v. Billan, 9 Barb., 78 and 134; Den v. Batton, 7 Halstead (N. J.), 205–232; Commonwealth v. Green, 4 Wharton, 599; Bouldin v. Alexander, 15 Wall., 131.*

BATTLE, J. The Mt. Pleasant (colored) Baptist Church employed Peter Hatchett to serve as its pastor for an indefinite period of time. A portion of the members becoming dissatisfied with Hatchett, and disapproving his conduct, attempted to discharge him from the pastorage of the church and to exclude him and his co-defendants, on account of disorderly conduct, from the fellowship of the church. As to Hatchett's discharge as pastor being the action of the majority of the church, the evidence is conflicting. Without undertaking to detail the evidence, it is sufficient to say we find it was.

After his discharge, he and his co-defendants took possession of the house of worship of the Mt. Pleasant Baptist Church, without its consent, and he preached therein and made appointments to preach therein, thereafter, with the view to their occupying and using the same permanently. They insist that they have a right to occupy

and use it in this manner; and that they would have continued to do so, unless prevented, is manifest.

The court below enjoined and restrained Peter Hatchett from preaching, or in any manner officiating in the Mt. Pleasant Baptist Church, and his co-defendants, Isaac Bracy, Ralph Williams and Jesse Patrick, from holding any meetings, or officiating in any manner at any meeting of the Mt. Pleasant Baptist Church, and from interfering or disturbing any regular meeting of said church; and the defendants appealed.

It is said in *High on Injunctions:* "Upon the question of the right to the preventive aid of equity to restrain a deposed minister from continuing to exercise his clerical functions in the church from which he has been removed, the courts have not been in exact harmony, the ground of difference resting mainly upon diverging views as to whether such an act is an ordinary trespass, which may be remedied at law, or whether the trespass is of that continuing and irreparable nature which can be satisfactorily remedied only by the extraordinary aid of equity. Upon the one hand, it has been contended that a court of equity should not enjoin a deposed clergyman from continuing his ministrations in the church from which he has been deposed, since he thereby becomes a mere trespasser, without right, and the courts of law afford ample remedy for such a grievance. Upon the other hand, it is held, and this doctrine has the clear weight of authority as well as principle in its support, that such an injury is of that continuous and irreparable nature that no rule of damages can rightly measure it, and that it therefore falls within the well defined range of the preventive aid of equity. *High on Injunctions, sec. 311; Trustees v. Stewart, 43 Ill., 81.*

"It has accordingly been held, and this doctrine is supported by the weight of authority, that where a minister of

a congregational church has been dismissed by the action of a majority of the church, and he, thereafter, 'usurps the pastoral office and attempts to exercise its functions by officiating as pastor, such majority are entitled to an injunction to prevent the deposed minister from continuing to officiate in that capacity.'" *High on Injunctions, sec. 311; Perry v. Shipway, 4 DeG. & J., 353;* and *Cooper v. Gordon, L. R., 8 Eq., 249.*

Says *High on Injunctions:* "Courts of equity, having no ecclesiastical jurisdiction, will neither revise nor question the ordinary acts of church discipline or the administration of church government. Their only power arising from the conflicting claims of the parties to the church property and its use, they will not decide as to the status of membership, and will not determine whether members have been properly or improperly excommunicated from a church, but accept the fact of their expulsion as conculsive proof that they are not members, and that, having been expelled by a vote of the church, they are no longer entitled to any of the rights or privileges of membership. Thus, where property has been conveyed in trust for the use and benefit of a religious organization, members of the church who have been excommunicated by a vote of the majority, but who still insist on their right to enjoy and use the church property, and who have taken possession and made periodical use of it without the consent and in defiance of the main body of the members, may be enjoined from interfering with or using the property." *High on Injunctions, sec. 308; Shannon v. Frost, 3 B. Mon., 253.*

The above rule applies especially to congregational churches. How far it applies to other churches, we do not undertake to say. "In a congregational church, the majority, if they adhere to the organization and to the doctrines, represent the church." They control in the govern-

ment of the church, and have a right to select its pastor and control its property.

The Mt. Pleasant (colored) Baptist church, it appears, is a congregational church. The majority had the right to control in the church government and to select its pastor and control its house of worship. Hatchett was only employed for an indefinite period of time. The majority had a right to discharge him. He and his co-defendants had no right to take possession of its church and use and occupy it without the consent and in open defiance of the majority.

The decree of the court below is modified, and a decree will be entered here enjoining and restraining Hatchett from officiating in the capacity of pastor of the Mt. Pleasant Baptist church, without the consent thereof, and enjoining and restraining appellants from interfering with or using its house, without its consent, or against the wishes of the majority.

46, 296
f80 337

46 296
f89 537

Fort Smith v. Dodson.

1. Municipal Corporation: *Power to impound and sell vagrant stock. Construction of statute.*

The statute (*Mans. Dig., sec.* 757), empowering cities and towns "to restrain and regulate the running at large of cattle, horses, swine and other animals within the limits of the corporation, and to distrain, impound and sell the same for any penalty imposed by any ordinance or regulation, and all costs of the proceeding," authorizes the passage and execution of an ordinance forbidding the running at large of hogs in the city limits, by causing them to be seized and impounded and sold for the cost and expenses, after due notice of the sale, without further notice to the owner, and though no penalty be prescribed for the violation of the ordinance; and such an ordinance is not objectionable as effecting a forfeiture of the animal "without due process of law."

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

City Attorney, for appellant.

The ordinance is constitutional and valid. *Acts of Incorporation, sec. 16; Mills on Em. Dom., secs. 6, 7 and 8; Mayor of Cartersville v. Lanham, 13 Law Reporter, 552; 26 Mich., 476; 10 Lea (Tenn.), 35; 30 Ill., 459; Dillon Mun. Corp., vol. 1, p. 284.*

The court excluded the ordinance upon the ground that the costs and charges were incident to a *penalty.* The costs of the proceedings means cost of seizing, impounding, feeding, etc., and merely the costs of any trial.

The power may be exercised without imposing a penalty. The owner cannot complain if he is not punished to the full extent of the law. *26 Mich., 476*, and cases cited.

"Due process of law" does not necessarily mean a judicial or legal proceeding, a judicial determination. *12 Kans., 271.*

Personal notice not necessary; sufficient if by publication. *48 N. Y., 313; Shaw v. Kennedy, N. C., Tenn. Rep, 158; 3 Ired. Law., 493; 6 ib., 168; 12 Kans., 263; 41 Penn., 481.*

The judgment should be reversed. *Secs. 5145–5181, Mansf. Dig., and cases cited note "f" to sec. 1265.*

Collins & Balch, for appellee.

This ordinance is attempted to be upheld under *sec. 757, Mansf. Dig.* The ordinance is void, no penalty being provided, and the city had no power to seize, impound and sell for costs only. *26 Mich., 476.*

It is void because it attempts to deprive the owner of his property without legal proceeding first had to condemn, or "due process of law." *39 Am. Rep., 208; 40 ib., 115; 7 Cush. (Miss.), 247; 35 Am., 420; 46 N. Y. (Ct. App.), 439; 40 Am. Dec. 279; 53 ib., 328; 10 Ohio, 36; 26 N. J. (Law), 72; 45 N. Y., 356.*

COCKRILL, C. J. The marshal of the city of Fort Smith, finding a hog belonging to the appellee at large upon the streets of the city, seized and impounded it, and afterwards sold it at public outcry. The appellee recovered judgment for the value of the animal in an action against the city. On the trial the city offered to justify the act by proving a sale under an ordinance passed by the council, authorizing the impounding and sale of swine found running at large, but the court ruled that the ordinance was invalid, and rejected the evidence offered. This ruling of the court is the only question pressed by counsel for determination.

The ordinance is said to be invalid because not within the power specifically conferred upon the council by the act of the legislature. Under the title of "General Powers of Cities and Towns," *Mansf. Dig., sec. 757*, is the following provision:

"They shall have the power to restrain and regulate the running at large of cattle, horses, swine, sheep and other animals within the limits of the corporation; to authorize the distraining, impounding and sale of the same, for any penalty imposed by any ordinance or regulation, and all costs of the proceeding."

In execution of the powers conferred by this provision, the council of Fort Smith passed the ordinance now in question. It forbids the running at large of hogs and other animals in the city limits; it establishes a pound and

authorizes the city marshal or policeman to cause any hog found running at large to be seized and impounded; it provides a reasonable fee for services performed in impounding, feeding and caring for the animal after seizure, and makes it the duty of the marshal to sell any impounded animal after giving five days' notice by posters in public places in the city—the proceeds of sale, after deducting the costs of seizure, impounding and keeping the animal, to be held for the benefit of the owner.

It is argued that where no penalty is imposed by the ordinance, no power to impound or sell any of the enumerated animals is conferred by the statute. This position assumes that the authority to impound and sell is granted only by that clause of the statute relating to the penalty. But this is a false hypothesis. The first clause of the section cited confers the power to "restrain and regulate the running at large" of the animals enumerated. These words alone confer authority to establish the customary means of preventing the evil aimed at, according to the familiar principle, that all power is implied which is necessary to give effect to that expressly conferred. *Town of Russellville v. White, 45 Ark., 485; Grover v. Huckins, 26 Mich., 476; Whitlock v. West, 26 Con., 406; Goselink v. Campbell, 4 Iowa, 296; Varden v. Mount, 78 Ky., 86; Whitfield v. Longest, 6 Ired., 268.*

Hogs and other animals running at large, contrary to lawful prohibition, are regarded in the light of a nuisance, and the usual and established method of suppressing the nuisance is by impounding the animals and causing a sale for the costs of the proceeding. *Cases sup.* But the authority to impose a fine or penalty *in personam* upon the owner would not arise by necessary implication from the first clause of the section, and the obvious intention of the succeeding clauses in relation to the penalty was to enlarge

rather than to limit the power granted by the preceding clause, and enable the city not only to suppress the nuisance but to punish the person responsible for it. As the ordinance attempts only to suppress the nuisance, it does not reach the limit of the power granted, much less overleap it. But the ordinance may be justified under the second clause of the section also. The power is expressly given to sell for costs when a sale is made for a penalty. Now, as the costs referred to, by clear implication, include the costs of "distraining, impounding and sale," the question arises: Is it necessary to a valid exercise of this power that the council shall go to the full extent of the authority conferred, and impose a penalty for the nuisance before they can render an impounding effectual by a sale for the costs and charges? In answer to this question the supreme Court of Michigan, in *Grover v. Huckins, sup.*, in a case like this, say, "A party is not to be heard to complain, if, in the punishment for a breach of the penal laws, some severable part of what is or should be the legal penalty is omitted."

Again, it is urged that the ordinance forfeits the impounded animal without judicial proceedings and without "due process of law." The ordinance does not, strictly speaking, create a forfeiture, for after paying the reasonable expenses of impounding and selling, provision is made for paying the residue of the proceeds of sale to the owner of the animal. *Bagley v. Castile, 42 Ark., 77.* A notice, such as is likely under the circumstances to reach the party concerned, is required. This is all that is necessary in such cases. "In judging what is 'due process of law'," said Mr. Justice Bradley in *Davidson v. New Orleans, 96 U. S., 107,* "respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment

for local improvements or none of these; and if found to be suitable or admissible in the special case, it might be adjudged to be 'due process of law'; but if found to be arbitrary, oppressive and unjust it may be declared to be not 'due process of law'." Such summary proceedings, without the form of judicial trial have universally been held valid as falling within the police power of the government. *McKibben v. Fort Smith, 35 Ark., 352; Goselink v. Campbell, sup.; Gilchrist v. Schmidling, 12 Kans., 263; Grover v. Huckins, sup.; Campan v. Langley, 39 Mich., 451; Moore v. St., 11 Lea (Tenn.), 35; The Mayor of Cartersville v. Lanham, 67 Ga., 753; Whitfield v. Longest, sup.*

The case of *Varden v. Mount, 78 Ky., sup.*, relied upon by the appellee seems to be an exceptional case in this particular line. The city ordinance in that case presented the same essential features as the Fort Smith ordinance, but the court assume that its provisions created a forfeiture of the impounded animal and proceeded to determine that that could not be done without a judicial investigation. Before the determination of this case, the Supreme Court of Kansas, in disposing of a similar question, used this language: "When nothing is attempted to be imposed upon the owner of the stock as damages or penalty, but only the reasonable cost of taking up, impounding and keeping the same, and sufficient notice is provided for, and the ordinance authorized by the city charter, it is believed that no court has ever held the law or the ordinance founded thereon, to be unconstitutional or invalid, although the sale may not be made under judicial process, although there may be no provision for a judicial investigation, except the general remedies to determine whether the law or the ordinance has been complied with, and although the notice provided for may not be a personal notice, but only a notice by publication or by posting." This, we

think, the correct view. Certainly no greater right to a judicial investigation exists in such a matter than in the case of an estray or the sale of real or personal property for non-payment of taxes.

It follows that the court erred in excluding the evidence offered by the city in justification of the sale, and the judgment must be reversed and the case remanded for a new trial.

COLEMAN v. FRAUENTHAL & CO.

1. APPEAL: *Affidavit for, before appellant's attorney.*
   An affidavit for an appeal from a justice of the peace, made before the appellant's attorney in his capacity of a notary public, is not void.
2. SAME: *Affidavit. Amendment in circuit court.*
   An imperfect affidavit for an appeal made by one partner before a justice of the peace may be amended in the circuit court by another.

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

E. A. Bolton and *J. H. Harrod*, for appellant.

A proper affidavit is a prerequisite to an appeal from a justice's to the circuit court. It is jurisdictional. *42 Ark., 183*, and *Ark. Rep., passim.*

An affidavit for appeal made by a client before his attorney of record, who is an officer authorized to administer oaths, is a nullity, against public policy and void. *Chitty Gen. Pr., vol. 3, pp. 291–2, ed. 1836, and p. 545; Jones' Rules, 43, also p. 337 ib.; Sidd's Pr., vol. 1, p. 493, ed. 1836; Jacobs Fisher's Dig., vol. 1, p. 137–8; 3 T. R., 403; 8*

Taunt., 74; Bac. Abr., vol. 1, p. 101, 103; 12 Johns. N. Y., 340; 37 Ga., 678; 46 ib., 257; 9 Ark., 62; Collins v. Stewart, Sup. Court Neb. May, 1884, N. W. Rep., vol. 20, p. 11.

The court erred in allowing the so-called "amended affidavit" to be made by a *different party.* This was not *amendment,* but an entirely new affidavit by a different party. The first affidavit was a *nullity,* and there was nothing to amend.

Argue upon the merits.

C. W. Cox for appellees.

The affidavit was made before a notary, an officer authorized to take affidavits. *Mans. Dig., sec. 2916.*

The English rule was only a rule of practice adopted by the courts, and only applied to certain kinds of affidavits, and there are numerous instances where affidavits were made before the attorneys, and allowed to be read. *1 Barnes, 45; Cases temp., Hardwick, 11.*

An affidavit made before an attorney, also a justice of the peace held good. *4 Cr. Ct. Ct., 134; 2 Paige Chy., 328.*

Reviews the American cases cited by counsel. In none of them was an amended affidavit offered, and in all of them the affidavit was rejected under a rule of court, or when the affidavit was of such a nature as to prejudice the rights of parties, if allowed.

In this case there is no pretense of injury. It was merely formal. But the defect, if any, was cured by the amended affidavit. The parties making the affidavits were partners, and each acted for the firm, and either could make the affidavit. *Mans. Rev. St., sec. 5080-81. Amendment* means the correction of an error. See *Webster; Phillips' New World of Words; 8 Moore, 584; 4 M. & S., 328;*

7 How. Pr., 294; 22 Barb. N. Y., 161; 13 Abb. N. Y., 268; 23 How. Pr., 491.

See, also, *3 Scam. (Iowa), 361; 51 Mich., 100; 27 Ib., 303; 4 Daly, 494.*

1. AFFIDAVIT FOR APPEAL: Taken before appellant's attorney.

COCKRILL, C. J. There is but one question that is material for us to consider in this case, and that is, whether an affidavit for an appeal from a judgment of a justice of the peace, made by the party appealing before his attorney of record as a notary public, is a compliance with the statute which makes an affidavit for an appeal a prerequisite to its prosecution. It is argued that an oath administered by an attorney to his client is of no validity whatever, although the attorney is an officer authorized generally to administer oaths; and, to sustain the position, a number of English cases are cited, in which the courts of law and equity in that country refused to receive affidavits made by a client before his attorney. The courts appear, however, to have acted under rules of practice adopted by them for the guidance of litigants, rather than in strict pursuance of a rule of law. The rule has been amended, and its scope enlarged by the several courts from time to time, and some of the cases cited are based upon rules of recent origin. *1 Fish. Dig., p. 137; 1 Chit. Gen. Pr., p. 545.* As these were no part of the practice of the courts prior to the fourth year of James I, they can have no binding force with us. The origin of the practice cannot be readily determined. The researches of Mr. Chitty and Mr. Daniel have produced no case earlier than the time of Lord Hardwicke, *in re Hogan, 3 Atk., 813,* A. D. 1754. In that case it is said: "At common law the practice is always objected to and discountenanced, and generally, in equity, from the inconvenience that would arise if such a practice was suffered;" and the reporter adds, "the petition was dismissed, with the

costs to come out of the pocket of the solicitor who thus very improperly took the affidavits." But whatever the date of the origin of the rule may be, there were always cases in which the affidavit might be made before the attorney in the cause, and in none of the cases does it appear that it was more than an irregularity to do so. In the case of *Taylor v. Hatch, 12 Johnson R.*, the Supreme Court of New York say the rule adopted by the King's Bench "is a fit and proper rule, which we shall therefore adopt here," and after that time it was followed in that state, being denominated, however, a mere technical rule (*People v. Spalding, 2 Paige Chy., 326*), evidently intended only to discourage attorneys from engaging in a practice so likely to lead to abuse; and accordingly an affidavit made by a client before his attorney is not regarded as a nullity there, but only as an irregularity; and, in this respect, the courts of that state profess to follow the English practice. *Gilmore v. Hempstead, 4 How. Pr., 152; see Ross v. Sherman, 2 Cooper, temp. Cottenham, 172, W.*

The rule of practice was enforced by this court in *Hammond v. Freeman, 9 Ark., 62*, where *Taylor v. Hatch* was cited without comment or explanation; but whether it has any binding force without formal adoption by this or the inferior tribunals of the state or not, it is clear that an affidavit for an appeal (about which there is no discretion or semi-judicial duty to be performed), when attested by the attorney for his client, is only an irregularity in practice, if the attorney is an officer authorized to administer the oath. It follows that if no objection had been made to the affidavit in the circuit court, no advantage could be taken of it here, even if the facts appeared of record.

When the objection was made in the circuit court, the party prosecuting the appeal from the justice of the peace offered and was allowed to swear to the statements of the

affidavits before another officer. There is no doubt of the power of the circuit court to permit an amendment of an informal affidavit for appeal. *Young v. King, 33 Ark., 745.* We have held that the omission from the jurat of the signature of the officer was a curable defect (*Guy, McClelland & Co. v. Walker, 35 Ark., 212*), and we think the court, in permitting the amendment now complained of, acted within the principle of that case, and in furtherance of the plain purpose of the liberal provisions of the statute as to amendments.

In *Bradey v. Andrews, 51 Mich , 100*, an amendment was permitted in exactly this state of case, although the statute of that state prohibits an attorney from swearing his client.

There were several members of the firm which prosecuted the appeal, and the first and second oaths were not made by the same individual. That was immaterial. Any one of several parties jointly interested may make an affidavit for all for the purpose of appeal.

Affirm.

---

46 306
63 559
46 306
74 306
46 306
79 418

McRae, Adm'r, v. Holcomb.

1. Witnesses: *Parties in actions for or against deceased parties.*

The provision in the constitution of 1874 which prohibits parties in actions by or against administrators, executors or guardians from testifying as to transactions or statements of the testator, intestate or ward, applies only to the parties to the record, and does not exclude one who has an interest in the result, but is not a party to the record.

2. Statutes: *Proviso. Construction of.*

The office of a proviso is to restrain or modify the enacting clause of a statute; and where the enacting clause is general in its language and objects, and is followed by a proviso, the proviso is construed strictly,

and takes no case out of the enacting clause which does not fall fairly within its terms. A proviso carves out of the enacting clause only special exceptions within the words as well as within the reason thereof.

APPEAL from *Nevada* Circuit Court.
Hon. L. A. BYRNE, Circuit Judge.

Smoote, McRae & Hinton for appellant.

All that portion of Powers' evidence as to conversation and transactions between him and deceased comes within the rule of exclusion in *Const. 1874, schedule, sec. 2.* Not witihin the letter, but within its spirit and meaning. Powers was directly interested and as much a party to the suit as if his name had appeared in the record as such. The judgment for appellee is, in effect, a judgment for Powers, in that it releases him from obligation.

Montgomery & Hamby for appellee.

Powers was a competent witness. He was not a party, and the proviso in *Const., sec. 2, schedule,* does not disqualify him. *35 Ark., 247; 37 ib., 195; 12 Otto, 163.*

SMITH, J. This appeal is from a judgment rendered in favor of Holcomb against McRae as administrator of John A. Crossland. The action was upon a promissory note, made by the deceased and alleged to have been lost or mislaid. Upon the trial, one Powers, not a party to the action, was introduced as a witness for the plaintiff and was permitted, against the objection of the defendant, to give evidence of sundry transactions and conversations had with Crossland, touching the matter in controversy. The ground

of the objection was that Crossland was dead, and that the witness was interested in the issue to be tried. The ruling of the court, in the admission of the testimony, is the only error complained of.

Powers swore, in substance, that he was the agent of Holcomb, who lived in Texas, and that, as such agent, he had sold to Crossland a tract of land in Nevada county for $560; that Crossland received the customary bond for title, paid one-fourth of the purchase money in cash, and for the residue made his three notes, payable to Holcomb and due respectively at six, twelve and eighteen months; that witness retained the notes for collection, and about the date of the maturity of the first note, Crossland called to pay it; that witness took the notes from his safe, the three being pinned together, computed the interest to date, indorsed the amount thereof, $6.50, on the first note, as he thought, received the $146.50, and surrendered the note; that about the time the second note matured, Crossland directed him to procure a deed from his principal, as he wished to pay off the whole debt, and when the deed arrived he was informed by McRae, then Crossland's attorney, and now his administrator, that the title bond and balance due on the land had been left with him; that witness could find but one note—the third—which was surrendered to McRae on payment of the principal and interest, $158.50, and the deed was delivered; that witness transmitted the money to his principal, who immediately wrote back that another payment was still due; that witness at once informed McRae that there was a mistake, one note being still unpaid, and requested him not to give up the deed to Crossland until the mysterious disappearance of the second note could be looked into; that witness soon after saw Crossland and demanded the unpaid installment, and Crossland replied: "Produce the note and I will pay it;" that witness

did not know that the note was in Crossland's possession until his death, which occurred soon afterwards, and witness was unable to say how it came into his hands, but supposes that when Crossland paid the first note, he surrendered the first and second also; that Crossland had never paid but three installments, nor had witness intended to part with the second note; and that witness considered himself morally and legally bound to make good the loss to his principal if the present action should go against him. The second note was produced in court, having been found among the papers of the intestate, and bore upon the back of it, in Powers' handwriting, the indorsement, "interest, $6.50," which he evidently intended to place upon the first note.

McRae was the only witness that was examined, and he corroborated the statements of Powers, so far as his own connection with the transaction extended, but went on to say that when he reported to his client what Powers had said about the mistake and that one payment was still due, Crossland claimed to have paid the note.

1. Witnesses against deceased parties.

Section 2, in schedule to the constitution of 1874, is as follows: "In civil actions no witness shall be excluded because he is a party to the suit or interested in the issue to be tried; provided, that in actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other, as to any transactions with or statements of the testator, intestate or ward, unless called to testify thereto by the opposite party."

It is admitted that the exclusion of Powers is not demanded by the words of this provision, but it is contended that so much of his testimony as relates to conversations and transactions between himself and the deceased is incompetent, if the provision is to be interpreted according

to its spirit and reason. This question is virtually settled by *Bird v. Jones, 37 Ark., 195*, and *Nolen v. Harden, 43 Ark., 307*, where it was decided that the persons excluded from testifying as to transactions or statements of testators, intestates and wards are the executors, administrators and guardians on one hand, and their antagonists in the suit on the other, and that persons who are neither pursuing, nor pursued by, the *fiduciaries* are not included in the prohibition. The object was to put the two parties to a suit upon terms of substantial equality in regard to the opportunity of giving testimony. To use the language of *Dr. Wharton* in his *Law of Evidence in Civil Issues, section 466*, when one of the parties to a litigated obligation is silenced by death, the other is silenced by law.

The constitution establishes a general rule that makes all persons who are of sufficient intelligence and not otherwise disqualified, competent witnesses, irrespective of their participation in the suit, or their interest in the result. But to this general rule there is one exception, viz.: Where the action is by or against an executor, administrator, etc., and the witness is a party to the record, he shall not speak of personal transactions with the deceased, where, by the nature of the case, the privilege of testifying cannot be reciprocal. But mere interest in the issue to be tried does not disqualify.

2. PROVISO: Office of.

The office of a proviso is to restrain or modify the enacting clause of a statute. Hence "the general rule of law, which has always prevailed and become consecrated almost as a maxim in the interpretation of statutes, that when the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is construed strictly, and takes no case out of the enacting clause which does not fall fairly within its terms. In short, a proviso covers special exceptions only out of

the enacting clause; and those who set up any such exception must establish it as being within the words as well as within the reason thereof." *U. S. v. Dickson, 15 Peters, 165, per Story, J.*

Our constitutional provision is identical in purport, and very nearly in language, with section 858 of the revised statutes of the United States. In *Potter v. National Bank, 102 U. S., 163*, such evidence as Powers delivered in this case was declared admissible. It is there said:

"The first clause of that section shows that there was in the mind of congress two classes of witnesses—those who were parties to the issue—that is, parties to the record; and those interested in the issue to be tried—that is, those who, although not parties to the record, held such relations to the issue that they would lose or gain by the direct legal operation and effect of the judgment. * * * The proviso * * * excludes only one of the classes described in its first clause,—those who are, technically, parties to the issue to be tried—and we are not at liberty to suppose that congress intended the word 'party,' as used in that proviso, to include both those who, according to the established rules of pleading and evidence, are parties to the issue, and those who, not being parties, have an interest in the result of that issue."

The same conclusion has been reached by other courts in construing similar statutes. *Tooker v. Davis, 47 Mo., 140; Wiltingham v. Smith, 48 Ga., 580; Bragg v. Clark, 50 Ala., 363; Blood v. Fairbanks, 50 Cal., 420.*

Judgment affirmed.

46 312
56 231
46 312
58 438
46 312
62 484
46 312
63 584
63 591
46 312
66 39
46 312
70 401
46 312
75 335
46 312
80 37
80 137
46 312
89 471

THE LITTLE ROCK & FORT SMITH RY. v. R. W. WORTHEN, COLLECTOR, ETC., ET AL.

1. STATUTES: *Unconstitutional, to be disregarded by executive officers.*
Officers of the executive department are not bound to execute a statute which, in their judgment, is unconstitutional. Their primary allegiance is due to the constitution, and if there be a conflict between the two the constitution, and not the statute is the law.

2. SAME: *Unconstitutionality of. Decision by executive officers.*
Executive officers incur peril by deciding for themselves, in advance of the courts, the unconstitutionality of a statute; but they are also liable to damages if they execute a statute which violates the constitution.

3. TAXES: *Legislature, no power to discriminate.*
The legislature cannot discriminate between different classes of property in the imposition of taxes. Its only discretion is in the ascertainment of values so as to make them equal and uniform throughout the state.

4. STATUTE: *Unconstitutional in part.*
When a statute is divisible and only a part of it is repugnant to the constitution, that part is rejected and the balance upheld.

5. TAXES: *On railroads. Construction of statute.*
So much of section 5649, Mansfield's Digest, as excludes "embankments, tunnels, cuts, ties, trestles or bridges" from assessment by the state board of railroad commissioners, is unconstitutional, and the board should disregard it and include them in the assessment.

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

J. M. Moore, for appellant.

Section 5 of article 16 of the constitution provides that all property subject to taxation shall be taxed according to its value, *that value to be ascertained in such manner as the gen-*

eral assembly shall direct, making the same equal and uniform throughout the state.

The first question that arises in this case relates to the powers of the legislature under the constitution. It is contended for the appellees that that provision of section 46 of the revenue act, which excludes embankments, etc., from the schedule of property required to be returned by railroad companies for assessment, must be treated as an attempt to exempt property from taxation, and is obnoxious to the provision, *section 6 of article 16 of the constitution*, prohibiting the exemption of property from taxation by the legislature.

It is a familiar rule that where there is a reasonable doubt as to the repugnance of an act of the legislature with a provision of the constitution, the courts will sustain the act; and when the question is raised the courts seek to place such a construction on a legislative enactment as will enable it to stand. *Cooley on Const. Lim., 182–5.*

Our constitution does not contain any restriction upon legislative discretion as to the manner of assessing property for taxation; on the contrary, the provision above quoted, in express terms, leaves the manner in which the value of property is to be ascertained wholly to the legislative discretion. The succeeding provision as to quality and uniformity only applies to property of the same species, and not to different classes of property, inherently different in its nature and requiring different methods of assessment. *Cooley on Taxation, 128–9, and note 1 to p. 129.*

What we contend for in this case is that the provision for excluding embankments, tunnels, etc., was not designed by the legislature as an exemption of property from taxation. That body was endeavoring to adopt some manner of assessment that would be suitable to this class of property with which it was dealing, and would operate equally and

uniformly on all property of that kind. As was said by the court in the *Kentucky Tax Case*, *115 U. S.*, *721*, "The right to classify railroad property, as a separate class, for purposes of taxation, grows out of the inherent nature of the property." The court might have gone further and substituted the word *necessity* for the word right; for the necessity for a separate and distinct classification of railroad property is apparent. We think this case is strongly in point in support of the constitutionality of the provision under discussion, and ask a careful consideration of it.

Second—There is no controversy as to the proposition that before property can be subjected to taxation there must be an assessment under a law passed by the legislature, and by an officer or tribunal clothed by law with the power to make the assessment. And where the statute does not by fair interpretation confer the power, the courts cannot, by adding to or subtracting from its language or provisions, create such a power. We think that by no known rule of construction can the revenue law be held to clothe the board of railroad commissioners with the power to assess those items excluded from the schedule required to be returned by the provisions of section 46.

Section 44 provides that the board shall assess railroad property in the manner "*hereinafter* provided."

Section 45 provides that sworn lists of schedules shall be returned of the taxable property of railroads as "*hereinafter* provided." That such property—that is, the property required to be returned in the schedules—shall be listed and assessed, etc.

Section 46 prescribes what shall be included in the schedules provided for in the preceding section, and excludes embankments, tunnels, cuts, ties, trestles and bridges, providing that they shall neither be returned or valued.

Section 49 provides that the board shall meet at the office of the secretary of state at a time designated in each year, and, after being sworn, shall proceed—to do what? Not to value and assess railroads or the property of railroad companies. The language is very different from that; it is, "they shall proceed to examine the lists or schedules of the description and value of the *railroad track* of the railroad companies filed with the secretary of state, in accordance with the requirements of this act." The meaning of the words *railroad track* is plain enough as they stand in this section, but if anything more is needed to show that only the portions of the track required to be embraced in the schedules were intended, it will be found in section 47, where the term is defined to mean such parts of the track as are required to be described and scheduled in the preceding section.

We submit then, 1st, that section 44 does not confer a general power on the board to assess railroad property, but that their powers are expressly limited and qualified, and to be exercised only in the manner thereinafter prescribed; 2d, that the duties and powers of the board in the matter of the assessment of the railroad track are prescribed in section 49, and by the express terms of that section they were only empowered to assess the property embraced in the schedule provided for in section 46; 3d, that the sense in which the term *railroad track* is used in the act is defined in section 47, and it was designed to, and should, control and limit the meaning of the term throughout the act.

The meaning of the act is too plain to require a resort to the rules of construction. The language used is plain and simple and free from ambiguity, and confers on the board of commissioners only a limited authority; and this language is in harmony with the obvious intent of the act,

which was not to confer on the board the power to assess those items which are excluded in section 46.

Dan W. Jones, Attorney General, for appellees.

No question is presented as to the power of the legislature to provide for the manner of ascertaining the value of this species of property; but it is conceded that full power is granted by the constitution for the establishment of the board of railroad commissioners, as was done by the revenue act of March 31, 1883. And it was, manifestly, the intention of the legislature that this board should have the sole power of assessing all railroad property in this state which is situated on the right of way.

That part of said revenue act relating to the valuation of railroad property is contained in the *Rev. Stat. of 1884, secs. 5647 to 5659*, both inclusive.

The contention on the part of the appellant is:

First—That the board of railroad commissioners has no power to construe the constitutionality of any part of the foregoing act, but must take it and act under it as it reads, without regard to the question of any part of it being in violation of the constitution.

Second—That it is in the power of the legislature, in providing for the manner of valuing railroad property, to determine what elements shall be taken into consideration as constituting such value; and that it was competent for that body to exclude the "embankments, tunnels cuts, ties, trestles and bridges" from the schedules to be filed, as not constituting elements of value; and that, therefore, such exclusion in section 5649, *supra*, is constitutional.

Third—That the board of railroad commissioners is created by the statute, and its powers are prescribed and limited by the statute, and that, consequently, it exceeded

its powers in considering the value of "embankments, tunnels, cuts, ties, trestles and bridges," when valuing the "railroad track" of appellant; that there is no manner provided by law for assessing "embankments, tunnels, cuts, ties, trestles and bridges," and, consequently, the same cannot be taxed.

Before examining these questions, *seriatim*, it may be conceded that the legislature may fail, *refuse* or neglect to provide a system, or manner, for ascertaining the value of any particular *species* of property, and that for such failure, refusal or neglect there is no remedy, except the ballot-box. But, when a system, or manner, is provided for ascertaining the value of *any* species of property, such system, or manner, must be in strict accordance with the constitution.

Then, to consider the grounds of appellant's contention in this action:

First—Did the board of railroad commissioners have the power to construe the constitutionality of any part of the revenue act affecting said board? or was it the duty of said board to take said act and act under it as it reads, without regard to the question of any part of it being in violation of the constitution?

It will be observed that said board is composed of three of the chief executive officers of the state—the governor, secretary of state, and auditor of public accounts—who, as such, were already under the solemnity of an oath of office which requires them to support the constitution of the United States and the constitution of the state of Arkansas, and to faithfully discharge their duties of office. *Const. of Ark., art. 19, sec. 20.*

In addition to this, they are required to take an additional oath, as members of such board of commissioners,

to "fearlessly, impartially and honestly, discharge their duties." *Sec. 5652 Rev. Stat., supra.*

Judge Cooley, in his work on Constitutional Limitations, at page seventy-four, says: "Whoever derives power from the constitution to perform any public function is disloyal to that instrument, and grossly derelict in duty, if he does that which he is not reasonably satisfied the constitution permits. Whether the power be legislative, executive, or judicial, there is manifest disregard of constitutional and moral obligation by one who, having taken an oath to observe that instrument, takes part in an action which he cannot say he believes to be no violation of its provisions. A doubt of the constitutionality of any proposed legislative enactment should in any case be reason sufficient for refusing to adopt it; and if legislators do not act upon this principle, the reasons upon which are based the judicial decisions sustaining legislation in very many cases will cease to be of force."

In fact, no principle is better established in the law than that such part of every act of a legislature as is in violation of the constitution is absolutely void, and that every officer of the law obeys or enforces it at his peril. *Rison et al. v. Farr, 24 Ark., 161; Eason v. State, 11 Ark., 481; Marbury v. Madison, 1 Cranch, 176, et seq.; Vanhorne's Lessee v. Dorrance, 2 Dallas, 307, et seq.*

Second—Is it true, as appellant contends, that it is in the power of the legislature, in providing for the manner of valuing railroad property, to determine what elements shall be taken into consideration as constituting such value; and that it was competent for that body to exclude "embankments, tunnels, cuts, ties, trestles and bridges," from the schedules to be filed, as not constituting elements of value; and that, therefore, such exclusion in *sec. 5649, supra,* is constitutional?

In order to determine whether that part of *sec. 5649, supra*, which excludes from the schedules to be filed by the railroad companies the "embankments, tunnels, cuts, ties, trestles and bridges," is in conflict with any, or all of these provisions of the constitution, it is well to inquire into the nature and extent of the rights of railroad corporations in the soil used by them for their roads, and whether these rights are property within the meaning of the constitution, and taxable as such.

From the authorities it must be conceded that the "embankments, tunnels, cuts, ties, trestles and bridges" of railroad companies are real estate, and that they are not within the description of property exempt by *sec. 5, art. 16, of the Constitution.*

See, *secs. 5–6–7, art. 16, Const.; Coke, Lett., 19; 2 Vesey, Jr., 651; 4 ib., 542; 3 Price, 357; 10 Vesey, Jr., 42; 1 Barn. & Cr., 694; 9 Mett., Mass., 199; 2 Bland Chy., 99, 145; 2 R. I., 15; ib., 459; 18 Wall., 206; Eastern Rep., vol. 3, no. 5, p. 569.*

None of this property can be exempted from taxation by the legislature. *Sec. 5, art. 16, Const.; Const. Cal., sec. 13, art. 11; 34 Cal., 432; 43 Cal., 331; 38 Iowa, 633; 39 ib., 56; 47 ib., 196; 19 W. Va., 408; 5 Ohio St., 589; 11 ib., 541; 25 Ill., 557; 30 ib., 146; 8 J. Baxt., 530; 25 Ark., 289.* In none of the states mentioned above, is there any provision answering to *sec. 6, art. 16*, of our constitution.

Third—Appellant contends that the board of railroad commissioners is created by the statute, and its powers are prescribed and limited by the statute, and that, consequently it exceeded its powers in considering the value of "embankments, tunnels, cuts, ties, trestles and bridges," when valuing the "railroad track;" that there is no manner provided by law for *assessing* "embankments, tunnels, cuts, ties, trestles and bridges," and, consequently, the

same cannot be *taxed.* In other words, this involves two propositions; which are, *first*, that the revenue act upon the subject of assessing and taxing railroad corporations must be taken as it was passed by the legislature, as an entirety, and is either all good or all bad; if all good, then the "embankments," etc , are not subject to taxation, and if all bad, then the legislature has failed to direct the manner in which the value of this species of property shall be ascertained; but, in either case, the board of railroad commissioners acted *ultra vires;* and, *second*, that the act merely regulates the *assessment* of railroad property, and that it is within the power and is the duty of the legislature to prescribe the manner or mode in which all property shall be assessed for taxation, and that, unless the mode so prescribed is pursued, no valid levy of taxes can be made.

The exemption being void and separable, it should be stricken out, and the act stand as if that provision had not been inserted. *34 Cal., 432; Cooley Const. Lim., 177, et seq.; 37 Ark., 356; 24 Ark., 161.*

As to the second proposition it is specious and untenable. *43 Cal., 331; 12 Barb., 225, N. Y.*

Where the railroad companies or corporations do not own the soil itself upon which their roads are located, still, as we have seen, they own such rights in the soil as are considered real estate; and this real estate, consisting in part of the "embankments, tunnels, cuts, ties, trestles and bridges," and not coming within any of the species of property exempted by the constitution from taxation, must be taxed according to its value.

SMITH, J. This suit was brought by appellant to enjoin the collection of the taxes for the year 1885, assessed upon its "railroad track" in the several counties through which

said railway runs, upon the alleged ground that the board of railroad commissioners exceeded its powers in requiring the railway company to include in the schedules required to be filed by it, a list and valuation of the "embankments, tunnels, cuts, ties, trestles and bridges," and in considering said "embankments," etc., as elements of value in making the assessment of said "railroad track."

Appellees answered, admitting the assessment of said "railroad track" in accordance with the provisions of the revenue act of March 31, 1883, but denying that said board of railroad commissioners assessed or valued the "embankments, tunnels, cuts, ties, trestles and bridges," upon appellants right of way, separately and apart from the other real estate constituting said "railroad track;" or according to the cost of constructing the same; but alleging that the value of said "embankments," etc., was considered in connection with the other property, constituting said "railroad track;" admitted that said board disregarded that part of said revenue act which attempts to exempt from assessment and taxation the "embankments, tunnels, cuts, ties, trestles and bridges" of appellants, as being unconstitutional, and assessed said "railroad track" at its true value, and that such assessment was not excessive.

Appellees also demurred to appellant's complaint upon the ground that it does not state facts sufficient to constitute a cause of action.

The cause was heard by the chancellor upon the complaint, answer and demurrer, and exhibits; the relief was denied, the bill dismissed, and the railway appealed.

No question is presented as to the power of the legislature to provide for the manner of ascertaining the value of this species of property; but it is conceded that full power is granted by the constitution for the establishment of the board of railroad commissioners, and for the separate

classification of railroad property for purposes of taxation. And it was, manifestly, the intention of the legislature that this board should have the sole power of assessing all railroad property in this state which is situated on the right of way.

The taxes upon the rolling stock of the railway company are not in litigation. That was assessed as personal property by the same board of railroad commissioners, under *secs. 5651* and *5653* of *Mansfield's Digest*, and the taxes have been paid.

Sec. 5647 provides that "the governor, secretary of state and auditor of public accounts shall be, and are hereby, constituted a board of railroad commissioners for this state; and on the first Monday in April in each year, shall proceed to ascertain the value of all property, including railroad track, rolling stock, water and wood stations, passenger and freight depots; offices, furniture and such other property, real and personal, as is owned by each of the railroads or railways of each company or corporation having existence under the laws of this state, or incorporated in whole or in part therein, and running through or in this state in the manner hereinafter prescribed."

Sec. 5649: "They (the railroad companies) shall, in the month of March, in the year 1883, and at the same time every second year thereafter, when required, make out and file with the secretary of state a statement or schedule showing the main and all side-tracks, switches and turnouts in each county in which the railroad may be located, and in each city and town in said county through or into which the road may run. They shall also state the value of all improvements, stations and structures, including the railroad track, located on the right of way, *but such schedule shall not include nor value embankments, tunnels, cuts, ties, trestles or bridges.*"

Sec. 5650: "Such railroad, as described and scheduled in the last preceding section, shall be held to be real estate for the purpose of taxation, and denominated 'railroad track,' and shall be so listed and valued, and shall be described in the assessment thereof as the railroad track of the ——— railroad company, in the county, city or town, and such description shall be considered as embracing all the property required to be assessed by section 5649, and when advertised and sold for taxes no other description shall be necessary."

Sec. 5652: "The board of railroad commissioners shall meet on the first Monday in April, in the year eighteen hundred and eighty-three, and at the same time in each year thereafter, at the office of the secretary of state for the state of Arkansas, and, after being duly sworn to fearlessly, impartially and honestly discharge their duties, shall proceed to examine the lists or schedules of the description and value of the railroad tracks of the railroad companies filed with the secretary of state in accordance with the requirements of this act, and if said schedules are made out in accordance with the provisions of this act, and, in the opinion of the board, the valuation of said railroad tracks is fair and reasonable, said board shall appraise the same, and it shall be the duty of the secretary of state to certify to the assessor of each county in which such railroads are located so much of said list, as values such railroad tracks as are located in such county, and in any city or town of such county, and such assessor shall list and assess the same as real estate, by the description, as hereinbefore specified."

These are the principal provisions of the revenue act, so far as they affect this case. The whole controversy has arisen upon the meaning, effect and constitutionality of the italicised clause of section 5649. The railway com-

pany made a return of the length of its main line and side-tracks, and of the value thereof, and of the structures on its right of way, not taking into account embankments, tunnels, cuts, cross-ties, trestles or bridges. The board determined that all railroad property in the state should be assessed at its true value, like any other property, without any deduction on account of embankments, etc. The several railroad companies were notified and requested to render statements of the true value of their respective lines, without regard to the restrictions contained in section 5649, and were accorded a full hearing. Acting upon the advice of the attorney general of the state, that said clause was unconstitutional, and that they were not bound by it, they proceeded to assess the appellant's railway at a sum nearly double what it had returned.

It is not complained that this valuation was excessive, but the contention is:

First—That the board has no power to construe the constitutionality of any part of the act, but must take it and act under it as it reads, without regard to the question of any part of it being in violation of the constitution.

Second—That it is in the power of the legislature, in providing for the manner of valuing railroad property, to determine what elements shall be taken into consideration as constituting such value; and that it was competent for that body to exclude the "embankments, tunnels, cuts, ties, trestles and bridges" from the schedules to be filed, as not constituting elements of value; and that, therefore, such exclusion in *section 5649*, *supra*, is constitutional.

Third—That the board of railroad commissioners is created and its powers prescribed and limited by the statute, and that, consequently, it exceeded its powers in considering the value of "embankments, tunnels, cuts, ties, trestles

and bridges" when valuing the "railroad track" of appellant; that there is no manner provided by law for assessing "embankments, tunnels, cuts, ties, trestles and bridges," and, consequently, the same cannot be taxed.

The meaning of the clause in question is not self-evident. If the legislature intended to enact that the railroad embankments, tunnels, etc., should not be separately assessed, then the board has not attempted to do this. For the pleadings show that the constituents of value which enter into railroad property have not been assessed in separate items or parcels, but *in solido*. The line, considered as a thoroughfare and means of transportation, has been valued as a unit. If, on the other hand, the legislature meant to relieve any portion of the property belonging to railroad corporations from the duty of contributing to the rightful demands of the state, in the exercise of its powers of tax ation, they have undertaken to do something which is quite beyond their power.

1. Unconstitutional statutes to be disregarded by executive officers.

2. They decide at their peril.

Now, officers of the executive department are not bound to execute a legislative act which, in their judgment, is repugnant to the constitution. Their primary allegiance is due to the constitution; and if there be a conflict between the two, the constitution is the higher law, or, rather, the supposed law is not a law at all, being null and void. They do, indeed, incur peril by deciding for themselves, in advance of the courts, the unconstitutionality of an enactment. But they are also liable to be punished in damages if they carry into effect an act which violates the fundamental law. *Rison v. Farr, 24 Ark., 161*, affords an illustration. The constitution of 1864 prescribed the qualifications of voters. The legislature attempted to add to the qualifications by directing that the voter, before depositing his ballot, should make oath that he had not, since the 18th of April, 1864, voluntarily borne arms against the

United States, nor aided the confederate authorities. Farr possessed the constitutional qualifications, but refused to take this oath. The judges of election would not allow him to vote; and he recovered judgment against them, which was affirmed by this court.

Judge Cooley, in his work on Constitutional Limitations, at page 74, says: "Whoever derives power from the constitution to perform any public function is disloyal to that instrument, and grossly derelict in duty, if he does that which he is not reasonably satisfied the constitution permits. Whether the power be legislative, executive or judicial, there is manifest disregard of constitutional and moral obligation by one who, having taken an oath to observe that instrument, takes part in an action which he cannot say he believes to be no violation of its provisions."

Article 16, of the constitution of 1874, contains the following provisions:

Sec. 5. "All property subject to taxation shall be taxed according to its value; that value to be ascertained in such manner as the general assembly shall direct, making the same equal and uniform throughout the state. No one species of property from which a tax may be collected shall be taxed higher than another species of property of equal value."

Sec. 6. "All laws exempting property from taxation, other than is provided in this constitution, shall be void."

Sec. 7. "The power to tax corporations and corporate property shall not be surrendered or suspended by any contract or grant to which the state may be a party."

The tunnels, tracks, sub-structures, superstructures, viaducts and masonry of a railroad are property—the private property of the stockholders. There must have been an interest in the land to justify the erection or affixing of

these structures in the first instance, and the exclusive possession and use of them afterwards by the company. They are, in fact, part and parcel of the railroad. The company controls the improvements, and it is only by lease or other arrangement that the trains of other companies are permitted to run over it. Now, it can make no difference, in respect to taxation, whether the rails are laid upon the surface of the road, or placed on pillars, or carried through a covered way or tunnel. *Smith v. Mayor, 68 N. Y., 552; People ex rel. v. Commissioners of Taxes, 82 ib., 459; Same v. Same, 3 Eastern Reporter, 569 (N. Y. Ct. of Appeals, Jan., 1886).*

All railroads are declared by the constitution (*art. 17, sec. 1*) to be public highways; but the public are entitled to use them only upon the condition of paying tolls.

3. TAXES: Legislature no power to discriminate.

The theory of our constitution is that the common burden shall be borne by common contributions. All property is to be taxed according to its value. "All" does not mean all the legislature may designate, or all except such as the legislature may exempt. If this were so the whole burden of taxation might be thrown upon land, or upon any one species of property. It means all private property, of every possible description, or all property other than that belonging to the state, or the general government. The legislature cannot discriminate between different classes of property in the imposition of taxes. The only discretion with which it is invested, is in the ascertainment of values, so as to make the same equal and uniform throughout the state. *People v. McCreary, 34 Cal., 432; Same v. Eddy, 43 ib., 331; C. & O. Ry. Co. v. Miller, 19 W. Va., 408; Zanesville v. Richards, 5 Ohio St., 589; Baker v. Cincinnati, 11 ib., 541; Ellis v. L. & N. R. Co., 8 Jere Baxter, 530; Fletcher v. Oliver, 25 Ark., 289.*

But it is further contended that, as the whole authority of the board in the premises is derived from the revenue act, and as the act makes no provision for the assessment of "embankments, tunnels, cuts, ties, trestles and bridges," therefore the same cannot be taxed. The argument, if limited to the separate assessment and taxation of these things, is good. But, if it is meant that these necessary parts of every railroad are not to be considered in the estimation of the value of the whole line, the argument assumes two propositions: *First*—That the revenue act upon the subject of assessing and taxing railroad corporations, must be taken as it was passed by the legislature, as an entirety, and is either all good or all bad; if all good, then the "embankments," etc., are not subject to taxation, because expressly excluded, and, if all bad, then the legislature has failed to direct the manner in which the value of this species of property shall be ascertained; but, in either case, the board of railroad commissioners acted *ultra vires*. *Second*—that the act merely regulates the *assessment* of railroad property, and that it is within the power and is the duty of the legislature to prescribe the manner or mode in which all property shall be assessed for taxation, and that, unless the mode so prescribed is pursued, no valid levy of taxes can be made.

It does not follow that the attempted exemption of certain parts of railroad property avoids the whole revenue act. The exemption, being void, must be stricken from the act and the act read as if that provision had not been inserted. *People v. McCreary*, *supra*.

4. Statute unconstitutional in part.

When a statute is divisible and a portion of it is repugnant to the constitution, so much of the statute is to be upheld as does not conflict with the constitution and the enactment sustained by rejecting the objectionable part. WATKINS, C. J., in *Washington v. State*, *13 Ark.*, *752*.

Judge Cooley, in his *Constitutional Limitations*, at *page 177, et seq.*, lays down the rule in such cases to be as follows: "Where a part of a statute is unconstitutional, that fact does not authorize the courts to declare the remainder void also, unless all the provisions are connected in subject matter, depending on each other, operating together for the same purpose, or otherwise so connected together in meaning, that it cannot be presumed the legislature would have passed the one without the other. The constitutional and unconstitutional provisions may even be contained in the same section, and yet be perfectly distinct and separable, so that the first may stand though the last fall. The point is not whether they are contained in the same section, for the distribution into sections is purely artificial; but whether they are essentially and inseparably connected in substance. If, when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained. The difficulty is in determining whether the good and bad parts of the statute are capable of being separated within the meaning of this rule. If a statute attempts to accomplish two or more objects, and is void as to one, it may still be in every respect complete and valid as to the other."

This rule was applied by this court, in the case of *The State v. Marsh, 37 Ark., 356*, to a section of the act of 1879, regulating the sale of liquors in this state. This court, through its late learned Chief Justice English, declared that it would not undertake to say that the legislature would have passed the act without the section being just as it was enacted; but that, as passed, the section was in violation of the commerce clause of the constitution of the United States, and, for that reason, void; and the section

was reformed by the court, by striking out the obnoxious words, and as thus reformed, it was held to be valid and is now the law of this state.

5. TAXES: Statute: Sec. 5649 of Mans. Dig. unconstitutional.

The clause of section 5649, under consideration, may be stricken out without detriment to the remainder of the act and the consistency of its parts. It is useless and unnecessary in any view; and construed as providing for an exemption, it is ineffectual and mischievous.

Of the proposition that the act is a mere regulation for the assessment of railroad property, it is sufficient to say that this clause, if enforced, would prevent the taxation of such property according to its value. An assessment is a prerequisite to a valid levy of taxes. And the legislature cannot, under the guise of regulating the duties of assessors, exempt property from taxation. *People v. Eddy, supra.*

If a law should be passed directing county assessors, in assessing farm lands, not to include nor value ditches, drains, wells, fences or other improvements, it would be their duty to go forward and assess the land at its real value, disregarding the directions.

The decree is affirmed.

SEPARATE OPINION BY COCKRILL, C. J.

There can be no doubt that, under the operation of our constitution, the legislature can, when they see fit, classify railroad property as a separate class for purposes of taxation. This is sometimes thought necessary from the inherent nature of the property. A former revenue act of this state adopted, as a basis suitable for ascertaining a value for taxation, the receipts of the railroad from its business. But the act now in force passes the tangible property of railroads into the general mass of taxable property, making the division of real and personal estate

that is made for individuals, and subjecting it to its quota, fairly due, to be levied as a property tax on the common mass. The only difference made between that and other property of the class to which it is assigned by legislative action, is the machinery provided for its assessment or valuation. One is fixed by the local assessors in the several counties, the other by a state board. The plan, however, provides but one measure of valuation, and that measure, as the constitution provides, is the *value*, the true value of the property taxed. When once assigned by the legislature to the class of property subject to the general property tax, there is no escape from its equal share of the common burden to be borne by that class. The constitutional command of equality and uniformity then presses the burden upon the whole mass alike, and prevents the possibility of legislative action oppressing one part for the benefit of the rest, or favoring one at the expense of the others. When a general system is provided for taxing a railroad track as real estate, it is no more competent for the legislature to say that it shall be returned for taxation at one-half its real value, than to provide for assessing it at double its value. Nor, after the adoption of such a system, would it be competent for the legislature arbitrarily to subtract from the mass of real estate, any particular part of it, whether it belonged to the agricultural or railroad class, and, under the plea of classification, exempt it from taxation. Classification may be resorted to for the purpose of separate taxation, but not for the purpose of permitting an escape from the burden of taxation. Under the searching provisions of our organic law no property can escape taxation, and no subterfuge can be successfully resorted to by the legislature to effect exemption therefrom.

It is proper to presume that the lawmakers who passed the act in question knew the limitation of their power,

and intended to keep within the bounds pointed out to them by the constitution. If the proviso which excludes from the return for assessment to be made by the companies the value of embankments, tunnels, cuts, etc., was intended as an exemption from taxation of a part of the real estate, it would be inoperative, as we have seen. But it does not appear to be necessary to so construe the act, and deference to a co-ordinate department should impel us to put that construction upon it which is consistent with the duty that was incumbent upon them to perform in its passage. I think the court should regard the proviso merely as a means devised for ascertaining the true value of the road. The cuts, tunnels, tressels and embankments are all necessary parts of the road, but none of them in itself adds any separate value to it. They merely overcome the inequalities of the soil, and I think it was the intention of the legislature in requiring the company to give in for assessment the main and all side-tracks, switches and turnouts, to give them in at their true value as a railroad, without adding to or subtracting from its actual cash or market value as such, anything by reason of the accidental fact that it embraced costly cuts or embankments. The valuation of the "tracks," as defined in the statute, which is inserted in the schedules furnished by the companies, is not conclusive of the value of the road to the commissioners. It is only a means of obtaining information. The duty is devolved upon them of exercising a sound practical judgment in ascertaining the value of the roads. The eminence of their official positions is a guaranty that the duty will be impartially performed. The company does not now complain of the performance of the duty, except in this: They appear to have been prevented by the board from deducting from the true value of the road as such, the cost or "value," as the statute has

it, of their cuts, embankments, trestles, etc. The members of the board would have been derelict in their duty if they had permitted an assessment of the property at less than its real value, just as they would have exceeded their authority if they had undertaken to augment the true value of the property as a railroad by reason of the fact that it happened to contain in its make-up, trestles, cuts and embankments.

As the assessment is regular the decree should be affirmed.

SHAW ET AL. v. HILL.

46 333
66 436

1. TAX SALES: *Act of* 1879 *unconstitutional.*

The act of 1879, "to provide for the redemption of delinquent lands," is unconstitutional, and deeds made under it are void.

2. IMPROVEMENTS: *Compensation for.*

It is only the *bona fide* occupant of another's land who is entitled to mitigate the owner's claim for damages and *mesne* profits, by offsetting the value of his improvements, or to compensation therefor, under the laws of this state.

APPEAL from *Union* Circuit Court in Equity.
Hon. B. F. ASKEW, Circuit Judge.

H. G. Bunn, for appellants.

The clerk's deed to appellee being void (*Bagley v. Castile, 42 Ark., 77*), no rights accrued, and no protection is given at law to acts under it. *Cochran v. Cobb, land commissioner, 43 Ark., 180.* Hence appellee was not entitled to any tender for value of any improvements, percentage, etc., pro-

vided in *section 2649, Mansfield's Digest*, as held in *Douglas v. Flynn, 43 Ark., 399; 40 Ark., 443.*

And appellee's holding over being a trespass and a transgression of the rules of right between man and man, and in fact an usurpation obtained by duplicity and fraud, and the improvements having been made under such circumstances, without the *knowledge* and consent of appellants, even in the face of their demands and suit for possession of said land, he is not entitled to compensation therefor, either at law or in equity. *James et al. v. Johnson et al., 28 Ark., 211.*

Under the cirumstances, improvements are not allowable of right, and the finding and allowance of the circuit court for improvements beyond the extent of rents and profits at least was erroneous, otherwise the theory that one cannot improve another out of his title to land is subverted by practical demonstration. *Waggener et al. a. McLaughlin et al., 33 Ark., p. 202; Pulaski County v. The State, 42 Ark., 118.*

Appellee could not recover for any improvements made within two years from date of his said clerk's deed if it were valid; a *fortiorari* in this case. *Gantt's Digest, 5216.*

BATTLE, J. Some time about the latter part of 1879 plaintiff George C. Shaw and others rented to the defendant, George W. Hill, the land in controversy for the year 1880, in consideration of his promise to pay the taxes assessed against the same for the years 1878 and 1879, and a reasonable sum of money in addition thereto; and plaintiff also agreed to deduct from the rent, and give to defendant credit for the value of such improvements as he should make upon the land during the year 1880. On or about the 1st day of January, 1880, he took possession under his contract to rent, and did some repairing on a house and fence on the land, which he testifies was worth

as much as the rent of the land for 1880. The land was returned delinquent at the time this contract was made on account of the non-payment of the taxes of 1878. Instead of paying the taxes as he agreed, he suffered the land to remain delinquent for one year, and then, on the 2d day of June, 1880, attempted to redeem the same and take a deed of conveyance thereof by the clerk, in his own name, under and by virtue of an act entitled "An act to provide for the redemption of delinquent lands," approved March 14, 1879. He claimed the land, under the deed, as his own, and held adverse possession thereof, and at the same time knew plaintiffs claimed it. He paid taxes on it for the years 1880, 1882 and 1883, amounting in the aggregate to the sum of $2.86, and with full knowledge of plaintiffs' title, and that they claimed it, made improvements thereon before and after the commencement of this action.

The court below found that the land was the property of plaintiffs; that they were entitled to the possession thereof; that defendant paid taxes and made improvements on it, before the commencement of the suit, of the value of $89.74, and after, of the value of $125; that the rents of the land were worth $125; and rendered a decree in favor of plaintiffs for the land, and directed that a writ of possession in favor of plaintiffs be issued after the expiration of ninety days upon plaintiffs paying to defendant the $89.74; and plaintiffs appealed.

1. Act of 1879 unconstitutional

The act of March 14, 1879, is unconstitutional. The deed made by the clerk under that act is void. *Bagley v. Castile, 42 Ark., 77.* The defendant is entitled to a credit for the improvements made under his rent contract on the rent of the land for 1880, according to the terms of his contract. The other improvements made by him were made with full knowledge of plaintiff's claim to the land and under a pretended title acquired by a violation of his contract with

plaintiffs. He is, therefore, not a *bona fide* occupant and not entitled to offset plaintiffs' claim for rents with the value thereof, or to compensation therefor. As a general rule, only the *bona fide* occupant is entitled to mitigate the owner's claim for damages and *mesne* profits, by offsetting the value of his improvements, or to compensation therefor, under the laws of this state. It would be manifestly inequitable to the owner, and, indeed, a highly dangerous policy to make allowances to one for the expenditures he has made for improvements, in disregard of the owner's rights, with full knowledge of his claim. *Fee v. Cowdry, 45 Ark., 410.*

2. IMPROVEMENTS: Compensation for.

The decree of the court below is therefore reversed, and this cause is remanded with instructions to that court to enter a decree herein in favor of appellants against appellee for the lands, and for the rent thereof for the year 1881 and every subsequent year it has been occupied by appellees, less the $2.86 paid for taxes, and for costs incurred in the court below, and to enforce the same by appropriate orders and proceedings. Judgment will be entered here against appellees for the costs of appeal.

FITZHUGH v. DAVIS, ADMINISTRATRIX.

46 337
71 98
46 337
74 238

1. VENDOR AND VENDEE: *Fraudulent representations of title.*

An honest expression of opinion by a vendor of his title, though erroneous, is not fraud, and affords no ground for rescission of the sale.

2. SAME: *Same.*

A misrepresentation in order to affect the validity of a contract must relate to some matter of inducement to the making of the contract, in which, from the relative position of the parties and the means of information, the one must necessarily be presumed to contract upon the faith and trust which he reposes in the representations of the other on the subject of the contract. For if the means of information are alike accessible to both, so that with ordinary prudence or diligence the parties might rely upon their own judgment, they must be presumed to have done so; and if they have not so informed themselves they must abide by the consequences of their own inattention and carelessness.

3. SAME: *Rescission of contract for fraud or mistake.*

Where a party desires to rescind a contract for fraud or mistake, he must upon discovery of the facts, at once announce his purpose and adhere to it. If he be silent and continue to treat the property as his own he will be held to have waived the objection, and will be conclusively bound by the contract as if the fraud or mistake had not occurred.

4. SAME: *Rescission for mutual mistake.*

The cases in which rescission of executed contracts with warranty has been granted for mutual mistake of both parties as to the vendor's title, show that it was, in the absence of some element of fraud, upon the ground of a total failure of consideration in the want of title to the whole, or a substantial part of the subject matter of the contract, and so rendering compensation in damages impracticable and inequitable.

5. SAME: *Same.*

To entitle a vendee of land who has gone into possession under a deed with general covenants of warranty, to rescind on the ground of *failure of title*, the loss must be such that he is thereby deprived substantially of the benefits of his purchase. If the beneficial enjoyment of his contract be not materially taken away and there is only a partial failure of consideration which can be compensated in damages there is no ground for rescission.

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

Thweatt & Powell and *Tappan & Horner*, for appellant.

In this case the appellee sold the entire place to appellant, representing that he had a good title, and appellant bought relying upon said representations; it turns out that the title to nearly one-third of the place proves defective, and according to reliable witnesses the place, as a plantation, has been most materially depreciated thereby; it is such a plain and palpable mistake, affecting the very substance of the subject matter of the contract, that a court of equity will rescind the contract. *5 Waite Actions and Defenses, page 510.*

When a bargain has been made, founded upon a mutual mistake of the facts constituting the essence of the contract, or founded upon representations of the seller, material to the bargain, it will be avoided, although made by innocent mistake. *5 Waite A. & D., page 513, sec. 2; Davis v. Mitchell, 1 Story (C. C.), 173; Harnion v. Allen, 2 Sumner (C. C.), 387.*

So if both parties to a contract for the sale of land are under a mistake with regard to the vendor's title, which was supposed to be perfect, but proves void, a court of equity will relieve the vendee from the contract. *5 Waite A. & D., 513*

A vendee may have a rescission of the contract on the ground of mistake, when it appears that his vendor supposed he had a title when he had none, nor will he be compelled to rely on his warranty or to pay the purchase money. *Bowlin v. Pollock, 7 Mon. (K.), 26.*

If a party makes representations with the intent that another rely upon them, and the other does rely on them

and these representations turn out to be false, it is as much a fraud as if the party knew them to be untrue. *3 Waite A. & D., 436; Bennett v. Judson, 21 N. Y. (7 Smith), 238; Carpenter v. American Ins. Co., 1 Story (C. C.), 57; 1 Story Eq., 201.*

If the misrepresentation was as to a material fact and the injury to the party who relied upon it was of such a character that he would have declined the purchase if he had known the true state of the case, equity will rescind the contract. *1 Story Eq., 212; Bacon v. Brown, 7 John. C. R., 204; Gill v. Carline, 4 J. J. Marshall, 392.*

Misrepresentation will affect the validity of the contract if it appears that the purchaser made the contract upon the faith and trust which he reposed in the representations of the other, on account of his superior information and knowledge in regard to the subject of the contract. *Yeates et al., v. Pryor, 11 Ark., 58; Kennedy v. Johnson, 2 Bibb., 12.*

In the case of *Yeates v. Pryor*, it was held that the vendor failing to perfect title to about one-third of the land he covenanted to convey, the vendee was entitled to a rescission of the contract. This court held in *Diggs v. Kirby, 40 Ark., 420*, that if there is a concealment of material facts, or misrepresentations affecting the title or valuation of the property amounting to fraud, the vendee may have relief, although he has accepted a deed. It is evident from the facts in this case, and the law applicable to them, that the appellant is entitled to the relief asked for, and that the circuit court erred in not making the injunction perpetual, and in not ordering a rescission of the contract.

Stephenson & Trieber, for appellee.

There are two question of law involved in this cause:

First—Is appellant entitled to a rescission of his purchase?

Second—If not, what abatements of purchase money is he entitled to?

1. This being an executed contract, appellant having accepted from appellee a deed, with full covenants of warrarnty, and under it taken possession of the plantation, it is only necessary for us to examine under what circumstances a rescission of a sale, fully executed, will be granted by a court of equity.

The leading case on this subject in this state, and one which has invariably been followed in all subsequent cases, as the correct exposition of the law of rescission, is *Yeates v. Pryor, 11 Ark., 58.*

It is there held: "Where a vendee has accepted title, he is presumed to have examined the evidences thereof, and held them sufficient, and in the absence of fraud, must rely upon his covenants of warranty."

As to what will constitute fraud, the court, in the same case, says: "It is not every misrepresentation of the vendor, in regard to the property sold, that will amount to fraud, be it ever so exceptional in point of morals. The misrepresentation, to affect the validity of the contract, must relate to some matter of inducement to the making of it, in which, from the relative position of the parties and their means of information, the one must necessarily be presumed to contract upon the faith and trust which he reposes in the representations of the other, on account of his superior information and knowledge in regard to the subject of the contract; for, if the means of information are alike accessible to both, so that, with ordinary prudence or vigilance, the parties might respectively rely upon their own judgment, they must be presumed to have done so, or if they have not so informed themselves, must abide

the consequences of their own inattention and carelessness."

For an affirmance of these principles by this court see *Davis v. Tarwater, 15 Ark., 286; Peay v. Wright, 22 ib., 198; Grider v. Clopton, 27 ib., 251; Rightor v. Rollins, 31 ib., 172; Merritt v. Robinson, 35 ib., 483; 15 Wall, 377; 3 Rand (Va.), 504; Rawl. Cov. Tit., 604; 1 Dana (Ky.), 305; 2 Green Chy., 489.*

A mere matter of opinion expressed by a vendor of land in good faith, in respect to the title to land sold by him, and the probable decision of the court thereon should it be contested, is not ground for the recission of the contract, because it turns out not to be correct; there being no confidential relation subsisting between the parties. *Maney v. Porter, 3 Humph. (Tenn.), 347.*

Having failed to inform himself of what he had the opportunity to ascertain, he must abide consequences of his own carelessness. *23 Ark., 277, 147; 24 ib., 456.*

There are two other strong grounds for refusing rescission:

First—The delay and failure to offer to rescind for so long a time after the discovery of the pretended fraud practiced by appellee upon appellant:

Second—His inability to place appellee *in statu quo.*

Where a party desires to rescind upon the ground of fraud or mistake, he must, upon the discovery of the fraud, at once announce his purpose and adhere to it. If he be silent and continue to treat the property as his own, he will be held to waive the objection, and will be conclusively bound by the contract, as if the mistake or fraud had not occurred. *He is not permitted to play fast and loose.* Delay and vacillation are fatal to the right which had before existed." *Grymes v. Sanders, 93 U. S., 62; 2 Woods, 244;*

40 Cal., 535; 3 Johns. Chy., 42; 15 Ark., 286; 17 ib., 228; 35 ib., 483; ib., 334.

He who seeks rescission must be in condition to, and shall put his adversary in *statu quo. 17 Ark., 228; 2 Ala., 189; 51 N. H., 426; 52 Ill., 397; 3 A. K. Marsh, 180.*

2. As to what amount appellant is entitled to as an abatement from the purchase money still due, the court below followed what has been the law of this state since the rendition of the opinion of this court in *Logan v. Moulter, 1 Ark., 313; see, also, 43 Ark., 439; 3 Caines, 111.*

Hon. J. W. Martin, Sp. J. The appellant, Fitzhugh, purchased of J. Cole Davis, appellee, on the 8th day of January, 1877, a plantation in Phillips county, of 960 acres, known as the "Back Rabb" place, described as follows: West half of southwest quarter of section 14; south half 15; southeast quarter 16; north half 22, and west half northwest 23, township 3 south, 4 east. The contract price was $12,000; cash $4,000, and two notes of $4,000 each, payable on the 1st days of April, 1878, and 1879, with 10 per cent. interest, from date till paid. These notes were secured by a deed of trust executed by appellant to appellee upon the entire plantation. Appellee executed to appellant a deed with general covenants of warranty, and he entered immediately into possession of the place, and has since held and cultivated it, except as hereinafter stated. As the loss of a part of this place is the foundation of this case, we give the steps leading up to this in detail here.

On February 23, 1878, a little over a year from the time of purchase by appellant, Mrs. Whittaker, one of the heirs at law of John Rabb, former owner of the plantation, filed her bill to recover a part of the land; appellant and appellee both being parties defendant thereto. In Decem-

ber, 1879, the Phillips circuit court in chancery sustained the claim of Mrs. Whittaker, and entered a decree in her favor for an undivided seven thirty-sixths of the entire tract. This decree was affirmed by this court at May term, 1882 (in case of *Davis v. Whittaker, 38 Ark., 453.*) At the following term of Phillips circuit court, the mandate of this court was placed on file, and on November 23, 1882, a final decree entered there and commissioners appointed to make partition of the land, which was done on report filed, and made final in December, 1883. In this partition, to which appellant was a party, 260 acres were given to Mrs. Whittaker; the balance of 700 acres, including all but 65 of the cleared land, was allotted to appellant.

On the 20th day of March, 1884, all that part of the place allotted to appellant, having been by appellee, advertised for sale, to pay the last note with accrued interest, the present suit was instituted, the object being to enjoin the sale, and for a rescission of the entire contract, and to have refunded to appellant the $8,800 which he had paid on the purchase.

The bill charged fraud and imposition on the part of appellee in the original sale, in that he had fraudulently induced appellant to believe that he had good and perfect title to the whole place, whereas, in fact, the title had utterly failed, and he had been evicted from 260 acres of the land. That the part so lost was a material inducement to the purchase by appellant, without which he would not have entered into the contract at all; and that the portion cut off was so connected with, and essential to the use and enjoyment of the other 700 acres, that he had substantially lost the benefit of his purchase, and that compensation for the loss of this 260 acres could not be made in money, or by abatement from the purchase price. In the language of

the bill, "That said 260 acres of land are so laid off that the value of the balance of the tract, and the whole tract, is greatly depreciated and lessened; by taking the woodland convenient and necessary for gin wood and timber for said place, it is rendered undesirable and next to valueless to plaintiff or any one else." A temporary restraining order was issued.

The appellee answered denying any fraud or misrepresentation in his dealings with the appellant, but alleging that he had conducted himself with the utmost good faith, and that all his statements in regard to his title were in perfect accord with his honest opinion and conscientious conviction in regard to it. That appellant had gone into possession and had for a long time held possession under his warranty deed, and had used and cultivated the place; that he could not be placed *in statu quo*, and that rescission would be inequitable and unjust. Admitted that the title to 260 acres had failed, and that appellant had, on November 23, 1882, been evicted therefrom, and proposed to abate for the amount of purchase money remaining unpaid sufficient to cover the loss, charging that the part cut off was not material to the place sold, and its loss could be readily compensated in money. And, further, that appellant's long acquiesence had waived any right he might have once had to a rescission, if such ever existed. The answer also contained a cross-bill asking foreclosure for balance of purchase money after abatement for the loss.

The finding and decree of the court below were in accordance with the allegations and prayer of the answer. Rescission was refused. An abatement was made for the loss of 7-36 of the place by a credit of 7-36 of the original purchase price of $12,000, as of November 23, 1882, date of eviction, entered on balance of purchase money, and a

foreclosure was decreed for the amount of the balance so found due.

Since the appeal, J. Cole Davis has died and the case has been revived in the name of his administratrix, but for convenience we have referred throughout to J. Cole Davis as "appellee."

A large mass of depositions was submitted on the trial below; and while there is some little conflict in statements made, especially in dates and matters of opinion and calculation, yet in the main they agree as to the material matters of fact.

The sale was made January 8, 1877, the matter having been under discussion for several weeks between appellant and appellee. Appellant, who lived in the immediate vicinity of several of the Rabb family and had heard that they asserted claim to the place, seems from the outset to have had some apprehension of trouble from that source. He inquired of appellee if the Rabb heirs, and especially Mrs. Whittaker, did not have a valid claim, and appellee told him that there was no prospect, as he believed, of any such claim ever being pressed, and if it was he did not think it could ever succeed. And he further assured appellant that he would be liable on his covenants to make good such a loss and that his financial condition was such as to afford ample security for this.

Appellant, accordingly, closed the trade, paid the cash, $4,000, executed the two notes of $4,000 each, and deed of trust to secure them, and went into possession of the whole place in January, 1877, there being then open and in cultivation about 373 acres, twelve acres of this being on the tract that was, afterwards, set apart to Mrs. Whittaker. The first $4,000 note was paid about the time it fell due, and on the 8th of July, 1879, $800 were paid on the last

note. After this appellant refused to make further payments.

The rescission is urged here on the ground of actual fraud in appellee in procuring the sale on the ground: *First*—That appellant had been induced by appellee's statements as to his title to go into the trade, believing that he was getting a perfect title, when his title to a large part of the tract had utterly failed. *Second*—That independent of any question of imposition, the loss of 260 acres was such a failure as to amount substantially to the loss of the benefits of the trade and to entitle him to rescission.

1. Fraudulent representation.

The statements made by appellee in regard to his title were, in the absence of artifice or concealment, mere expressions of opinion in regard to his title and could not be classed as fraudulent misrepresentations. The validity of the claim of Mrs. Whittaker depended upon the construction of a complicated will, about which learned counsel differed, and the vigor with which appellee, under advice of able attorneys, litigated the case through a long and expensive lawsuit, showed the sincerity of his belief in the construction he then put on this will. An honest expression of opinion in such case, though erroneous, is not fraud. *5 Waite Ac. & Def., 515; Smith v. Richards, 13 Pet., 26; Maney v. Porter, 3 Humph. (Tenn.), 347; Speiglemyer v. Crawford, 6 Paige Chy., 254.*

2. Same.

And on another ground appellant is precluded from setting up this erroneous opinion as a basis of rescission in itself. He had been living for several years in the immediate neighborhood of this Rabb place, and intimately acquainted with the Rabb family and the history of this title. The will of John Rabb was on record and all the means of investigating the title were as open to him as to appellee. He was a man of large property and evidently of no mean intelligence, and there was nothing in the personal relations

of vendor and vendee of a confidential character to exempt appellant from investigating for himself. Nor is there anything to show that appellee, by any artifice, endeavored to forestall or prevent a full examination by him. The rule in such cases in this state is thus stated in *Hill v. Bush*, *19 Ark.*, *522:* "That a misrepresentation, in order to effect the validity of a contract, must relate to some matter of inducement to the making of the contract in which, from the relative position of the parties and their means of information, the one must necessarily be presumed to contract upon the faith and trust which he reposes in the representations of the other on the subject of the contract. For, if the means of information are alike accessible to both, so that with ordinary prudence or diligence the parties might respectively rely upon their own judgment, they must be presumed to have done so. Or if they have not so informed themselves, must abide by the consequences of their own inattention and carelessness," citing *Yeates v. Pryor*, *11 Ark.*, *66*, and numerous authorities.

3. Rescission for fraud or mistake.

And even if there had been any element of fraud in the conduct of appellee in the negotiations preceding the sale, it could have been, at most, only in reference to this Whittaker claim, and as to that, independent of the considerations already mentioned, appellant was, early in 1878, made defendant to her bill to enforce this claim. And yet we do not find him proposing a rescission until about the time of the bringing of this suit, in March, 1884. During all these years he had been in tho full enjoyment of the whole plantation, and not offering to rescind till he is pressed for final payment. The place has become greatly depreciated in value by reason of the breaking of the levees, overflow and washing away of fences and bridges, and is actually at the time most of it under water.

"Where a party desires to rescind upon the ground of mistake or fraud, he must, upon the discovery of the facts, at once announce his purpose and adhere to it. If he be silent and continue to treat the property as his own, he will be held to have waived the objection, and will be conclusively bound by the contract as if the mistake or fraud had not occurred. He is not permitted to play fast and loose. Delay and vacillation are fatal to the right which had before subsisted." *Grymes v. Sanders, 93 U. S., sup. C., 62.* On same subject see *5 Waite Act. and Def., 511.*

It must be clear that there has been such a misstatement of the facts as to mislead the injured party and to induce him to enter into the transaction. And he must be prompt to avail himself of the objection as soon as it is discovered. He must not wait to experiment and see whether the transaction may not after all turn out well. Acquiescence for a little time in such cases is condonation. *Morgan v. N. O. R. R. Co., 2 Woods, 244; 7 W. Va., 273; 51 How. (N. Y.), 69.*

In view of these principles, rescission cannot be sustained under the circumstances here presented, on the first ground of misrepresentation as to appellee's title.

4. Rescission for mutual mistake.

Can it be demanded on the other ground, which revolves itself really into the question of a mutual mistake as to the title to the 260 acres set apart to Mrs Whittaker? Was this such a failure as, in the absence of fraud or imposition, to entitle appellee to rescind?

We are cited by learned counsel for the appellant to a number of authorities to sustain this position: That where there is a mutual and honest mistake, even of both parties as to vendor's title, equity will decree a rescission. A brief reference to these authorities will show that where a rescission was granted in executed contracts with warranty, it has been, in the absence of some element of fraud, upon

the ground that there was a total failure of consideration, in the want of title to the whole, or a substantial part of the subject matter of the contract, and so rendering compensation in damages impracticable and inequitable. Let us examine some of these citations. *5 Waite Act. and Def., 513*, as follows:

"Nothing is clearer than the doctrine that a bargain founded in a mutual mistake of the *facts* constituting the *essence* of the contract, or founded upon representations of the seller material to the bargain and constituting the essence thereof will avoid it, although made by innocent mistake," citing *Daniel v. Mitchell, 1 Story C. C., 173; Glassell v. Thomas, 3 Leigh (Va.), 113; Hammond v. Allen, 2 Sumner C. C., 387.*

"So if both parties to a contract for the sale of land are under a mistake as to the vendor's title, which was supposed to be perfect but proves *void*, a court of equity will relieve the vendee from the contract," citing here *Hadlock v. Williams, 10 Vermont, 570.*

The first case cited of *Daniel v. Mitchell*, was a case of purchase of a tract of land for its timber solely; represented by vendor to have 6,000,000 feet of pine timber, whereas it only had one-twelfth of that amount. Judge Story says: "Here, then, we have a tract represented by the vendors in their contract as containing 6,000,000 of timber, and that supposed fact constituting the very basis of the bargain; when in fact it does not contain more than one twelfth of that quantity. * * * We do not meddle with cases where the error in quantity is of a slight nature not going to the essence of the bargain. The purchaser here contracted to give $50,000 for a tract of land represented to contain 6,000,000 feet of pine timber. It cannot be possible that they ought in law or justice, or common sense, be bound to pay that amount for 500,000 feet only."

And it may be further said of that case, while Judge Story puts the decision on the ground of mistake, independent of intention, yet it is evident that he was strongly impressed by the suspicious circumstances of the case and especially the examination of the land. He says: "An exploration was accordingly made by an agent of the purchasers, accompanied by an agent of the vendors. How it was conducted the evidence sufficiently discloses. A more complete example of credulity and delusion on one side and of mistake and misrepresentation (whether innocent or designed is not material to be examined) on the other side perhaps cannot be found in the annals of our country."

The next case cited of *Glossell v. Thomas*, was where both vendor and vendee were mistaken altogether as to the identity of the tract conveyed. The vendor did not convey, nor the vendee receive the tract of land or any part of it which was designed by both. Of course a case for rescission.

In *Hammond v. Allen*, decided also by Judge Story, was a case of executory contract for services to be performed in prosecuting a claim against the government of Portugal. The parties contemplating expensive and tedious services to be performed had stipulated for a very large fee. It turned out that, at the time of entering into this contract, the claim had been actually allowed, and all that was necessary was for claimant to present himself and receive his money. Of this fact both Allen and Hammond were ignorant at the time. The court, after referring to the delicate relation of the parties as principal and agent, says in closing: "It is a case of mutual error upon a matter of fact constituting the very basis of the contract and the *whole consideration* for it.

Haddock v. Williams was in like manner a case of entire failure of consideration and on that ground rescinded. The vendor had no title whatever to the land conveyed.

We are referred also to *Bowlin v. Pollock*, *7 Monroe (Ky.), 26*. This, like the last, is a case of entire failure of consideration. In summing up, the court says: "In short he has gotten nothing by the contract of the least benefit except a simple warranty against the heirs of Spillman. * * * If he had gotten a defective title by the contract we admit that the cases are not wanting to show that he ought to rely on his warranty."

A very casual glance at the facts of case now before the court will serve to show the vast difference between the facts of these cases relied on by appellant and the one we are considering. Here we have a perfect title passing to appellant to all the plantation, except a little less than one-fifth in value. And that is cut off by an impassable slough from the main tract, and for five years appellant states his only revenue from it was a rent paid of $81 per annum on the twelve acres cleared there when he bought. During all this time he was running a large cotton plantation on the part which he retains and was enjoying the use, cultivation and profits of the 363 acres.

Kerr on Fraud and Mistake, p. 339, says: "If the false representation by which a contract has been induced was not made fraudulently, but was made through mistake or misapprehension, and the subject matter of the contract, though differing in some respects and in certain incidents from what it was represented to be, is not so different in substance as to amount to a failure of consideration, the transaction will not be set aside, if the party who made the representations is willing to give compensation for the variance, and the variance is such as to admit of compensation by a pecuniary equivalent." And on page 406 the

same author says: "What is the nature or degree of mistake which is relievable in equity as distinguished from mistake which is due to negligence, and therefore not relievable, cannot well be defined so as to establish a general rule, and must in a great measure depend on the discretion of the court under all the circumstances of the case."

And further on same subject, page 408, Mr. Kerr says: "Mistake in matter of law or fact to be ground of equitable relief must be of a material nature, and must be the determining ground of the transaction. A man who seeks relief against a mistake must be able to satisfy the court that his conduct has been determined by the mistake. * * *

"Nor, indeed, does the circumstance that the mistake may be in a material matter always in itself entitle a man to the interposition of the court. The law does not go to the length of requiring that parties who deal with each other at arms length should be on the same level as to information and knowledge. If parties stand upon equal footing, and the means of information and knowledge are open to them both, either of them is entitled to the benefit of his own judgment, skill and ability. If the parties act otherwise fairly in the transaction, and it is not a case in which one of them is bound, upon the ground of confidence or otherwise, to make a disclosure to the other of matters affecting the subject matter in respect of which they are dealing, the court will not interfere."

"A man cannot have relief on the ground of mistake, unless the party benefited by the mistake is disentitled in equity and conscience from retaining the advantage he has."

The case of *Thompson v. Jackson, 3 Rand.* (*Va.*), *504*, is very similar in its facts to the one at bar. Jackson sold to Thompson a tract of land by a survey showing it to be about 278 acres. A deed was executed and land mort-

gaged to secure a balance of purchase money. It appeared afterward and before payment that by a mistake in survey the tract embraced something like one-fourth less than shown by the survey. The land was advertised for sale under the mortgage, and Thompson filed his bill to rescind. The court in discussing the principles on which *rescission* is granted in cases of executed contracts, says:

"The vendor has parted with his possession and has taken his money, bonds or other equivalent. The vendee has entered into possession clothed with the fee or other estate purchased, and for security of his title has taken a deed with such covenants and warranty as his contract called for. To undo all this is a strong-handed measure, and none but a clear and strong case will justify it. * * * * When the application is to rescind an executed contract for land, the English books lay it down as a general rule, admitting of but few exceptions, that to justify such a decree fraud must appear, and this fraud must be distinctly put in issue by the pleadings. If the charge be a mere failure of consideration arising from the sale of a defective title, unmingled with fraud or *mala fides* of any kind, it is generally laid down that the vendee will be left to the covenants and warranty in his deed."

"To this general rule there are some exceptions of cases which may be classed under the head of mistake; but the mistake must be plain and palpable, and must affect the very substance of the subject matter of the contract."

Arguing then as to the facts of the case, the court continues:

"How stands the case on the ground of mistake? The vendee has bought a tract of land for 278 acres. It seems that in making the survey the surveyor ran in on Wright's lines so as to take from him a slip of not more than 8 acres, I believe. But take the land lost at the largest esti-

mate, and say it was worth a fourth of the whole purchase money. Yet can it be said that it would furnish one of those cases of mistake that would authorize the rescission of the whole contract? Has not the purchaser got the substance of the thing bought? The surveyor says this land is of no peculiar value, that it is maiden wood land and there is sufficiency of timber for the place without it."

"If you say that for such a deficiency as this, not affecting the bulk of the land, you will rescind, where will you stop? * * * * I am clear, therefore, that the chancellor was right in refusing to rescind this contract."

5. SAME: The rule.

The rule is: To entitle a vendee of land, who has gone into possession under a deed with general covenants of warranty, to rescind on the ground of *failure of title*, the loss must be of such character as that he is thereby deprived substantially of the benefits of his purchase, but if the beneficial enjoyment of his contract be not materially taken away, and there is only a partial failure of consideration which can be compensated in damages, there is no case for rescission.

Applying the rules which the authorities, as well as common sense and justice indicate for our guidance to the case at bar, there are many considerations connected with this transaction tending to the conclusion that a court of equity should not grant the rescission asked for.

The appellant purchased and went into possession of this plantation in January, 1877, taking his deed with covenants of warranty. And evidently at that time, as his conduct showed in inquiring into appellee's financial condition, contemplating this very contingency of the loss through Mrs. Whittaker's claim, and that he would have to rely on these covenants, and the ability of appellee to perform them, for his protection.

When he took possession there was on the whole track 373 acres in cultivation of rich Mississippi bottom land, used exclusively for raising cotton. Of this, 361 acres (Fitzhugh puts it at 363) were on the part to which there is a good title, and only twelve acres of cleared land on that, afterwards, allotted to Mrs. Whittaker, 53 acres having since the sale been put in cultivation by tenants under a five year lease made by appellee before the sale. This tract called "Buck Island" is cut off and isolated from the balance of the place in a manner that cannot well be appreciated, without a plat, which accompanies the transcript as part of the depositions. The whole tract of 960 acres lay in a solid rectangular body, except 160 acres (the southeast quarter of 16) abutting upon the extreme northwest portion of the tract. This 160 acres, together with 100 acres cut off from the northwest corner of the rectangular body of land in the main tract, by a slough called West Bayou, running diagonally across from northeast to southwest, constitutes the portion, 260 acres, set apart to Mrs. Whittaker. West Bayou is a natural barrier by which this tract is divided from the main plantation; it is impassable except by ferry or bridge, and there is neither across it. Appellant built a bridge over it, but it was afterwards washed away in 1882, and he never rebuilt it. He says of it in his deposition:

"By the partition Mrs. Whittaker got all of the land known as 'Buck Island,' or all of the land lying west of West Bayou," and 'Buck Island' never realized me but one year's rent from the time I bought it until Mrs. Whittaker got it, * * * except for twelve acres I collected $81 every year." This detached body of land, which the commissioners found to be of the value of 7-36ths of the whole 960-acre tract, and hence set apart to Mrs. Whittaker, seems to have been of little practical use to the bal-

ance of the land, and its only value to appellant, practically, was the rent derived from it, and he complains that he had realized very little from it even in that way. Its relation to the balance of the place really seems to present an unusually clear case for compensation in damages. Even its exact relative value, with reference to the whole place, had been the subject of judicial ascertainment in the former suit to which both appellant and appellee were parties. And independent of this the deposition established beyond controversy that if there was any error in value, it was in favor of appellant in the partition made.

There is an effort made to show that there was an utter insufficiency of timber on the 700 acres set apart to appellant for the purposes of supplying the place with fire wood, fence and gin wood, and that the Buck Island place was essential for this reason to its beneficial enjoyment. But this claim is not sustained by the facts. To begin with, it does not appear that for seven years, from 1877 to 1884, that appellant had even depended on or used this tract for such purpose. Certainly for two years prior to his application for rescission in 1884, there had been no bridge across West Bayou, and he had been practically cut off from it.

His gin and principal improvements were on the extreme eastern side of his place, more than a mile from the nearest timber on this Buck Island place, while there was on his 700 acres, besides the 361 acres in cultivation, timbered land variously estimated at from 100 to 250 acres, much of it large forest timber, suitable for any farm purpose that might be required, and a quantity of it young growth since the war, but which is shown by depositions on both sides to be of rapid growth and already fit to supply the place with fire wood for engine and other purposes. And this timber lies near to the gin and other im-

provements, where it can be readily and conveniently procured without going across the entire plantation, as was necessary to reach the Buck Island place, even when they could get across the bayou.

There are some statements made in response to leading interrogatories, giving as the opinion of the witnesses, that the place was materially injured by the loss of this tract. But they all resolve themselves into one proposition, that the best timber was on the Buck Island place.

Indeed, considering that this 260-acre tract was so isolated at the extreme end of the place, remote from the cotton gin, press and other improvements; shut off as it was by an impassable barrier, and overflowed as it all was, and depreciated then in value, it would seem to have been a good bargain for the appellant to get rid of it, on the terms allowed by the chancellor, in a *pro rata* abatement from the original purchase price.

Moreover, the proceedings in the Whittaker suit greatly simplified the duties of the court in this case. It definitely set apart to Mrs. Whittaker a specific proportion, 7-36ths of the entire place, and hence furnished an exact basis for the *pro rata* abatement from the purchase money.

In view of all the facts in this case, that the posession and enjoyment of the place was held so long by appellant; that he never sought for a rescission till the place had, by reason of broken levees, deep overflows and destruction of improvements, greatly depreciated in value; that the main plantation, as used and enjoyed by him, is still in his undisputed possession; that the part so lost was separate and isolated, and its loss could have but little effect upon the full beneficial enjoyment of the plantation; that such loss was not only susceptible of, but had been, the subject of judicial ascertainment; and that appellant gets substan-

tially all he bargained for, and a liberal abatement for what he lost, it is clearly not a case for rescission.

Let the decree of the court below be affirmed.

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

---

46 358
65 158

46 358
68 246
68 247

TOWN OF MAGNOLIA v. SHARMAN & CO.

1. LIQUOR: *Power of municipality to license sale of.*

No municipal corporation in this state has any authority to deal with the liquor question in any other way than to license, regulate, tax or suppress tippling houses and dram-shops and other places of habitual resort for tippling.

2. TAXES: *Illegal, when recoverable.*

An illegal tax paid to a municipal corporation under threats and compulsion may be recovered from the corporation by the party paying it.

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

H. G. Bunn, for appellant.

There are two questions involved in this case, to-wit:

First—Had the town council of Magnolia authority to adopt and enforce the ordinances and collect the license taxes thereunder demanded and paid?

Second—If the exactions were unlawful did or did not appellees pay the same voluntarily, that is to say, was the compulsion shown by the pleadings and testimony sufficient to render the payment involuntary in the legal sense?

It is admitted that the town of Magnolia has no authority by its charter to deal with the liquor question in any other way than "to license, regulate, tax or suppress tippling houses and dramshops and other places of habitual resort for tippling." *Tuck v. Town of Waldron, 31 Ark., 462.*

The witness swore that appellees sold "ardent spirits as druggists on prescription."

Granting for the sake of argument that the license tax was illegal, does the evidence show such a state of facts as that appellees *involuntarily* paid it? A mere verbal protest amounts to nothing. The threats of the constable amount to nothing. Before either of these can be considered, it must appear that the tax was paid as a *dernier resort* to avoid personal arrest or the immediate seizure of property. *First Nat. Bank of Americus v. Mayor, etc., 68 Ga., 119; Robinson v. Inhabitants of Greenbush, 58 Me., 390.* See *Detroit v. Martin, 34 Mich., 170.*

The rule seems to be as follows, viz.:

"Where a party pays an illegal demand, with a full knowledge of all the facts which render such demand illegal, without an immediate and urgent necessity therefor, or unless to release (not to avoid) his person or property from detention, or to prevent an immediate seizure of his person or property, such payment must be deemed voluntary, and cannot be recovered back. And the fact that the party, at the time of making the payment, files a written protest, does not make the payment involuntary." *2 Dil. Mun. Corp., 947.* Quoting from *Lanborn v. Dickerson, 97 U. S., 171; Union Pacific R. v. Dodge County, 98 U. S., 541.*

The coercion or duress which will render a payment involuntary, must in general consist of some actual or threatened exercise of power possessed, or believed to be

possessed, by the party exacting or receiving the payment over the person or property of another, from which the latter has no other means of immediate relief than by making payment. *2 Dill. Mun. Corp., 943, 3d ed.*

All the cases that may be cited against our position, are cases wherein facts appear to create exceptions to the general rule. Among these exceptional facts are:

Statutes providing for refunding money.

Laws giving power of immediate arrest or distraint to collecting officers.

Mistakes of law and facts combined, and sometimes mistakes of facts alone.

Neither of the ordinances of the town of Magnolia, nor any state law in question, conferred any power upon her collecting officer to arrest the person or seize the property of any person liable to pay the license tax imposed, and this appellees knew, were expected to know and could not be excused for not knowing.

Jones & Martin for appellee.

First—The town council had no authority to exact license tax as was attempted in the ordinance.

The town only had authority to license, regulate, tax or suppress tippling houses and dram-shops, and to regulate or prohibit ale and porter shops or houses, and public places of habitual resort for tippling and intemperance. *Tuck v. Town of Waldron, 31 Ark., p. 465.*

Second—The taxes were paid under compulsion of threats, under protest; was actually received by the town, and the tax was illegal and void. All the elements necessary concur. *Cooley on Taxation, p. 565–6; 15 Wall., 75–77; 39 Tex., 236; 25 ib., Marshal v. Sneider; ib., 86.*

The payment being made under protest, the right is clear. *61 Maine, 391; 57 Penn. St., 433; 23 Cal., 111.*

Hon. C. B. MOORE, Sp. J. On the ———, 1879, the town council of the town of Magnolia adopted an ordinance requiring a license tax to be paid for the purpose of selling liquors by the quart as a druggist in said town for the year 1880.

The license tax for that year appellees paid under formal protest, as recited in the receipt therefor, dated January 1, 1880, to the constable and revenue collector of the town, amounting to the sum of $50, as stated in the account sued on, and on the 3d of January, 1881, the town council adopted another similar ordinance, numbered 50, requiring license from persons selling liquors in the town; and appellees, under formal protest, recited in the receipt, then paid the license for the year 1881, amounting to the sum of $100.

On the 29th of June, 1882, appellees brought this action before Thomas S. Mullins, one of the justices of the peace of Magnolia township, to recover back the license taxes amounting to the sum of $150 and interest, which they claimed had been illegally exacted from them and against their protest made at the time of paying the same.

Judgment was rendered in favor of Sharman & Co. An appeal was taken to the circuit court, where judgment was again rendered against the town of Magnolia. Motion for a new trial overruled, and an appeal taken to this court.

There are two questions involved in this case:

First—Had the town council of Magnolia authority to adopt and enforce the ordinance and collect the license taxes thereunder demanded and paid? 1. LIQUOR: Power of town to license sale of.

Second—If the exactions were unlawful, did or did not appellees pay the same voluntarily; that is to say, was the compulsion, shown by the pleadings and testimony, sufficient to render the payment involuntary in the legal sense?

The first of these can hardly be considered a question. Independently of the "local option law," or of any special prohibitory liquor law for the town of Magnolia, neither this town, nor any other town in the state, has authority to deal with the liquor question, in any other way than to "license, regulate, tax or suppress tippling houses and dram shops, and other places of habitual resort for tippling." This is candidly admitted by the learned counsel for appellant. It was definitely and authoritatively set at rest by this court in *Tuck v. Town of Waldron, 31 Ark., 462.*

2. When illegal taxes paid, recoverable.

As to the second question presented, R. R. Sharman, the only witness in the case, testified that he paid the license taxes referred to under protest, after they had been demanded by the collector for the town of Magnolia three several times. The constable was the collector, and at the time of demanding the taxes made threats of arrest, and other penalties, if payment was not made—and that the payments were made after appellees had taken legal advice on the subject.

It is a general proposition that an action may be maintained to recover money paid under an illegal and void tax, if paid involuntarily or under compulsion. There are certain elements or conditions, however, which must exist in order to the maintenance of such an action.

The Supreme Court of Georgia, in the case of *National Bank v. The Mayor of Americus, etc., 68 Ga., 119,* thus states these conditions:

"Three elements are essential and must concur to sustain an action to recover back money on the ground of the illegality of the tax.

"*First*—The authority to levy the tax must be wholly wanting.

"*Second*—The money sued for must have been actually received by the defendant corporation.

"*Third*—The payment of the plaintiff must have been made upon compulsion, to prevent the immediate seizure of his goods, or the arrest of his person, and not voluntarily made; unless these conditions concur, paying under protest will not give a right to recovery."

Judge Cooley, in his work on *Taxation, p. 565*, says: "The authorities warrant us in specifying the following as the conditions on which any such action may be maintained:

"*First*—The tax must have been illegal and void, not merely irregular.

"*Second*—It must have been paid over by the collecting officer, and have been received to the use of the municipality.

"*Third*—It must have been paid under compulsion.

"And to these should be added, perhaps,

"*Fourth*—The party must not have elected to proceed in any remedy he may have had against the assessor or collector."

This doctrine is supported by reason and the weight of authority as found in numerous decisions of the courts of last resort in many of the states of the union. *Sandwich Glass Co. v. Boston, 4 Metc., 181; Joyner v. School District, 3 Cush., 567; Hubbard v. Brainard, 35 Conn., 563; First National Bank v. Watkins, 21 Mich., 483; Tuttle v. Everett, 51 Miss., 27.*

The Supreme Court of the United States, in the case of *Erskine v. Van Arsdale, 15 Wallace, p. 75,* states the rule in these broad terms: "Taxes illegally assessed and paid may always be recovered back if the collector understands from the payer that the taxes are regarded as illegal and that suit will be instituted to compel the refunding of them."

This court has recognized the doctrine in its fullest extent in the case of *Drew Co. v. Bennett, 43 Ark., 364.* The county court of Drew county exacted from Bennett $450 for liquor license, when only $400 was the legal tax. Bennett paid under protest, and sued to recover the excess of $50. This court said, in passing on the question: "The excess over $400, which Bennett was made to pay as a county tax, was an illegal exaction, and he was entitled to recover it."

The record in this case shows, beyond question, that the license tax was illegal and void, was received to the use of the municipality of Magnolia, and was paid under threats and compulsion. All the elements concur to make it a proper case for maintenance of an action to recover an illegal and void tax.

The judgment of the Columbia circuit court is affirmed.

Hon. B. B. BATTLE did not sit in this case.

---

46 364
186 27
187 539

CHAFFE & SONS V. LANDERS, AD., ET AL.

1. USURY: *When contract for excessive interest is not.*

A contract to pay at a future day a sum larger than the actual debt and lawful interest, but dischargeable by payment of the true debt and interest before the day, is not usurious, unless a mere shift to avoid the usury laws; but the excess will be held a penalty for failing to pay the true debt and lawful interest within the time limited, against which equity will grant relief.

APPLICATION:

Jeffery & Co. executed to Chaffe & Sons on the 5th day of September, 1878, their note for $2,154.33, due January 5, 1879, with interest at 10 per cent. from date until paid, in settlement of account. On the same day Jeffery also executed his individual note to Chaffe & Sons for $3,000, due eight months after date, with interest at 8 per cent.

per annum from maturity until paid, and also executed a mortgage on land, reciting that it and the last note were executed as collateral security for the firm note, and providing that if Jeffrey & Co. should not pay the first note by the maturity of the last, the land should be sold for payment of the last note. To a complaint to forclose this mortgage for the amount of the first note the defendant pleaded that the mortgage and note it secured were usurious and void. *Held:* That the two notes were but one transaction, and in the absence of proof that it was the intention to secure to the creditor unlawful interest, the excess of the last note over the actual debt and interest will be held but a penalty for failing to pay the first within the time limited, and not a contract for usurious interest; and the mortgage will be foreclosed for the amount of the true debt and interest.

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

W. P. & A. B. Grace, for appellants.

The Supreme Court of the United States, per McLean, J., in the case of *Lloyd v. Scott*, said: "Where a party agrees to pay a specific sum, exceeding the lawful interest, provided he do not pay the principal by a day certain, it is not usury, for the reason that by a punctual payment of the principal he may avoid the payment of the sum stated, which is considered as a penalty." *Lloyd v. Scott, 4 Peters, 225.* To same effect see *Spain v. Hamilton, 1 Wall., 604; Cutler v. How., 8 Mass., 257; Tuttle v. Clark, 4 Conn., 153; Pollard v. Baylor, 6 Munf. (Va.), 433; Gowen v. Carter, 3 Iowa, 244; Shuck v. Wright, 1 G. Greene's Rep., 128; Fisher v. Anderson, 26 Iowa, 28; Rogers v. Sample, 33 Miss., 360; Gambrill v. Doe, 8 Blackf. (Ind.), 140; Billingsly v. Dean, 11 Ind., 331; Lawrence v. Cowles, 13 Ill., 577; Sumner v. The People, 29 N. Y., 338; Bank, etc., v. Curtis 19 Johns., 326.*

But it is useless to multiply citations in support of a principle that is so well settled as to be almost axiomatic.

We venture the assertion that no modern case can be found wherein it has been held that an agreement to pay a larger sum in default of a smaller was usurious. The universal rule is, that if the debtor may defeat the payment of the larger sum by the payment of a smaller, then the larger sum will be treated as a penalty, and the contract enforced as to the sum really due. *Tyler on Usury, 204–217.*

Robert Neill, for appellee.

Appellant relies upon the principle stated in *Lloyd v. Scott, 4 Pet., 225.*

In a case presenting a state of facts where the principle is applicable, it may possibly be the law in this state now, although our statute on usury, as remarked by this court in *Marks v. McGehee, 35 Ark., p. 219*, is very broad and imperative. In *Lloyd v. Scott* the facts were widely different from those of the case at bar, and the same may be said of each of the other cases cited by appellant, except the case referred to as *Fisher v. Anderson, 26 Iowa*, which we have failed to find.

All the cases in which the principle contended for by appellant has been applied, so far as we have found, are where the debtor makes a *single entire contract* to pay a certain sum at or before a given time, and further agreed that in case of default in making such a payment he would pay an additional sum in excess of legal interest.

In this case the note from A. C. Jeffery & Co. (a firm composed of A. C. Jeffery and W. C. Dixon) represented *one* contract; the note and mortgage of A. C. Jeffery evidenced *another* contract, not between the same parties.

But it is unquestionably the fact that a large sum in excess of legal interest was included in Jeffery's note; *it* is the note and the only one secured by the mortgage, which is clear in its terms on this point.

By the terms of Jeffery's note he agreed to pay $3,000 to Chaffe & Sons eight months after 5th of September, 1878. By the terms of the mortgage this note was to be in "full force against Jeffery in lieu of the original indebtedness of A. C. Jeffery & Co., if they failed or refused to pay off and discharge their note."

The mortgage is a conveyance and a security, and by it a greater sum or value was attempted to be secured than is allowed by law.

"All bonds, bills, notes, assurances, conveyances and all other contracts or securities whatsoever, whereupon or whereby there shall be reserved, taken or secured, or agreed to be taken or reserved, any greater value for the loan or forbearance of any money, goods, things in action or any other valuable thing, than is prescribed in this act shall be void." *Mansfield's Digest, sec. 4735.*

As above stated, this court in *Marks v. McGehee, 35 Ark., p. 219*, speaking of the note and mortgage there under consideration, say:

"The note itself was avoided *in toto*, notwithstanding its inclusion of a previous valid debt. The latter stood on its original merits. The mortgage was a conveyance and a security, and by it a greater sum or value was attempted to be secured than was allowed by law. That by force of the statute made it void; and the court could not convert it into an instrument of different terms, so as to make it stand as a surety for the sum from which the usury could be eliminated. The transaction was a whole thing, void in itself, but not affecting existing debts either to invalidate or secure them."

In this case we contend that by the terms of Jeffery's note and mortgage it was agreed between him and Chaffe & Sons that if Jeffery & Co.'s note was not paid at maturity, 15th January, 1879, it was to be at an end, extinguished

and merged into the new contract. A. C. Jeffery substituted his own note for $3,000 and obtained a credit on same until the 5th of May, 1879. Jeffery was also bound in the full sum of the original debt, and to get Chaffe & Sons to forbear the collection of their debt he consented to an addition thereto grossly in excess of the legal rate of interest.

This is usury, and the mortgage is a *security* for the entire $3,000 debt, and, as the court said in the case above cited, it cannot be converted into an instrument of different terms.

"Generally a higher security taken from the debtor extinguishes the original contract. It is merely a question of intention." *Costor v. Davis, 8 Ark., p. 213.*

It clearly seems to have been the intention of Jeffery and Chaffe to extinguish the Jeffery & Co. note immediately after its maturity, if it then remained unpaid.

The language of the mortgage (*page 9 transcript*) is: "Now, in case the said A. C. Jeffery & Co. shall fail or refuse to pay off and discharge said indebtedness to the said John Chaffe & Sons, then a certain promissory note executed by the said A. C. Jeffery at Melbourne, September 5, 1878, for $3,000, due at eight months from date and payable to John Chaffe & Sons, with 8 per cent. per annum interest from maturity, shall be in *full force* against the said A. C. Jeffery, *in lieu* of the original indebtedness of A. C. Jeffery & Co. first above mentioned."

STATEMENT.

COCKRILL, C. J. A. C. Jeffery & Co., on the 5th day of September, 1878, executed in Izard county, Arkansas, their promissory note for $2,154.33 to John Chaffe & Sons, due January 15, 1879, to bear interest at 10 per cent. per

annum from date till paid, in settlement of an account due the latter firm. On the same day A. C. Jeffery, one of the firm of A. C. Jeffery & Co., executed his note for $3,000 to John Chaffe & Sons, due eight months after date, bearing interest at 8 per cent. per annum from maturity until paid, and also executed a mortgage on 509 acres of land in Izard county, in which it was recited that the last note and mortgage were given as collateral security for, and were to become void on payment of the firm note. Jeffery died. The firm note was not paid, and to a complaint to foreclose the mortgage for the amount of the firm indebtedness, the heirs and representatives of Jeffery answered that the second note was tainted with usury, which rendered it and the mortgage securing it void.

The court found that the answer was sustained, and the complaint was accordingly dismissed. No proof of the transaction between the parties at the time of executing the notes was taken, the defendant relying solely upon the following clause in the mortgage to sustain the answer, viz.:

"Now this deed of conveyance is made upon this condition: That whereas the said Augustus C. Jeffery and W. C. Dixon, partners in business at Mt. Olive, Izard county, Arkansas, are indebted to the said John Chaffe & Sons in the sum of $2154.33, for which amount the said John Chaffe & Sons hold a note against A. C. Jeffery & Co., who are the said Jeffery and Dixon above named and which note is to fall due in January, 1879: Now, in case the said A. C. Jeffery & Co. shall fail or refuse to pay off and discharge said indebtedness to the said John Chaffe & Sons, then a certain promissory note executed by the said A. C. Jeffery at Melbourne, September 5, 1878, for $3,000, due at eight months from date, and payable to John Chaffe & Sons, with 8 per cent. per annum interest from maturity, shall be in full force against the said A. C. Jeffery, in lieu of the

original indebtedness of A. C. Jeffery & Co. first above mentioned and described, for which indebtedness the said $3,000 note secured by this conveyance is given and held as collateral security, and at the maturity thereof, if in the meantime the said A. C. Jeffery & Co. shall not have paid their indebtedness to John Chaffe & Sons, Moses M. Greenwood, who is made a trustee for the purpose of this trust, shall proceed, after giving at least thirty days' notice, by written or printed handbills posted up in at least ten public places in the county of Izard, to sell all the above described lands with all and singular the improvements, privileges and appurtenances thereto belonging, for cash, and pay, first, the expenses of said sale and this trust; secondly, pay the said $3,000 note to the said John Chaffe & Sons, and the remainder, if any, to be paid over to the said A. C. Jeffery or his legal representatives."

OPINION.

USURY: When contract for excessive interest is not.

It is not claimed that there was usury in the firm note. Jeffery was severally liable for its payment. The execution of his individual note in like amount for the same indebtedness would have created no other or different liability. It is clear, from the written agreement of the parties, that it was not the intention that the creditor should ever claim the aggregate amount of the two notes. Jeffery's individual note and the mortgage securing it, were to stand as collateral security for the firm debt. But to insure the prompt payment of the amount due, the individual note, although given for the firm indebtedness, was executed for an amount largely in excess of the actual debt. The two notes have the appearance of being parts of one transaction. By the arrangement, Jeffery was to have the option of discharging the debt in January, 1879,

or at any time before the maturity of his individual note, several months thereafter, by the payment of the amount found due on the settlement with Chaffe & Sons in the preceding September, and legal interest. If he failed to discharge his partnership obligation within that time, then the intention of the parties was that he should be mulcted in an additional sum—that is, the difference between the partnership debt and interest, and the amount specified in his separate note.

It was settled a long time ago, in England, that "wherever it is in the power of a known borrower of money to pay the principal within a limited time without interest, upon non-payment the reservation of a larger sum than the statute allows is no usury." *Floy v. Edwards, 1 Cowper, 112, 115.*

The language quoted is reported as Lord Mansfield's, and he cites *Hawkins, P. C., c. 82, sec. 19,* to the same effect. The doctrine has never been doubted or departed from by the courts of that country, and at an early day it was announced by the Supreme Court of the United States in this language: "Where a party agrees to pay a specific sum, exceeding the lawful interest, provided he does not pay the principal by a day certain, it is not usury, for the reason that by the punctual payment of the principal, he may avoid the payment of the sum stated which is considered as a penalty." *Lloyd v. Scott, 4 Pet., 205.* The same doctrine has been announced and applied by many of the state tribunals, and was recognized by this court in the case of *Trader v. Chidester, 41 Ark., 242, 247,* where a stipulation in a promissory note to pay an amount over and above the principal and interest as an attorney's fee, in the event of an action on the note, was held to be a penalty, and for that reason did not render the contract usurious. See, too, *Boozer v. Anderson, 42 ib., 167.*

The rule, generally recognized, is, that wherever the debtor, by the terms of his contract can avoid the payment of a larger sum by paying the amount actually due and lawful interest at an earlier day, the contract is not usurious, but the difference between the two sums is regarded as a penalty. *Gaar v. Louisville Banking Co.*, *11 Bush.* (*Ky.*), *189; Witherspoon v. Musselman*, *14 ib.*, *214; Conrad v. Gibbon*, *29 Iowa*, *120; Weyrich v. Hobleman*, *14 Neb.*, *432; Wilson Sewing Machine Co. v. Moreno*, *6 Sawy.*, *38; 2 Pars. Const.*, *116*, *n.* (*s.*); *Pars. N. and B.*, *p. 413; Tyler Usury*, *210.*

But contracts of this character are closely scrutinized, and if what is termed a penalty is intended as a contrivance to avoid usury, the arrangement will be declared usurious. Lord Mansfield thought it necessary to guard against the abuse of the principle announced by him, by the declaration often quoted, that where the real intent is a loan, or forbearance of money, and more than legal interest is taken, "the wit of man cannot find a shift to take it out of the statute." *1 Cowper*, *sup.; Sumner v. People*, *29 N. Y.*, *337.* But the intention must be manifested either by the written agreement or extraneous proof. In the absence of a showing that it was so intended in this case, we must regard the excess over the amount due simply as a penalty, to be relieved against by the court (*Boozer v. Anderson*, *supra*), as the debtor did not relieve himself by paying the smaller sum at the earlier day. The appellants, wisely, do not seek to enforce the penalty, but ask only what is actually due—that is, the amount found due on the settlement, and 10 per cent. interest in accordance with the original agreement between the parties: and the decree must be reversed and the case remanded with instructions to enter a decree for the appellants in accordance with the prayer of the complaint.

STEWART V. SMILEY, AD.

46 373
56 636
46 373
58 96
46 373
61 579
46 373
70 188
46 373
74 86
46 373
83 419
46 373
89 72

1. ADMINISTRATION: *Appointment of administrator. Necessity for.*
The appointment of an administrator by the probate court is an adjudication of the necessity for the appointment, which is conclusive in a collateral issue.

2. SAME: *Lien upon lands for payment of debts not perpetual.*
The charge upon a decedent's lands for payment of his debts is not perpetual. The heirs cannot be forever deterred from the possession of the lands of their ancestor by the neglect of the administrator or creditors to enforce payment of the debts.

3. SAME: *Administrator's right to the lands.*
An administrator has no control of his intestate's lands when not needed for payment of his debts, nor of the rents due from the lessees of his heirs; and cannot collect them as administrator even by consent of the heirs, but only as their agent. Such consent does not make him the tenant's landlord.

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

George H. Sanders, for appellant.

To support the action of attachment to enforce a lien for rent, the relation of landlord and tenant must exist. As to who and what a tenant is, see *Wood on Land. and Ten., see. 1.* The appellee *was not* the landlord of appellant; he was the tenant of the heirs, and could not attorn to a stranger, or change his relation. The relation of landlord and tenant once being fixed, is a covenant which runs with the land. *Ib., secs. 310, 309.*

The debts having been paid, the administrator *de bonis non* had no concern or interest in the lands or its rents, and he could not, by virtue of his office, assume the position of landlord. *Sec. 4161, Mansf. Dig.*, gives an original

administrator all the rights of the intestate as to tenants; but where the debts are paid and the estate settled, and the heirs have taken possession, an administrator *de bonis non* has no such authority. He has no interest in the lands and no control whatever over them. *27 Ark., 238; 5 ib., 607, 629; 30 ib., 778; 33 ib., 676; 37 ib., 159; Schouler, ex. and ad., 212; 22 Maine, 305; 38 Mich., 802; 55 N. H., 9; Schouler, ex. and ad., 213, 509, 510;* see, *Filby v. Cowen, 45 Wisc., 471; 32 ib., 379.*

Having no authority by law, *as administrator*, and the heirs could not make him the landlord of appellant. They might make him their agent to receive the rent, and his receipt would have discharged the debt for rent, but they could not invest him with authority to enforce the statutory landlord's lien. The lien cannot be assigned or transferred—it is personal. *31 Ark., 597; 36 ib., 561; 39 ib., 345.*

The Appellee, pro se.

First—The appellant having occupied the lands of the intestate, is liable.

Second—Appellant having attorned to the administrator, and having agreed to pay him the rent, is estopped to deny his right. *Mansf. Dig., sec. 68, 2522; 2 Blk. 57; 1 Wash., R. P., 40, 489.*

The probate court having passed upon the necessity of an administrator *de bonis non*, the propriety or regularity of the appointment cannot be inquired into collaterally. *11 Ark., 579; 23 Wall., 108.*

STATEMENT.

John Davis died in 1871 or 1872; administration was had upon his estate, and through it the debts were all paid.

When the administration begun is not disclosed, but the administrator died in 1876, and no move was made in the matter in the probate court until the appellee was appointed administrator *de bonis non* in 1883. After the debts were paid, and before the appellee's appointment, the heirs took possession of the real estate, filed a bill for its partition and procured an order of sale for that purpose. Shortly before the appellee's appointment they leased the lands, or a part of them, to the appellant for the year 1883 for a stipulated sum to be paid them as rent. After the appellee was appointed administrator, the agent who had negotiated the contract of lease for the heirs went with him to the tenant, the appellant, and informed him that the administrator was the proper party to collect the rent, and directed him to pay the same to him. The appellant expressed a willingness to pay the rent to the administrator when it should become due, if he was authorized to receive it; and according to the administrator's testimony, subsequently promised to pay it to him. He failed to do so, however, and the administrator caused the crop on the land to be attached for the rent under the statute authorizing the proceeding to enforce the landlord's lien. The attachment was sustained and a personal judgment rendered against the appellant in favor of the administrator.

OPINION.

1. ADMINISTRATOR: Necessity for appointment.

COCKRILL, C. J. It is probable that there was no real necessity for the appointment of an administrator *de bonis non*—at least none is apparent from the record. The probate court, having jurisdiction in the matter, has adjudged, however, that the necessity existed, and that adjudication is conclusive in a collateral issue. *Adams v. Thomas, 44 Ark., 267.*

Conceding that the appellee is the lawful administrator of the estate, his authority to sue for the rents of the real estate does not follow. The statute confers the power upon an administrator to control the lands of his intestate for the purpose of paying debts. His authority in that respect is derived solely from the statute, for at common law the administrator had nothing whatever to do with the lands of his intestate. But the charge created upon the lands by the statute for the purpose of paying the intestate's debts is not a perpetual one, even when the debts of the estate remain unpaid, as was ruled in *Mays v. Rogers, 37 Ark., 155.* The heirs cannot be forever deterred from the possession of the lands of their ancestor by the neglect of the administrator and the creditors to enforce payment of debts due by the estate. *Ib.* And if the claims for which the estate is liable have in fact been discharged, there is no room to contend that the statute still confers the right upon the administrator to control the lands. *Menifee v. Menifee, 8 Ark. 47–8; Reed v. Ash, 30 ib., 775; Tate v. Jay, 31 ib., 576.*

There is no pretense that there were any demands of any sort against the estate of Davis at any time after the appointment of the administrator *de bonis non.* They had been paid off and the administration practically closed long before letters were granted to him. The lands had passed into the possession of the heirs and were not needed for any purpose of administration. The administrator then had no power to control the rents. *Reed v. Ash and cases, supra; Flood v. Pilgrim, 32 Wisc., 376; Filby, as admr., v. Carrier, 45 ib., 469.*

The court sustained the recovery, however, upon the assumption that the promise of the tenant to pay the rent to the administrator, after being informed by the agent who had negotiated the lease for the heirs that he was the

proper person to receive it, conferred upon him the authority to sue for the recovery in his official capacity. The judgment cannot be sustained upon that theory.

The administrator had not the right, against the consent of the heirs, to occupy the lands or collect the rents. If he had received the rents at their request, his receipt to the tenant would have discharged the debt, upon the principle that a payment to the agent is a payment to the principal. In such case the administrator would account for the rents with the general assets, not by force of any requirement of the statute, but rather in pursuance of his agreement to do so. *Kimball v. Sumner, 62 Maine, 305; Lucy v. Lucy, 55 N. H., 9; Conger v. Atwood, 28 Ohio St., 134; Schouler Ex. & Ad., sec. 213.*

Consent cannot add anything to his official capacity. If the agent in this case was authorized to act for the heirs in the dealing with the administrator about the payment of the rent, the most that can be said that was done was simply an agreement made to the effect that a debt due to the heirs should be paid by the tenant to the administrator. This conferred no power upon the administrator as such. Nor did it create the relation of landlord and tenant between him and the appellant. That relation already existed between the appellant and the heirs of Davis. The possession was derived from them. The administrator was never in possession, and had no control over or interest in the lands. Under such circumstances it is difficult to understand how an agreement that the rent should be paid to him, could convert him into a landlord. *Hansen v. Price, 45 Mich., 519; Wood Landlord and Tenant, sec. 309.* His is not the case of an original administrator who, by the terms of the statute, succeeds to the rights and remedies of his intestate. *Mansf. Dig., sec. 4161.* The authority of the administrator *de bonis non* is limited to the administration of

assets not already administered. *State, use of Oliver, v. Rottaken, 34 Ark., 144.*

In no view of the case had the administrator a legal interest in the matter in controversy, and the judgment must be reversed and the case remanded for further proceedings.

---

46 378
78 212
f79 418

LAWRENCE V. LACADE.

1. REVIVOR: *When to be in name of widow alone. Practice in Supreme Court.*

Upon the death of an intestate whose estate is less than $300, it should be turned over by the probate court to his widow alone and not to her and his children; but where the death occurs during a pending suit in which the intestate was plaintiff and his estate is improperly turned over to the widow and children. the revivor of the suit in their names instead of hers alone, cannot be objected for the first time in the Supreme Court.

2. EVIDENCE: *Deposition of dead witness.*

The deposition of a deceased witness is admissible at the trial, though he resided in the county where it was taken and within thirty miles of the place where the court was held.

3. WITNESSES: *Of transactions with a deceased party.*

When the widow and heirs, and not the administrator of an intestate, are the parties to an action, the testimony of the adverse party of transactions with the deceased is admissible. The widow and heirs are not within the proviso of section 2, schedule to the constitution of 1874.

APPEAL from *Garland* Circuit Court.
Hon. J. B. WOOD, Circuit Judge.

John M. Harrell and *Sam W. Williams* for appellants.

We submit that here is enough of the testimony to dis-

close the errors we complain of within the rule. We assign the following errors:

First—The children of LaCade have no interest in this suit, and a judgment in their favor is erroneous. *Mansfield's Digest, sec. 3*, provides that where there is a widow, the estate shall vest in her. If there are minor children it shall vest in them. Where there is a widow, as here, the alternative, "or children, as the case may be," has no place. *Hampton v. Physick, 24 Ark., 561; Harrison v. Lamar, 33 Ark., 824; Word v. West, 38 Ark., 243.*

This court has decided that, even without the action of the probate court, the law vests the estate in the widow, if there is one, where the estate is worth less than $300. Then there can be no presumption of an amendment below to correspond with proof, for here is an affirmative error in rendering judgment in favor of parties that the record shows have no interest.

Second—The court erred in excluding the testimony of Louis Phillipe and Lawrence, for it was not an administrator suing here, but a widow and heirs, and this court has decided the question in two cases, limiting the exceptions in the constitution to suits where *administrators* are parties and to no other. *Wassell v. Armstrong, 35 Ark., 248; Bird et al. v. Jones, 37 Ark., 200.*

At that page Chief Justice English says: "In this case the complainants do not sue as executors or administrators, etc. Mrs. Bird sued in her own right *as widow*, * * * the others as heirs of Nathan Bird." He cites *1 Wharton Law of Evidence, secs. 464, 477.*

Lastly, if Mrs. LaCade has sued in a representative capacity then she could not testify for her husband as his representative, and upon the theory upon which the court tried the case here is another error. *1 Greenl. Ev., 337, 338.*

We admit that Mrs. LaCade was competent, for she was claiming in her own right as widow, and for that reason the testimony of Lawrence and Louis Phillipe was competent. The court below was not consistent, and the deposition of LaCade should not have been read.

R. G. Davies, for appellees.

The first error complained of in appellants brief is that the case was revived in the name of the widow and children. There was no objection or exception saved to the revivor, and the fact that the case was so revived is not made the ground of a motion for a new trial.

No objection was made to the deposition of L. T. LaCade at the time it was read—as to the objection that at the time of reading the deposition, the witness must reside 30 miles away—it was impossible to locate his residence, he being dead.

Sec. 2921, Mansfield's Digest, says: "Depositions may be used on the trial of all issues in any action. * * * * where the witness is dead."

The act in regard to perpetuation of evidence only refers to cases where a suit is expected, and not to one pending. See *Mansfield's Digest, secs. 2960, 2965.*

The order vesting the property in the widow *and* minor children was made at the request of the widow, Mrs. LaCade, and no order was necessary to vest it in her. *Harrison v. Lamar, 33, Ark., 824.* This, if an error, is one of which defendants cannot complain.

Mrs. LaCade was appointed *guardian ad litem* for the minor children in whom the estate had been vested, jointly with herself, at her request, and the evidence of Lawrence and Phillipe was properly excluded.

The case of *Wassel v. Armstrong*, has no appliability to the case at bar, and did not come within the constitutional

provision. Neither does the case of *Bird v. Jones*, *37 Ark.*, *200*. This was a case where there had been no administration and no guardian appointed. There is nothing in the *Bird v. Jones* case to show what the estate amounted to, but in this case the estate is vested in the widow and minors in *lieu* of administration. At any rate the evidence of LaCade and Lawrence was immaterial, and it is clearly shown by the testimony of Mrs. Phillipe and others that there was a partnership existing.

SMITH, J. LaCade sued Lawrence and Louis Phillipe before a justice of the peace for work and labor done. Lawrence answered that LaCade did not perform the labor charged for upon any contract to work for defendant, and was never in the employ of the defendant, and that defendant does not owe plaintiff any part of the sum charged; that the defendant had a contract with Louis Phillipe for the making of wine on the place of defendant, from the vintage of defendant's vineyard, for the consideration agreed upon between defendant and Louis Phillipe, by which said Louis Phillipe was to employ all the assistance he might require, and pay *himself* for all labor, etc., and expense necessary in making wine; and if Louis Phillipe hired the plaintiff he did so upon his contract as principal party thereto, and not as agent of Lawrence; that the wine is not yet made under said contract with said Louis Phillipe and this defendant, and nothing was due Louis Phillipe from Lawrence.

Phillipe also answered, setting up his contract with Lawrence, substantially as Lawrence had stated it, admitting the hiring of LaCade by him, but alleging failure on the part of LaCade to perform his contract, and claiming recoupment for losses sustained.

1. REVIVOR: Widow and heirs.

On motion of LaCade, the case was transferred to the court of common pleas, under the provision of law creating that court. It was there tried before the court, without the intervention of a jury, and LaCade had judgment against both defendants. They appealed to the circuit court. Pending the appeal LaCade died, and his whole estate, being worth less than $300, was, by order of the probate court, turned over to his widow and four minor children. The cause was revived in their names and proceeded to trial with the result of a verdict and judgment for the plaintiffs.

The first error assigned is, allowing the action to be revived and prosecuted in the joint names of LaCade's widow and children, when the latter had no interest. It is doubtless true that, under *sec. 3, of Mansfield's Digest*, where there is a widow, the estate is to be vested in her, and the alternative, "or children as the case may be," has no place. But no objection was made to the order of revivor, and the action of the court in the matter was not even made a ground of the motion for a new trial. It is in vain to make such objections in this court for the first time.

2. EVIDENCE: Deposition of dead witness.

Again: It is urged that the court erred in admitting the deposition of LaCade taken in the county of his residence, and within thirty miles of the place of holding the court. But no motion was made before the commencement of the trial to suppress it. And such a motion, if it had been made, should have been denied, the witness being dead. *Mansf. Dig., secs. 2955, 2921.*

3. Transactions with deceased.

But the court did commit a substantial error, to the prejudice of Lawrence, in rejecting so much of the testimony of Lawrence and Phillipe as showed transactions with the deceased. The rejected testimony tended to negative the existence of any partnership between the defend-

ants, or other joint liability to the plaintiffs. The action was neither by nor against fiduciaries.

In *Bird v. Jones*, *37 Ark.*, *200*, this court, by ENGLISH, C. J., said:

"None of the complainants sued as executor or administrator of Nathan Bird. Mrs. Bird sued in her own right as his widow, and the other complainants, claiming under him as heirs, sued in their own rights. The widow and heirs are not within the exceptions made by the proviso of the section (*Sec. 2, Schedule to the Constitution of 1874*) to the general rule established by it." See, also, *McRae v. Holcomb*, *ante*.

But the exclusion of the evidence worked no injury to Phillipe, as it had no tendency to disprove his individual liability to pay for LaCade's work.

The judgment against Phillipe is therefore affirmed, and the judgment against Lawrence is reversed, and as to him a new trial is ordered.

---

46 383
56 114

PRAIRIE COUNTY v. MATTHEWS.

1. TAXES: *Appeals from board of equalization. Construction of statute.* All that is necessary for a "party" to "appeal" to the county court from the action of the county board of equalization of taxes is to apply to the court for the correction of its errors. The words "party" and "appeal" are not used in the statute in their technical sense. The board is not a court; it has no parties before it, can render no judgment nor grant any appeal.

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

J. E. Gatewood, for appellant.

First—No appeal was taken from the board of equalization to the county court. *Act March 31, 1883, sec. 80.* The board is in some sense a court, with its jurisdiction limited to the matters specified in the act creating it, and the county clerk keeps a *record* of its proceedings. *Sec. 83.* If any appeal is taken, as the act does not provide the manner, etc., the usual method by motion, affidavit, etc., must be followed. No appeal having been taken, the county court had no jurisdiction.

Second—The county court had no jurisdiction to grant an appeal, not being a court of appellate jurisdiction. The appeal should have been taken before the board. *Sec. 5687, Mansfield's Digest.*

Third—The act providing for equalization boards is constitutional. *28 Ark., 270; 30 ib., 665; art. 2, sec. 23; art. 16, sec. 5, Const.* The legislature having clothed the boards with the power of determining and equalizing the values of property, the county court, treating the application as an original petition to said court, had no original jurisdiction to grant the relief. The action of the board is final unless appealed from under section 80.

C. E. Warner, for appellee.

The board of equalization is not a court at all; it has no power to hear and determine causes, to adjudicate the rights of parties, or try an issue of law or fact. Their functions are purely ministerial, and are not conclusive. The act does not prescribe when or how an "appeal" shall be taken, nor by whom granted, and the reasonable construction is that the legislature simply meant that the person aggrieved might *apply* to the county court for relief. *Secs. 80, 82.* Appellant was not a *party* to the proceeding, nor

brought before the board, and he was in no way bound by its action. *Sec. 5201, Mansfield's Digest.*

Section 35, page 935, Gould's Digest, provided that the owner of land might *appeal from* the assessment returned by the assessor, etc., and under this act it was held that the land-owner might apply directly to the county court to review the action of the assessor. *17 Ark., 416.*

County courts are vested with *exclusive original jurisdiction* in all matters pertaining to the assessment for taxation, levy and collection of taxes, etc. *Art. 7, sec. 28.*

SMITH, J. Matthews applied by petition to the county court to reduce the assessment of his lands. He represented that he had given in for assessment fifty-nine tracts, within the time and in the manner prescribed by law, and the assessor had valued them; but the board of equalization had, arbitrarily and without any evidence, raised such valuations to the extent of $5,325; that this action was taken in his absence and without notice to him, but as soon as he learned what had been done he went before the board and unsuccessfully endeavored to induce it to reconsider its action. But the county court, finding that the petitioner had not asked for nor obtained the allowance of an appeal from the board, refused to entertain his petition or take jurisdiction of the matter.

Matthews appealed to the circuit court and was there confronted with a motion to dismiss his appeal, upon two grounds: *First*—The appeal should have been taken from and before the equalization board, the county court being powerless to grant an appeal from the board to itself; and, *Second*—The county court has no appellate jurisdiction under any circumstances. But the circuit court denied the motion and proceeded to give Matthews such relief as, in its opinion, the proofs showed he was entitled to.

TAXES: Appeals from equalization board.

The only question raised by the present appeal is one of jurisdiction.

Sec. 5687, Mansfield's Digest, after creating a board for the equalization of taxable values in each county, provides that any party aggrieved by any action of the board may appeal therefrom to the county court. It is not prescribed when nor how the appeal is to be prayed, nor by whom, nor upon what conditions it is to be granted.

Our opinion is that, in this provision, the legislature did not use the terms "party" and "appeal" in their technical legal sense of party to a suit, and the removal of a cause from an inferior to a superior court for review; but in their popular signification of "person" in the one case, and "invoke the aid of" in the other. This is the only construction upon which the provision can stand. For appeals only lie from one court to another; never from an executive officer to a court. By our constitution the powers of government are distributed among three distinct departments, each confided to a separate body of magistracy. And no person, or set of persons, of one of these departments, can exercise any power belonging to either of the others, except in certain instances, for which special provision is made, not necessary to be here enumerated. Now, the functions of the board of equalization are ministerial. Its members are assessors and valuers of property. None of the judicial power of the state is vested in them, either individually or collectively. Their power is limited to raising and reducing the valuation of property which the assessor has returned on his list. This is not a judicial proceeding. The conclusion reached by them is not the determination of a court. The board is not a court in any sense. No causes are pending before it for adjudication. Parties are not brought in by any sort of process. No judgment is rendered, and no means of

enforcing any judgment are provided. Hence no appeal, strictly speaking, can be taken or authorized from its decision to the county court, or to any other court, because it is not a judicial tribunal competent to pass upon any case. *Constitution of 1874, sec. 4, and art. 7, sec. 1; Dunn v. State, 2 Ark., 230; Allen, ex parte, 26 ib., 9; Logan Branch Bank, ex parte, 1 Ohio St., 432.*

The revenue act of January 1, 1853, sections 3 and 4 (*Gould's Dig., ch. 148, secs. 35 and 36*), enacted that any person who might think himself aggrieved by the assessment of his property might appeal to the county court and have the assessment corrected, if found incorrect; the appeal to be in writing, to state specially the grounds of appeal and the thing complained of, and no other matter to be considered by the court.

In *Redd v. St. Francis County, 17 Ark., 416*, a land-owner filed his petition in the county court to reduce and correct the assessment of his lands. And it was held the court had jurisdiction to grant the relief prayed for.

There is nothing in *Randle v. Williams, 18 Ark., 380*, to conflict with this view. For, although it is said that if the assessment and levy of taxes upon the property of an individual be excessive, the appropriate remedy is by appeal to the county court; yet "appeal" must be read as equivalent to application, as construed in the previous case of *Redd v. St. Francis County.*

No point is made as to the constitutionality of the act in creating boards of equalization. As was said by this court in *Van De Griff v. Haynie, 28 Ark., 270*, where the constitutionality of an act establishing a state board of equalization was challenged, the legislature has general power over the subject of taxation, and may select its agencies for determining and fixing taxable values. And this decision was adhered to in *Edrington v. Matthews, 30 Ark., 665.*

Affirmed.

BAUER v. ST. L., I. M. & S. RY. CO.

46 388
59 479
46 388
61 621
62 167
46 388
78 108

1. RAILROADS: *Negligence. Injury to employe.*

When a person enters into the employ of another he assumes all the risks ordinarily incident to the business, and cannot recover for injuries resulting therefrom, unless the employer has, or by the exercise of ordinary care would have, knowledge or information that the particular employment is, from extraneous causes known to him, more hazardous or dangerous than it fairly imports, or is understood by the employe to be, and fails to inform the latter of the fact or of the information. In which case he will be liable to the employe for all the consequences resulting to him from the lack of such information.

2. SAME: *Same.*

A person engaged in the service of a railroad company as car inspector with a full knowledge of the dangers incident to the service, who is injured while in discharge of his duties by an engine of another company running over the same tracks at the station for making up its trains, by lease from his employer, through the negligence of the engineer of the lessee company in running the engine, cannot recover damages from the company employing him.

3. SAME: *Contributory negligence.*

In order for an employe to maintain an action against his employer for negligence he must himself be free from negligence contributing to the injury.

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

Clark & Williams for appellant.

The court erred in amending plaintiff's first instruction, and in giving it as altered, and in giving the first, second, third and fourth instructions for appellee. *5 B. J. Lea (Tenn.), 546; 56 Iowa, 337.*

These instructions are wrong:

First—They tell the jury that the defendant was *not* guilty of negligence by not seeing Bauer on the track.

Second—That Bauer was guilty of contributory negligence by not seeing the engine in time to save himself.

See *36 Ark., 371; 40 ib., 336; 37 ib., 562; 39 ib., 491; 5 N. Y., 887; 36 Ark., 41; 6 Wait's Act. & Def., p. 584; ib., 586–595–6; 51 Me., 325; 10 Mees. & Welsb., 546; 3 Allen, 176; 6 Gray, 505; 58 Me., 199; 23 N. W. Reporter, 14; 21 ib., 633; 49 N. Y, 47; 13 N. Y., 533; 11 N. W. Rep., 55; 21 ib., 536; Sher. & Red. on Neg., sec. 31, note 1; Whart. on Neg., sec. 323; 76 Ill., 25; 74 N. C., 655.*

So, in the case at bar, it is not sufficient to say that because Bauer was on the track that he did not see the engine coming; that he was a man of full age, and might have seen the engine and got off the track; if he had kept a lookout, etc., the injury would not have happened. These will not constitute the juridical cause of the injury. Undoubtedly they were conditions without which the injury would not have happened—but there is no causal connection between these conditions and the injury. Suppose a man engaged under a car repairing it, and is killed by a sudden and negligent pushing the car from its place, would the fact of his being under the car be any cause of his injury? *59 Wis., C. 127.* Unquestionably if he had not been there he would not have been killed. Now, the case of Bauer here was radically the same. He was employed to inspect all the trains on that yard as they came and departed. He was in his proper place when he was injured. He owed no duty at all to keep a lookout for such an engine as this coming over the track. There was no causal connection therefor between his not looking and seeing the train and the injury. In no sense can the case be likened to the case of a traveler crossing a railroad track at a public

crossing, where it has been often held that he cannot recover for an injury unless he looked both up and down the track, for in that case the train is expected to be running at full speed—the traveler has no business or right on the track at all except to cross and go about his business. His failure to look, in such case, is negligence contributing to the injury; *i. e.*, a juridical cause of the injury, because common prudence would dictate that he should anticipate the danger of such passing train, and yet even this failure to look is not negligence *per se*, and is often no objection to a recovery. See *Ferguson v. Wis. Cent. R. R. Co.*, *23 N. W. Reporter* (pamph.), where the court say: "The jury may well have found, from the testimony, that the noise of the car on the track was drowned by that made by the passing engine; that when he stepped upon the track he was so enveloped in the smoke and steam from the engine that he could not see the approaching car, and that he did not know or have any reason to suspect that a running switch was being made;" and the court cites *Butler v. Milwaukee & St. P. Ry. Co.*, *28 Wis.*, *487*. Yet the court below took the view that Bauer's case was exactly like that of a traveler crossing the track on a highway and injured by failure to look up and down for a train, and no argument could induce the court to see the facts in any other light, and hence these erroneous instructions. And see *Brown v. N. Y. C. R. R. Co.*, *32 N. Y.*, *597*; *Butler v. M. & St. P. R. Co.*, *28 Wis.*, *487*; *McGovern v. N. Y. C. & H. R. R. Co.*, *67 N. Y.*, *417*; *French v. Tallston Branch R. R. Co*, *116 Mass.*, *537*.

Dodge & Johnson for appellee.

We shall not undertake to follow appellant's counsel in his objections to the four instructions given upon defendant's request.

The theory upon which the defendant's counsel based their propositions of law, was this:

First—That Bauer was in the employ of defendant as car inspector; that in order to discharge his duties as such, he was necessarily required to be on and about the different tracks in defendant's yards, and in consequence, in order to do this work and carry out the object for which he was employed, he necessarily assumed all the ordinary risks of such employment.

Second—That if Bauer, assuming all the ordinary risks incident to the employment, found that where he was compelled to work was a railway yard upon which were many parallel tracks, great noise and confusion caused by passing and repassing engines and cars, then it became his duty to be more vigilant and careful, and to exercise more caution, because of this increased danger.

Third—That if, with all the knowledge necessarily gained in the daily performance of his duties for three years, Bauer walked on the main track when there was ample room on either side (eight or ten feet space as shown by the evidence), and by so doing chose the more dangerous place without any impelling necessity, or his duties requiring it, then he alone assumed all risk and was to blame; and,

Fourth—That unless Bauer was weak-minded, or defective in hearing, and that such defects were known to defendant's servants, they had a right to presume that he was of sound mind and good hearing, and need not act otherwise. See *114 U. S., 617; 95 U. S., 762; 22 Minn., 165; 24 N. W. Rep., 423; 1 ib., 37; 6 Pac. Rep., 529; 1 N. W. Rep., 606; 34 Iowa, 160; 4 N. W. Rep., 783; 7 Fed. Rep., 766; 8 ib., 489; 1 Dillon, 579; 36 Ark., 46–50; ib., 377; 4 ib., 549; 95 U. S., 439; Beach on Cont. Neg., p. p. 10–11, and notes to Davies v. Mann, 10 Mees. & W., 546.*

BATTLE, J. On the 14th day of June, 1883, Frederic Bauer, the father of appellant, was killed by a locomotive of the Texas & Pacific Railroad Company in the yard and on the track of the St. Louis, Iron Mountain & Southern Railway Company, at Texarkana, in this state. He left Minnie Bauer, his widow, and Frederic W. Bauer, his only child and sole heir and distributee, him surviving. Frederic W. Bauer instituted this action against the St. Louis, Iron Mountain & Southern Railway Company to recover damages suffered on account of the killing.

The facts in this case are substantially as follows:

The road of the Texas & Pacific Railroad Company connects with the defendant's road at Texarkana. The defendant had a great many tracks running parallel to each other through its yard at that place. The Texas & Pacific had no separate yard at that place, but some time previous to and on and after the 14th day of June, 1883, had used the tracks, depot and round-house of the defendant. Frederic Bauer was and had been in the service of the defendant, at Texarkana, as car inspector, for three years, at the time he was killed. On the morning of June 14, 1883, he was on duty, and had been inspecting the incoming trains as they arrived. There were at this time many trains running on the various tracks, and very much noise and confusion. There was, as the witnesses say, a great rush of trains, coming and going on the several tracks that morning, making a great noise by the blowing off of steam, ringing of bells, etc. Bauer had inspected one train, and in proceeding to another portion of defendant's yard, stepped on one of its tracks, and was walking on it when he was run over and killed by an engine of the Texas & Pacific Railroad Company backing to defendant's round-house along the track on which he was walking, and was running at the rate of about four miles an hour.

At the time he stepped on the track he was about the length of the tender in front of the approaching engine, with his back towards it, and had walked forty or fifty feet on the track when the engine struck him. This was about 9 o'clock in the morning. Bauer, it seems, did not see or hear the engine coming, and the engineer in charge of the engine did not see Bauer before he was struck. The engine had been taken out of the defendant's roundhouse to the south end of the yard to take a train out to Texas, but the purpose of taking the train out was abandoned, and the engine ordered back to the roundhouse, and the engineer in charge was taking the engine back when the accident happened. The engineer was in the employment of the Texas and Pacific Railroad company. There was a space of eight or ten feet between the track on which Bauer was killed and the tracks nearest to it on each side.

The plaintiff asked the court to give two instructions to the jury, which are as follows:

First—"That if the jury believe that said Frederic Bauer was an employe of the defendant company, and charged with the duty of inspecting the trains of the defendant, and the cars of such trains at and within the yard of the defendant at Texarkana as such trains arrived and departed, it was the duty of the company to warn the said Bauer of any extraneous and unexpected dangers to him in the exercise of such duty, which were known to the company, or which, in the exercise of ordinary care, should have been known."

Second—"That if the jury believe that the deceased, Bauer, was employed as car inspector within the yard at Texarkana and that while engaged in such employment, he was run over and killed in the yard by a locomotive and tender of the Texas & Pacific railway, not belonging

to the defendant company, but in the yard by defendant's consent, then the defendant company are liable for such death, unless the evidence shows that said deceased was warned by his company, or had knowledge or reason to know that said locomotive and tender would be on said track in defendant's yard at the time and place where the killing took place."

The court changed the first instruction by adding the words: "Unless Bauer, from his position and experience, must or ought to have known of such extraneous or unexpected dangers," and gave it as amended. The second was given as asked.

The court, then, upon request of the defendant, gave the following four instructions against the objection of the plaintiff, and exceptions were saved:

First—"If the jury find from the testimony that the deceased was, at the time of the accident, in the employment of the defendant, and that the discharge of his duties required him to be on and about the different tracks in defendant's depot yard, then the deceased (plaintiff's intestate), is in law considered to have entered upon such employment, assuming himself the ordinary risks of such employment; and if the jury find from the evidence *that one of the ordinary risks of such employment was the danger of being run over by an engine or cars; then if he was so run over, and the cause of such accident was a lack of prudence on his part, defendant cannot be held responsible for the result, unless, after becoming aware of the want of care on the part of the deceased*, the defendant's servants negligently caused the engine to run him down.

Second—"If the jury find from the testimony, that the point where the accident happened was the depot yard and grounds of the defendant; that there was a large number of parallel tracks; that there was a great noise

and confusion, caused by the passing and repassing of engines and cars; that the plaintiff's intestate, Bauer, was familiar with all the usual circumstances and surroundings of the vicinity, then it was the duty of Bauer to observe care and caution commensurate with the dangers to be avoided (and the greater the noise and confusion, and the number of cars and engines so passing, the greater the necessity on the part of Bauer to observe care and caution); and if the jury find from the testimony, that he failed to observe the degree of care and prudence necessary, under the circumstances, and that such failure on his part directly contributed to the injury, then the plaintiff cannot recover, unless they further find that the engineer failed to make any effort to stop after he discovered the neglect of Bauer in not looking out for his own safety.

Third—"If the jury find from the testimony that the deceased, Bauer, was walking on the railway track at a point where he had reason to anticipate the frequent passing of engines and cars, that upon either side of said track there was sufficient space between said parallel tracks for him to have walked in safety, his choosing the more dangerous, if you so find, in preference to a safer path, without any impelling necessity, was such an act of contributory negligence as to preclude a recovery in this case, and the jury must find for the defendant, *unless they further find from the testimony that the person in charge of the engine which caused the injury negligently and willfully failed to give warning after seeing Bauer upon the track.*

Fourth—"Unless you find from the testimony that there was some defect of the mind or hearing of the person walking on the track, and that defect was known to the engineer or person engaged in running the engine, then such person so engaged should be justified in taking it for granted that the person walking on the track—if the jury

find that the engineer saw said person—was of sound mind and good hearing, and that he would take such an ordinary precaution for his own safety as to step off the track in time to avoid being struck; and the engineer is only *responsible for not making all possible efforts to stop the engine after he discovered, in exercising the judgment of an ordinary prudent man, that the person on the track is not taking any precaution to save himself.*"

The jury returned a verdict, and the court rendered judgment in favor of defendant against plaintiff. Plaintiff moved for a new trial; (1) because the verdict was contrary to the evidence; (2) because the verdict was contrary to law; (3) because the court erred in refusing to give to the jury the first instruction asked for by him, and altering it and giving it as amended; (4) because the court erred in giving to the jury the first, second, third and fourth instructions asked for by the defendant, and each of them. The motion was overruled, and plaintiff filed his bill of exceptions, signed by the judge, and appealed.

1. NEGLIGENCE: Injury to employe.

When a person enters into the employ of another he assumes all the risks ordinarily incident to the business. "He is presumed to contract with reference to all the risks ordinarily incident to the employment; consequently he cannot recover for injuries resulting to him therefrom." But if the employer has, or in the exercise of ordinary care, would have "knowledge or information showing that the particular employment is, from extraneous causes known to him, hazardous or dangerous to a degree beyond that which it fairly imports, or is understood by the employe to be, it is his duty to inform the latter of the fact, or put him in possession of such information;" and failing in this respect, he is liable to his employe for all the consequences resulting to him from the lack of such infor-

mation. *Baxter v. Roberts, 44 Cal., 187; Wood on Master and Servant, chapter 15.*

2. SAME:

In *Clark v. Chicago, Burlington & Quincy Railroad Co., 92 Ill., 43*, it was held that "a person engaged in the service of a railroad company as an engine-driver, with full knowledge of the danger incident to the service, who receives an injury while in the discharge of his duties, by a collision with a train of another company using the same part of the road under a lease from his employer, through the negligence and recklessness of the employes of the lessee company in running the train in violation of the reasonable rules of the lessor company, cannot recover damages of the company employing him, such an accident being one of the ordinary risks of the service, and not attributable to any negligence on the part of the employer." Mr. Justice Scott, in delivering the opinion of the court, said: "The running of trains is known to be a dangerous occupation, and that in which plaintiff was engaged was, no doubt, rendered more so by reason of the fast trains that were run over the same track by two distinct companies. But it cannot, with any show of reason, be claimed that plaintiff was injured by anything that defendant did to render the service more dangerous than it was known to him to be before he engaged in it. Opportunity was afforded him to ascertain and become familiar with the work to be performed and the peculiar dangers to which he would be exposed, and knowing them as well as he did, the law is well settled that he assumed all the ordinary risks incident to his engagement. The negligence of the employes of the lessee company is one of the hazards against which it must be presumed he contracted. There is no warrant in law or in any consideration that concerns the public welfare, for the proposition that defendant impliedly contracted with plaintiff that the employes of the lessee

company would observe strictly the rules adopted to secure safety in the running of trains over the road in which both companies were engaged. Experience teaches that in no service do the employes always observe due care. In railroad, as well as in other hazardous labor, every cautious person cannot but anticipate that there may be omissions of duty on the part of employes that might expose co-employes to injuries. Such are among the ordinary exposures, and if a party is unwilling to assume such risks, he must not engage in the service. It is a matter of no consequence whether plaintiff was in a common employment with the servant of the lessee company, whose negligence or willfulness caused the injury. Plaintiff was not injured by any cause outside of the ordinary perils of the service in which he was engaged. He was exposed to no new dangers by any negligent conduct of defendant that he could not have anticipated before he entered upon the performance of his engagement."

The defendant, therefore, is not responsible for the negligence of the engineer who was in charge of the engine which killed Bauer. He was a servant of the Texas & Pacific Railroad Company.

It is said, however, that the engine which ran over Bauer had been taken out in the morning to take out a Texas train, but the trip had been abandoned and the engine came back through the yard, unexpectedly, at the time it struck Bauer; and that there is no evidence that Bauer had any reason to expect it along at that time. Neither is there any evidence that he did not, or that the defendant was guilty of negligence in its passing along at that time. Bauer had been in the service of defendant, at Texarkana, for three years, as car inspector. In that time the Texas & Pacific Railroad Company had been using the yards, tracks, depot and round-house of the de-

fendant. He knew, or ought to have known, that defendant and connecting companies could not move their locomotives when their trains were being made up, or when being broken up, according to a time table, and that the locomotives, at all times, would not pass up and down the tracks at stated or certain times.

3. Contributory negligence.

In order for an employe to maintain an action against the employer upon the ground of his alleged negligence, he himself must be free from negligence contributing to the injury. *Shearman & Redfield on Negligence* lays down the rule thus: "One who is injured by the mere negligence of another cannot recover at law or in equity any compensation for his injury, if he, by his own or his agents' ordinary negligence or willful wrong, contributed to produce the injury of which he complains; so that, but for his concurring and co operating fault, the injury would not have happened to him; except where the direct cause of the injury is the omission of the other party, after becoming aware of the injured party's negligence to use a proper degree of care to avoid the consequences of such negligence." *Shearman & Redfield on Negligence, sec. 25; Wood on Master and Servant, sec. 456.*

Mr. Justice Swayne, in delivering the opinion of the court in *Railroad Co. v. Jones, 95 U. S., 439*, said: "Negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person under the existing circumstances would not have done. The essence of the fault may lie in the omission or commission. The duty is dictated and measured by the exigencies of the occasion. One who by his negligence has brought an injury upon himself cannot recover damages for it. Such is the rule of the civil and of the common law. A plaintiff in such cases is entitled to no relief. But where the defendant

has been guilty of negligence also, in the same connection, the result depends upon the facts. The question in such cases is: First, whether the damage was occasioned entirely by the negligence or improper conduct of the defendant; or, second, whether the plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary care and caution, that but for such negligence or want of care and caution on his part the misfortune would not have happened. In the former case the plaintiff is entitled to recover. In the latter case he is not. *Tuff v. Warman, 5 C. B. N. S., 573; Butterfield v. Forrester, 11 East, 58; Bidge v. Grand Junction Railroad Co., 3 M. & W., 244; Davis v. Mann, 10 ib., 546; Clayouls v. Detheck, 12 Q. B., 439; Van Lien v. Scoville Manufacturing Co., 14 Abb. (N. Y.) Pr. N. S., 74; Ince v. East Boston Ferry Co., 106 Mass, 149.*"

In *Schofield v. Ch., etc., Ry. Co., 114 U. S., 617*, Mr. Justice Blatchford, in delivering the opinion of the court, said: "Where a person in a sleigh, drawn by one horse, on a wagon road, approaches a crossing of a railroad track with which he is familiar, could have seen a coming train during its progress through a distance of seventy rods from the crossing if he had looked from a point at any distance within six hundred feet from the crossing, and was struck by the train at the crossing and injured, he was guilty of contributory negligence, even though the train was not a regular one and was running at a high rate of speed, and did not stop at a depot seventy rods from the crossing in the direction from which the train came, and did not blow a whistle or ring a bell between the depot and the crossing."

In *Williams v. C. M. & St. P. Ry., 24 N. W. Rep., p. 423*, Judge Cassaday said: "But the fact is conclusively established by the evidence that had the driver, while approaching the crossing, exercised ordinary vigilance in looking

in the direction of the coming engine, he would have discovered it in time to have stopped his team before reaching the railroad track, and thus have prevented the injury. Failing so to do, he was clearly guilty of contributory negligence under all the authorities. In support of this, the respondent's counsel have cited so many cases that we do not feel called upon to cite any."

But counsel for appellant say Bauer's case was not like that of a traveler crossing the track on a highway and injured by a failure to look up and down for a train. They say: "He was employed to inspect all the trains on that yard as they came and departed. He was in his proper place when he was injured. He owed no duty at all to keep a lookout for such an engine as this coming over the track. There was no causal connection therefor between his not looking and seeing the train and the injury. In no sense can the case be likened to the case of a traveler crossing a railroad track at a public crossing, where it has been often held that he cannot recover for an injury unless he looked both up and down the track, for in that case the train is expected to be running at full speed—the traveler has no business or right on the track at all, except to cross and go about his business. His failure to look, in such case, is negligence contributing to the injury; *i. e.*, a juridical cause of the injury, because common prudence would dictate that he should anticipate the danger of such passing train, and yet even this failure to look is not negligence *per se*, and is often no objection to a recovery."

The opinion of the court in *Holland v. Chicago, Milwaukee & St. Paul Railway Company*, *18 Federal Reporter*, *243*, is a satisfactory answer to this argument. The facts in that case are as follows: The plaintiff was in the employ of the railroad company as a laborer, engaged in the exca-

vation of a certain part of the defendant's road known as the short line. The tools which were used in this excavation were kept on one side of the track in a tool chest, and it was conceded it was a proper place or site for the tool chest, which was provided for the work upon the bank. The place where this tool chest lay was on the opposite side of the bank from where the excavation was being done, and across the railroad track, and at that place there were three or four tracks. The plaintiff came down to his work in the morning, and when he came there, in order to reach the tool chest, he had to cross these tracks. He went that way across the tracks the first day to obtain his tools, and the second morning he came down the same way to go to his work, where he had a perfect right to cross. As he came down that morning he discovered upon the first track some empty flat-cars that were being pulled out of the way, or had just gone out of the way, so that he could get past the track without difficulty. Then, upon the next track, when he came to that, he looked up and down the track for the purpose of seeing whether there was anything in his way to prevent his crossing, and coming in one direction he saw a freight train that was coming down on that second track. He waited for the train to go by. After the freight train passed by he passed immediately in the rear of it on to the main track, and in doing so he walked in front of a passenger train of cars coming toward him, and was injured by it.

Judge Shiras, in delivering the opinion of the court, said: "A very ingenious argument has been made by counsel for plaintiff, based upon a line of authorities produced before the court to show that, under the circumstances, the plaintiff had a right to do what he did, upon the theory that in the first place he had a right to rely upon the fact that the company itself would do whatever

was proper for the company to do for his protection, in giving signals, or whistling, or warning him by ringing a bell, or anything that it should have done to protect its employes; that he had a right to rely upon it that the company would do all that care and prudence upon its part would require to be done; and that the court must hold that, under the evidence, the company did not do what was required of them, because there was no signal or warning given to the employes of the coming of the train.

"Argument is also made, based upon a line of authorities cited, that where the employe is, by reason of his employment, placed in a dangerous position, and he is required to devote his time and attention to the work that he is engaged in doing, that that will excuse him from being as alert as he otherwise would be to the danger of his position. The rule laid down in the authorities cited is to be applied when the facts of the case require it, and this arises ordinarily in cases in which the employe is required, by the very work he is to do, either to be upon the track, or in some place of danger. Many cases arise where employes are required to go upon or under cars to make repairs on the cars while on the track. It is plain that where the railroad company requires an employe to go under a car to repair it, the duty devolves upon the company to see that no other car is sent down upon that car, so as to move the car upon which the employe is at work. Or in case an employe is sent to work in a place where danger lies *while he is performing* such work, he has a right to rely upon the company exercising due care to protect him in his work.

"In the *Derrick Case, 106 Mass., 461* (*Goodfellow v. Railroad Co.*), cited by plaintiff's counsel, where the employes were required to be on the track and hold a rope attached to a derrick, it was necessary, for the safety and protec-

tion of others, that the men who had hold of the rope should give their attention to that matter. When they were placed in that position, and the railroad company knew that fact, there was a duty laid upon the railroad company to see that no injury happened to them; and in all these cases, extreme as they are, the rule is still recognized by the courts that the employe is not relieved from exercising the care which he should exercise, considering the work in which he is engaged. In other words, if there is recklessness and carelessness on the part of the employe, it will still defeat his right of recovery.

"Now, in this case, the undisputed evidence, as I said before, shows that the man was not engaged in any work that required his attention. He was simply walking across the track, and if there is anything that becomes automatic, it is the act of walking or going from one place to another. We do not direct our attention to the act of lifting one foot and then putting it down; it is done without the exercise of thought on our part, and is necessarily an automatic action. It was not necessary for him to give much attention to it, aside from the fact of where he was walking. When he walked, he walked automatically. A man, when he is walking, can give his attention to what is taking place about him. It is a very different state of facts from where a man is required to do a mechanical piece of work, and where he cannot do it properly unless he directs his time and attention to that piece of work. In this case, therefore, the query is whether the jury would be justified, under the state of facts as narrated by the plaintiff and his witnesses, in saying that where a person is coming down for the purpose of crossing a railroad track, or an employe is coming down for that purpose, where are several tracks, and he finds a train upon one track, and waits for that to pass him, and after that goes

past him he can deliberately walk across to another track, on which he knows trains frequently run, without using his senses of sight and hearing, and still be in the exercise of due care.

* * * * * *

"To my mind the plaintiff's own testimony shows clearly that there was culpable carelessness on the part of this plaintiff; and if the jury should find, on its being submitted to them, that he was in the exercise of due care (and otherwise they could not find a verdict for him) it would be my duty to set the verdict aside."

We find no error in the instructions given to the jury prejudicial to appellant. Construed as a whole and according to their manifest intent, they are correct. The questions of fact in the case were fairly submitted to the jury, and the verdict was sustained by sufficient evidence. We think that the court below did not err in overruling the motion for a new trial, and the judgment must be affirmed.

---

46 405
54 128
46 405
57 333
46 405
64 328
64 332
65 273

PROBST & HILB v. WELDEN ET AL.

1. FRAUDULENT CONVEYANCE: *Withholding property from general assignment.*

Where a failing debtor makes an assignment purporting to convey all his property for the benefit of creditors, but intentionally withholds a valuable part, the assignment is fraudulent and void, as between the assignor and attaching creditors, though the part be withheld for the purpose of applying it to other debts not secured by the assignment, and be actually so applied.

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

S. R. Allen, for appellants.

It will be observed that the words of general conveyance in the deed are restricted by the "schedule thereafter," to be filed by the assignee.

The assignment was not, therefore, full and fair on its face as it was ruled by the court below, to be, in charges two and three, given for defendants. *Minns v. Armstrong, 31 Md., 87; Guerin v. Hunt, 6 Minn., 375.*

As the deed limited the conveyance to such property as the assignee should see fit to inventory, and as the assignors retained a part of the estate, it is clear that such was the intent secretly, though published as a general assignment. It was therefore void, and said second and third instructions for the defendant should not have been given. *Pierson v. Manning, 2 Mich., 445, 456; Roberts on Fraudulent Conveyances, 32; Bump on same, 70.*

The question in this case was one of mixed law and fact, and the strict rule as to not disturbing the verdict of a jury upon the question of "fraudulent intent" does not apply, and the court will set it aside when in other cases it might not. *Vance v. Phillipps, 6 Hill, 433; Cunningham v. Freeborn, 11 Wendall, 240.*

That any fraud, either of the assignee alone, the assignor alone, or both together, done after a valid assignment is made, will not affect the assignment, is conceded. But when it appears that the deed is framed that way, and both parties act in that way under it, the presumption it seems to me should then be conclusive. Although, as shown by the testimony of the assignee, that the assignors made and delivered him an inventory, it is by the deed restricted in its operation to be only as a matter of assistance to the assignee, and not as a part of the conveyance; the conveyance restricting itself to convey such as the

assignee should inventory. This is the only inventory known in the whole transaction. The point is, it seems to us, did the appellees assume to make a full general assignment, and reserve cotton, notes or any other property to be handled by them at their own will and independent of the assignment. If so, the assignment is void.

Clendenning & Read and *Geo. W. Williams*, for appellees.

The facts in this case do not constitute fraud, unless they were mere cloaks for concealing property for the assignors. No *actual* fraud existed—the property was parted with, or so set apart before the assignment. The statute is directed, not against the inconsistent possession, but a fraudulent design; not against fair and honest contracts, but conveyances made with intent to delay, hinder or defraud creditors. *Bump Fr. Conv.*, *63; 27 Tex.*, *437; 18 Ark.*, *141*, *122; 13 Penn. St.*, *592.*

The deed being fair on its face and extrinsic evidence necessary, to throw light on the intent, the jury were the sole judges of that question. *Bump Fr. Conv.*, *363.* All the law asks is, that the debtor give up all his property to the payment of his debts. *Ib.*, *356.* Even a concealment of part of the assets conveyed does not necessarily invalidate the assignment, but is merely a circumstance tending to prove fraud. *Ib.*, *402.* Nor is it absolutely necessary that a change of possession should accompany the transfer. *Martin v. Ogden*, *41 Ark.*, *186; ib.*, *378.* "Fraud must be proved. Mere conjecture or surmise, however probable or persuasive, is never allowed to establish fraud." *Ib.*, *366; Conway, ex parte*, *4 Ark.*, *302.*

"To render the assignment invalid, when good on its face, the fact of a fraudulent intent when making it must be legitimately found from evidence that will fairly sup-

port the finding, and it must also be an intent to commit a fraud on creditors by making the assignment, and not by some entirely independent act which might, and probably would, have been done precisely as it was, had no assignment been made or contemplated." *Wait Fraud. Con., 421; Livermore v. Northrup, 44 N. Y., 111; Wilson v. Forsyth, 24 Barb. (N. Y.), 128; Shultz v. Hoagland, 85 N. Y., 469.*

The assignors conveyed "all of our and each of our property, real, personal or mixed, wheresoever the same may be situated." If, then, the cotton and notes really belonged to the assignors at the time of the assignment they were conveyed to the assignee, and he could and should have taken possession. But it is claimed by appellants that the assignment, while general in terms, was limited by the schedule filed by the assignors. It is true that if a schedule containing only a part of the property is filed with an assignment which in general terms conveys all the property, but at the same time refers to the schedule as containing all the property, the assignment is limited by it. Such is not this case. The schedule filed by the assignors "as tending to assist the assignee" did not purport to contain the property assigned, nor does the assignment refer to it in any manner so as to restrict the property conveyed to that in it. All of the cases cited for appellants are limited to the schedules by a direct reference to them as containing the property. The statement in the assignment, "the inventory to be filed," refers to the inventory of the assignee upon taking possession. With the making and filing of this the assignors had naught to do. If done imperfectly it was the fault of the assignee; not a fraud of the assignors. The general terms in the assignment had full force and effect to convey all the property of the assignors because the schedule is not referred to in such a way as to restrict.

COCKRILL, C. J. This appeal is prosecuted to reverse a judgment dissolving an attachment. Both parties were mercantile firms. Probst & Hilb brought the suit against the appellees upon an account due them for merchandise, and sued out an order of attachment upon the ground that they had disposed of their property for the purpose of defrauding their creditors. Subsequently the affidavit for attachment was amended, and the appellees were then charged with having shipped a part of their property out of the state, not leaving enough therein to satisfy their debts. No defense was made to the main action, and judgment was rendered for the appellants, but the grounds for attachment being controverted, and a jury called to try that issue, a verdict was returned for the appellees and judgment dissolving the attachment was entered upon it.

The only question at issue was the truth or falsity of the allegations in the affidavit for the attachment. As to the first ground for attaching, the substanntial facts are as follows: Several months prior to the institution of the suit the appellees, being in failing circumstances, made an assignment for the benefit of their creditors. The assignment purported to convey all of the debtors' property of every character, to a trustee for the benefit of the creditors. A schedule or inventory of their property was made out by the debtors and delivered to the trustee with the deed of assignment. It was not referred to in the deed and did not state that it embraced all the property assigned. It was intended as a guide to the assignee in his effort to collect and identify the property. The schedule was made on the night of October 28, 1881, at the time the assignment was finally agreed upon and drawn. The assignment bears date and was delivered the next day. The proof shows that at the time of making out the schedule the debtors owned six bales of cotton, some promissory notes of the face value of $300, or more,

and several hundred dollars in currency, which they intentionally omitted from the schedule and failed to deliver to the assignee. Their explanation of this was that they intended to use these assets for the purpose of paying off the claims of certain home creditors, and they actually devoted them to that purpose, except the proceeds of two bales of cotton, which they say their agent embezzled. Before the assignment they had agreed to deliver the cotton to one of their creditors in payment of a debt due by the firm. The settlement was not consummated, but after the assignment the four bales were delivered on account, in pursuance of the agreement. The notes had been offered to another creditor in payment of his debt a short time before the assignment, but as his debt was already secured he declined to receive them in satisfaction; but when the schedule was made the assignors resolved to withhold them for the purpose of effecting a settlement with the creditor, and subsequently had them pledged to a bank in Fort Smith as collateral security for a loan of money to the creditor to discharge his debt.

The currency that was on hand at the time of making the schedule was delivered to their attorney just before the assignment was consummated, with instructions to carry it to Fort Smith and there pay off a note of the partners upon which a neighbor, whom they desired to protect, was liable as indorser. The attorney accepted the commission for them and discharged the debt after the assignment was executed.

FRAUDULENT ASSIGNMENT Withholding assets.

The assignors do not deny that it was their intention, at the time of making the assignment, to withhold a valuable part of their assets from the assignee and to withdraw that property from the operation of the assignment. As the assignment purported to convey all their property, and the schedule was in effect an assurance that it embraced, if not

the property conveyed, at least all that the assignors were then mindful of, with nothing concealed or intentionally omitted, the intentional withholding of a valuable part was a manifest deception. The suspicion of creditors would, naturally, be disarmed by the fair appearance of affairs, and they would be induced to rest quiet in the belief that the debtors had, in fact, appropriated all their property to the payment of their debts. The assignment would thus enable the debtors more successfully to convert the property reserved to their own use—it would become a cloak for the accomplishment of their secret designs. "An intentional omission" of property from a schedule under such circumstances, as is well said by the New York court of appeals, "calculated (as it is) to deceive and lull into slumber and inactivity the interest and diligence of the creditor, would plainly argue a fraudulent purpose." *Shiltz v. Hoagland, 85 N. Y., 464; Bank v. Halsey, 57 Barb., 249; Craft v. Bloom, 59 Miss., 69.*

Here the withholding was confessed to be intentional, the design was coeval with and entered into the execution of the assignment, and if the facts were not explained by the debtors, the court or jury trying the issue were not at liberty to withhold the brand of fraud—so far at least as the assignors were concerned.

The only explanation offered was that the assets were reserved with the intention of devoting them to the payment of certain home creditors, who were not preferred by the terms of the assignment. The fact remains, however, that the property was really reserved for the time to the use of the assignors. That, the law inhibits. The preconceived intention, to devote the property to the payment of debts, could not change the legal effect. There was nothing to prevent a change of the purpose at any time; and, moreover, the commission of an act unlawful

in itself is not made legal by the fact that it proceeds from a commendable motive. In *Sparks v. Mack et al., 31 Ark., 666*, it was ruled that a deed fraudulent in its inception could not be made good as to third persons by a subsequent parol agreement. The deed under consideration designated the creditors who were to receive a preference under its operation, and each of the other creditors had a right to infer that when those named were paid, the residue of the assets would be distributed ratably among the others. Besides, if the assignors could administer upon any part of the property they affected to assign, or control it for a purpose not contemplated by the assignment, what would prevent them from secretly enjoying the fruits of it if they so elected? The creditors for whose benefit the reservation was intended had no power or control over it. It was not their property, and when the two bales of cotton were lost, the creditor for whom they were intended did not pretend to assume the loss. It is true it was the duty of the assignee, if he assumed to act under the assignment, to take possession of this property as of the other assets, but that would not affect the intention of the debtors in making the assignment. In contemplation of law, that act was a fraud upon the appellants' rights. It is not necessary for us to determine whether the assignee participated in the fraud, or whether his participation was essential in order to avoid the deed. The only parties concerned in this litigation are the attaching creditors and the assignors in the deed. The real and personal assets assigned by the debtors are attached as their property in this action, but neither the assignee nor any one else has seen fit to intervene and assert a claim to any part of it. The title to the property is therefore not in issue, and we can make no adjudication about it that would be binding on an adverse claimant, if there is one. The

defendants to the action having made the conveyance with a fraudulent intent, the attachment should have been sustained, regardless of any other question. *Enders v. Richards, 33 Mo., 598.*

Upon the second ground the appellants sustained their position without contradiction under the rule announced in *Durr v. Hervey, 44 Ark., 301.*

As the judgment is contrary to the evidence, it must be reversed, and the case remanded for a new trial.

LITTLETON V. STATE.

1. BAIL-BOND: *How enforced.*

The proceeding by *scire facias* to collect the penalty of a forfeited bail-bond is not exclusive of the common law action upon the bond. Either may be pursued; but the proceeding by *scire facias* must be in the court in which the default was made.

2. SAME: *Defenses by bail. Duress.*

It is not necessary to the validity of a bail bond that the accused should sign it, and the relation of principal and surety between him and his bail exists only in a qualified sense, and it is no defense to an action on the bond against the bail, that the accused was illegally in custody at the time it was taken.

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

Harrison & Crownover and *Davis & Bullock* for appellants.

First—The complaint should have been stricken from the files because it was altogether unnecessary, and the summons should have been quashed, because it was fatally defective in failing to require appellants to appear and show

cause why judgment should not be rendered against them for the sum specified in the bail-bond, on account of the forfeiture thereof. *Mansfield's Digest, sec. 2068; Miller v. State, 35 Ark , p. 277; Thomm v. State, 35 Ark., 328.*

Second—The circuit court had no jurisdiction to try and render judgment in this case, because the forfeiture was not incurred in that court. The justice court of Delaware township alone had jurisdiction, because the forfeiture was incurred there. The circuit court had no connection whatever with the bail-bond. The prisoner was not bound to appear there. The statute expressly and positively says that the action on the bail-bond shall be in the court in which the defendant was required to appear. *Mansfield's Digest, sec. 2067; Flynn v. State, 42 Ark., p. 315; Cauthorn v. State, 43 Ark., p. 129.*

Third—It will not be denied, we apprehend, that the arrest of Easley at his home, in Logan county, by the deputy sheriff of Yell county, on the justice's warrant from Yell county, was unlawful. If so, then he was not legally under arrest, and was unlawfully restrained of his liberty at the time the bond was executed by appellants to procure his release, and such bond must necessarily be void. Hence, the declarations of law made by the court below must be erroneous. It makes no difference whether the bond was executed in Logan county, or executed after Easley had been unlawfully forced down into Yell county. *Blevins v. State, 31 Ark., p. 33; Chitty's Criminal Law, vol. 1, p. 49; Bishop's Statutory Crimes, vol.—, p. —.*

Dan W. Jones, Attorney General, for appellee.

The complaint sufficiently set out a cause of action. The appellants appeared in obedience to the summons and made answer to the complaint. By the repeated decisions

of this court appearance and answer waived any informalities in the summons, if any in fact existed.

Though unnecessary the complaint was not improper.

While forfeiture by the justice was legal, judgment on the bail bond could not be rendered by him, it being beyond his jurisdiction. *Con., art. 7, sec. 40.* The circuit court properly exercised jurisdiction and the findings of fact and declarations of law by the court were correct and sustained the judgment.

STATEMENT.

Upon a warrant issued by a justice of the peace of Yell county for the arrest of William Easley for a misdemeanor committed in Yell, the sheriff of that county arrested the accused in Logan county and brought him back to Yell county, and there took from the appellants a bail bond for the defendant's appearance before the justice at a day specified in the bond, and discharged him. The defendant failed to appear before the justice as required by the condition of the bond, and the state brought this action by complaint and summons in the circuit court of Yell county against the bail. The bond was not signed by the defendant. The defenses to the action were: *First*—That the circuit court had no jurisdiction—the forfeiture of the bond being in the justice's court. *Second*—Duress: That the arrest in Logan county by the sheriff of Yell and his subsequent custody of the defendant in Yell, were illegal and the bond was void for duress. There was final judgment against the appellants for the penalty of the bond ($500) and they appealed.

OPINION.

COCKRILL, C. J. It is claimed that the proceeding by *scire facias* to collect the penalty of a forfeited bail bond is exclusive of all other remedies, and that as this was an ordinary action upon a complaint filed in a different court from that in which the condition of the bond required the accused to appear, the court erred in refusing to grant the appellant's motion to dismiss the action.

1. Bail bond, how enforced.

The statute requires the prosecuting attorney to sue out a *scire facias* where default has been made, but it does not negative or preclude the right to proceed by action on the bond. At common law such recognizances could be enforced by an action of debt, and while the proceeding by *scire facias* is the one primarily contemplated by the statute, it does not exclude the old action. The question has arisen in other tribunals, where it is held that either remedy may be pursued. *Com. v. Green, 12 Mass., 1; State v. Gorley, 2 Iowa, 52; St. v. Glass, 9 ib., 325; St. v. Kinne, 39 N. H., 129; St. v. Welch, 59 ib., 134.* The correctness of this practice was intimated in *Cauthron v. State, 43 Ark., 128*, and is now fully approved.

If this proceeding were by *scire facias*, instead of an ordinary action on the bond, it would fail, because in that form of proceeding the record must be in the same court in which the default was made. *Cauthron v. State, supra.*

2. Duress as defense to action.

But it is maintained that the prisoner was illegally restrained of his liberty, and the bond having been executed for the sole purpose of releasing him therefrom, could not be enforced. The caption, the original arrest of the person for whose appearance the bond was given, was illegal. It was made by the sheriff of Yell county in the county of Logan, and not in hot pursuit of the offender. In Logan county the sheriff of Yell had no official authority and no

power to execute the process. But the bond was taken by the sheriff of Yell, in the latter county, while the prisoner was in his custody, and there a charge was pending against the prisoner for an offense cognizable before the magistrate who issued the warrant of arrest. Upon a trial for the offense under the circumstances, or upon an application by the prisoner to be released from imprisonment upon *habeas corpus*, the courts refuse to inquire into the manner or circumstances of the arrest, even though it has been made by force in a foreign jurisdiction. *Elmore v. State, 45 Ark., 243; ex parte Scott, Barn. & 9 Cress., 442; Davis' Appeal, 16 Penn. St.; ex parte Coupland, 26 Texas, 386; People v. Rowe, 4 Park. (N. Y. Cr. Rep.), 253; State v. Ross, 21 Iowa, 467.*

As the prisoner is entitled to discharge upon bail in every case of misdemeanor, it is difficult to see what greater right he has to have the court inquire into the manner or place of his arrest, after release, than he had before. As it is a question in favor of liberty, it would seem that the courts would more readily inquire into the cause of his complaint while the restraint is upon him. And so it has been held that after bail in a criminal case no objection can be taken to the manner of the arrest. *Peck v. State, 63 Ala., 201; Stever v. Stornberger, 24 Wend., 275; Springfield Man'f'g Co. v. West, 1 Cush., 388.*

In *Plummer v. People, 16 Ill., 358*, in a proceeding by *scire facias* upon a forfeited recognizance, and where the principal was a party to the bond and pleaded duress, the test applied by the court was whether he would have been released on *habeas corpus* at the time of executing the bond.

But if the detention of the principal was illegal and would have avoided the recognizance as to him, it does not follow that the bail should be released. It is a general rule of law that duress to avoid a contract must have been laid

upon the party pleading it. A principal can never be released for duress done to another. Some confusion in the cases exists as to whether a surety may avoid his obligation by reason of the duress of his principal. Without entering upon a review of the cases, it is sufficient to say that the limit to which any well-considered decision that has come under our observation has gone, is that if one is a surety, and no more, and enters into the contract in ignorance of the duress of the principal he may avail himself of the duress as a defense, because if the privilege is denied him he would be deprived of redress against his principal without fault on his part. *Griffith v. Sitgreaves, 90 Penn. St., 161; Brant on Surety, etc., sec. 5.*

But that reason cannot apply in favor of bail in a criminal case, because the law affords them no redress against their principal upon payment of their recognizance. The recognizance is a primary undertaking on their part. It is not necessary that the prisoner should be a party to it. *Tilson v. State, 29 Kans., 452.* The statute does not require it (*Mansf. Dig., secs. 2042, 2047*), and in *Highmore on Bail, p. 204*, it is said: "The penalty in the recognizance is no other than as a bond to compel the bail to a due observance thereof and has no connection with the principal; they could not sue him thereon for money paid to his use or on his account, for it was paid on their own account and for their own neglect." Payment of the recognizance, in no way, operates as a discharge of the principal's obligation to appear in court, and that obligation may be enforced by the state after bail have been discharged by payment of the recognizance. The object of the state in requiring bail is not pecuniary compensation, but to require the presence of the accused to the end that justice may be administered; and in order that they may escape the payment of the penalty, extraordinary remedies are given to the bail against

the person of the accused. They are his *quasi* jailors and it is to compel the performance of their duty as such that the bond is taken. Exacting the penalty of the bond of the bail is the punishment for neglect of this duty, not for any act of the accused. The relation, therefore, of principal and surety between the accused and his bail exists only in a qualified sense. The Supreme Court of the United States have recently reviewed the question of the relative rights of principal and bail, and conclude that it is against public policy to aid the bail to relieve themselves from the punishment meted out to them for their neglect in failing to surrender their principal to justice. *U. S. v. Ryder, 110 U. S., 729.*

This being true, no principle suggests itself which would permit the duress of the accused to inure to the benefit of his bail. *Huggins v. People, 39 Ill., 241; Plummer v. People, supra.*

We are aware that there are cases upon bail bonds in which the sureties have received the benefit of the duress of the principal, but an examination will show that in most of them there was a fundamental defect in the proceedings which led to the arrest that in effect rendered it and the bond taken in pursuance of it void, as in *Fisher v. Shattuck, 17 Pickering, 252*, where the magistrate requiring the bond had no jurisdiction of the subject matter, and hence no authority whatever. The same court in later cases, without inconsistency, refused to receive the plea of duress of the principal from a surety. *Robinson v. Gould, 11 Cush., 55; Bowman v. Hiller, 130 Mass., 153.*

The case of *Blevins v. State, 31 Ark., 53*, is of the same class as *Fisher v. Shattuck.* There the sheriff of Pope county, under process issued to him from Pope, made an arrest and took bail in Conway county. The court held that in Conway county the sheriff of Pope had no official

capacity, and that a bond taken there by him was no more than a bond executed by a private citizen, and was, for that reason, a nullity.

Other cases, where the surety has been relieved, come within one of the generally recognized exceptions to the rule, as where the father is surety for the son, or the husband for the wife. *Schee v. McQuilken, 59 Ind., 269.*

The judgment of the court is right and must be affirmed.

MENDEL & BRO. v. DAVIES.

46 420
81 48

46 420
90 305

1. RELEASE: *Consideration. Contract against public policy.*

An argreement by an attorney at law to release his debtor from his debt on condition that the debtor will give him the collection of a claim sent to him by his correspondent, but in which the debtor had no pecuniary interest as collecting agent or otherwise, is without consideration and not enforceable, though the debtor deliver the claim to the attorney for collection; or, if there be a consideration, the agreement is against the policy of the law which forbids a trustee, agent or bailee, without reward, to use the trust property or subject matter of the agency or bailment, or his relation thereto, for his own private advantage.

2. CONTRACTS: *Unlawful, not enforceable.*

Where the ground of a promise on one part, or the thing promised to be done on the other part, is unlawful, the courts will not enforce the contract for either party.

APPEAL from *Hot Spring* Circuit Court.
HON. J. B. WOOD, Circuit Judge.

Thomas C. Peek for appellant.

The contract *was executed*, and the firm of attorneys received a benefit, a consideration, something of value, for

their release and satisfaction of their disputed claim. Anything that is of benefit to one or a detriment to the other is a sufficient consideration.

R. G. Davies, pro se.

This is a case where a man who is acting as the agent of another to employ an attorney for that other, gets himself hired (so he says) to employ a firm of lawyers by an arrangement with one of the firm in consideration of his employing the services of the firm of lawyers that the firm of lawyers are to give him $120, the amount of a just account they hold against him. To say that such a contract would be binding on the firm, the other partner, an innocent purchaser of the account, or anybody else, would be an insult to the intelligence of the court. And any man who would make such a contract is not worthy of belief. If the appellant ever made any such a contract he ought never to have mentioned it. One who stands in the relation occupied by the appellant cannot use the subject matter of his agency or the relation which he bears to it for his own personal benefit. See *Perry on Trusts, p. 533, vol. 1.*

SMITH, J. Townsend & Morphy, a firm of lawyers, had a demand against Mendel & Bro. for professional services rendered. Morphy afterwards removed from the state, and Townsend sold the account to Davies, who brought an action. Mendel & Bro. pleaded accord and satisfaction; but on a trial before the court without a jury, the finding and judgment were against them.

CONTRACT: Illegal consideration.

The evidence tended strongly to show that Morphy, before leaving the state, had agreed with Mendel & Bro. to release or forgive this debt upon condition that they would

place in the hands of his firm a certain claim, of which they had control, in favor of E. Kahn & Co., of Cincinnati, against a merchant of Hot Springs; and that the condition had been performed. The defendants had no pecuniary interest, either as collection agents or otherwise, in the claim. They were merchants, and the claim had been sent to them with directions to select and employ some attorney to look after the creditor's interests, the debtor being in failing circumstances. The circuit court declared the law to be, "that the defendants, having been intrusted by E. Kahn & Co. with the duty of engaging for them the services of an attorney, and having assumed such duty, had no right to stipulate with such attorney that he should pay them a valuable consideration for such employment; and if the defendants, in employing Townsend & Morphy for Kahn & Co., and in consideration thereof agreed with Morphy that the claim sued on was settled, such agreement was invalid and no defense to this action." The correctness of this declaration is the only point in the case.

The promise of Morphy to cancel the debt due his firm by the defendants was wholly gratuitous; nothing of value, in the eye of the law, moved from the promisees; or, if there was a consideration, it contravened the general policy of the law, which is that a trustee, agent or bailee without reward cannot use the trust property or subject matter of the agency or bailment, or his relation thereto, for his own private advantage. And where the ground of the promise on one part, or the thing which is promised to be done on the other part, is unlawful, neither party can derive any assistance from a court of justice to carry it into effect. To enforce such contracts would encourge men to violate their duties, and engage in speculations for their own benefit, to the hazard or possible detriment of those

to whom they have assumed to render a voluntary courtesy.

Regularly, Townsend & Morphy should have been parties to this action, either plaintiffs or defendants; the assignment of an account not being authorized by statute. The defect was, however, waived by going to trial without objection. The old rule was that an account was not assignable, so as to vest the legal interest in the transferee and enable him to sue in his own name. But now, with a few enumerated exceptions, all actions are required to be prosecuted in the name of the real party in interest. *Mansf. Dig., secs. 4933-4; Anderson v. Lewis, 10 Ark., 304; Yonley v. Thompson, 30 ib., 399.*

Affirmed.

LITTLE ROCK & FORT SMITH RY. v. ATKINS.

46 423
58 131
46 423
77 10
46 423
82 507
46 423
86 328

1. INSTRUCTIONS: *Modification of. Practice in Supreme Court.*
When an instruction is modified and then given, but the record fails to show the modification, or in what form the instruction was finally given, the Supreme Court will presume that as modified it embodied the law.

2. RAILROADS: *Contributory negligence. Onus of proof of.*
Contributory negligence is a defense and must be proved by the defendant who alleges it, and therefore holds the affirmative of the issue.

3. SAME: *Contributory negligence. Leaving a moving train.*
It is not negligence *per se* for a passenger to leave a moving train. Whether it be so in a particular case depends upon the rapidity of the motion, the fact whether it is day or night, the distance from the car to the ground or surface upon which the passenger alights, the age and vigor of the party, and whether he takes the risk by the command or encouragement of the company's agent in charge of the train, or to escape a greater peril.

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

J. M. Moore, for appellant.

Appellee's plain duty was to have informed the conductor that she needed assistance to get off the train, and then to have waited for him to stop the train and come to her assistance, and if he failed to do this, as is claimed in this case, and caused the train to start without giving her opportunity to get off with that degree of care that it was proper should have been exercised by a person in her feeble condition, it was her duty to have remained on the car.

It is true that the court, in the second instruction asked by the plaintiff, announced in an abstract way that if the plaintiff's injury was caused by her negligence the defendant was not liable. But we are entitled to have the instructions based upon the facts as established by the evidence. The instructions that the court refused were drawn with reference to the peculiar facts in evidence and for the purpose of informing the jury as to the correlative duties and liabilities of both the parties. As was said by Mr. Justice HARRISON in *St. L., I. M. & S. Ry. Co. v. Cantrell, 37 Ark., 526*, "it may, as a general proposition, be said that it is imprudent and a want of ordinary care to alight from a train while it is in motion; but whether it was so in a particular case must depend upon the circumstances under which the attempt was made." It was for the purpose of calling the attention of the jury to the circumstances under which the attempt was made in this case that we offered the instructions that were refused.

There are numerous elements to be considered in determining the question of negligence in the most of cases where it relates to the exposure of the person, and is re-

lied on to defeat a recovery on account of the negligence of another party. A risk that would, *per se*, be negligence and imprudence under one state of facts, may not be so held under different circumstances. As in the Cantrall case, where the party relied on the directions of the defendant's servant, or in the very familiar case where one has to elect between two perils; but standing alone, and without any circumstances to excuse or justify it, the attempt to get off a train while it is in motion, is universally condemned by the courts as negligence, precluding any right of recovery by the party who attempts it. Nor will the courts permit a party to balance an inconvenience, such as that of being carried by one's station, against the hazard of such an attempt. *Lake Shore & M. S. Ry. v. Bangs, 47 Mich., 470; Burrows v. Erie Ry. Co., 63 N. Y., 556; Gavett v. M. & L. R R. Co., 16 Gray (Mass.), 506; Jewell v. Ch. St. P. & M. Ry. Co., 6 Am. and Eng. Ry. Cases, 379; 54 Wis., 510; Cumb. Valley R. R. Co. v. Manyans, 61 Md., 53.*

Here we have an elderly lady, weak, feeble and infirm, with a large, heavy valise in her right hand, the side upon which was the railing of the platform, attempting to step off a moving train without any assistance, and stepping with her right foot forward, an awkwardness by which the most vigorous person would have been almost certain to have tripped and fallen.

Moreover, the plaintiff testifies that when she got to the door, before she went out on to the platform, the train was in motion; she admits that the attempt was dangerous, but thinks she would have succeeded if she had not been encumbered with the valise. We venture to assert that no case can be found in which a right of recovery has been maintained under such facts as are in evidence in this case. *Secer and others, v. T. P. & W. R. Co., 10 Fed.*

Rept., 15; R. R. Co. v. Aspell, 23 Pa. St., 149; C. R. & B. Co. v. Letcher, 69 Ala., 106.

Upon the question as to the duty of the defendant to have assisted the plaintiff in alighting, there is no evidence that she requested the conductor to assist her, or gave him notice that she would need assistance, or that it was the custom of defendant to assist passengers in alighting. Under these circumstances no negligence could be imputed to the defendant on this ground, and the court should have given the instructions asked by defendant on that point. *Sherman & Redfield on Neg., sec. 278; N. O. R. R. Co., v. Statham, 42 Miss., 607.*

The law does not require of railroad companies that they shall regulate the length of the stoppage of trains at the stations with reference to the disabilities of the feeble and infirm, unless notice is given to the servants in charge of the running of trains.

We asked instructions embodying this principle and the court refused them, leaving the jury without any guide on that point. It was very natural to expect that, in the absence of instructions as to the law, the jury would conclude that it was the duty of the conductor to hold the train until he saw the plaintiff safely off, on account of her special need of protection, although there is no pretense that notice was given him. *T. W. & W. R. R. Co. v. Baddeley, 54 Ill., 19; 2 Wood on Ry. Law, p. 1128.*

A. S. McKennon and *J. E. Cravens* for appellees.

Under our view of the law, this court cannot disturb the judgment in the case, unless it declares that the plaintiff, Ruth Atkins, in stepping from the train to the platform, while it was in slow motion and had not moved

more than five feet, as shown by the proof, was contributory negligence, *per se.*

Under the circumstances her act cannot be so declared as a matter of law, is our sincere judgment.

Was the plaintiff in the performance of her duty to leave the train guilty of such carelessness in stepping from the train as to defeat her recovery? in other words, was her conduct different from that which might be expected from ordinarily prudent persons under like circumstances? If not she was not guilty of contributory negligence, although it may be apparent that if she had remained on the train no injury could have resulted. The court, we think, properly defined in the fourth instruction, *negligence*, as applicable to the plaintiff, and in the remaining instructions so charged the jury, as that they were at perfect liberty to take the most favorable view possible in the interest of the appellant, of any and every fact tending to establish such negligence on the part of the plaintiff. The instructions asked by the plaintiff were drawn to be liberal and fair; and, in addition, those asked by the defendant, numbered one, two and three, given in full, and four, modified by the court, are more than liberal, and perhaps, some of them would not have been given had objection been made. The second and third assume a great deal more than any view of the testimony warrants. The proof is very clear that the plaintiff would have reached the platform in safety, with her valise in hand, had the train remained standing a moment longer. In the first instruction the jury are told that, if they believe the train stopped long enough to enable the plaintiff to have alighted, by the exercise of reasonable diligence, they will find for the defendant.

No one can justly assume from the evidence in this cause that the plaintiff needed more than the usual time to

get off, or that her age or feeble condition was such as to require a longer stop than usual to enable her to get off.

If trains take old people as passengers, they, as well as young people, are entitled to a reasonable time in which to alight from the trains in safety. Upon this point we refer to the identical case referred to in the appellant's brief. *T. W. & W. R. R. Co. v. Baddeley (54 Ill., 19), 5 Am. R, p. 71.*

The fifteen instructions of defendant were properly refused, all points of value to the appellant having been covered by the instructions given, and, if correct in this, the only question is as before stated, whether the cause should have been submitted to the jury. Under our constitution, this court has repeatedly held that if there is any evidence in support of the plaintiff's cause, however slight, it is the province of the jury to pass upon it.

As to whether the plaintiff was guilty of contributory negligence, *per se*, or as a matter of law, we call attention to the following authorities: *Cumberland Valley Railroad Company v. Mangans (61 Maryland Reports, 53), 18 A. & E. Railroad Cases, p. 182; 17 Mich., 99; 49 N. Y., 47.*

As to the question of negligence in leaving the train while in slow motion, and who should determine it, see *59 Mo., 27; 4 Ont. Rep., 201; 45 Ga., 288; 66 N. C., 494; 53 Ill., 510; 54 ib., 133; 46 Texas, 356; 21 A. & E. Ry. cases, 364; 98 N. Y., 128; 37 Ark., 523.*

SMITH, J. Atkins and wife recovered a verdict and judgment for $1,200 on account of injuries sustained by the female plaintiff in alighting from one of the defendant's trains. The answer denied negligence on the part of the company's servants, and alleged that the plaintiff was guilty of contributory negligence.

The object of the appeal being to test the correctness of the instructions that were given and refused, we state so much of the evidence as is necessary to show their relevancy.

Mrs. Atkins was a passenger bound for Knoxville, a station on the defendant's road, which the train reached, in daylight, twenty minutes late. The testimony conflicted as to the length of the stop made. Some of the witnesses stated that the train barely came to a halt, and immediately proceeded on its way. The trainmen and others in the employ of the defendant deposed that the stop was sufficient to enable passengers to alight in safety—say from thirty seconds to two minutes. As soon as the train became stationary Mrs. Atkins left her seat and went to the platform of the car. One witness swore that she hesitated, and appeared to be looking out for friends to meet her, and acted so irresolutely as to produce the impression, in the mind of the witness, that it was not her intention to debark at the station. She stated, however, that she lost no time, but when she reached the platform the train had started again. All the witnesses agree that it was then moving very slowly, having gone only a few feet. Mrs. Atkins was encumbered with a heavy valise, and attempted to step from the car platform to the station platform adjacent. She fell and sustained serious injuries. Her age was fifty-eight years, and she says that she was as active as persons of that age usually are. A merchant testified that she was in his store about five months before that, and was so feeble that she had to remain seated while he waited upon her. Another witness said that he had lived neighbor to her two years ago, and she was in very feeble health. Still another testified that she staggered as she walked from her seat to the door of the car. But this may have been caused by the valise which she carried in

her hand, or by rising from her seat simultaneously with the stoppage of the train.

The following directions were given at the instance of the plaintiff:

First—Railroads are public carriers, and the utmost care is required of them for the safety of passengers upon their trains.

Second—A passenger is entitled to a reasonable time to leave the car in which he has been riding. When a train is stopped for that purpose, and when reasonable time is not in fact allowed to get off in safety (of which juries are the judges), and in attempting to do so, without fault on his part, injuries result to him, he is entitled to recover from the railroad company for such injuries.

Third—If the jury find that the plaintiff, Ruth Atkins' own negligent conduct caused, or contributed to cause, the injury received by her, they will find for the defendant.

Fourth—Negligence consists in a want of the reasonable care which would be exercised by a person of ordinary prudence, under all existing circumstances, in view of the probable danger of injury.

Fifth—If the jury find from the evidence in this cause that the defendant's train did not stop at the station at Knoxville long enough to enable the plaintiff, Ruth Atkins, to leave the car and reach the platform while the train was stationary, and that she stepped off therefrom on the platform while the train was in motion, it is a question for the jury to say whether she was guilty of negligence, as above defined, and barred thereby from a recovery for the injuries received.

Sixth—If the jury find from the evidence in this cause that the defendant's train did not stop long enough at the platform to allow the plaintiff to leave the train while

standing, and that she stepped therefrom while it was in such slow motion as not to indicate recklessness, imprudence or negligence, as heretofore defined, and that she received injuries by a fall from the motion of the train, she is entitled to recover, and if you find for the plaintiff, Ruth Atkins, you will assess her damages at a sum sufficient to compensate her for injuries sustained, the pain suffered, the effects of the injury on her health according to its degree and probable duration, the expense to her of her sickness resulting from the injury and of attempting to effect a cure.

The court gave the following instruction on its own motion, against the objection of defendant:

"A reasonable time to get off as mentioned in these instructions is such time as it usually requires for passengers to get off and on the train at that station in safety."

In behalf of the defendant the court charged as follows:

First—It was the duty of the plaintiff to exercise reasonable diligence in alighting from the train upon its arrival at the station; and if you believe the train stopped long enough to enable her to have alighted by the exercise of reasonable diligence, you will find for the defendant.

Second—Railway passengers are required to take notice of the usual regulations. Where it is the custom to signal the approach to a station by the blowing of a whistle, and to announce the name of a station in the cars for the purpose of giving notice and opportunity to passengers to be in readiness to depart without delay when the train stops; and when these regulations are observed, it is the duty of the passengers to make themselves ready to get off at once, and if there is any reason why they need assistance, or require more than the usual time, they should notify the officers and servants in the train.

Third—The defendant was under no obligation or duty to the plaintiff on account of her age or feeble condition, to assist her off the train, or to stop longer at the station than was usual, to enable her to get off, unless she had notified the conductor or some employe on the train of her condition.

The defendant also prayed the following direction:

Fourth—If the act of the plaintiff in attempting to get off the train after it had started was such as a prudent person in her condition, exercising care proportioned to the danger, would not have done, the defendant is not liable for the injury, and the jury in deciding whether it was prudent for her to attempt to alight, will take into consideration her age and physical condition. A passenger who is old and feeble has no right to take a risk that a person in that condition cannot prudently take and throw the consequences upon the carrier, the railroad company in this case.

The bill of exceptions recites that the court struck off from this instruction the ordering words at the end thereof, and gave the residue of said instruction to-wit: "If, in this cause, you believe from the evidence the plaintiff delayed and remained in the car longer than was usual, and on account of such delay was too late to get off before the train started, the defendant is not liable for her injuries, and you will find for the defendant."

The court refused the following requests of the defendant:

Fifth—It was the duty of the defendant upon the approach of the train to the station to announce the name of the station, and of the plaintiff to get herself in readiness to get off as soon as the train should arrive and stop at the station, or if from age and debility, she was not able to get off with usual diligence, or without assistance,

it was her duty to notify the defendant's servants of her condition. Upon the arrival of the train it was her duty to get off at once, and the defendants were required to stop the train a reasonable length of time to enable the passengers to alight; but they were not required to stop longer on account of any inability of plaintiff to get off promptly, or to assist her in alighting, unless she had notified them of her condition. A reasonable time was as much time as usually had enabled passengers to get off and get on the train at that station in safety.

If you believe that no notice was given that plaintiff required assistance, or more than the usual time to get off, and that the train stopped a reasonable time at the station, you will find for the defendant, even though she may have been unable to get off within the usual time or without assistance. If the train was not stopped a reasonable time to enable the plaintiff to get off, it was her duty to remain in the car and request the employes in charge of the train to carry her back to the station, and, if they refused, to go on to the next station, and she would have been entitled to sue and recover from the defendant damages for the annoyance and inconvenience caused to her by being carried by her station; but she had no right to run any risk of injury by attempting to get off after the train had started. And if, from her age or weak and feeble condition, it was imprudent for her to attempt to alight after the train was in motion, the defendant is not liable for the injury that resulted to her, and it is your duty to find for the defendant.

Sixth—If she was infirm from recent illness and was by that reason prevented from alighting before the train started, when a person free from injury could, by reasonable diligence, have alighted, and did not notify the employes on the train of her feeble condition, the defendant

is not liable for the injuries, and you will find for the defendant.

Seventh—If you find that the plaintiff, upon the arrival of the train at Knoxville, did not immediately proceed to get off, but delayed for a time, waiting or looking for friends to meet her, and that it was by reason of her delay that the train was put in motion before she got off, the defendant is not liable for her injuries, and you will find for the defendant.

Eighth—If you believe from the evidence the plaintiff was looking for friends to meet her at the depot, and when the train stopped that she delayed, looking for her friends, instead of getting off at once, and was thereby delayed until it was too late for her to get off before the train started, you will find for the defendant, although you may believe the defendant was negligent in not stopping the train a greater length of time.

Ninth—If you find from the evidence that the train was stopped the average length of time at the station that passengers were in the habit of getting off and on at that station, and the time had always, on previous occasions, been sufficient, there was no negligence on the part of the defendant, and you will find for the defendant.

Tenth—If you believe the train was stopped long enough to enable passengers of usual health and vigor to have alighted by the exercise of reasonable diligence, you will find for the defendant, unless you further find defendant's servants were notified that plaintiff was unable to get off within the usual time.

Eleventh—If you believe the plaintiff's injury was caused by the mutual fault of the plaintiff and defendant, you will find for the defendant, although defendant's fault may have been greater than plaintiff's.

Twelfth—The mere fact of the injury does not render defendant liable. It must have been caused by defendant's negligence, unmixed with any fault on plaintiff's part. And the plaintiff must prove negligence on the part of the defendant, and that she was free from negligence on her part. And unless you find from the weight of the evidence, *first*, that defendant was guilty of negligence which contributed to her injury; and, *second*, that she was free from fault or negligence, you will find for the defendant.

Thirteenth—If you believe from the evidence that the plaintiff's injuries were caused by her attempting to get off the train while it was in motion, that she was at the time old and feeble, you will find for the defendant, even though you may believe defendant was guilty of negligence in not stopping the train a longer time at the station.

Fourteenth—If you believe from the evidence that the plaintiff was old and infirm to such an extent that it was dangerous for her to attempt to get off the train while it was in motion, you will find for the defendant, although you may believe defendant was negligent in not stopping the train longer at the station.

Fifteenth—If the defendant was aged and feeble, so that she needed assistance in alighting from the cars, it was contributory negligence for her to attempt to get off the cars while the train was in motion, and you will find for the defendant, although you may believe the defendant was also negligent in not stopping the train longer at the station.

Sixteenth—If you believe from the evidence that it was imprudent, in view of her age and feeble condition, for the plaintiff to attempt to get off the train while it was in motion, you will find for the defendant, although you may believe that the train was not stopped long enough to give her time to alight.

Eighteenth—If the plaintiff was old and feeble, and attempted to get off the train while it was in motion, with a heavy valise in her hand, such act constituted contributory negligence on her part, and she cannot recover in this action.

An exception in mass was attempted to be reserved to the six instructions given in behalf of the plaintiff. We perceive no serious objection to any of them, nor to the direction given on the court's own motion.

1. INSTRUCTIONS: Modification of. Practice in Supreme Court.

We confess our inability to comprehend what modification the court made of the fourth prayer of the defendant, what portion of it was granted and what rejected, and in what form the instruction was finally given. Under such circumstances, the presumption is the instruction as modified embodied the law. *Smith v. Childress, 27 Ark., 328; St. L., I. M. & S. Ry. Co. v. Hecht, 38 ib., 357.*

Of the denial of the remaining prayers, error cannot be justly predicated. The fifth, sixth, thirteenth, fourteenth, fifteenth, sixteenth and eighteenth assume the existence of a state of facts, of which the record contains no evidence, viz.: the enfeebled and debilitated condition of the plaintiff. Whatever of value or sound law was contained in the seventh, eighth, ninth, tenth and eleventh had already been given in charge to the jury. The repetition and reduplication of instructions is a practice not to be commended. All the law applicable to this case, which it was necessary for the jury to know, might have been expressed in half a dozen concise propositions.

2. CONTRIBUTORY NEGLIGENCE: *Onus* of proof.

The twelfth prayer announced an incorrect rule of law. Contributory negligence is a defense and the proof of it devolves upon the defendant, who alleges it, and therefore holds the affirmative of this issue. The courts of last resort in Massachusetts and several other states have, indeed, adopted the contrary principle—that the plaintiff

must show he was in the exercise of due care, at the time the injury happened. But this, it is believed, is inconsistent with the rule of evidence, adjusting the burden of proof according to the state of the pleadings; and it is certainly opposed to the weight of authority as settled in England, in the Supreme Court of the United States and a majority of the states of the union. The cases on this subject are collected in *Beach on Contributory Negligence, secs. 156-7.*

This court has already given in its adhesion to the more reasonable rule—that the plaintiff will be presumed to have been ordinarily prudent until the contrary appears, either from his own evidence, or that of the defendant. *T. & St. L. R. Co. v. Orr, ante 182.*

The jury in this case might well have concluded from the testimony that the railroad company had not afforded a reasonable time to passengers, who held tickets for Knoxville, to leave the cars in safety.

3. SAME: Leaving moving train.

The next question was whether the plaintiff was herself negligent, either in getting off promptly or in getting off at all, under the circumstances in proof. These were essentially questions of fact; and some of the rejected prayers sought to take the last mentioned question from the jury. It is not negligence *per se* for a passenger to leave a moving train. As was said by Mr. Justice HARRISON in *St. L., I. M. & S. Ry. Co. v. Cantrell, 37 Ark., 526,* "It may, as a general proposition, be said, that it is imprudent and a want of ordinary care, to alight from a train while it is in motion; but whether it was so in a particular case must depend upon the circumstances under which the attempt was made. It would not be so, if the train was moving so slowly that no damage could be reasonably apprehended." Whether it was culpable or excusable, depends on the rapidity of the motion, the fact whether it is day or night, the distance from the

car to the ground or other surface upon which the passenger proposes to alight, the age and vigor of the party, and whether he takes the risk by the command or encouragement of the company's agents in charge of the train, or to escape a greater peril. *M. & L. R. R. R. Co. v. Stringfellow, 44 Ark., 322; St. L., I. M. & S. Ry. Co. v. Rosenbery, 45 ib., 256; Sibley, Rec'r v. Smith, ante 275; Cumberland, etc., R. Co. v. Manyan, 61 Md., 53; Filer v. N. Y. C. R. Co., 49 N. Y., 47; Morrison v. Erie Ry. Co., 56 ib., 302; Bucher v. N. Y. C. & H. R. R. Co., 98 ib., 128; Penn. R. Co. v. Kilgore, 32 Pa. St., 292.*

The plaintiff was not threatened with any danger by remaining on the cars, nor did she act upon the advice of any of the trainmen. But she was compelled to decide upon a sudden emergency, whether she should leave the train, or be carried past her destination. And although the event showed that she underrated the danger, yet as the danger was not apparent, she should not be held to the most rigid accountability for her mistake of judgment. *Filer v. N. Y. C. R. Co., supra; Satler v. Utica, etc., R. Co., 88 N. Y., 49; Bucher v. N. Y. C. & H. R. Co., supra.*

Affirmed.

---

46 438
57 511
46 438
64 350
46 438
70 28
46 438
76 34
46 438
f80 415
82 306
46 438
87 70

Dowell v. Tucker.

1. Wills: *Probate of, how contested. Statute repealed.*

Sections 6525, 6526, *Mansfield's Digest,* for contesting in the circuit court the probate or rejection of wills by the probate court were repealed by the subsequent provisions of the civil code upon the same subject.

2. Statute of Limitations: *Tacking disabilities.*

The disability of a married woman to sue terminates at her death, and the statute of limitation then begins to run, and can not be postponed for her infant heirs by tacking their disability to hers.

3. SAME: *When avoidable by demurrer.*

As a rule the statute of limitations cannot be availed of by demurrer to the complaint in an action at law, unless the complaint shows that sufficient time had elapsed to bar the action, and the non-existence of any ground of avoidance.

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

Frank Doswell and *J. W. & J. M. Stayton*, for appellants.

1. Is *section 32, chapter 18, Gould's Digest*, which was omitted from *Gantt's Digest*, but is carried forward in *Mansfield's Dig.* as *sec. 6525*, authorizing the proceedings in the circuit court by *devisavit vel non*, the law?

2. This section has not been expressly repealed, and if repealed at all it is repealed by implication. Repeals by implication are not favored. The rule is: "That an existing statute shall not be repealed by a subsequent enactment unless the repeal be expressed in words of revocation, or unless there is such manifest repugnance that both cannot be in force; and also that all statutes upon the same subject matter shall be so construed as that all shall be continued in force if that construction is possible." *State, to use, etc., v. Watts et al., 23 Ark., 304.* See, also, *Babcock v. City of Helena, 34 Ark., 149; Morrison v. State, 40 Ark., 448.*

3. The code was intended only to repeal and change the form of actions and suits, and abolished the old forms and modes of procedure in them. But in all cases other than this, wherein it is silent, the provisions of *Gould's Dig.* are law until repealed or changed by amendment, inconsistent legislation, or expressly. *Whitehall v. Wells, 20 Ark., at p. 111.* See, also, *McPherson v. State, 29 Ark., p. 225.*

4. All statutes and laws in force in the state at the time of the adoption of the civil code in any case provided for

by the code, were repealed by the code, but such repeal did not affect existing rights. *Mansfield's Dig., sec. 6363.*

5. Appeals from final orders of the probate court were allowed by *sec. 197, chap. 4, Gould's Dig.;* but by *sec. 198,* same chapter, the time for taking appeal was limited to "the term of the court at which the order complained of was made," and there was no saving or exceptions as to infants, married women, etc. The provisions of *sec. 32, chap. 180, Gould's Dig.,* give additional remedy to that of appeal, and are wise and salutary. Such was the law before the adoption of the code.

6. By second sub-division of *section 513, Civil Code,* appeal lies from the probate court to the circuit court, and thence to the Supreme Court from every order admitting a will to record or rejecting it, if taken within three years from date of such order. There is no saving or exceptions as to infants, married women, etc. By sub-division 12, of *section 513, Civil Code,* any party interested, who was not a party to the proceedings by actual appearance, or being personally served with process, may, within three years after such final decision in the circuit court, by bill in chancery, impeach such decision and have a retrial of the question of probate, and have a jury, etc. An infant not a party shall not be barred of such proceeding in chancery until one year after attaining full age. The remedy given by the last provision was not available, unless there had been an appeal from the probate court to the circuit court, and the question finally determined there. So this court said in *Mitchell et al. v. Rogers, admr., et al., 40 Ark., p. 91.*

7. The provisions of *sec. 32, chap. 180, Gould's Dig.,* and those of subdivision 12, of *sec. 513, Civil Code,* are not the same, nor are they in conflict—the one providing for an original proceeding in the circuit court without regard, and in addition, to the right of appeal from the probate court ;

the other for an original proceeding in chancery to vacate an order made by the circuit court on appeal from the probate court. And for the same purpose under subdivision 2 of *sec. 513, Civil Code,* an appeal can be taken from the final order of the circuit court to the Supreme Court, if taken within the time named by the section. There is no provision of the *Civil Code* which gives the same remedy as that afforded by *sec. 32, chap. 180, Gould's Digest,* and it is no argument against legislative enactments to say that they multiply remedies, thereby affording additional means of asserting and securing private rights, especially those of the infant, who is always under the protection of the courts. Nor is said section in any manner inconsistent with the provisions of the code on the subject under consideration.

8. The law as laid down in *sec. 32, chap. 180,* was the law of the land at the time the pretended will was admitted to record. It is admitted that there is no vested right in any particular remedy, and that the legislature may modify or change the remedy, but never so as to leave no remedy at all, or one so difficult as to be practically without avail. *Woodruff v. Scruggs, 27 Ark., 26; McCreary v. State, ib., 425; Riggs v. Martin, 5 Ark., 506.* See, also, *Bishop's Statutory Crimes, sec. 178,* and authorities therein cited. Also, *section 13, art. 2, Const. 1874.*

The circuit court could have no jurisdiction of the issue of *devisavit vel non* until the subject matter had been passed upon and determined by the probate court; hence, it is but a method of exercising superintending control over the probate court. And under the provision of *sec. 14, art. 7, constitution 1874,* the circuit court of Lawrence county had jurisdiction to hear and determine this case.

As to supervising control of the circuit court over inferior tribunals, see *Carnall v. Crawford Co., 11 Ark., 604,*

in which this court said that the power of superintending control extends to the parties litigant, as well as the courts themselves. See, also, *Marr ex parte, 12 Ark., 84.*

12. The case of *Tobin et al. v. Jenkins et al., 29 Ark., 150*, was an action begun precisely as this was, since the enactment of the civil code, and since the adoption of the constitution of 1874, and although the constitutionality of the section of *Gould's Digest*, under which the suit was brought and the question as to whether this section was repealed by the code, is not discussed in the published report of the case, is it possible that so important a question as that of the jurisdiction of the circuit court over the subject matter of the suit was entirely overlooked and not considered at all by this court in determining that case?

Later still, in *Janes et al. v. Williams et al., 31 Ark., 189*, this court said that *sec. 32, chap. 180, Gould's Digest*, afforded ample remedy to parties desiring to vacate an order of the probate court admitting a will to probate, and still later in *Ludlow v. Flournoy, 34 Ark., p. 451*, this court in effect said the same.

15. If *sec. 32, chap. 10, Gould's Dig.*, is the law, then the statute of limitation had not even begun to run as against plaintiffs at the beginning of this action. The plea of the statute of limitation can not be raised by way of demurrer, but must be pleaded as any other defense to an action.

The statute of limitations does not begin to run against married women until death of the husband or discoverture. *Angell on Lim., chap. 2, sec. 60, 5th edition.*

W. R. Coody, for appellees.

The main question is the jurisdiction of the circuit court in such a proceeding. Has the circuit court any original jurisdiction under the laws and constitution of

this state in regard to the probate of wills, so as to try an issue of this character, which was formerly conferred upon it by special statute under the constitution of 1836, or does the provisions of the code in regard to the probate of wills repeal this provision of the statutes, which, with the constitution of 1874, confines it exclusively to the probate court, with appellate power alone in the circuit court?

The legislature in 1838 conferred power upon the courts of probate to admit to probate last wills and testaments either in the common or solemn form, *without appeal*, but instead of appellate power conferred upon the courts original jurisdiction, under the constitution of 1836, to try the old issue of *divisavit vel non* directly, and thereby to sustain or invalidate a will, which had been admitted by the probate court. See, *revised statutes of the state 1838, pages 764 to 772.*

Now by our civil code of practice a different system or rule is established, and by the constitution of 1874 different jurisdictions are conferred upon the probate and circuit court. This code, which was adopted in 1868, and went into full effect January 1, 1869, regulated the procedure in all civil actions and *proceedings* in all the courts of this state, though not expressly enumerated, and all that may be thereafter created; and all laws coming within the purview of its provisions *shall* be repealed. *Mansfield's Digest, sec. 4910.*

Even without a repealing clause, it is a general rule in the construction of statutes, which repeal by implication, that when the legislature takes up a whole subject, and covers the entire ground, intending it as subs itute for all other statutes upon the same subject, all prior acts will be repealed, although the old acts may contain provisions not embraced within the new. *Pulaski County v. Downer, 10*

Ark., 589; Coats v. Hill, 41 Ark., 151; Mears v. Stewart, 31 Ark., 17.

But the civil code of practice, not only by intendment and by implication, repealed all other practice acts, coming within its purview, but did so by express declaration, and was clearly intended as a complete system of practice within itself, covering the whole ground and all subjects of civil procedure in all the courts of the state, and to substitute the same as the only rule of practice governing all actions and proceedings of every kind and character. *Nordman v. Craighead, 27 Ark., 371; Smith & Bro. v. Van Gilder, 26 Ark., 532–3.*

While the legislature cannot take away from a party all remedy, yet a party has no vested right in any particular remedy, and the legislature may change the mode of procedure in the courts at will, and such changes will relate back and affect all undetermined cases. *Vaughn v. Bowie, 29 Ark., 278; Green v. Abraham, 43 Ark., 424.*

Then the remedy and proceedings pointed out and established by the code of practice in regard to the probate and contest of wills, is full, plain and complete within itself. *Code, sec. 513, subd. 7, 11; Mansf. Dig., sec. 6522; 14 Bush., 509; 40 Ark., 96; 18 B. Mon., 61; 4 Met. (Ky.), 168; 5 Bush., 386; 11 ib., 332, 337; 14 Bush., 47; 2 Redf., on Wills, 27, 28; 13 Ga., 171.*

The jurisdiction of the probate court is *exclusive* and *original*, in matters of wills, and the circuit court has none except by appeal. *Gould's Dig., p. 312; ib., p. 1078, secs. 32–3–4; ib., p. 1076, secs. 16, 18, 31; Const. 1868, art. 7, sec. 1; 30 Ark., 567.*

Then under the authority conferred by the constitution 1868, the legislature, by the act of March 16, 1871, *Gantt's Digest, secs. 1184* and *1185*, absolutely abolished the probate courts of the state, and conferred "*exclusive*

original jurisdiction" upon the circuit courts of everything properly pertaining to courts of probate. *Gantt's Digest, sec 1185; 30 Ark., at page 668.*

Then all the *original*, or exclusive jurisdiction held by the probate courts, either constitutional or legislative, in regard to wills, estates, etc., was, by the express language and provisions of the act of 1871, conferred upon the circuit courts, where it remained fully and exclusively.

Art. 7, Const. 1874, sec. 34, created courts of probate, which had been abolished under the act of 1871, in almost the identical language of the constitution of 1836, and in language that cannot be mistaken, declared that the probate court should "have *such exclusive original* jurisdiction in matters relating to the probate of wills, the estates of deceased persons, executors, administrators, guardians and persons of unsound mind, and their estates AS IS NOW VESTED IN THE CIRCUIT COURT, or may be hereafter prescribed by law." See, *sec. 1185, Gantt's Digest.*

Art. 7, sec. 11, Const. 1874: The circuit court is the great residuum of uninvested jurisdiction, and only can hold such as is not conferred upon some other court. *State v. Devers, 34 Ark., pages 192 to 198.*

The same statute which confers exclusive original jurisdiction in matters of estates of deceased persons, executors and administrators upon the probate court, confers the like exclusive jurisdiction in regard to the probate of wills. *Gantt's Digest, sec. 1184.* And this jurisdiction, ever since the constitution of 1874, has been recognized by this court as exclusive, except for fraud in chancery. *Perkins v. Sheegog, 34 Ark., 127; West v. Waddell, 33 Ark., 581;* and *Rienhart v. Gartrill, ib., 728.*

As to wills, this jurisdiction is more exclusive and absolute in the probate courts, from the fact that their action in regard to wills cannot even be reviewed in chancery; it

can only be reached by appeal. *Mitchel v. Rogers, 40 Ark., 91.*

But as it were apparently to put this question entirely at rest, and have no doubt as to the jurisdiction of the probate courts, the constitution of 1874, by section 23 to the schedule thereof, declared in emphatic language, "that the probate courts *shall* be a continuation of the circuit courts for all matters of probate jurisdiction, and the papers and records pertaining to said courts and *jurisdictions* shall be transferred accordingly.

The appellants are barred. The statute commenced to run on the death of Mrs. Dowell, and the minors could not tack their disabilities to hers. *19 Ark., 291; 13 ib., 344; Angell on Limitation, secs. 195, 199, 477, note (1)*, and *478 to 482; 1 How., U. S., 247; 23 Miss., 133; 9 Humph., 546; 16 Ark., 154; 22 ib., 5; 1 Metc. (Ky), 602; 17 Ark., 609; ib., 661–2; 31 Ark., 378–9.*

BATTLE, J. On the 18th day of August, 1884, Harry M. Dowell and Taylor Dowell commenced this action against Frank W. Tucker and others. They state in their complaint, among other things, as follows:

That, on or about the 9th day of September, 1865, Samuel Robinson departed this life intestate, leaving him surviving his daughter, Martha C. Dowell, wife of John Henry Dowell, as his sole heir at law, the said Martha C. being the mother and the said John Henry Dowell being the father of plaintiffs. That Samuel Robinson, at the time of his death, was seized and possessed of real and personal property of the value of $40,000. That some time in March, 1868, Martha C. Dowell departed this life intestate, leaving her surviving her husband, the said John Henry Dowell, and the plaintiffs, her sons, and sole heirs at law.

That on the 11th day of October, 1865, the said John

Henry Dowell, at the county of Lawrence and before the probate court of said county, "procured to be propounded a certain instrument of writing, which he falsely and fraudulently represented to be the last will and testament of Samuel Robinson, deceased."

That by this supposed will Samuel Robinson is made to say: "I give, devise and bequeath to my daughter, Martha Cyrena Dowell, and my son-in-law, John Henry Dowell, the whole of my undivided estate, all the property, real, personal and mixed, of which I shall die seized or possessed, or to which I shall be entitled at the time of my decease, of whatever kind or character, to have and to hold to them and their heirs to their use and benefit forever, without any reserve whatever."

That this paper was probated and admitted to record by the court of probate of Lawrence county, and said John Henry Dowell qualified as executor thereof and took possession of the personal and real estate, sold and disposed of the former, settled with the court, and was discharged before the commencement of this suit. That the said paper-writing was not the last will and testament of said Samuel Robinson, deceased, because—

First—He was, at the time when, etc., mentally incapable of making a will.

Second—Said will was not the voluntary conscious act of the said Samuel Robinson, but was prepared, concocted and executed by the said John Henry Dowell, and under his direction and influence, and was procured by fraud and deceit practiced upon the said Samuel by the said John Henry.

Third—That there was no publication of the will and no declaration by the said Samuel concerning the same.

Fourth—That the probate was informal.

That after the death of the said Martha C. the said John H. sold and conveyed the lands to Henry M. Mandeville and William Allen, since deceased, who took possession under their deed; that since that time Mandeville sold and conveyed his interest to defendant, Frank W. Tucker, and Tucker reconveyed by way of trust to secure the purchase money, and that this trust is still unsatisfied; that Allen died before the commencement of this action, leaving a widow and divers heirs, some of whom are known and others unknown to plaintiffs; that Tucker and the heirs of Allen are in possession of the lands, who, with Mandeville, are made defendants.

The prayer of the complaint was that said pretended will be rejected, declared void and held for naught, and for other relief.

The defendant, Tucker, demurred to the complaint, because—

First—It did not state facts sufficient to constitute a cause of action against him. *Second*—The circuit court has no jurisdiction of the subject matter of the controversy. *Third*—Misjoinder of parties defendant. *Fourth*—For want of proper parties. *Fifth*—That neither of the paragraphs shows a cause of action, nor all together, against him. *Sixth*—Because the action appears to be barred by limitation of five years. *Seventh*—Because plaintiffs are estopped by acts of their ancestors, through whom they claim.

The demurrer was sustained by the court, and the plaintiffs appealed.

1. CONTESTING WILLS: Statute repealed.

This action is based on sections 6525 and 6526 of Mansfield's Digest, which say: "If any person interested in the probate of any will shall appear within five years after the probate or rejection thereof, and by petition to the circuit court of the county in which such will was estab-

lished or rejected, pray to have any such will rejected, if previously established, or proven, if previously rejected by the court of probate, it shall be the duty of the circuit court to direct an issue to try the validity of such will, which issue shall in all cases be tried by a jury."

"Sec. 6526. If no person shall appear within the time aforesaid to contest the validity of such will, the probate or rejection thereof shall be binding, saving to infants, married women, persons absent from the United States, or of unsound mind, a like period after their respective disabilities are removed."

Have these statutes been repealed? They were a part of the revised statutes of this state. Subsequent to their enactment the civil code of practice was enacted. Section 513 of the civil code provides, that wills shall be proven before and admitted to record by the probate court; that an appeal shall lie from the probate court to the circuit court, and thence to the Supreme Court, upon every order admitting a will to record, or rejecting it; that the appeal to the circuit court shall be taken within three years after rendering the order of probate, or rejection in the probate court, and to the Supreme Court within one year after the decision in the circuit court; that the court to which a will is offered for probate may cause all persons interested in the probate to be summoned to appear on a certain day; that when the proceeding is taken to the circuit court, all the necessary parties shall be brought before the court; and upon the demand of any one of them a jury shall be empanneled to try which or how much of any testamentary paper produced is, or is not, the last will of the testator; that, if no jury be demanded, the court shall determine that question, and the final decision given *shall be a bar to any other proceeding to call the probate or rejection of the will in question*—subject to the right of appeal or writ

of error to the Supreme Court as hereinbefore named, but nothing in that section should preclude a court of chancery from its jurisdiction to impeach such final decision, for such reason as would give it jurisdiction over any other judgment at law.

Section 21 of the civil code provides that appeals from orders and judgments of the probate court "may be taken to the circuit court in the same time and in a similar manner in which appeals from the circuit court are taken to the Supreme Court, except that the original papers and copies of the orders of the probate court shall be delivered by the clerk of the probate court to the clerk of the circuit court, upon an appeal being taken, instead of a copy of the complete record."

Section 780 says: "This code of practice shall regulate the procedure in all civil actions and proceedings in the courts of this state, and all laws coming within the purview of its provisions shall be repealed."

Section 857 says: "All statutes and laws heretofore in force in this state, *in any case provided for by this code*, or inconsistent with its provisions, are hereby repealed and abrogated."

The civil code of practice unquestionably provided for all cases in which *sections 6525* and *6526 of Mansfield's Digest* afforded any relief or remedy, and that being the case repealed the last named sections.

In the absence of an express repeal they were repealed by the code by implication. For, as said in *Pulaski County v. Downer, 10 Ark., 590*, "The authorities are abundant to support the proposition that when the legislature takes up a whole subject anew, and covers the entire ground of the subject matter of a former statute, and evidently intended it as a substitute for it, the prior act will be repealed thereby, although there may be no express words to that

effect, and there may be in the old act provisions not embraced in the new." See *Mears v. Stewart, 31 Ark., 19.*

The general assembly, by an act entitled "An act to divide the state into sixteen judicial circuits, to confer original jurisdiction in all matters pertaining to probate and administration upon circuit courts, and to fix the time for holding said courts," approved April 16, 1873, abolished probate courts, and vested in the circuit court all the powers and jurisdiction formerly, and at the time of the passage of the act, possessed by courts of probate.

The circuit court was vested with jurisdiction in all matters pertaining to the probate of wills at the time the constitution of 1874 was adopted. By that constitution probate courts were re-created and vested with "such exclusive original jurisdiction in matters relative to the probate of wills, the estates of deceased persons, executors, administrators, guardians and persons of unsound mind, and their estates, as was then vested in the circuit courts, or might be thereafter prescribed by law."

It must follow, then, that under the constitution of 1874, the circuit court has not and cannot take original jurisdiction in any matter relative to the probate of wills.

2. STATUTE OF LIMITATIONS: Tacking disabilities

If it be true that the statutes relied on by appellants are still in force, they are barred from maintaining this action. The five years in which these statutes required such actions to be brought expired before the commencement of this suit.

The complaint alleges that Samuel Robinson, the testator, left him surviving Martha C. Dowell, his daughter, his sole heir; that the will in question was probated on the 11th day of October, 1865; that Martha C. was a married woman at this time, and so continued until her death; and that she died some time in March, 1868, intestate, leaving surviving her, the plaintiffs her sole heirs and dis-

tributees at law. Under this state of facts Martha C. Dowell was the only party who had a right to contest the will of Robinson during her lifetime. She was a married woman, and the five years did not commence running during her coverture; but when she died it commenced running against the plaintiffs. The fact that they where minors at that time did not prevent the statute running. They cannot tack their disabilities to that of their mother, Martha C. Dowell, in order to suspend or continue the suspension of the operation of the statute. This is a well settled principle of law. *Angell on Limitations* (*6 ed.*), *secs. 197, 198, 477, 479, 482; Wood on Limitations, sec. 251; Thorp v. Raymond, 16 How.* (*U. S.*), *247; Lewis v. Marshall, 5 Pet.* (*U. S.*), *469; Carter v. Cantrell, 16 Ark., 164; Parsons v. McCracken, 9 Leigh, 495; Bunce v. Walcott, 2 Conn., 32.*

As a rule the statute of limitation cannot be taken advantage of by demurrer to the complaint, in an action at law, unless the complaint shows that a sufficient time had elapsed to bar the action, and the non-existence of any ground of avoidance. That is done by the complaint in this case. *Collins v. Mack, 31 Ark., 684; McGehee v. Blackwell, 28 Ark., 27.*

The demurrer in this case was properly sustained. The judgment of the court below is affirmed.

46 453
71 221
46 453
76 394

GREEN, AD., v. BYRNE, AD.

1. ADMINISTRATION: *Ancillary administrator, duty of.*

The office and duty of an ancillary administrator is to protect the rights of domestic creditors and pay their claims, to prevent the necessity of their having to follow the estate into a foreign jurisdiction, and to pay over any surplus in his hands, after paying home creditors, to the administrator of the domicile.

2. SAME: *Administrator de bonis non: no claim against former administrator.*

An administrator *de bonis non* cannot call a former administrator to account for money in his hands. He and his sureties are liable only to the heirs, legatees and creditors.

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

Scott & Jones, *A. B. & R. B. Williams* and *B. B. Battle*, for appellants.

A court of equity, where it appears that the lands are in the possession of another, will not entertain a bill, nor grant relief, to remove a cloud from title; because the remedy is at law, by ejectment. *27 Ark., 414; 30 ib., 579; 37 ib., 643; 44 ib., 436; 43 ib., 28.*

Eighteen years having elapsed since the dissolution, by death, of the partnership, and no excuse being shown for the failure, any claim or demand to hold F. M. Ivy to account is stale. *85 Penn. St., 387; 61 Me., 38; 70 Me., 17; 1 How. (U. S.), 161; Wood on Lim., 116, 117, 122, 124.* The statute of limitation can be pleaded in equity by demurrer. *28 Ark., 27.*

All suits were barred, long before the commencement of this suit, against F. M. Ivy for account. *1 Edw. Chy. (N.*

Y.), 417; ib, 343; 3 Abb. (N. Y. Ct. App.), 152; 43 Ark., 469; Wood on Lim., 116, 117.

The administrator or executor of the legatee (Wallace) is the only party who can sue to collect his legacy. *31 Ark., 723; 21 ib., 164.*

Lands are assets in an administrator's hands for the payment of debts only; not to pay legacies. *Mansfield's Digest, secs. 68, 170; 27 Ark., 235; 30 ib., 775; 21 ib., 62.*

Wallace's legacy is stale and barred. *Authorities sup.*

No debts are shown to have been duly authenticated and probated against Ivy's estate within two years. *Mansfield's Digest, secs. 98, 103.*

Probate courts have exclusive jurisdiction of the probate of claims, and the charging of assets with debts, the sale of lands to pay such debts, and the administration of estates. Courts of equity have no such jurisdiction. *40 Ark., 438; 23 ib., 93; 34 ib., 63.*

The creditor's lien on the lands is dependent on his claim and is barred and extinguished with the claim. *41 Ark., 523; 43 ib., 464.*

All right or claim to sell the lands for the payment of debts or legacies is stale, eighteen years having elapsed since the death of Thos. Ivy. *37 Ark., 155; 6 ib., 156; 7 Wheat., 63.*

There was no prayer for possession of the land, but plaintiff took judgment therefor. Equity can afford him no such relief. His remedy, if any, was by ejectment. *21 Ark., 62.*

L. A. Byrne, for appellee.

The eminent counsel for appellants insist that we have mistaken our action; that a suit at law would have been the proper remedy.

If this objection could be urged at all, it comes too late. A motion should have been made at the proper time to transfer to the law docket, or the objection will be treated as waived. *Mansfield's Digest, sec. 4927; 31 Ark., 411; 32 ib., 562; 37 ib., 185.* This objection cannot be raised by demurrer. *Cases supra.*

The only issue and judgment for review, is that for the possession of the lands, and let us see whether or not this is right.

It is a conceded proposition that no claims have been probated in this state. The court of probate of Texas has jurisdiction of these matters as well as the unpaid legacy. This is evident when it is shown that the administration there awaits an administration here to realize upon the proceeds arising from the sale of the land made by the probate court here. If these unsatisfied demands are charges upon the real estate of the deceased, there is no other way of dealing with these demands.

The probate court of Texas cannot order a sale of land in this state.

In *42 Ark., 167*, Judge SMITH, in delivering the opinion of the case, said: "The duties of the ancillary administrator are to pay off the debts of the deceased proven here; to settle his accounts under the supervision of the court to which he owes his authority, and to transmit the residuum to the administration in chief for distribution among the persons beneficially entitled." See, also, the ruling of the court in *34 Ark., 117.* This is the sole object of the administration in this state, aided by this suit.

The counsel for appellant leaves untouched the question whether or not the legacy of Wallis is a charge upon the real estate of decedent.

This question has a material bearing on the case. A reference to the following authorities will conclusively set-

tle the question; *Redfield on Wills, vol. 2, 207 to 212; 54 Miss., 235; 77 N. C., 426; 85 N. Y., 142.*

And when land is so charged, it can be divested only upon payment of the legacy. *25 N. J. Eq., 95.*

The very terms of the will are conclusive. The residuary devisee, F. M. Ivy, was to take nothing until the legacy was paid off, and parties holding under him can claim no greater right than he had.

It is a well-established rule of law that a purchaser of land, charged with a legacy, from the residuary legatee or devisee, takes *cum onere*, and the land is subject to the payment of the legacy. *54 Vt., 253; 77 Ind., 437; 134 Mass., 543; 40 Ark., 433.*

An unpaid legacy stands in all respects as to the residuary legatee the same as an unpaid debt, and in delivering the opinion of the court in the case of *Hall et al. v. Brewer et al., supra*, Judge SMITH said: * * * "No question of purchase for value without notice is now before us. The bill does not admit that these purchasers are entitled to protection, and such a defense could only be presented by answer. But it may well be doubted whether the plea of a *bona fide* purchaser for value is available when the defects in the title arise out of a rule of law of which the defendant is bound to take notice"—citing *Woolworth' 340.*

The legacy of Wallis and the debts, being a charge upon the lands of the deceased, his administrators have the right to the possession thereof until they are discharged, and the administration closed in the probate court. *42 Ark., 25.*

In this connection we shall answer the question asked by appellant's counsel in their brief: What right have we to sue for the legacy of Wallis? And says that his administrator is the proper party.

We have not for once denied this; nor are we attempting to sue for this legacy. Let the probate court administer this question after a court of equity has turned over to its administrator the possession of the land.

But before we can maintain this suit it must be shown that there is a necessity for it; that the estate is stil unadministered, and in doing this we show that there is an administration pending in the state of Texas, and an unpaid legacy and some debts—the exact amount is not known—probated and under the jurisdiction of the probate court of the state of Texas.

The appellants can take nothing but the interest of the residuary devisee, and as he is not entitled to anything until the debts and the legacy of Wallis are paid, the appellants have taken the estate prematurely and as they take these lands so charged, the courts of equity treat them as trustees. *40 Ark., 439; 83 Ind., 112.*

The appellants must either discharge these prior claims or surrender the land to a proper administration.

The residue, whatever it may be, they are entitled to as the interest of the residuary devisee.

The counsel in the brief for appellants insists lastly that whatever claims existed against this land for the payment of debts and legacies are, first, barred at law by the statute of limitations, and, secondly, in equity are stale demands. This is a question that cannot come into the determination of this suit, as the courts of the state of Texas will determine this, the forum where the debts and legacy are payable.

Granting that it is a proper question, the plea will not avail anything, for two reasons. First, because, as a matter of law, it is not barred, and, secondly, under the terms of the will the executor, Ivy, and those claiming under

him hold, as trustees of an express trust, to which the statute cannot be pleaded.

The records show that in the year 1877 F. M. Ivy, for the first time, filed his settlement with the probate court of Bowie county, showing that he had exhausted all the assets of the estate of Thomas, under the orders of that court, in the payment of debts. That he then had and held the possession of the land in controversy in his fiduciary capacity, until during the year 1879. That during that year he was dispossessed by *his creditors*, the appellants, claiming his interest as residuary devisee, and that in November, 1880, this suit was brought by the ancillary administrator of Thos. Ivy. This needs no argument. There is no peaceable, adverse possession extending beyond the statute bar.

The demand is not stale, referring exclusively to the legacy, for at no time has there been any funds in the hands of the executor with which the same could be paid.

This question might be urged after there had been a distribution of the assets and the administration closed.

The distributors of the legatee are guilty of no laches, for they at no time have had a cause of action against the executor and administrator. *40 Ark., 433.*

They stand waiting for the order of the probate court directing payment, and the court is powerless for the want of funds. All the residue of the decedent's property has been seized by the creditors of the residuary devisee, and the administration of the estate clogged

The appellant's possession is acquired by virtue of an express trust, to which, in a court of equity, the statute of limitation will not apply. *22 Ark., Wood on Lim., sec. 205; 200, note 1.*

Hon. SAM. W. WILLIAMS, Sp. J. In this case the appellee, filed his complaint against Francis M. Ivy, as executor of Thomas Ivy, B. W. Green, administrator *de bonis non* of W. W. Andrews, and others, in the circuit court of Miller county, in chancery, upon which original summonses were issued for the defendants, on the 11th day of November, 1880. In the complaint the appellee describes himself "as administrator, with the will annexed of estate of Thomas Ivy, deceased, late of the county of Bowie and state of Texas, duly appointed and qualified by the honorable the probate court in and for the county of Miller and state of Arkansas." As no letters are attached, nor date of them given, we are not advised, by the transcript, as to the date, but infer from other matters apparent in the record, that the appointment had been made recently before the bringing of the suit. From the original and amended complaints and exhibits, upon which the case was decided below, on demurrer, it appears that Thomas Ivy, late of the county of Bowie and state of Texas, being seized of a large estate, both real and personal, situated in the states of Arkansas and Texas, on the 9th of December, 1857, made his last will, in which are the following provisions which are pertinent to this case, to-wit:

"*Firstly*—I desire all my just debts and liabilities to be paid by my executor hereinafter to be named.

"*Secondly*—I devise and bequeath unto my brother, Marion Francis Ivy, all the estate, right, title and interest in possession, reversion or remainder, which I, at this time, have, or shall have, of, in and to lands, tenements, hereditaments or annuities, or rents charged upon, or issuing out of them, whether situated in this the said county and state, Bowie county, Texas, or otherwise. And I further bequeath and devise unto my brother, all the right,

title and interest, in possession, reversion or remainder, which I have at this time, or shall have, in or to any slaves or personal property whatever, whether the same is, or may be in this, the said county and state, or elsewhere; most of said estate consisting of lands and slaves and other personal property, situated and being in said county of Bowie, and in the county of Lafayette, in the state of Arkansas. I do bequeath unto my said brother, Marion Francis Ivy, the proceeds of all my choses in action, and my interest in all claims, of every description, in which I am or may be interested; provided that none of the above legacies and bequests shall interfere with or annul the legacies hereinafter to be mentioned and set forth in this my last will and testament.

"*Thirdly*—I bequeath and devise unto my nephew, Thomas H. Wallace, $5000, which I desire to be paid to him, either in money or property, by my said brother, out of my said estate, when he, the said Thomas H. Wallace, arrives at the age of twenty-one years.

"*Fourthly*—I hereby nominate and appoint my said brother, Marion Francis Ivy, the executor of this my last will and testament, and desire him to carry out the foregoing provisions, and to attend to all matters of my estate as he may deem best."

This will is duly attested by two witnesses, so as to make it a good will concerning real estate in Arkansas. Francis M. Ivy, called Marion Francis, in this will, proved this will, it is alleged, before the county court of Bowie county, Texas, a court having jurisdiction, though no record evidence of the probate is exhibited, and took out letters testamentary on the 24th of February, 1862, and fully administered the estate in said county in Texas, the domicile of testator. There is no allegation or evidence that the will and probate have ever been admitted to record in Arkansas,

as prescribed by the statute regulating wills. *Mansfield's Digest, secs. 6513, 6531, 6532, 6534.*

The testator departed this life on or about the 15th day of January, 1862, shortly before the probate of his will. That the executor has never made his final settlement with the Texas court; that his administration was still open, awaiting the result of an ancillary administration to be had in the state of Arkansas, where the largest and most valuable portion of the estate of testator, realty, was and is situated, then in Lafayette, now in Miller county, in said state; and remained wholly and entirely unadministered by any court of competent jurisdiction in Arkansas. That testator, and his brother, Francis M., at the time of testator's death, were partners in the business of farming in the county of Lafayette, now in Miller. That the slaves were emancipated. That certain lands belonged to the testator in his own right, and he had an undivided half interest in others with Francis M. That William W. Andrews, on the 31st of October, 1865, filed his complaint, and had a writ of attachment issued against Francis M. Ivy, from the circuit court of Lafayette county, which was, on the 4th of November, 1865, levied upon portions of this land. On the 22d of November, 1867, Andrews recovered judgment against Francis M. Ivy, and on the 8th of November, 1871, the judgment was revived; and on the 15th day of October, 1875, a *ven. ex.* was issued on this judgment, directed to the sheriff of Miller county; and on the 9th day of December the lands were sold *in solido*, and not in legal subdivisions, and Martha J. Andrews, as the administratrix of W. W. Andrews, became the purchaser. Before this sale, Francis M. Ivy, on the 1st day of May, 1875, mortgaged the lands, which were devised to him by Thomas Ivy, to Wm. B. Crabtree, reserving in the mortgage, the right to 160

acres, as a homestead. That Crabtree well knew the condition of the lands, and the interest of the estate of Thomas Ivy, at the time the mortgage was executed. That the notes secured by the mortgage were assigned, by Crabtree, to K. Mandel & Co., of Jefferson, Texas. That suit was brought, in the Miller circuit court, March term, 1879, to foreclose this mortgage, by Mandel & Co., against F. M. Ivy, Henry Moore, as assignee in bankruptcy of Francis M. Ivy, Crabtree, James Kelly and Mrs. Andrews, and B. W. Green, administrator, *de bonis non* of W. W. Andrews. That a decree was rendered and an order made to sell land to satisfy it. That under this decree the lands which had belonged to Thomas Ivy, as well as those in which he had an undivided interest, were sold on the 7th of June, 1879, and were bought by William R. Kelly, who appears to have bought in trust for Mandel & Co., and B. W. Green, as administrator *de bonis non*, of Andrews' estate. That on the 1st of December, 1875, Francis M. Ivy, on his own petition, was declared a bankrupt, by the district court of the United States for the eastern district of Arkansas. That he scheduled these lands of Thomas Ivy as his, as residuary devisee subject to the payment of testator's debts and the legacy to Wallace, and subject to his own mortgage to Crabtree. That Henry Moore was appointed assignee in bankruptcy of the estate of Francis M. Ivy, the bankrupt, who sold all the interest of the bankrupt in the lands embraced in the schedule, and James Kelly purchased them. That Kelly, afterwards died, and John A. Roberts was appointed administrator, and as such, it was charged, was setting up some claim to the land. That Kelly, in his lifetime, did not pay the assignee the purchase money, nor has his administrator, since. Kelly's heirs are not named or made parties.

That Thomas H. Wallace, to whom testator bequeathed the sum of $5,000, departed this life on or about the 1st day of April, 1862, aged about twenty-two years. His heirs are named, but as this legacy is personalty, and a chose in action, the heirs, as such, cannot recover it. There has never been any administration of Wallace's estate. The complaint further states, that the legacy to Wallace was not paid to him in his lifetime, nor has it been paid to "his heirs" since. It is stated, in general terms, in the complaint, that there are unpaid claims against the estate of the testator; that the estate, real and personal, in Texas has been exhausted and applied to the payment of partnership debts, and individual debts of Thomas Ivy; and all the personal property in Arkansas has been sold and so applied, and nothing is left to pay said legacy and indebtedness, except the Arkansas lands. The prayer of the complaint is, that all of the sales, in so far as they attempted to dispose of any lands belonging to the estate of Thomas Ivy, deceased, be declared void, set aside and held for naught; that William R. Kelly, now acting as trustee for K. Mandel & Co., and for B. W. Green, as administrator, etc., or some other suitable person, be appointed receiver, with authority to take charge of said lands belonging to said estate during the pendency of this suit, to rent out the lands, collect the rents and hold the same, with the money he may have on hand, as such trustee, subject to the order of the court, and to do and perform all orders and duties that may be required of him by the court; that the defendant, Francis M. Ivy, as surviving partner of Thomas Ivy, may be required to discover and set forth a full, true and particular account of all and singular the partnership property and every part thereof which has been possessed by him, or come into his hands, or to the hands of any other person or persons by his or-

der, or for his use, with the particular nature, quality or qualities, and true value thereof, respectively, and how the same and every part thereof has been applied and disposed of; and that he also be required to set forth an account of the debts due from and to the testator, and what legacies, if any, have been paid, and to whom, and whether any such debts are now outstanding, and why; that the said B. W. Green, as administrator, etc., and John A. Roberts, as administrator, etc., may be required by order of this court to render a true, full and particular account of all and every sum or sums of money which has or have been received by them, or either of them, or any other person by their or either of their orders, for and in respect of the rents and profits of said estate, or any part thereof; and that plaintiff have judgment therefor, and for such other and further relief as to justice and equity may appertain.

The plaintiff filed an amendment to his complaint, making the heirs of W. W. Andrews parties, and stating that they claimed to own the lands under these several sales. And in response to a motion to make the complaint more specific, as to debts due from Thomas Ivy, in this amendment, it is stated "that the plaintiff has been informed by the executor of the last will and testament of Thomas Ivy, deceased, in and subject to the jurisdiction of the laws of the state of Texas, there are subsisting and unliquidated debts and liabilities against the estate of Thomas Ivy, deceased, but *to what extent, to what amount, and the nature and class of the same, plaintiff is not sufficiently informed with certainty.*" This amendment sets out with useless particularity the names of the heirs of Wallace. As they could not sue for this legacy, and it must be collected, if at all, through an administrator on Wallace's estate, this was unnecessary. It sets out more minutely

the manner of administering the estate in Texas, and exhibits the executor's reports to the county court of Bowie county, and shows specifically the full administration of the assets there, which makes it more remarkable that the debts of the estate, if probated there, could not have been specified better than upon *general information.* The amendment further states, that the sales of the lands set out in the original complaint were made for the personal and individual debts of Francis M. Ivy. That these Arkansas lands are the only assets of the estate of Thomas Ivy remaining unadministered, out of which to pay Wallace's legacy, and that the administrator and heirs of W. W. Andrews held possession of these lands under and by virtue of the sales set forth in the original complaint.

The circuit court of Miller county overruled a demurrer of defendants to the complaint and amendment, and after finding the facts, decreed that all the several sales of the lands be annulled, set aside and held for naught, and for recovery and possession of the land. It was further decreed that the lands were assets in the hands of Byrne, the administrator, for payment of debts and lawful demands of said estate, and that he proceed with said administration to a final settlement thereof, under the orders of the probate court of Miller county, and that he recover costs.

1. ANCILLARY ADMINISTRATOR: His duty.

This plaintiff was an ancillary administrator in Arkansas. The office and duty of such administrator is to protect the rights of domestic creditors and pay their claims, to prevent the necessity of their having to follow the estate into a foreign jurisdiction, and to pay over any surplus in his hands, after paying home creditors, to the administrator of the domicile. *Shegog v. Perkins et al., 31 Ark., 539; Williamson v. Furbush, 31 Ark., 539; Gibson, ad., v. Dowell, 42 Ark., 164; Clark v. Holt, 16 Ark., 257; Duval v. Marshall, 30 ib., 231.*

This suit seems to reverse the usual order. It is an effort to transfer an unfinished administration to Arkansas for completion, and to call the administrator of the domicile to account as surviving partner of the testator, when it is well settled that an administrator *de bonis non* cannot call the former administrator to account for money in his hands, and he is responsible for that alone to the creditors, distributees and legatees for account and upon his bond. *Williams v. Cubage, 36 Ark., 307; Finn v. Hempstead, 24 Ark., 117; Oliver v. Rottaken, 34 Ark., 144.*

A surviving partner when administrator, or executor, it would seem, must settle with the court to whose jurisdiction he belongs, unless some peculiar circumstances existed, as where there are domestic creditors, and the assets under the control of the surviving partner were within the jurisdiction of the court which granted the ancillary administration and were liable to be wasted or to misapplication by the surviving partner; then, it would seem that an ancillary administrator might call upon equity for a receiver or invoke the ordinary remedies which administrators may ask, in a proper case, against a surviving partner who was wasting or misapplying partnership assets. But no such case appears here. It is not pretended that Francis M. Ivy has any unconverted partnership assets. This feature of the case, calling for an account, seems to have been abandoned at the hearing, and is expressly abandoned here, by plaintiff in his brief.

As to debts in Texas, we shall treat the general allegation just like a general allegation of fraud, without specifications. It will not be presumed that any probate court would grant an order to sell real estate and divest the heir or devisee, or those claiming under them, of title, on the statement that the administrator was "informed that there were unpaid debts." But this court will not collaterally

inquire into, or question the power and jurisdiction of the probate court to grant administration. That court might err in improperly granting administration, but we could only review it on appeal or writ of error. But it might be a question for us to determine now and here, whether collateral aid shall be granted to an unnecessary administration. For in this case the will charges the legacy upon the land and there seems to be no necessity for an administration on Ivy's estate to collect Wallace's legacy, if lapse of time has not barred it. The lands devised to Francis M. Ivy, it seems, went into his hands clothed with an express trust, and when the personal assets are exhausted, it might be subjected, if not before, to the payment of this legacy. *West v. Williams, 15 Ark., 682.* And it has been held that where lands are devised, charged with the payment of a legacy, that the legatee may proceed against the lands *in rem.*, without waiting for the executor to exhaust the personal assets. *Sand v. Champlin, 1 Story Rep., 326.* See, also, *Wright v. Den, 10 Wheaton, 204; Lewis v. Darling, 16 Howard (U. S.), 1; 2 Binney Rep., 525; 6 ib., 395; Redfield on Wills, chap. 13, sec. 57, par. 7, 8, 9, 10, p. p. 558–9.*

It would seem from the drift of authorities that even where the personalty has been exhausted, in payment of debts, leaving a legacy unpaid, for which the realty might have been liable, the legatee has a right of subrogation against the heir, and to subject the realty, or compel contribution in equity. This seems to be a well-established branch of equity jurisdiction. *1 Story Eq. Jur., sec. 565.* It is true that it has been held in New York, under its peculiar statutes, that where an executor, who is the devisee of realty, has exhausted the personal estate in paying debts, the legatee of an unpaid legacy, is not, on that account, entitled to a priority over legal liens which other creditors of the executor have acquired upon such

realty, by judgment. *Wilkins v. Harper, 2 Barber, N. Y., ch. 338.* Same case affirmed by court of appeals, *1 N. Y., 586.*

The application of this principle in Arkansas may well be doubted where our laws make realty assets in the hands of an administrator, subject to debts, with right of possession, and to rents and profiits in the administrator. While it is true the personalty is the primary fund out of which debts are paid, yet, in some sense, their payment out of the personal estate is in exoneration of the realty, and that would seem, upon ordinary equitable principles, to give to an unpaid legatee a right of subrogation, in this state, even where the legacy was not charged on the realty. That was not, however, a question in the New York case, which involved a mere contention for priority, between the judgment creditor of the devisee, and the legatee whose legacy was not charged on the land devised. In the case of *Hall v. Brewer, 40 Ark., 434,* a bill was filed by a fourth-class creditor, whose claim had been in litigation during the entire pendency of the administration, and when the creditor recovered judgment, and had his claim classed, the administration had been closed and the land turned over to the heirs and the personal property distributed. This court held that the death of a decedent fixes a lien upon lands for the payment of debts, and they pass to his heirs and devisees charged with such debts, and where a creditor's debt has been duly probated and not paid, or has come into existence too late to be probated, or after the administration has been closed, he may, in equity subject them in the hands of the heirs or devisees or their alienees with notice, to payment of the debts. The same principal was settled in *Wilson v. Harris, 13 Ark.* Under the authority of these cases, and others like them, it would seem that the remedy of the

legatee and Texas creditors, if any, was complete in equity without the expensive and tedious process of an Arkansas administration, and in a tribunal fully competent to marshal assets, settle priorities, remove clouds and grant final relief. But in this case, no party entitled to this relief is before the court as plaintiff or defendant. Nothing remains tangible in this case, as a reason for administering the Arkansas lands, but Wallace's legacy, as no specific debts are shown. That legacy was allowed to remain uninforced for over eighteen years, before the complaint was filed, and now, at the end of twenty-four years, as far as we are informed, no administrator has ever been appointed on his estate, and yet no one but an administrator could collect or give to Thomas Ivy's administrator a lawful acquittance for this legacy. *Lemore v. Rector, 15 Ark., 436; Pope v. Boyd, 22 Ark., 535; Anthony v. Peay, 18 Ark., 30; Worsham v. Field, ib., 448; Pryor v. Ryburn, 16 Ark., 672; Slocum v. Blackburn, 18 Ark., 319; Atkins v. Guice, 21 ib., 173; Martin v. Tyree, 41 ib., 314.*

These questions, which are suggested, and not directly presented, in this case, would properly arise whenever an administrator of Wallace's estate, or any unpaid creditor of Thomas Ivy, with properly established and authenticated claims from the Texas tribunal, shall present their complaint, in equity, to subject the lands, devised to Francis M. Ivy, to the charge of the unpaid debts and legacy. Then it will be time enough to determine whether Francis M. Ivy, and those claiming under him, hold the lands in trust, subject to debts and legacies, or whether they hold adversely. Also, whether or not they are innocent purchasers, and whether or not the demands are stale, or barred by limitation.

All that it is necessary to decide, and all we do decide, now, is:

First—In advance of the presentation of a copy of the will and probate thereof, duly certified to the probate court of the county in Arkansas where the lands of Thomas Ivy lie, and the order of that court that the will shall be recognized and admitted of record as wills in this state are recorded, as provided in *sections 6532–3, Mansfield's Digest.* In advance of the establishment in the probate court, granting the ancillary letters, of unpaid debts and legacies, by certified transcripts or otherwise; and after so great lapse of time, it is not to be presumed that any probate court would cloud the title of lands of a citizen of this state by granting an order to sell. *Mays v. Rogers, 37 Ark., 155; Stewart v. Smiley, Mans. Op.*

Second—Until some reason or necessity is shown more than appears in this record, the plaintiff below is not entitled to bring any possessory action for the lands in advance of an order to sell.

Third—That, while it is true, as contended, that if a plaintiff is entitled to any relief, it should not be denied him because he may have mistaken the tribunal, yet, as the plaintiff does not show that he is entitled to the relief prayed for, the court was not bound to change the whole object and scope of his complaint, in order to grant relief as at law, even if he had been entitled to a judgment for possession.

For these reasons, the decree of the court below is erroneous, the plaintiff below having shown no ground for either equitable or legal relief. The decree is reversed, and a decree will be entered here dismissing the complaint and for costs.

Hon. B. B. Battle did not sit in this case.

CITY OF LITTLE ROCK v. PRATHER ET AL.

46 471
70 554
70 555
70 556

46 471
f90 130

1. TAXES: *Illegal, may be enjoined.*

A court of equity has jurisdiction under the constitution to enjoin the collection of an illegal tax, when such injunction will present a multiplicity of suits.

2. TAXATION. *Of occupations, trades, etc.*

The legislature has authority under the constitution to delegate to cities the power to tax occupations.

APPEAL from *Pulaski* Chancery Court.
Hon. J. W. BUTLER, Special Judge.

Terry, *C. B. Moore*, *J. M. Moore* and *U. M. & Geo. Rose*, for appellants.

Benjamin, *T. B. Martin* and *G. W. Williams*, for appellees.

STATEMENT.

Hon. J. W. BUTLER, Sp. J. The act of the general assembly of the state of Arkansas, for "the better government of the cities of the first-class, and to confer additional powers on such cities, and to provide in what manner changes may be made in the number of aldermen and wards of such cities," approved March 21, 1885, provides, in the fifth subdivision of section 3 of the act, as follows:

"The city council of any such city shall also have power to pass, by a two-thirds vote of all the members elected thereto, an ordinance requiring that any person or persons, company or corporation, who shall engage in, exercise, follow or carry on any trade, business, profession or vocation, within its corporate limits, shall take out a license therefor, and pay into the city treasury, before receiving

the same, such amount of money as may be specified by such ordinance for such license, not exceeding fifty dollars ($50) per annum for any person for the trade or business, vocation or profession he may be individually engaged in, nor exceeding one hundred dollars ($100) per annum for any company or corporation, to be graded in each class as near as may be practical according to income, or amount of business done or property therein invested, and shall have full power to punish a violation of any such ordinance; provided, that neither the above limitation as to amount of license, nor anything herein contained, shall be construed as a limitation or restriction upon the power of any such city to tax, license, regulate or suppress any trade, business, calling or vocation in any case where such power previously existed or may be conferred by any other law; and that nothing herein contained shall be so construed as to apply to common laborers, artisans, mechanics and other persons working for wages by the day, week or month; and, provided further, that every such ordinance shall direct that the money realized thereunder shall be sacredly kept as a fund to be used only for the improvement of the streets, alleys and public grounds of such city, or to improve its sanitary condition."

The city council of the city of Little Rock, on the 7th day of July, 1885, under the authority of said act, passed Ordinance No. 7: "To require licenses to be taken out for certain trades, business, professions and vocations that may be engaged in, exercised, followed or carried on within the corporate limits of the city of Little Rock, and to specify the amount of such licenses and grade according to which the same shall be regulated."

A short time after the passage of the ordinance, D. J. Prather, a physician, and other persons of different callings, for themselves and all others interested, filed their

complaint in the Pulaski chancery court against the city of Little Rock, the clerk, the treasurer and collector of the city. The scope of the bill is:

That the city council of the city of Little Rock, after having levied a tax of five mills on the dollar, on all real and personal property within said city for all purposes, unlawfully and in violation of the constitution and laws of the state, passed an ordinance to require licenses to be taken out for certain business, professions and vocations that may be engaged in, followed or carried on within the corporate limits of said city (the ordinance being set out in full in the bill, and styled "Ordinance No. 7.")

That plaintiffs desire to and will exercise and follow their respective professions and vocations within said city, and that the defendant, the city of Little Rock, unless restrained, will undertake to enforce said ordinance, and plaintiffs and other citizens will be subjected to numerous prosecutions, arrests and suits in the attempt to enforce said ordinance.

That under said ordinance there are many citizens engaged in the various callings, whose incomes, gross sales and capital invested therein cannot be taxed; that there are numerous citizens and tax-payers who will be required to pay and contribute largely in excess of their proportionate part of the burden provided for under the ordinance, and that the taxation imposed is not equal, uniform or just, that it is in violation of the constitution of the state and of the constitution of the United States.

Plaintiffs prayed that the city of Little Rock, her officials, etc., be enjoined from enforcing said ordinance, that the ordinance be declared void, and for a temporary restraining order until a final hearing of the cause, etc.

The city of Little Rock answered the complaint, stating: That "Ordinance No. 7" was adopted by the concurrent

vote of two-thirds of all the members elected to the city council, and that in framing and adopting said ordinance all of the requirements of the act of the general assembly of the state, approved March 21, 1885, were observed. That the license taxes required therein are *not* unduly burdensome or oppressive, nor violative of any constitutional requirement of equality or uniformity, and that the said act authorizing the passage of said ordinance is not contrary to the constitution of the state, nor are any of the provisions of said ordinance contrary to any of the laws of said state, nor to the constitution of the state, nor of the United States.

That the ordinance was published and notice given that all persons having complaints to make against the classifications and gradings of the licenses, should file them in the office of the city clerk. That all the complaints filed were investigated, and "Ordinance No. 15," amending Ordinance No. 7, was passed by the concurrent vote of two thirds of all the members of the city council, "Ordinance No. 15" being set forth in full in the answer.

After the adoption of Ordinance No. 15, it is alleged, in the answer, that the intention of the city authorities was to proceed against persons violating the provisions of said ordinance in no other manner than as provided for in said Ordinance No. 7, as amended.

With defendant's answer there was a demurrer to the complaint. The several grounds were in effect:

First—That the bill did not show cause for equitable relief.

Second—There was an adequate remedy at law.

Third—That the bill sought to enjoin proceedings of a criminal or quasi-criminal nature.

Fourth—That there was a defect of parties, plaintiffs and defendants.

Fifth—The court had no jurisdiction.

The demurrer to the complaint was overruled, and the cause was submitted for final hearing upon the complaint and amendments thereto, the answer of defendants and exhibits, and the motion to dissolve the temporary injunction.

The court refused to dissolve the temporary injunction and adjudged and decreed Ordinance No. 7 and the amendments thereto, to be null and void, and made the injunction perpetual. Defendants appealed to this court.

OPINION.

Counsel for appellants submit that this is a suit to enjoin criminal prosecutions for the violation of a city ordinance. We notice:

First—The question of the jurisdiction of the Pulaski chancery court.

1. Jurisdiction to restrain illegal tax.

The case of the *City of Little Rock v. Barton et al.*, *33 Ark.*, *436*, was similar to the present case, in many respects. The plaintiffs, in behalf of themselves and others interested, prayed that the city of Little Rock be enjoined from collecting the license tax required of brokers by an ordinance of the city, the penalty for the violation of the ordinance being a fine, imprisonment, etc.

The court held that the chancery court had jurisdiction by the act of the legislature of 1873, which, in express terms, conferred the jurisdiction. See *Mansfield's Dig.*, *sec. 3731;* also, *sec. 13*, *art. 16*, *Const. 1874*

The case of *Taylor*, *Cleveland & Co. v. The City of Pine Bluff*, *34 Ark.*, *603*, was a proceeding in chancery by the plaintiffs and others interested, to enjoin the enforcement of a city ordinance, a violation of which subjected the party to an arrest and fine.

In that case, the court decided that "so much of the bill as sought to enjoin the city from prosecutions for violations of the ordinance was without the usual ambit of chancery relief." * * * After quoting *section 13, art. 16, Const. of 1874*, the court added: "This widens the range of equity jurisdiction, and will sustain the bill to the extent of giving the court power to inquire into the validity of the exactions, and if found void so to declare it, and restrain the city authorities from its collection."

A later case, *Waters-Pierce Oil Co. v. The City of Little Rock, 39 Ark., 412*, it is contended, settles the law differently.

But that case was never intended to undermine *Little Rock v. Barton et al.*, nor *Taylor, Cleveland & Co. v. Pine Bluff*. For the court, while disclaiming the jurisdiction to enjoin criminal prosecutions, did restrain the sheriff from distraining and selling property for the non-payment of a license tax imposed by a city ordinance. Section 5 of the act of 21st of March, 1885, conferring the authority upon cities of the first class, gives a civil remedy for the violation of the ordinances to be passed under the act, in addition to the criminal proceeding.

And a court of equity has jurisdiction, under the constitution, to enjoin the collection of an illegal tax where such injunction will prevent a multiplication of suits.

Has the legislature the authority, under the constitution, to delegate to cities of the first class the power to tax occupations?

The act says: "Persons engaged in any trade, business, profession or vocation, shall take out a license therefor. * * * "

It is sometimes difficult to determine whether a license is intended as a regulation or as a tax, but in this case there can be none.

The conferring of power upon cities of the first class to require a license from persons engaged in the useful trades, callings and professions, the amount of the license fees, and the uses to which the fund shall be applied, clearly indicate that the raising of revenue was the object. The license fees are, in effect, taxes, and the authority to impose them was a grant of the taxing power of the state.

In the matter of taxation, the legislature has plenary power, except as restricted by the state or federal constitutions, over property and persons within the limits of the state, and this taxing power the legislature "may delegate with the necessary restrictions to the state's subordinate political and municipal corporations to the extent of providing for their existence, maintenance and well-being, but no further." *Art. 2, sec. 23, Const. 1874.* This power extends to every known object of taxation.

Judge Cooley says: "It reaches to every trade and occupation, to every object of industry, use or enjoyment, to every species of possession."

In *Nathan v. Louisiana, 8 How., 80,* it is stated that, "The right of a state to tax its own citizens for the prosecution of any particular business or profession within the state has not been doubted. And we find that in every state money or exchange brokers, vendors of merchandise of our own or foreign manufacture, retailers of ardent spirits, tavern keepers, auctioneers, those who practice the learned professions, and every description of property, not exempted by law, are taxed."

It is said in *People v. Coleman, 4 Cal., 49,* that, "The power of the legislature to tax trades, professions and occupations is a matter completely within its control, and, unless inhibited by the constitution, eminently belonging to and resting in the sound discretion of the legislature. This principle has been repeatedly maintained by the

courts of almost every state in the union, and reiterated by the decisions of the Supreme Court of the United States."

That callings and pursuits are the subjects of taxation, see *License Cases, 5 How., 593; Brown v. State Maryland, 12 Wheat., 444; Jones v. Page & Stallworth, 44 Ala., 658; San Jose v. S. J. & S. C. R. R. Co., 53 Cal., 476; Burch v. Mayor, 42 Ga., 600; Simmons v. State, 12 Mo., 268; St. Louis v. Sternberg, 69 ib., 303; Stewart v. Potts, 49 Miss., 749; Newton v. Atchison, 31 Kans., 151; Carson v. State, 57 Md., 266; Ex parte Robinson, 12 Nev., 267.*

Attention has been called to certain sections of our constitution which, it is insisted, limit and restrict the taxing powers of the legislature.

* * * "All property subject to taxation shall be taxed according to its value, * * * making the same equal and uniform throughout the state." *Sec. 5, art. 16, Const. 1874.*

This section imposes no restriction upon the legislature in the taxing of property, and sections eight (8) and nine (9) of the same article refer to limitations of taxation by the state and county upon property as such, and have no reference to license taxes.

"No municipal corporation shall be authorized * * * to levy any tax on real or personal property to a greater extent in one year than five mills on the dollar of the assessed value of the same." *Sec. 4, art. 12, Const.* This section has reference to property only. A tax on occupations is, in no sense, a tax on property.

These provisions of the constitution do not, in terms, limit the power of the legislature to delegate to municipal corporations the right to tax occupations.

"The usual provisions in the constitutions of the different states concerning taxation do not prohibit the legislature from imposing or authorizing municipal authori-

ties to impose taxes upon trades, special professions and occupations." *2 Dillon Municipal Corporations, sec. 793.*

Section 5, of article 16, above quoted, is subject to this proviso: "The general assembly shall have power from time to time to tax hawkers, peddlers, ferries, exhibitions and privileges in such manner as may be deemed proper."

From this it is argued that there is an implied restriction upon the taxing power of the legislature over occupations, except those mentioned, according to the maxim of interpretation, "that the expression of one thing is the exclusion of another."

Admitting that this is true, as to the power of the legislature to tax any other callings (for state revenue), it does not follow that the legislature may not delegate to municipal corporations the power to tax all occupations. This question, at various times and under different constitutions, has been passed upon by this court.

In *Washington v. State, 13 Ark., 752*, it was said: * * * "The constitutional provisions concerning revenue were intended to apply to state revenue, and are not, and were not, applicable to taxes levied for county purposes.

"All such local taxes for county or municipal purposes might well be authorized, if self-imposed, according to the discretion of the people of such county or town through their magistrates or officers, elected and directly responsible to them. * * * But the imposition of taxes granting licenses by counties or towns may be authorized or regulated by legislation, and that legislation is not necessarily controlled or limited by the provisions of the constitution in regard to state revenues."

In *Baker v. State, 44 Ark., 134*, the previous decisions of the court, relating to this question, were reviewed. Chief Justice COCKRILL, in reaffirming *Washington v. State*, said: "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."

Conceding that the legislature had the right to confer power upon cities of the first class to tax occupations, the remaining question is: Does the ordinance conform to the law?

For the "better government of cities of the first class," and for their maintenance and well-being, the legislature conferred the "enlarged and additional powers" set forth in the enabling act.

The power, mentioned in the fifth subdivision of section three, was cautiously granted. To pass an ordinance taxing occupations it required the concurrence of two-thirds of all the members elected to the city council—the tax was to be graded, as near as practicable, according to the income, business or property invested, and was limited in amount; laborers, artisans, mechanics and persons working for wages by the day, week or month, were exempted from taxation, and the fund arising from the license tax was "to be used only in the improvement of the streets, alleys and public grounds, or to improve the sanitary condition of such cities."

The objection made to Ordinance No. 7, do not require an examination of it, section by section, throughout the numerous sub-divisions defining the various classes and specifying the amount of the license tax.

The methods for carrying into effect this grant of power were necessarily committed to the discretion of the city

council; and any abuse of that discretion, which was not apparent on the face of the ordinance, should be established by proof.

The answer denies the allegations of the bill, to the effect that the ordinance failed to conform to the act, and no testimony was taken in support of such allegations, consequently in determining the validity or invalidity of the ordinance we have nothing to look to except the ordinance itself.

Now, an inspection of that document does not disclose the fact that the classifications adopted by the council were in any degree arbitrary, or that the license tax demanded of each class was not graded as near as was "practicable according to incomes, or amount of business or property therein invested," or that the amounts fixed were oppressive or unjust to any class, or to any individual of that class, or that any difference in the manner of grading licenses in the different classes had been made without good and sufficient reason.

It is also objected that there is a discrimination against corporations in violation of the fourteenth amendment of the constitution of the United States. No corporations complain in the bill that the act, or the ordinance, denies to them "the equal protection of the law"; it is not alleged that corporations are discriminated against. It is argued, however, that such is the case. We think the supposed discrimination is not real. The rule of equality only requires that the law shall be applied impartially upon "all persons in similar circumstances."

By the law and the ordinance, two or more persons associating themselves as a partnership, and carrying on business as such, might be taxed not exceeding $100; a dozen persons associating themselves in business as a cor-

poration, could be taxed no more; there is no discrimination in this against the persons composing the corporation.

All tax laws are more or less unequal in their practical workings, and in the assessment of taxes on occupations, hardships in particular cases, are likely to occur.

If there should be injustice or oppression in any class, and it should be made to appear in a proceeding for that purpose, the ordinance might be held void to that extent. But if this should be so, it would afford no sufficient reason to set aside the whole ordinance.

The license tax complained of was "self-imposed"; the city of Little Rock, through its officials, passed the ordinance requiring licenses to be taken out, and the ordinance on its face does not disclose a want of conformity to the act.

The decree of the Pulaski chancery court is reversed, the injunction dissolved, and the bill dismissed.

Hon. B. B. Battle did not sit in this case.

---

46 482 73 53

46 482 d89 58

Lesser, as Assignee, v. Banks et al.

1. Bill of Exceptions: *What it is.*

A bill of exceptions is a record which is made when signed by the judge and filed by the clerk, and nothing can be inserted in it by the clerk by directions in the bill except writings so identified by the directions that the identity is certain upon comparing the writing with the directions.

APPEAL from *Lee* Circuit Court.
Hon. M. T. Sanders, Circuit Judge.

Stephens & Trieber and *J. M. Hewitt* for appellant.

Argue upon the merits.

Geo. H. Sanders for appellees.

There is nothing before this court for determination, there being no properly prepared or filed bill of exceptions. *St. L., I. M. & S. Ry. v. Godby, 45 Ark.*

COCKRILL, C. J. The appellant's arguments for the reversal of the judgment in this case rest solely upon the evidence and the court's directions to the jury. The counsel for the appellees contend that these matters cannot be reviewed because the bill of exceptions does not bring them to our consideration. The bill of exceptions, as certified by the clerk in the transcript filed here by the appellant, purports to set forth all the testimony adduced at the trial, the instructions of the court to the jury and the exceptions taken thereto. But, in return to a writ of *certiorari* sued out, for that purpose, the clerk has certified a copy of the bill as it was at the time it was allowed by the circuit judge and still exists among the records of the court.

It is a skeleton bill which not only casts upon the clerk the duty of filling the numerous blanks found in it, but gives him no reference, brand, mark or *indicia* of any sort, by means of which he may be safely guided in the discharge of his duty in some of its most material features. Depositions were referred to by the name of the witnesses testifying, but as these were on file in the case, any proper reference to them was a sufficient identification to guide the clerk to a certain conclusion. But the testimony of a number of witnesses was heard *ore tenus*. As to that fea-

ture we will allow the bill of exceptions to speak for itself, viz.: "Defendant thereupon introduced C. H. Banks, who testified (clerk insert here his testimony), J. M. Daggett, who testified (clerk insert here his testimony), Thos. Day, who testified (clerk will insert here his testimony)," and the testimony of many other witnesses for each party was called for in the same way. The clerk is also directed to insert the prayers for instructions that were given and those refused, without receiving any indication by which he should be guided in determining what had been asked, what given, or refused. It is also disclosed that the court gave to the jury a charge independent of that asked by the parties, but the only evidence of it found in the bill is a request that the clerk insert it.

From what source the clerk was to derive his information as to these matters is not pointed out. And yet, it is certain that nothing that is not reduced to writing can be embodied in a bill of exceptions by reference to it alone. Even where a writing is referred to, it must be so identified, by the reference in the bill, that when the paper and the reference to it are compared, the identification can be made with certainty. Any other rule would make the final record of a case as vacillating and uncertain as the memory or the will of the clerk to whom its final making up might be referred, and would place the rights of parties, who have judgments of record, entirely in the power of the person who eventually makes up the bill of exceptions for this court.

When a question arises as to whether any matter found in a bill of exceptions can hold its place there, we are not at liberty to look to extraneous proof to determine it, but are confined to the evidence that the bill itself gives for that purpose. It is a record and must carry with it its

own verity. The record is made when the bill is allowed by the judge and filed by the clerk.

The questions presented upon the insufficiency of the bill of exceptions are ruled by the case of *St. Louis, Iron Mountain & Southern Ry. Co. v. Godby, 45 Ark., 485*, and as none of the matters assigned as error are before us, the judgment must be affirmed.

St. L., I. M. & S. Ry. v. Phelps, ex rel.

46 485
73 117
74 360

1. Damages: *For delay in transporting freight.*

The general rule of damages for unreasonable delay in transporting freight is the difference between the value of the property at the time and place it should have been delivered and its value when it was delivered, with interest, after deducting the charges for freight, whether the depreciation in value accrued from a fall of prices or from a physical injury sustained through the negligence of the carrier.

2. Practice in Supreme Court: *Erroneous but harmless instructions.*

The Supreme Court will not reverse a judgment for an erroneous instruction of the circuit court, where it is apparent that no injury resulted from it to the appellant.

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

Dodge & Johnson, for appellant.

In the case of delay in the transportation of merchandise beyond the time stipulated, or if there is no stipulation, as was in this case, beyond a reasonable time for the transportation and delivery of the same, the damages would be the direct and actual losses sustained thereby,

such as the decline in the value of property or actual injury thereto. The difference between the value of the property at the *time when* and *the place where* it should have *been delivered*, and its *value when* it was delivered, if it had declined in value, or had been actually injured, would be the proper mode of estimating the damages, unless the delay was inevitable, as when it was caused by the act of God or the public enemies. *9 A. & E. R. Cases, 333–5; Hutchinson on Carriers, sec. 771; Field on Damages, sec. 375; Sedgwick on Damages, Marg. pp. 336, 359*, and notes; *Wood's Mayne on Damages, secs. 14, 15, 26, 31, 39; Ward v. R. R., 47 N. Y., 33; Buggs et al. v. R. R., 28 Barb., 520 and 521; Peet v. R. R., 20 Wise, 598; Weston v. R. R., 54 Maine, 378; Cutting et al. v. R. R., 13 Allen, 384; Scott v. Steamship Co., 105 Mass., 470; Cooper v. Young, 22 Ga., 273.*

But from the amount so found it is proper to deduct the freight where that had not been paid. *Hutchinson on Carriers, secs. 771, 772; R. R. Co. v. Ragsdale, 46 Miss., 458; Scott v. Steamship Co., 106 Mass., 468; King v. Woodbridge, 34 Vt., 565; Ashe v. DeRossett, 5 Jones (N. C.), 301; Crater v. Binninger, 4 Vroom, 517; Field on Dam., secs. 388–9; 44 Ark., 349.*

Sam W. Williams and *Geo. Thornburgh*, for appellee.

There is no proof of any difference in value between the places of shipment and delivery, stations not very distant from each other, and no presumption of difference of value arises. The verdict and judgment are right, and the instruction, if erroneous, was harmless. *10 Ark., 9; 11 ib., 754; 23 ib., 115; 21 ib., 357; 22 ib., 215; 23 ib., 32.* If any presumption arises at all, it is that the place of destination is the better or higher market; so if the instruction is erroneous, it was an error in appellant's favor.

The true rule for the measure of damages in cases like this is stated in *Hutchinson on Carriers, secs. 328, 356.* See, also, *44 Ark., 443.*

Damages for delay in transporting freight.

COCKRILL, C. J. The appellees delivered an engine and some other machinery to the railroad company at Black River station to be transported to Walnut Ridge. The company permitted the machinery to remain exposed to the weather about sixteen months before transporting and delivering it to the appellees at the place of destination. In the meantime it rusted, and from that cause deteriorated in value, and this action was prosecuted to recover for the injury. The only point made upon the appeal is as to the rule for the measure of damages laid down by the court for the guidance of the jury.

It is the general rule in this class of cases that the measure of recovery is the difference between the value of the property at the time and place it should have been delivered, and its value when it was in fact delivered, with interest, after deducting the charges for freight. It is immaterial whether the depreciation in value is caused by a fall in prices or by a physical injury sustained through the negligence of the carrier. Compensation for the actual loss sustained is what the law aims at, and the increased value at the place of delivery is what the owner, relying upon the carrier, has lost.

The complaint against the judgment here is that no proof was made, at the trial, of the value of the machinery, at Walnut Rridge, at the time it should have been received there, but that the proof of value at that time was confined to the place of shipment.

The jury were instructed that the difference between that value and the value at the time and place of delivery was the proper measure of damages. The record does not

apprise us that this worked unfairly upon the railroad, and no injury could have resulted unless the market price at the earlier date was less at the destination than at the place of shipment. Under the circumstances there is no presumption that the machinery was worth less at Walnut Ridge than at Black River at that time. The two points are stations on the same line of road; they are not many miles apart, and it is common knowledge to all persons that both are dependent on the same general markets for supplies and articles of the kind in dispute. The conditions being the same at the two points, the prices cannot be presumed to be materially different. *Seigbert v. Stiles, 39 Wisc., 533.*

But the reasoning of the court in the *Rome Railroad v. Sloan, 39 Ga., 636*, is a complete answer to the appellant's contention: "We think it safe to lay down the rule, that the commodity shipped is presumed to be worth as much at the point of destination as it is at the place of shipment. In fact, it is generally worth more. If it were not so there would be no inducement to ship. And the law allows the owner of the goods that increased price in case they are not delivered, if he chooses to avail himself of it by proof. But if he fail to do so, and only prove the value at the place of shipment, which is not rebutted by the defendant, the latter is not injured, and has no just cause of complaint. Indeed, he is presumed to be benefited by the plaintiff's neglect to make the proof and insist upon the full measure of his rights."

The proof was that, at the time of shipment, the property was in good condition and worth $500. When received, its market value was much reduced, and the appellees sold it shortly afterwards at what was proved to be its then fair market value at Walnut Ridge, viz., $240. The verdict was for $200.

If there was error in the instruction, it was harmless, and as it is not made to appear that the appellant has been prejudiced, the judgment is affirmed.

CHAPMAN V. HUDSON.

1. STATUTE OF LIMITATIONS: *Trover. Conversion by bailee.*

An action in the nature of trover cannot be maintained against a bailee for hire or his assignee, until the term of hire expires, and the statute of limitations does not run against the owner of the property until then, unless the bailee or assignee does some act with the property inconsistent with his right as bailee, and amounting to an abandonment of it. This would be a conversion for which the action might be brought immediately, and from which time the running of the statute will date.

[In this case the defendant purchased the property from the bailee, and used it as his own before the term expired; but the action was not brought for more than three years after the purchase, but less than three after the term. *Held:* Barred.—REP.]

2. SAME: *Same. Removal of property.*

The removal or concealment of property to avoid its recovery by an action of replevin, will not postpone the commencement of the statute of limitations against an action of *trover* for conversion of the property.

APPEAL from *Little River* Circuit Court.
Hon. J. E. BORDEN, Special Judge.

W. P. Feazel, for appellant.

Bales was a bailee for hire, and his bailor could bring no action against him, either of trover or replevin, nor against his vendee, until the expiration of his lease. The action was not barred. *Angell on Lim., p. 128, note 3 (6th*

ed.); 10 Ark., 228; 17 ib., 449; Bliss on Code Pl., sec. 23; Story on Bail, sec. 39; Cooley on Torts, p. 449; 50 Ala., 19; Wells on Replevin, secs. 31 to 53.

If one by his unlawful act prevents another from bringing a suit, the statute will not run until the disability is removed. *Gantt's Dig., sec. 4143; 24 Ark., 559.*

A. J. Hudson, pro se.

When there is a tortious, or wrongful taking, the statute of limitations begins to run from the taking or conversion. *Angell on Limitations, 5th ed., sec. 304, and notes.*

If Bales sold the wagon and oxen, the sale was a conversion on his part, as well as on the part of defendant, Hudson, for which plaintiff might immediately have brought his action against Bales or Hudson, or both of them, and the statute of limitations would begin to run from date of sale. *2 Hilliard on Torts, 4th ed., sec. 4, pp. 32, 33.*

It is immaterial whether Bales sold the wagon and team, or that the defendant took them without Bales' consent. Either act would amount to a conversion on defendant Hudson's part, and the statute would begin to run from the conversion in his favor. *2 Hilliard on Torts, 4th ed., secs. 123 and 3 a, pages 26, 27, 28, 29, 30, and notes.*

The statute begins to run whenever the cause of action is complete. *10 Ark., 228; 32 ib., 122.*

1. STATUTE OF LIMITATIONS: When commences in trover.

COCKRILL, C. J. Chapman sued Hudson, in the Little River circuit court, to recover the value of a wagon and oxen which the complaint alleged belonged to the plaintiff and had been converted by Hudson to his own use. The conversion took place in the summer of 1879; the suit was brought in December, 1882, more than three years

thereafter. The defense was the statute of limitations. The appellant sought to avoid the operation of the statute by proving that he hired the oxen and wagon to one Bales for the residue of that year, and that Hudson obtained his possession from Bales. It is argued from this that the appellant could have maintained no action for the property until the beginning of the year 1880, that is, until the expiration of Bales' term of hiring. Now, as Bales was a bailee for hire and had the right of possession and an assignable interest in the property, this argument would be unanswerable if he or his vendee had done no act amounting to a conversion; for while the right of possession is in another, the owner cannot maintain an action in the nature of trover. But Bales, notwithstanding he had only the temporary use of the property, took it to the state of Texas, and, being followed there by the appellee and threatened by him with the levy of an attachment upon his effects, turned over the appellant's property to the appellee in payment of the debt for which the attachment issued; that is, he exercised the right of absolute ownership over it. This conduct was inconsistent with his right as bailee and was an abandonment of it. It was a conversion of the property, and is likened, by the authorities, to a destruction of it, and put an end to the contract of bailment, and the owner's right to take possession of the property or to recover damages for the tort accrued immediately upon the commission of the act. *Brown v. Wallace, 17 Ark., 451–2; Spencer v. McDonald, 22 ib., 476; Baily v. Colby, 34 N. H., 29; Sargeant v. Gill, 8 ib., 325; Sanborn v. Cohuren, 6 ib., 14; Farrant v. Thompson, 5 B. & Ald., 826; Galvin v. Bacon, 8 Me., 28; Bigelow Lead. Cas. Tort, p. p. 429–30; Note to De Voin v. Mich. Lumber Co., 25 Am. Law Reg., 240–1.*

It is true Bales testified that he notified the appellee that he surrendered nothing more than his own interest in the property, but that tended to prove only that he committed no wrongful act in making the sale, and, if true, it would have been a defense to an action against him for conversion. But his testimony and all the proof in the case lead to but one conclusion as to the intention of his vendee, the appellee here. He avowed his design to hold the property absolutely at the time of the negotiation, and exercised absolute dominion over it when it came to his possession. His version of the matter was that he believed Bales had purchased the property from the appellant on a credit and had the right to sell it. The appellant was not ignorant of the adverse claim of title. A few weeks after the appellee's purchase, he employed an attorney to bring suit for the recovery of the specific articles, and the attorney went to Texas, without delay, for that purpose, but the appellee prevented the suit, at that time, it is said, by an unexpected removal of the property. No further attempt appears to have been made by the appellant to assert his rights until the institution of this suit.

2. SAME: Removal of property to avoid action.

The appellee testified on the trial that he had allowed the property to remain in Texas to prevent an action against him for its recovery, and it is argued that this should stop the operation of the statute of limitations in this suit. The position is untenable. There is absolutely nothing in the record to show that the remedy now adopted by the appellant could not have been pursued at any time after his cause of action accrued as readily as at the date of the institution of this suit.

It follows, then, the statute has run against the appellant's action from the date of the appellee's possession in 1879, or at least from the time the appellant was apprised of the hostile attitude of the possession (*Pickens v. Sparks*,

44 Ark., 291; Lawson v. Cunningham, 21 Ga., 454; Wood on Lien, sec. 183), and as suit was not commenced within three years thereafter, the action was barred, and the judgment must be affirmed.

GARRETT BROS. v. WADE.

46 493
65 114

1. EXEMPTION: *Notice of claim of, when waived.*

It is the duty of a judgment debtor who claims exemption of his property from sale to give to the creditor five days' notice of filing the schedule of exemption; but this notice may be waived by the creditor, and *is* waived by his voluntary appearance before a justice, or before the circuit court on appeal, and contesting the right to the exemption.

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

G. W. Shinn, for appellants.

Five days' notice was not given as required by *sec. 3006, Mansf. Dig.* Nor was the notice waived by appellants. The exemption can be claimed at any time before sale; but when it is claimed, the statute must be followed. *28 Ark., 485; 40 ib., 352; 33 ib., 464; 42 ib., 410.* The statute is peremptory, and the notice *must* be given before the exemption can be claimed.

Geo. L. Basham, for appellee.

Exemption laws are liberally construed, and apply to all cases within the spirit of the act. *28 Vt., 674; 36 ib., 271; 45 Miss., 182; 18 Tex., 416; 24 Ark., 155; 25 ib., 101.*

Appellants, by appearing in court and contesting appellee's claim, waived notice. See *Probst & Hilb v. Scott, 31 Ark., 652.*

COCKRILL, C. J. The appellants were the judgment creditors of the appellee, and caused a writ of garnishment to be served on one of her debtors for the purpose of subjecting the debt due her to the payment of their judgment. On the return day of the writ the appellee appeared, and upon leave granted filed an answer in the garnishment proceeding, claiming the debt as exempt from seizure, and filed with her answer a schedule of her property. The appellants demurred to the answer, and the demurrer being overruled, they declined to take further action in the matter; the justice sustained the claim to exemption, and the appellants prosecuted their appeal to the circuit court. There the judgment of the justice was, in affect, affirmed, and this appeal is prosecuted to reverse the judgment of the circuit court.

The debtor's right, in general, to the exemption of a chose in action is not questioned by the appellants, but it is argued that the privilege of any exemption of personal property was waived or lost in this case by a failure to comply strictly with the following provision of the statute:

"Whenever any resident of this state shall, upon the issue against him for the collection of any debt by contract, of any execution or other process, * * * against his property, desires to claim any of the exemptions provided for in article 9 of the constitution of this state, he shall prepare a schedule of all his property, including moneys, rights, credits and choses in action held by himself or others for him, and specifying the particular property which he claims as exempt under the provisions of

said article; and after giving five days' notice, in writing, to the opposite party, his agent or attorney, shall file the same with the justice or clerk issuing such execution or other process, or attachment, and the said justice or clerk shall thereupon issue a supersedeas staying any sale or further proceeding under said execution, or process, or attachment against the property in such schedule described and claimed as exempted, and by returning the property to the defendant, etc, * * *" *Mansf. Dig., sec. 3006.*

The law favors exemptions, and the statutes regulating the manner of asserting the claim, are not to be construed strictly for the purpose of defeating the end the state has in view in making provision for its citizens.

It is apparent from this statute that the allotment of the personal property to be withheld by the debtor from the grasp of his execution creditor, may be made at any time after the issue of process, if prior to the sale. *State v. Read, 94 Ind., 103; Shepherd v. Merrill, 90 N. C., 208.*

It is not necessary that the debtor should demand an appraisement. It is his duty to set forth all of his property in the schedule with its value, and provision is made, in the interest of the creditor, when there is not enough to satisfy his debt, after deducting property to the amount in value allowed as the exemption of personalty, for the appointment of appraisers to determine whether the property claimed as exempt exceeds in amount the limit fixed by the constitution. In order that the creditor may be prepared to show that his debtor is not of the protected class, or if entitled to exemption, that he (the creditor) may not be surprised by omissions of property from the schedule, and perhaps to save him from unnecessary costs in following a debtor who owns less than the law exempts, provision is also made for giving him notice of the inten-

tion to assert the claim five days before hand. The time given is solely for the benefit of the creditor. He may waive it if he sees fit, and when he does so he cannot be heard to complain that he has been injured.

It is true, in this case, no written notice was served upon the creditors that the debtor intended to claim her exemptions, but she filed an answer asserting the right and accompanying it was a schedule which is admitted to be in substantial compliance with the statute. The appellants took issue upon the right of exemption by filing their demurrer to her answer, and when defeated upon that ground, elected to make no other contest.

This was as clear a waiver of the written notice as the appearance of a defendant without summons in an ordinary action. Moreover, if the appellants had not appeared in the justice court to contest the right of exemption, the prosecution of the appeal to the circuit court, where the matter was to be tried *de novo* (*Cason v. Bone, 43 Ark., 17*), was itself a waiver of the notice, and gave the circuit court the same power to proceed that the justice would have had upon full notice in writing to the creditors.

It is a general rule that the voluntary appearance of a party entitled to notice, amounts to a waiver of such notice. *Wade, Notice, secs. 1203, 1220.*

It was not necessary for the debtor to intervene in the garnishment proceeding in order to make good her claim to the debt due her. It was proper for her to file her schedule and claim as in an ordinary levy upon execution. *Winter v. Simpson, 42 Ark., 410.* But the schedule was, in fact, filed with the justice who issued the process, and her claim was in compliance with the statute. The appellants could have suffered no injury from the form of proceeding, and the practice pursued met with the approval of

this court in the case of *Probst & Hilb v. Scott*, *31 Ark.*, *652*.

Let the judgment be affirmed.

BROWN v. DONEGHEY.

46 497
65 114

1. EXEMPTIONS: *Notice of filing schedule when waived by creditor.*

When a justice of the peace refuses to issue a supersedeas to restrain the sale of exempted property, on account of the failure of the debtor to give the creditor the five days' notice of filing his schedule, and the debtor appeals to the circuit court and the creditor appears there and resists the right of exemption he thereby waives the required notice.

APPEAL from *Faulkner* Circuit Court.
Hon. G. W. DENISON, Special Judge.

E. A. Bolton for appellant.

Five days' notice was not given as required. *Sec. 3006 Mansf. Digest.* The statute must be complied with. *41 Ark. 249*.

The appellee *pro se.*

The law as to notice is simply *directory*, not mandatory. *Any* notice to the creditor which protects him fraud, surprise or imposition satisfies the spirit of the law. *1 Burr.*, *447; Potter's D. W. on Stat.*, *224; Thompson on Home & Ex.*, *sec. 652–3*, *833*.

COCKRILL, C. J. This case is ruled by the case of *Garrett Bros. v. Wade, ante.*

The appellee's property was held by a constable under execution. He applied to the justice of the peace, who issued the writ, to file his schedule of exempted property and issue a supersedeas to restrain the sale. The notice required by the statute had not been served on the plaintiff in execution five days before the schedule was offered, and the justice refused to issue the supersedeas for that reason. The defendant thereupon filed an affidavit and bond for appeal to the circuit court to prevent the sacrifice of his exemptions. *Winter v. Simpson, 42 Ark., 411.* The creditor followed the case and resisted the right of exemption in the circuit court, where the matter was heard *de novo*, but the court awarded the debtor his exemptions, and the creditor appealed to this court. His only contention is that he had no legal notice of the debtor's intention to claim his exemptions. As we have before decided, his voluntary appearance and resistance of the right of exemption was a waiver of notice.

Affirmed.

HERSHY V. MACGREEVY & YANTIS.

1. EVIDENCE: *Verified complaint in action on account.*

When a complaint in an action upon an account, refers to the account, which is attached to it, for the several items and their separate value, and alleges that the items are worth the amounts charged and that the defendant is justly indebted to the plaintiff in the amount claimed, and is properly verified, it sufficiently complies with section 2915, Mansfield's Digest, which makes a verified account *prima facie* evidence of its correctness until denied by the defendant under oath, and will authorize a judgment by default for the amount of the account without further evidence.

2. PLEADING: *Striking from files for scandalous matter.*

When a pleading is replete with irrelevant and scandalous matter the court may properly strike it from the files.

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

Sanders & Husbands for appellant.

The complaint did not state a cause of action. It does not allege that the services were completed; that the suits had terminated, or the relation of client and attorney had ceased. Without such allegation there is no cause of action stated. See *Phelps & Jones v. Patterson, 25 Ark., p. 185.* A complaint must state facts sufficient to constitute a cause of action. This one does not.

A defendant by allowing judgment to go by default, may in effect admit the facts stated in the complaint, *but does not admit that those points constitute a cause of action. Johnson v. Pierce, 12 Ark., p. 600; Hunt et al. v. Burton et al., 18 Ark., 194; Chaffin et al. v. McFadden, 41 Ark., 43; Odd Fellows Association v. Hogan, 28 Ark., 261.*

It was error to render judgment for the amount of the account sued on *without any proof of the value of the services. Page v. Sutton v. Orlopp, 29 Ark.; 305; Taylor, Radford & Co. v. Hathaway, 29 Ark., p. 599; Beel & Carlton v. Welch, 38 Ark., p. 149.*

The lower court abused discretion in refusing appellant time to answer after verification of the complaint. In order to entitle plaintiff to judgment he should have on file such complaint as the law regards, and sworn to as the law requires. Appellant was not required to answer the unsworn to complaint. He could have a rule on plaintiff to verify on pain of dismissal.

The court below erred in refusing to set aside the judgment and grant a new trial as asked by appellant.

In his motion for new trial appellant stated most of the usual grounds for new trial, and also he stated that he had a meritorious defense, and set forth what it was, and exhibited the evidence of same. The practice of this court has been to set aside *default* judgments for less cause and weaker reasons than those relied on in this case by appellant. *Browning et al. v. Roane et al., 9 Ark., 355; Fullerton v. Hought, 12 Ark., 399; Kupferle v. Merchants' National Bank, 32 Ark., 719.*

Under the rulings of this court this is a proper case for the exercise of the corrective power over abused discretion of the lower court. See *21 Ark., p. 460; ib., 329; 22 Ark., p. 164; 26 Ark., p. 323; 26 Ark., p. 421.*

MacGreevy & Yantis, appellees, *pro se.*

No authorities need be cited in this cause.

The points appellees rely on are too well settled in this state to justify it.

The motion for a new trial being filed out of time it was discretionary with the court to receive it. No cause was shown, and therefore, the court properly exercised its discretion in striking.

The judgment on its face shows that evidence to justify it was had.

COCKRILL, C. J. This is an appeal from a judgment by default in a suit upon an account. The court heard no testimony on the rendition of judgment, but the judgment entry recites that the account was duly verified.

1. EVIDENCE: Verified complaint on account

In suits upon accounts the statute makes the affidavit of the plaintiff that his account is "just and correct" *prima facie* evidence of the fact. No further burden is cast upon him until the correctness of the account is denied. *Mansf. Dig., sec. 2915.* Upon failure to answer the material allegations of the complaint they stand confessed; the affidavit proves the value of the goods sold or services rendered, and there is no necessity for proof of any other fact to enable the court to pronounce judgment. *Ib., 5175.*

It is not necessary that the affidavit to the account should be in the language of the statute or that it should be attached to the account itself. The spirit of the statute is complied with when, as in this case, the complaint, after a proper reference to the account, which is attached to it, for the several items and their separate value, alleges that the services performed are worth the amounts charged and that the defendant is justly indebted to the plaintiff in the amount claimed, and the complaint is itself properly verified. This is, in substance, a verification of the account.

2. Pleading stricken from files for scandalous matter.

The court did not abuse its discretion in refusing to open the judgment. In the original motion for relief against the default no effort was made to show a meritorious defense to the action. Several amendments to the motion were subsequently filed in which it was alleged that some of the items of the account were in excess of the contract for services agreed upon by the parties, and that in others a charge was made in excess of the value of the services rendered; but these amendments were replete with irrelevant and scandalous matter and the court properly caused them to be stricken from the files.

As to diligence in making his defense none was shown. The defendant alleged, in his first motion, that he supposed he had counsel who would attend to his interest but his subsequent allegations and the exhibits which

he filed in support of them show that he was not sincere in his first statement; for his excuse in the end for this negligence was that no resident attorney would undertake to make his defense for him, and that the non-resident attorneys applied to would appear in his behalf only upon condition that the case could be transferred to their home court. The circuit judge, doubtless, understood that the inability to procure legal assistance had been brought upon the defendant by his own conduct, and his paltering with the court in the matter in hand could not commend the reasonableness of the excuse for suffering the default.

Affirm.

GAINES, COLLECTOR, v. SPRINGER.

1. JURISDICTION: *Injunction of federal process by state courts.*

   A state court cannot enjoin the collection of a tax levied pursuant to a mandamus issued by a federal court to enforce the payment of its judgments.

2. SAME: *Of federal court to enjoin its judgment. Citizenship.*

   A bill filed in a federal court to enjoin the collection of a tax levied in pursuance of its mandamus for payment of a judgment rendered by it would not be an original suit, but ancillary and dependent—supplementary, merely, to the original suit in which the mandamus was issued, and would be maintained without reference to the residence or citizenship of the parties.

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

J. G. B. Simms and *Dodge & Johnson*, for appellant.
D. H. Reynolds, for appellee.

BATTLE, J. Plaintiff, Levi H. Springer, states, in his complaint on file herein, among other things, as follows: That he was the owner of the east half of section 30, in township 18 south, and in range 2 west, in Chicot county, and of personal property; that this tract of land was assessed for taxation for the year 1884 at $320, and his personal property at $360; that the total valuation of the assessment of the real estate of Chicot county for 1884 is $983,032, and of the personal property $346,385, amounting in the aggregate to the sum of $1,329,417.

That various persons, having judgments in the circuit court of the United States for the eastern district of Arkansas against the county of Chicot on coupons of bonds issued to certain railroad companies, amounting in the aggregate to over $120,000, obtained various writs of mandamus from the said circuit court of the United States, commanding the county court of Chicot county to levy a tax sufficient to pay the aggregate amount of said judgments; and that thereafter the county court, composed of the county judge and some of the justices of the peace of Chicot county, met on the third Monday in July, 1884, at the court-house of said county, "for the purpose of levying the county taxes and making appropriations for the expenses of the county," for the year 1884, and levied, among other taxes, a tax of 20 mills on the dollar on the taxable property of the county to pay said judgments so far as it would extend; that the tax of 20 mills is illegal and void, for many reasons stated, which are unnecessary to mention in this opinion.

The prayer of the complaint is that the collection of the 20 mills tax be perpetually enjoined.

The defendant, Abner Gaines, collector of Chicot county, demurred to the complaint, because the facts therein stated were not sufficient to constitute a cause of action. The

court overruled the demurrer, and the defendant electing to rest on his demurrer, a decree was rendered perpetually restraining and enjoining the collection of the 20 mills tax, and the defendant appealed.

1. Injunction of federal process by state courts

"As a general rule the state courts refuse to trespass upon the clearly established jurisdiction of the United States courts, and refuse to grant injunctions against the enforcement of judgments recovered in those courts, preferring that whatever ground of equitable relief may exist against such judgments should be urged in the United States courts themselves. Especially will the state courts refuse to interfere in cases where jurisdiction is expressly conferred by statute upon the federal courts, as in the case of a judgment for an infringement of letters patent. And as between the state and federal courts, in which this jurisdiction is co-ordinate over the same subject matter, that court which first obtains jurisdiction will be left to retain it to the end, and its process will not be interfered with by injunction from the other tribunals." *1 High on Injunctions, sec. 266.*

In *Taylor v. Carryl, 20 How., 583*, it was held "that the property seized by the sheriff under the process of attachment from the state court, and while in the custody of that officer, could not be seized or taken from him by a process from the district court of the United States, and that the attempt to seize it by the marshal, by a notice or otherwise, was a nullity, and gave the court no jurisdiction over it, because to give jurisdiction to the district court, in a proceeding *in rem*, there must be a valid seizure and an actual control of the *res* under the process."

Freeman v. Howe, 24 How., 450, was an action of replevin instituted in a state court against a United States marshal to recover possession of property held by the marshal under process of attachment issued by a clerk of a United

States circuit court in a suit instituted in the last named court. It was contended by the plaintiff in the replevin suit that the process of attachment was directed against the property of the defendant in the attachment, and conferred no authority upon the marshal to take his property. In reply, Mr. Justice Nelson, in delivering the opinion of the court, said: "But this involves a question of right and title to the property under the federal process, and which it belongs to the federal, not to the state courts, to determine. This is now admitted; for though a point is made in the brief by the counsel for the defendant in error, that this court had no jurisdiction of the case, it was given up on the argument. And in the condition of the present case, more than this is involved; for the property having been seized under the process of attachment and in the custody of the marshal, and the right to hold it being a question belonging to the federal court, under whose process it was seized, to determine, there was no authority, as we have seen, under the process of the state court, to interfere with it. We agree with Mr. Justice Greer in *Peck et al. v. Jennis et al.*, *7 How.*, *624:* 'It is a doctrine of law too long established to require citation of authorities, that where a court has jurisdiction, it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise, its judgment, till reversed, is regarded as binding in every court; and that where the jurisdiction of a court, and the right of plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court.' 'Neither can one take the property from the custody of the other by replevin, or any other process; for this would produce a conflict extremely embarrassing to the administration of justice.'"

He adds further on: "Reference was made, also, on the argument in the present case, to an opinion expressed by Chancellor Kent, in his Commentaries, as follows: 'If the officer of the United States who seizes, or the court which awards the process to seize, has jurisdiction of the subject matter, then the inquiry into the validity of the seizure belongs exclusively to the federal courts. But if there be no jurisdiction in the instance in which it is asserted, or if a marshal of the United States, under an execution in favor of the United States against A, should seize the person or property of B, then the state courts have jurisdiction to protect the person and property so illegally invaded.'"

"The error into which the learned chancellor fell, from not being practically familiar with the jurisdiction of the federal court, arose from not appreciating, for the moment, the effect of transferring from the jurisdiction of the federal court to that of the state, the decision of the question in the example given; for it is quite clear, upon the principle stated, the jurisdiction of the former, and the validity and effect of its process, would not be what the federal, but state court, might determine. No doubt, if the federal court had no jurisdiction of the case, the process would be invalid, and the seizure of the property illegal, for which the aggrieved party is entitled to his remedy. But the question is, which tribunal, the federal or state, possesses the power to determine the question of jurisdiction or validity of the process? The effect of the principal stated by the chancellor, if admitted, would be most deep and extensive in its operation upon the jurisdiction of the federal court, as a moment's consideration will show. It would draw after it into the state courts, not only all questions of the liability of property seized upon mesne and final process issued under the authority of the

federal courts, including the admiralty, for this court can be no exception for the purposes for which it was seized, but also the arrests upon mesne, and imprisonment upon final process of the person in both civil and criminal cases, for in every case the question of jurisdiction could be made; and until the power was assumed by the state court, and the question of jurisdiction of the federal court was heard and determined by it, it could not be known whether, in the given case, it existed or not. We need scarcely remark, that no government could maintain the administration or execution of its laws, civil or criminal, if the jurisdiction of its judicial tribunals were subject to the determination of another."

In *Riggs v. Johnson County*, *6 Wall.*, *166*, plaintiff recovered judgment in a circuit court of the United States against a county for interest on railroad bonds, issued under a state statute, in force prior to the issue of the bonds, which made the levy of a tax to pay such interest obligatory on the county. A state court perpetually enjoined the county officers against making any levy of taxes to pay such bonds and the interest thereon. After the injunction granted by the state court had been issued, plaintiff applied to the circuit court in which he had recovered his judgment for a mandamus to compel the county officers to levy a tax to pay his judgment. The county officers answered, making as return the injunction previously granted by the state court. The circuit court refused to grant the application. The Supreme Court of the United States, holding that mandamus against the county officers to levy the tax was the appropriate and proper remedy in the case, said: "Authority of the circuit courts" of the United States "to issue process of any kind which is necessary to the exercise of jurisdiction and agreeable to the principles and usages of law, is beyond question, and the

power so conferred cannot be controlled either by the process of the state courts, or by any act of a state legislature. Such an attempt was made in the early history of federal jurisprudence, but it was wholly unsuccessful. Suit in that case was ejectment, and the verdict was for the plaintiff. Defeated in the circuit court, the defendant went into the state court and obtained an injunction staying all proceedings. Plaintiff applied for a writ of *habere facias possessionem*, but the judges of the circuit court being opposed in opinion whether the writ ought to issue, the point was certified to this court; and the decision was that the state court had no jurisdiction to enjoin a judgment of the circuit court, and the directions were that the writ of possession should issue. Prior decisions of the court had determined that a circuit court could not enjoin the proceedings in a state court, and any attempt of the kind is forbidden by an act of congress. * * * * *

'State courts are exempt from all interference by the federal tribunals, but they are destitute of all power to restrain either the process or proceedings in the national court. Circuit courts and state courts act separately and independently of each other, and in their respective spheres of action the process issued by the one is as far beyond the reach of the other as if the line of division between them 'was traced by landmarks and monuments visible to the eye.' * * * * * *

"Viewed in any light, therefore, it is obvious that the injunction of a state court is inoperative to control, or in any manner to affect the process or proceedings of a circuit court, not on account of any paramount jurisdiction in the latter courts, but, because, in their sphere of action, circuit courts are wholly independent of the state tribunals. Based on that consideration, the settled rule is, that the remedy of a party, whose property is wrongfully at-

tached under process issued from a circuit court, if he wishes to pursue it in a state tribunal, is trespass, and not replevin, as the sheriff cannot take the property out of the possession and custody of the marshal. Suppose that to be so, still the defendants insist that the writ was properly refused, because the injunction was issued before the plaintiff's application was presented to the circuit court. Undoubtedly circuit courts and state courts, in certain controversies between citizens of different states, are courts of concurrent and co-ordinate jurisdiction, and the general rule is, that as between courts of concurrent jurisdiction, the court that first obtains possession of the controversy, or of the property in dispute, must be allowed to dispose of it without interference or interruption from the co-ordinate court. Such questions usually arise in respect to property attached on mesne process, or property seized upon execution, and the general rule is, that where there are two or more tribunals competent to issue process to bind the goods of a party, the goods shall be considered as effectually bound by the authority under which they were first attached or seized. * * * * *

"The argument for the defendants is, that, this rule controls the present controversy, but the court is of a different opinion, for various reasons, in addition to those already mentioned. Unless it be held that the application of the plaintiff for the writ is a new suit, it is quite clear that the proposition is wholly untenable. The theory of the plaintiff is, that the writ of mandamus, in a case like the present, is a writ in aid of jurisdiction which has previously attached, and that, in such cases, it is a process ancillary to the judgment, and is the proper substitute for the ordinary process of execution, to enforce the payment of the same, as provided in the contract. Grant that such is the nature and character of the writ, as applied in such

a case, and it is clear that the proposition of the defendants must utterly fail, as in that view there can be no conflict of jurisdiction, because it has already appeared that a state court cannot enjoin the process or proceedings of a circuit court.

"Complete jurisdiction of the case, which resulted in the judgment, is conceded; and if it be true that the writ of mandamus is a remedy ancillary to the judgment, and is the proper process to enforce the payment of the same, then there is an end of the argument, as it cannot be contended that a state court can enjoin any such process of a federal court."

Mr. Justice Strong, in delivering the opinion of the court, in the *Supervisors v. Durant*, *9 Wall.*, *417*, said: "Indeed, it is not now contended that mandamus is not a proper remedy in cases like the present, where a relator has obtained a judgment, which can be satisfied only by the levy of a tax, and when the proper officers of a municipality, against which the judgment has been obtained, refuse or neglect to levy it. That it is a legitimate remedy has been ruled in very many cases.

"In such a case 'the writ is * * * neither a prerogative writ, nor a new suit. On the contrary, it is a proceeding ancillary to the judgment which gives the jurisdiction, and, when issued' it 'becomes a substitute for the ordinary process of execution, to enforce the payment of the same, as provided in the contract.' It is a step toward the execution of the judgment, and necessary to the jurisdiction of the court.

"It is insisted, however, that even if the circuit court may award a mandamus to aid in the enforcement of its judgments, the writ should not have been awarded in this case, because the district court of Washington county had enjoined the defendants against levying and collecting any

tax for the payment of the bonds and coupons, for a portion of which the relator had obtained his judgment. This injunction the defendants pleaded, and to the plea the relator demurred. That such an injunction was wholly inoperative to prevent the circuit court of the United States from enforcing its judgment by mandamus to the defendants to compel them to levy the tax which the law authorized and required, is no longer to be doubted. * * * The true reason why the injunction was not a bar to the mandamus is, that the district court of the state and the circuit court are independent courts, and that neither can interfere with the process or proceedings of the other. It would hardly be contended that a state court can enjoin a defendant against paying a judgment which has been, or may hereafter be, recovered in a circuit court of the United States. If it may, federal jurisdiction is a myth. It is at the mercy of the state tribunals. Yet there is no substantial difference in principle between the allowance of such an injunction and that of one against a proceeding in aid of an execution—a mandamus to levy an authorized tax to pay a judgment."

In *The Mayor v. Lord, 9 Wall., 409*, it was held: "An injunction from a state court against a city's levying a tax to pay certain bonds of the city cannot be set up to prevent a mandamus from the federal courts ordering the city to levy a tax to pay a judgment obtained against it in the federal court on those same bonds." Mr. Justice Swayne, in delivering the opinion of the court, said: "The injunction cannot avail the respondents. The relator was not a party to the proceeding. If he had been, it is not competent for a state tribunal thus to paralyze the process issued from a court of the United States to give effect to its judgment. This is a sound and salutary principle. It is vital to the beneficial existence of the national courts,

and has heretofore been applied by this tribunal, upon the fullest consideration, in other cases presenting the same question."

The questions involved in the cases cited may now be regarded as finally settled in the manner decided by the Supreme Court of the United States, as we have shown. According to the opinions cited, it must follow that a state court cannot enjoin the collection of a tax levied pursuant to a mandamus issued by a federal court to enforce the payment of its judgments. There is no difference in the right to enjoin the levy and the right to enjoin the collection of a tax, the grounds of injunction being the same before and after its levy. If the mandamus of the federal court would be sufficient to defeat it in one case, it would be in the other.

2. SAME: By federal court. Citizenship.

If the appellee is entitled to the injunction asked and contended for, he should go into the circuit court of the United States for the eastern district of Arkansas to seek it. That court can grant the relief, if he is entitled to it. A bill to enjoin the collection of the tax filed in that court, on the equity side thereof, would not be an original suit, but ancillary and dependent, supplementary merely to the original suit in which the mandamus was issued, and would be maintained without reference to citizenship or residence of the parties. *Freeman v. Howe, 24 How., 460; Kippendorf v. Hyde, 110 U. S., 276; Pacific R. R. v. Missouri Pacific R. R., 111 U. S., 505.*

The judgment of the court below is, therefore, reversed, and the complaint is dismissed without prejudice.

St. L., I. M. & S. Ry. v. Wilkerson.

46 513
61 351
61 621
62 242
46 513
65 434
46 513
74 412
46 513
f82 270
46 513
83 301
46 513
87 542
46 513
d89 107
f90 403

1. Railroads: *Negligence. Contributory negligence.*

If the employes on a railroad train see a person on the track far enough ahead of the train to get out of the way, and are not aware that he he is deaf, or insane, or from some other cause insensible of the danger, or unable to get out of the way, they have a right to presume that he will do so, and to go on without checking the speed of the train until they see that he will not do so, when they must give extra alarm by bell or whistle, and if that be not heeded they must stop, if possible, in time to avoid injury to him. But if they know, or have reason from his appearance to believe, that from insanity, drunkenness or other cause he is insensible of the danger, or unable to avoid it, they must presume that he might not, and must use proper care to avoid injuring him, or the company will be liable for the consequences.

APPEAL from *Lonoke* Circuit Court.
Hon. F. T. Vaughan, Circuit Judge.

Dodge & Johnson, for appellant.

From the facts of this case it will be seen that the entire defense was based upon an utter absence of negligence on the part of defendant's servants, and upon the contributory negligence of the deceased, J. C. Lee. The acts of the deceased were not simply *carelessness*, but they amounted to recklessness and an utter indifference to his own personal safety, which, in any sane person, was inexcusable.

Not only was the deceased a trespasser upon defendant's track, but he was hard of hearing, and at the time of the accident "slightly intoxicated." Yet, in this condition, he deliberately walked upon a railroad track, and continued to walk in front of an approaching train, and then turns and looks at the train, and at last, as the train is nearly upon him, attempts to step from the track, but

staggers or slips, and while in the very act of leaving the track is struck and killed. Such are the facts. Is not that negligence—yea, recklessness—of the most clear and palpable kind?

All the law writers tell us that contributory negligence, "in its legal signification, is such an act or omission on the part of the plaintiff amounting to a want of ordinary care, as concurring or co-operating with the negligent act of the defendant, is a proximate cause or occasion of the injury complained of." To constitute contributory negligence, there must be a want of ordinary care on the part of plaintiff, and a proximate connection between that and the injury. Did the plaintiff exercise ordinary care under the circumstances? Was there there a proximate connection between his act or omission, and the hurt he complains of? These are the vital questions where contributory negligence is the issue.

And it is a general rule, firmly imbedded in the law, and conclusively settled in this state, as elsewhere, that such negligence will defeat a recovery.

Says Black, C. J., in *R. R. Co. v. Aspell, 23 Pa. St., 147:* "It has been a rule of law from time immemorial, and it is not likely to be changed in all time to come, that there can be no recovery for an injury caused by the mutual default of both parties. When it can be shown that it would not have happened except for the culpable negligence of the party injured concurring with that of the other party, *no action can be maintained.*" *Butterfield v. Forester, 11 East., 60; R. R. Co. v. Ledbetter, adm., 45 Ark. (MS); R. R. Co. v. Marker, 41 ib., 549; R. R. Co. v. Miles, 41 ib., 321–2; R. R. Co. v. Pankhurst, 36 ib., 377; R. R Co. v. Freeman, 36 ib., 50–1; Murphy v. Deane, 101 Mass., 462–6; R. R. v. Goodman, 62 Pa. St., 338; Kline v. R. R., 37 Cal., 400; R. R. v. Jones, 95 U. S., 439; 19 Ga., 442–7; 36 Ark., 46; ib.,*

377; 81 Penn. St., 366; 24 ib., 468; 87 Ill., 532; see, also, *R. R. v. Ledbetter, 45 Ark.*

And where this rule prevails, only such aggravated negligence as amounts to *intentional mischief* on the part of the railway will render it liable in the event of an injury to a trespasser. *Morrissy v. R. R., 126 Mass., 380; Nicholson v. R. R., 41 N. Y., 541–3; Mason v. R. R., 27 Kan., 89; R. R. v. Wolf, 59 Ind., 92; R. R. v. Eaton, 53 ib., 310; Carroll v. R. R., 13 Minn., 34–7; Donaldson v. R. R., 21 ib., 296–7; R. R. v. Pankhurst, 36 Ark., 377; R. R. v. Ledbetter, adm., 45 Ark.; R. R. v. Freeman, 36 ib., 50–1; R. R. v. Houston, 95 U. S., 697; Finleyson v. R. R., 1 Dill., 579.*

As a general rule a trespasser on the track is held to be there at his peril. He must keep himself informed of the approach of trains from every direction, and in case of injury will be held guilty of such contributory negligence that he cannot recover from the railway company, notwithstanding concurrent negligence on its part. *Feuenbeck v. R. R., 59 Cal., 269; State v. R. R., 58 Md., 484–90; Meek v. R. R, 38 Ohio St., 638; Lenox v. R. R., 76 Mo., 90; Horner v. R. R., 61 Tex., 505; Rothe v. R. R., 21 Wis., 256; Lardner v. R. R., 28 La. An., 321; Culver v. R. R., 37 Iowa, 323–4; Poole v. R. R., 8 Jones (Law), 341; Austin v. R. R., 91 Ill., 36.*

A railway company is not liable for a failure on the part of its employes to stop the train on seeing a person walking upon the track, even though there is time enough to do so, provided the proper signals of warning are given. The company may presume that the trespasser is in full possession of his senses, and that he will appreciate his danger and act with discretion. *R. R. v. Madglin, 85 Ill., 483; Holmes v. R. R., 37 Ga., 596; Traber v. R. R., 64 Mo., 274; Frick v. R. R, 39 Md., 576–81; R. R. v. Graham, 95 Ind., 238–9; R. R. v. Miller, 25 Mich., 277–9.*

It has become a recognized rule of law in this class of cases, that "a person who had no lawful right to be upon a railway track, car, or any other vehicle, and is there without the consent of the carrier, cannot recover damages for anything short of *gross negligence* on the part of the carrier, occurring after the latter has had notice of such person's presence there." *Shearman & Redfield on Negligence, sec. 264; Duff v. Ry. Co., 2 A. & E. R. R. Cases, 3; Cauley v. Ry. Co., 2 ib., 6; Gardner v. Ry. Co., 18 ib , 171.*

And while it may be stated as a general rule of law, that the mere fact of a man being a tresspasser does not deprive him of all rights, nevertheless, the railway company, upon whose property he is trespassing, are not of course bound to exercise any care or diligence for his safety. This would be unreasonable, since the company has the right to suppose that no one will trespass on their cars or track. But the railway company is most unquestionably responsible for any *intentional* or *wanton* injury done such trespasser. *McCarty v. R. R., 17 Hun., 75; R. R. v. Sinclair, 62 Ind., 304, 307; Gills v. R. R , 59 Pa. St., 143; R. R. v. Collins, 87 Pa. St., 407; R. R. v. Hall, 72 Ill., 223; 22 Ill., 633; 125 Mass., 79; 10 Allen, 363; 100 Mass , 208; 126 ib., 380; 12 A. & E. R. Cases, 80; 8 ib., 547; 4 ib., 536; Thomp. on Neg., p. 449, etc.; 21 Minn.; 49 Ind., 93.*

Thompson on Neg., p. 1155, sec. 7, lays down the correct rule: "That the question of negligence is ordinarily for the jury, yet, where there is *no* evidence that the injury was *willfully*, *wantonly* or *intentionally* inflicted by the defendant, and the uncontradicted facts of the case *show* contributory negligence on the part of the plaintiff, it is proper for the court to rule as a matters of law, that the plaintiff cannot recover." See, *36 Ark., 46; ib., 50; ib., 376; 40 ib., 322; 41 ib., 549; 83 Mass., 190.*

As to the rule in cases of physical infirmities, etc., see *Beach on Cont. Neg., secs., 146, 147, 66; 115 Mass., 200; 18 N. Y., 423; 111 U. S., 228; 71 Mo., 489–92; 84 Pa. St., 228–9; 72 Mo., 169–71; R. R. v. Ledbetter, 45 Ark.*

Sam. W. Williams, with whom are *Sol. F. Clark* and *Wm. J. Duval*, for appellees.

The duty of outlook where a highway runs or crosses a railway track; in short, in all places where it may be expected that people may be, is too well established to admit of dispute. *Indianapolis & St. Louis Railroad Co. v. Stout, 53 Indiana, 143; Texas & Pacific Railroad v. Chapman, 57 Texas, 75; Kelly v. St. Paul, Minneapolis & Manitoba Ry. Co., 29 Minn., 1; Farley v. C. R. I. & P. R. Co., 16 Iowa, 337; Brown v. New York Central Railroad Co., 32 N. Y., 597; Butler v. M. & St. P. R. Co., 28 Wis., 487; McGovern v. N. Y. C. & H. R. R. R. Co., 67 N. Y., 417; French v. Tolliston Branch R. R. Co., 116 Mass., 537.*

See especially as to duty of outlook the case of *Railroad v. White, 5 B. J. Lea (Tenn.), 540.*

We ask, also, special consideration of the case in *69 N. Y.*, where it is held that the rule requiring persons before crossing a railroad track to look, etc., is not applied inflexibly in all cases without regard to age or other circumstances.

Richardson v. New York Central Railroad Co., 45 N. Y., 846. This case incidentally establishes the duty of outlook, by holding the company liable where it has constructed its road so trains could not be seen. It also establishes that sounding whistle and ringing the bell is not the whole duty of the company, and will not excuse it when its trains are hidden. See, also, *Memphis & Little Rock Railroad v. Sanders et al., 43 Ark., 227.* We especially call at-

tention to the part of the decision at the bottom of that page, where this court decides that it was a question for the jury whether or not the custom, attempted to be proved here, of persons being on the track, excuses neglect to heed warning. See *36 Ark., page 50.* See, also, *Little Rock & Fort Smith Railway Co. v. Finley, 37 Ark, 563; Little Rock & Fort Smith Railway Co. v. Jones, 41 Ark., 160.* Also, *40 Ark., 338; 1 Thomp. on Negl., secs. 448–9; 47 Ill., 298; 67 N. Y., 417.*

Notwithstanding the assertion of the railroad writer, *Mr. Wood, at page 1303, 1304, section 323, of volume 2,* of his work on railways, that such contributory negligence is a question of law, and only in exceptional cases is a question of fact for the jury, in which assertion he cites no authority except to sustain what he calls the exception, we undertake to say and prove that the cases are rare and decidedly exceptional where contributory negligence is not a question for the jury, and not one of law for the court.

Says *Mr. Lacy,* in his *Digest of Railway Decisions, at page 462, section 170,* "When it is for the court to decide." Negligence is, in all instances, a question of fact, and it is only where a question of fact is entirely free from doubt that the court has the right to apply the law without the action of the jury. He cites *Bernherdt v. Renssellaer & Saratoga Railroad Co., 32 Barbour (N. Y.), 165; Same v. Same, 18 Howard's Practice (N. Y), 427; 19 ib., 190, 23; ib., 166; Central Railroad Company v. Moore, 4 Zabriskie (N. J.), 824.* And we cite on this point, *Kellogg v. New York Central, 79 New York, 72; Stackus v. New York Central, 79 New York, 464; Smeedis v. Brocklin, etc., Railroad Co., 88 N. Y., 13; Wolfkiel v. Sixth Avenue Railroad Co., 38 N. Y., 49; 79 N. Y., 464.*

Let us admit, which we do, that Lee was a trespasser and was guilty of contributory negligence, and let us

admit that all the appellant claims in that regard is true; did that license them to kill him? This case brings up another principle; as a fact, did appellant's servants know that plaintiff was in a place of danger in time to have saved him, and did they, after discovering his danger, use proper caution and care? If they did not, then the company is liable, however gross the neglect of Lee may have been; otherwise we must hold that a trespasser forfeits his life if the employes of the appellant choose to take it, and everyone who sets foot upon a railroad track holds his life, not as a legal right, but at the mercy and forbearance of railroad employes. *Whart. on Negl., sec. 335; ib, 334; Sh. & Redf. on Neg., sec. 493.*

The first instruction properly given. It is law. *43 Ark., 227.* If the appellant, knowing Lee's danger, produced by his own neglect, in time to save him, negligently killed him, it is liable. *Cases supra.* It was a question for the jury, and they have found by their verdict that deceased was killed by the negligence of appellant, after being aware of his danger in ample time to save him.

BATTLE, J. On the 17th day of May, 1883, J. C. Lee was killed by a train of appellant. His daughter and sole heir, Mary Wilkerson, brought this action for damages, which she claims she suffered by reason of his death.

There was some evidence, introduced on the trial, tending to show that J. C. Lee was, on or about the 17th day of May, 1883, walking on the track of the defendant, the St. Louis, Iron Mountain & Southern Railway Company, south of Little Rock; that while there a train of defendant ran, approaching him in the same direction he was walking, at the rate of fifteen miles an hour; that he was seen by the fireman of the train about one-half mile ahead, before the train reached him; that at the time he was first

seen he was staggering and had the appearance of being very drunk, and was walking on or near a trestle of the road, which was one hundred feet long and twelve or fifteen feet high; and that the train ran against him while on the trestle and killed him, without giving him any warning save the ringing of a bell a short time before the train struck him.

Appellant concedes that the evidence shows that plaintiff, Mary Wilkerson, was Lee's daughter and sole heir; that he was a widower, about fifty years old, and sometimes became intoxicated.

Many instructions were given by the court to the jury. Among them was one given at the request of plaintiff, over the objection of defendant, in the words following:

"The plaintiff moves the court to instruct the jury that if they believe from the evidence the employes of the defendant railroad, on the 17th day of May, 1883, discovered that J. C. Lee was upon the track of said railroad in a position where, by reason of the nature of the track at that place, or by reason of Lee's condition, or both, it was not reasonable to suppose that he would or could get off the track in time to have saved himself, then it was their duty to use all reasonable appliances, if in their power, to save his life. And if the jury believe from the evidence that they had it in their power so to do, and that they negligently failed to use such reasonable appliances, whereby said Lee was killed, they must find for plaintiff, although they may find that he was guilty of contributory negligence in placing himself in such position."

The jury were required, at the request of plaintiff and defendant, to make certain special findings, and they returned the same as follows: To plaintiff's interrogatories they answered as follows:

First—Did the fireman see Lee upon the the track staggering when the train passed around the curve?

Answer—Yes.

Second—Was the manner and conduct of deceased, when first seen and up to the time he was struck, such as to lead a reasonable person to believe that he could not or would not escape from danger?

Answer—Yes.

Third—Was there anything in the condition of the deceased, Lee, apparent to the observation of those upon the train, or anything in the condition of the track where Lee was walking, which should have led a reasonable man to suppose that Lee would not or could not get off the track?

Answer—Yes.

To defendant's interrogatories they answered as follows:

First—Did deceased see the train in time to have gotten off the track before it struck him?

Answer—No.

Second—Did deceased have timely warning by the ringing of the bell of locomotive, or otherwise?

Answer—No.

Third—Had deceased stepped off the track before he was struck?

Answer—No.

Fourth—Were there any obstructions near or at the place where deceased was struck, that would have prevented deceased from stepping off the track in time to avoid the danger?

Answer—Yes.

Fitfh—Was deceased drunk or sober at the time he was struck?

Answer—Intoxicated.

The jury returned a verdict in favor of plaintiff for $712.50.

The defendant then filed its motion for a new trial, which was overruled. It saved exceptions and appealed.

The true rule and well settled doctrine governing in cases like this is stated in *R. R. Company v. Pankhurst, 36 Ark., 376*, thus: "One who is injured by the mere negligence of another, cannot recover at law or equity any compensation for his injury, *if he, by his own or his agent's* ordinary negligence or willful wrong, contributed to produce the injury of which he complains, so that, but for his concurring and co-operating fault, the injury would not have happened to him, except where the direct cause of the injury is the omission of the other party, *after becoming aware of the injured party's negligence*, to use a proper degree of care to avoid the consequences of such negligence."

Lee had no legal right to be on that part of the railroad track of appellant where he was walking at the time he was killed. It was not at a public crossing, and was no part of a public highway. It was made solely for the running of the cars and train of appellant, and the fact that persons did walk upon it, however frequently, did not change it's character and convert it into a highway for footmen. Being on the private property of appellant, he was where he should not have been, and was bound to use every precaution, every dilligence, every care, against any danger which might have happened to him there. *Finlayson v. R. R. Co. 1 Dill., 579.*

This was his duty. The fact that he was drunk did not relieve him of it. "Drunkenness," it is said, "will never excuse one for a failure to exercise the measure of care and prudence which is due from a sober man under the same circumstances. Men must be content, especially when they are trespassers, to enjoy the pleasures of intoxication *cum periculis*. When they make themselves drunk, and in that condition wander upon a railroad track, and

sustain an injury, they will not be heard to plead their intoxication as an answer to the charge of negligence," or as a reason why the railroad company should be held responsible to them for damages. *R. R. Co. v. Pankhurst, 36 Ark. 371; Chicago, etc., R. R. Co. v. Bell, 70 Del., 102; Toledo, etc., R. R. Co. v. Riley, 47 Ill., 514; Herring v. W. & R. R. R. R. Co., 10 Ind., 402.*

1. RAILROADS: Negligence Contributory negligence.

If the employes of a railroad company in charge of its train see a man walking upon its track at a distance ahead sufficient to enable him to get out of the way before the train reaches him, and are not aware that he is deaf or insane, or from some other cause insensible of the danger, or unable to get out of the way, they have a right to rely on human experience and to presume that he will act upon the principles of common sense and the motive of self-preservation common to mankind in general, and will get out of the way, and to go on without checking the speed of the train until they see he is not likely to get out of the way, when it would become their duty to give extra alarm by bell or whistle, and if that is not heeded, and it becomes apparent that he will not get out of the way, then, as a last resort, to check its speed, or stop the train, if possible, in time to avoid disaster. If, however, the man seen upon the track is known to be, or from his appearance, gives them good reason to believe that he is insane or badly intoxicated, or otherwise insensible of danger, or unable to avoid it, they have no right to presume that he will get out of the way, but should act upon the hypothesis that he might not or would not, and should use a proper degree of care to avoid injuring or killing him. Failing in this, the railroad company would be responsible for damages, if by the use of such care, after becoming aware of his negligence, they could have avoided injuring him. *Lake Shore, etc., R. R. Co. v. Miller,*

25 Mich., 279; R. R. v. Freeman, 36 Ark., 46; R. R. Co. v. Pankhurst, 36 Ark., 376.

The instruction objected to by appellant was properly given. Comment on the facts of the case is unnecessary. It is sufficient to say there was some evidence to sustain the verdict and special findings of the jury. It is not for us to decide whether we would return a like verdict or believe the evidence was properly weighed.

Judgment affirmed.

COGSWELL v. MCKEOGH.

1. PRACTICE: *Transfer of cause. Errors not excepted to, waived.*
   An error of the circuit court in overruling a motion to transfer a cause to the equity docket is waived if not excepted to at the time and saved in a motion for new trial.
2. SAME: *Evidence. Instructions. Errors in.*
   Errors in the admission of evidence and in instructions are waived if not excepted to at the time and insisted on in the motion for new trial.
3. PRACTICE IN SUPREME COURT: *Verdict of jury, when conclusive.*
   The verdict of a jury where the evidence is conflicting is decisive in the Supreme Court.

APPEAL from *Garland* Circuit Court.
HON. C. B. WOOD, Circuit Judge.

Sanders & Husbands, for appellant.

Parol evidence is not admissible *at law* to show that an instrument, absolute on its face, was intended as a mortgage. *31 Ark., 165; 37 ib., 149.* It is only in equity that

it can be done. *Notes to Chase's Case, 17 Am. Dec., 302; 21 Wend, 36; 6 Hill, 219; 16 Barbour, 439.*

The cause should have been transferred to equity, and though no exceptions were saved, yet when errors of law go to the very essence of the action and the jurisdiction of the court, the court will reverse, as in *39 Ark., 249.*

R. G. Davies, for appellee.

No exceptions were saved to the refusal to transfer to equity, nor to any instructions given, and objection is now too late.

The jury found for plaintiff, and there was evidence to sustain their verdict. In such cases this court will not reverse.

SMITH, J. McKeogh sued Mrs. Cogswell, alleging that he, being indebted to her, executed two mortgages, one for $608 and another for $1,500, on certain household goods and furniture, to secure said sums. That he was tenant of defendant, occupying and renting from her a hotel in Hot Springs. That the money being due and unpaid on the mortgages, they entered into a contract by which she agreed to take all the property included in the mortgages at a sum equal to the amount paid out by him for same, less whatever certain arbitrators should say the property had been damaged by use, etc., and would pay him for all improvements made by him on the hotel during his tenancy; that he gave possession of the hotel with the furniture, and afterwards she refused to submit the matter of value and damage to arbitrators, as agreed; that the mortgaged property and the improvements were of the value of $4,175.25, less $400 for use and wear. He sues at law for the difference between the mortgage debts and the

alleged value of the mortgaged property and the improvements.

The answer denies any indebtedness to the plaintiff; denies that the transaction with reference to the $608 and that part of the furniture involved by said transaction was a mortgage, but charges that it was an absolute bill of sale of that part of said property known as the Bryson & Camp furniture, for said sum of $608, and exhibits the bill of sale; denies the agreement, as stated by plaintiff, by which she took the furniture, but states that the agreement was that she was to take the furniture included in this mortgage to secure the $1,500, at such sum as certain arbitrators should say was its *real value at that date*; denies that she refused to keep the agreement as made to ascertain value, but charges that she was ready and willing to conform to the same and selected arbitrators for that purpose, and that he, in violation of the agreement, contended that the cost price of the furniture to him, less the depreciation from use, should be the basis of the settlement of value; further denies that the property was of the value of her debt against the plaintiff.

The answer concluded by a motion to transfer the case to the equity docket and for a reference to a master to take and state an account between the parties. This motion was denied.

A trial was then had, in the course of which each party testified as to the terms of the agreement under which McKeogh relinquished his right of redemption in the mortgaged chattels, the value of the property and the other matters in controversy. McKeogh swore that the bill of sale exhibited by Mrs. Cogswell with her answer, was not in fact a sale, but was intended as a mere security for money paid out by her to relieve the furniture from the claims of Bryson & Camp. And the court charged, "That

if the jury believed from the preponderance of the evidence that the instrument purporting to be a bill of sale was in fact given as security for money loaned or advanced plaintiff, then it was a mortgage and they will so consider it in arriving at their verdict."

The jury returned a verdict in favor of plaintiff for $879.15.

And the sole ground of the motion for a new trial is, that the verdict is against law and evidence.

1. Transfer of cause, when waived.

It is unnecessary to decide whether the application for transfer to equity should have been granted. No exceptions were saved to the decision of the court in that matter, and the error, if any was committed, was waived. *Mansf. Dig., sec. 4927; Brewer vs. Winston, ante.*

2. Errors as to evidence and instructions must be excepted to.

This court declared, in *George v. Norris, 23 Ark., 121,* that at law parol evidence is inadmissible to show that a transaction witnessed by a bill of sale was not an absolute sale, but only a mortgage; although the rule is well known to be different in equity. But Mrs. Cogswell took no exceptions either to the introduction of the testimony, or to the charge of the court. And objections to evidence or instructions come too late after verdict. They must be taken at the time and insisted on in the motion for new trial. *McCarron v. Cassidy, 18 Ark., 34; Allen v. Hightower, 21 ib., 316; Graham v. Roark, 23 ib., 19; Crump v. Starke, ib., 131; Cheatham v. Roberts, 23 Ark., 651; Burris v. State, 38 ib., 221; Peterson v. Gresham, 25 ib., 380; Knox v. Hellums, 38 ib., 413; Ray v. Light, 34 ib., 421.*

3. Finding of jury decisive.

It was a question of fact for the jury to determine, whether the plaintiff's or defendant's version of the final contract of sale was the true one; and their determination in favor of the plaintiff is decisive.

Judgment affirmed.

MEMPHIS & LITTLE ROCK RY. v. SALINGER, AD. SALINGER, AD., v. MEMPHIS & LITTLE ROCK RY.

1. RAILROADS: *Contributory negligence. Riding on platform.*

If at the time of an accident by which a passenger is injured he is voluntarily and unnecessarily upon the platform of a running railroad car, when there is room for him inside the car, this is such contributory negligence as will prevent a recovery for the injury.

2. SAME. *Same.*

Where a passenger who is injured upon a railroad car has so far contributed to the injury by his own want of ordinary caution, that but for such negligence he would have escaped unhurt, he cannot recover for the injury.

APPEALS from *St. Francis* Circuit and from *Pulaski* Circuit Courts.

Clark & Williams, for Salinger, admr.

The question of contributory negligence, in riding upon the platform, was, under the circumstances, a fact for the jury. Whether it was negligence or not depends upon the peculiar circumstances of each case, and is a fact to be submitted to the jury. The platform is often as safe, if not the saftest position one can ride. No one could anticipate a train falling through a rotten bridge. A passenger who rides on the platform assumes only the extra risk of such dangers as threaten that position in a greater degree than if inside the car. If the danger threaten the entire train, or if the passenger was as liable to be injured in one place as much as another, then it is for the jury to say whether he contributed to his own injury or not. *18 N. Y., 534; 95 ib., 562; 26 ib., 102; 31 ib., 318; Wharton Neg., sec. 359; ib., 364; 9 Rich. (S. C.), 84; 115 Mass., 239;*

70 Penn St., 359; 31 N. Y., 314; Sh. & Redf. Neg., sec. 284–284 a.; 30 Md., 224; 29 Iowa, 338; 1 Duer., 233; 43 Me., 501; 33 Iowa, 562; Hutchinson on Carriers, sec. 652; 34 Mo., 45; 7 Pac. Rep., 769; 21 N. W. Rep., 633; 23 ib., 14; Thompson on Neg., vol. 2, p. 1149, sec. 4; 10 Mees. & W., 549; 5 Exch., 243; 10 U. C. Q. B, 254; 2 Hun., 514; Moaks Und. on Torts, 286–7; 10 Cent. Law Journal, 330.

"The fact that the injured person did some act by which he incurred or increased danger, *does not necessarily involve negligence which will prevent recovery where the danger was created by some wrongful act of the company.* The question is for the jury whether he acted from wrong-headedness or as a prudent man would have done under the circumstances."

Now, to bring these cases within the cases referred to, it should have been proved *that Slainger and Goldberg knew, or had occasion to know, of the rottenness of the bridge which the train fell through.* Without this, as we have said, there is no causal connection between their carelessness and the injury. See authorities *supra; 62 N. Y., 558; 12 Q. B., 439; 6 Wait Ac. and Def., 589; 36 Vt., 580; 3 L. R. Q. B., 204; 3 M. and W,, 247; 19 Conn., 566; 1 Scott N. R. 392; 9 C. & P., 601; 1 Strobh., 525; 51 Me., 325; 20 Iowa, 562; 8 Barb., 368; 3 Allen, 176.*

U. M. & G. B. Rose, for the railroad company.

It is contributory negligence for a passenger to ride on the platform of a car, when there is no reasonable excuse for so doing, and after he has been warned of his danger. And if an injury happened to him under such circumstances, through the company's negligence, yet if it also appear that the injury would not have fallen upon him but for his being in that position, he is precluded from re-

covery. *40 Ark., 322; 41 ib., 542; 36 ib., 41; ib., 371; 95 U. S., 439; 14 Allen, 429; 16 Gray, 501; 51 Ill., 495; 38 Ga., 409; 99 Pa. St., 492; 2 Wood on Rys., p. 1157.*

SMITH, J. These two cases were decided on substantially the same facts. Both were actions for damages, brought by personal representatives, for the negligent killing of their intestates, who were passengers on a train operated by Sibley as receiver. The answers denied negligence and averred that the deceased had met death by their own negligence in voluntarily and unnecessarily occupying a position upon the platform while the train was running. In the case last above mentioned, the jury, under the instructions of the court, found the issue for the defendants. In the other case, the plaintiff recovered judgment for $2,500.

1. CONTRIBUTORY NEGLIGENCE: Riding on platform.

Salinger and Goldberg were traveling on the west-bound train from Memphis and occupied seats in the ladies' coach until they reached Forrest City, the supper station. After that, they went out upon the platform to smoke. They were warned by the brakeman and also by the conductor that it was dangerous to ride there, but replied that they would go inside as soon as they had finished their cigars. About four miles west of Forrest City was a bridge or trestle. The engine and tender passed over safely, but the express, baggage, smoking and emigrant cars broke through the bridge and turned over either completely or partially. One hundred and eight passengers were aboard, of whom, as it appears, none were killed or even seriously injured, except Salinger and Goldberg, who were standing on the platform between the ladies' car and the emigrant car, and Adair, who was in the baggage car. The seating capacity of the passenger coaches in the train, exclusive of the

sleeper, was one hundred and fifty. The front trucks of the ladies' car left the track, but the car did not turn over. The sleeping car in the rear did not run off.

The following are the only directions that are complained of here in Salinger's case:

Third—"One who is injured by the negligence of another cannot recover any compensation for the injury if he, by his own ordinary negligence or willful wrong, materially contributes to produce the injury of which he complains, so that but for his concurring fault the injury would not have happened to him." Approved.

Sixth—"If the jury find that the defendant had attached to its train any suitable passenger car, and had assigned the plaintiff's intestate a seat therein, and that there was room for him in such car, and that he voluntarily went upon the platform, and while there was advised by the officers in charge of the train to go into the car, but neglected to do so, and was killed in that position, and that no one in the car assigned to him was injured, they will find that the negligence of the plaintiff directly contributed to the injury, and will find for the defendant."

Seventh—"If at the time of the accident the deceased was voluntarily and unnecessarily on the platform (that is, if there was room inside the car for deceased), this constitutes such contributory negligence as would prevent a recovery."

In the case of Goldberg, the motion for a new trial alleged that the verdict was contrary both to the evidence and instructions; and also error in the charge of the court, and in its refusal to charge as requested.

That portion of the charge which was excepted to follows:

Second—"It is not controverted that when the deceased, Goldberg, was killed he was riding on the front platform

of the ladies' or first-class car; but the question, whether so being on the platform was contributory negligence in such manner as to defeat his rights of recovery depends upon circumstances, and is a question for the jury; and, in determining this question, the court instructs the jury as follows:

"That the deceased, having a first class ticket, had a right to be in his seat in the first-class car, or in the second-class car, or, for the purpose of smoking, in the smoking car, and if injured in either of such positions by the defendant's negligence he would have a right to recover. The question is whether standing upon the platform was a more dangerous position, and enhanced the defendant's risk for his life and safety over and above the risk if he had been in any of the places where he had such right to ride.

"The deceased, by taking a position on the platform, assumed the risk of such additional damages only as were naturally incident to such a position and such as a prudent man would have foreseen. If the event by which the deceased lost his life was in its nature such as endangered all parts of the train alike, and was as likely to have injured the deceased had he been in other places where he had the right to be as on the platform, then the being upon the platform did not contribute to the injury."

Third—"The question whether the standing upon the platform was more dangerous than in the cars must be determined by the nature of the accident which caused the injury, not by reference to any other accident which might have been expected to happen.

"It must be determined by the question whether a prudent man, in anticipation of such an accident, would have regarded and avoided the platform as a position where he would have been more likely to be injured than if in his

seat in the cars; and if the jury believe that the nature of the accident was such as to threaten all positions in the cars alike, or that it threatened no more danger to one standing upon the platform than to one in the cars, then the jury will find that the deceased was not guilty of contributory negligence, notwithstanding they may believe he was warned not to stand there, and notwithstanding it appeared after the happening of the event that he would not have been injured in the car."

The defendants asked the following instruction:

Fifth—"There are portions of every railroad train which are so obviously dangerous for a passenger to occupy, and so plainly not designed for his reception, that his presence will constitute negligence as a matter of law, and preclude him from claiming damages for injuries received while in such position. A passenger who voluntarily and unnecessarily rides upon the platform of a car cannot be said to be in the exercise of that discretion and caution which the law requires of all persons who are of full age, of sound mind and ordinary intelligence; and if he suffers an injury in consequence of his occupping such a position, he cannot recover." Approved.

This the court modified so as to read as follows:

"A passenger who voluntarily and unnecessarily rides upon the platform of a car cannot be said to be in the exercise of that discretion and caution which the law requires of all persons who are of full age, of sound mind and ordinary intelligence."

The court also modified a direction prayed by the defendant, identical in language with No. 6 of the Salinger series above set out, so as to make it read thus:

"If the jury find that the defendant had attached to its train a suitable passenger car, and had assigned plaintiff's intestate a seat therein, and there was room for him in such

car, and that he voluntarily went upon the platform, and while there was advised by the officers in charge of the train to go into the car, but neglected to do so, and was killed in that position, and that no one in the cars assigned to him was injured, this is a circumstance, which in connection with all the other facts and circumstances connected with the accident, the jury may consider in arriving at a conclusion as to whether the deceased was guilty of such negligence and want of prudence as contributed to his death; and if they find, in view of all the facts connected with this accident, that the death of plaintiff's intestate was due to the negligence of the defendants, and was contributed to by the negligence and want of care on part of deceased in being on the platform instead of in the seat assigned him, they will find for defendants."

The court also refused a prayer of the defendants, the same in tenor and effect with No. 7, of the Salinger series, but gave a direction couched in the same language as No. 3, of that series; and also the following, at the instance of the defendant:

"To establish the liability of the defendant as a passenger carrier two things are requisite: That the defendant should be guilty of some negligence which mediately or immediately produced or enhanced the injury; and that the passenger should not have been guilty of any want of ordinary care and prudence which contributed to the injury. But the burden of proving contributory negligence is on the defendant."

The evidence was contradictory upon the points, whether the disaster to the train was due to the presence of rotten timbers in the bridge, and whether the defect was latent, or might have been discovered by the application of scientific tests. But the jury might well have resolved any doubts they may have had upon the subject by finding

that the accident was not inevitable, and that the receiver had not done his whole duty to the traveling public by keeping his road in thorough repair. And if the passengers, who lost their lives, had been seated in the compartments provided for their accommodation, there would have been an end of the cases.

But back of this lay another question—whether these persons had not themselves so far contributed to their misfortunes by their own want of ordinary caution, that, but for such negligence, they would have escaped unhurt. Now there is, and can be, no serious controversy that Salinger and Goldberg were, of their own choice and for their own pleasure, and not from necessity, standing upon the platform, at the time of the accident, after repeated warnings of their danger, and were killed in consequence of occupying that exposed position. And the jury in the Goldberg case, in order to reach their conclusion, must have ignored these facts, all of which are either conceded, or indisputably proved. Hence we have no hesitation in saying that the verdict is not supported by sufficient evidence. For they have found the issue of contributory negligence directly contrary to what the facts are admitted to be.

The verdict is also contrary to the third and fourth directions given at the request of the defendants, and to the modification of the fifth and sixth. But the truth is the jury must have been mystified by the confused and contradictory charge of the court. The second and third directions for the plaintiff are cloudy, tending to obscure a very plain matter. They seem to tell the jury that notwithstanding Goldberg may have been guilty of negligence which contributed to his death, yet they, by virtue of their omnipotence as triers of the facts, might find otherwise, if they chose to disregard the evidence.

The instruction numbered 3, in both series, is taken from *Shearman & Redfield's* work *on Negligence, sec. 25*, and is applicable to almost any case where the cause of action is a negligent injury, the defense contributory negligence and there is any testimony to support the defense.

The fifth prayer for defendants in the Goldberg series was based upon the opinion of this court in *L. R. & F. S. Ry. v. Miles, 40 Ark., 322.* We perceive no objection to the prayer as originally framed. It is good law, pertinent to the case in hand and warranted by the state of the proofs. Still we should never reverse a judgment which was righteous and just because the circuit court had refused an unobjectionable request and had substituted in its place a direction which conveyed the same general idea. The same thing may be said of the modification of the sixth prayer.

2. Contributory negligence.

The seventh prayer as granted in the Salinger case should have been granted in the Goldberg case. It is contributory negligence for a passenger to remain on the platform of a car propelled by steam, when there is no reasonable excuse for so doing, and after he has been specifically warned of his danger. And if an injury happen to him under such circumstances, through the company's negligence, yet if it also appear that the injury would not have fallen on him but for his being in that particular position, the company may successfully defend against an action for such injury. *Wharton on Negligence, sec. 364; Beach on Cont. Neg., sec. 54; Hickey v. B. & L. R. Co., 14 Allen, 429; Camden & Atlantic R. Co., 99 Penn. St., 492; Macon & Western R. Co. v. Johnson, 38 Ga., 409; Ala. Great Southern R. Co. v. Hawk, 72 Ala., 112; Quinn v. Ill. Cent. R. Co., 51 Ill., 495; Abend v. Terre Haute & I. R. Co., 111 Ill.*

Contributory negligence is ordinarily a question of fact; but when the facts are not in dispute, the province of the jury is very much narrowed.

An action was brought in the circuit court of the United States for the eastern district of Arkansas, for the death of Adair, who was killed in the same wreck. The plaintiff was beaten upon the issue of contributory negligence, the proof showing that, for the purpose of smoking, he had gone into the baggage car, a place not intended for the reception of passengers, and was there when the train fell through the bridge.

The judgment of the Pulaski circuit court is affirmed, and the judgment of the St. Francis circuit court is reversed, and the cause remanded to be proceeded with in conformity to this opinion.

HIMSTEDT V. GERMAN BANK.

46 537
187 423

1. BANKS: *Relations between, and depositors.*

   The relation between a bank and a general depositor is not that of bailor and bailee, but of creditor and debtor, the bank becoming the owner of the deposit and debtor for repayment of it, or any part of it, to the depositor upon demand.

2. SAME: *Garnishment of. Parties.*

   Where there is a general deposit of money in bank by a wife, as her own, the bank becomes her debtor for the amount of the deposit, and not the debtor or bailee of the husband, and cannot be garnished by the attaching creditor of her husband upon the ground that the money was his, fraudulently transferred to her. The remedy is in equity, in which the husband and wife and bank are, all, necessary parties.

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

T. J. Oliphint, for appellant.

The proof shows conclusively that the money belonged to the husband, and known so to be by the garnishee, according to all legal requirements of notice. It was the bank's duty to hold the amount to abide the litigation they knew was progressing. As to the sufficiency and effect of the notice, see *Wade on Notice, secs. 11, 7, 10, 27, 28, 30, 89, 251, 672, 676, 681, 685, 7; 48 N. Y., 326.*

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

The issue in this cause was whether the bank owed Frank Marko. The money was generally deposited by her, and the relation of debtor and creditor was created, not bailor and bailee, and the money could not be reached by a garnishment proceeding. Plaintiff's remedy was in equity.

A bank is bound to pay to a depositor, or his order, money deposited by him, and cannot refuse on the ground that it belongs to another. *42 Ark., 62.*

The payment to Mrs. Marko is expressly enjoined by *sec. 4627, Mansf. Dig.*

There was no actual notice to the bank. The mere social chat or conversation with Thompson was not legal notice; it was not addressed to him as an officer of the bank, but as an individual. *Morse on Banks, etc., 2d ed., 125, 130; 6 Southern Law Rev., p. 5; 1 Hill, 578; 1 Metc., 308; 24 Barb., 313; 3 M. G. & S., 16; 1 Disn., 285; 9 Penn. St., 27; 3 Md., ch. 388.*

SMITH, J. This is a continuation of the case of the *Bank v. Himstedt*, reported in *42 Ark., 62.* Himstedt had sued Frank Marko and Elizabeth, his wife, for a debt due by the hus-

band; had taken out an attachment and summoned the bank as a garnishee. The answer denied any indebtedness to Frank Marko, but disclosed that the bank held $75, which had been deposited by Elizabeth in her own name. The plaintiff discontinued his action against the wife, and the bank honored her check for the amount standing to her credit. Judgment having been rendered against the defendant and the attachment having been sustained, the garnishee was ordered to pay into court a sufficient sum to cover the plaintiff's debt and cost of suit. But on appeal this last mentioned order was reversed.

Upon the second trial the evidence showed that Frank Marko, being indebted to Himstedt in a small sum, had sold his real estate in Little Rock and, by his direction, the purchase money had been paid to his wife, who deposited it in the bank. An attempt was also made to show that the bank had actual notice that the money deposited in the name of Elizabeth Marko belonged to her husband.

On this branch of the case the finding of the court below correctly summarizes the evidence, thus:

"On the morning of the day on which the attachment was issued the plaintiff saw A. J. Thompson, who was the collector of the bank, and a director in it, and a member of the discount board, passing in front of his store. At the time Thompson was not engaged in the business of the bank, but was merely passing casually on the way to his dinner. The plaintiff and Thompson were acquainted with each other, and a conversation took place between them. The plaintiff told Thompson that Marko was trying to beat him out of his debt, and was about to leave town, and that the money in bank belonged to him and not to his wife.

"Himstedt did not tell Thompson that he asserted any claim to the money, nor did he direct Thompson to hold

the money as the money of Marko. Thompson understood the conversation as only a friendly and social one, and did not understand that it was directed to him as an officer of the bank, or that he was expected to take any action, or refrain from taking any, in consequence of what Himstedt had said. He did not communicate the information which he had derived from Himstedt to the other officers of the bank, and never took any action in consequence of it."

The issue was whether or not the bank owed anything to Frank Marko. And as it had never had any dealings with him, and the deposit it held had never been adjudged to belong to him, and no appropriate proceeding, having that object in view, was then pending in any competent tribunal, with the necessary parties before it, the judgment was necessarily for the bank.

1. Relation between banks and depositors.

The attempt to reach this money by process of garnishment, indicates a misconception of the relation which exists between a bank and its depositors. A general deposit is not a contract of bailment, in which the title to the thing deposited remains with the owner. But the title to money deposited passes to the bank, and the bank becomes debtor to the depositor. In consideraton of the loan of the money, and the right to use it for its own profit, the bank agrees to refund the same, or any part thereof, on demand. The nature of the relation created by the transaction, as being that of debtor and creditor, and not bailor and bailee, was pointed out by this court as early as the case of *Dawson v. Real Estate Bank, 5 Ark., 296.* And such is the law everywhere. *Foley v. Hill, 2 Clark & Finnelly, 28; Marine Bank v. Fulton Bank, 2 Wallace 252; Phœnix Bank v. Risley, 111 U. S., 125.*

The debt which the bank owed was to Mrs. Marko, not to her husband. Marko may have given the money to

his wife, and his intention, in so giving it, may have been to defraud his creditors. But this would not alter the relation between the parties to the deposit, nor vary their rights and duties. The money, if not exempt by law, might, no doubt, have been subjected to the satisfaction of the plaintiff's demand by some proceeding, to which the debtor, his wife and the bank were parties. For instance, the plaintiff might have filed a bill in equity, setting up his claim and attachment, Marko's insolvency and contemplated removal from the state, and fraudulent purpose in causing the money to be paid to his wife. And he might have obtained an injunction restraining the bank from paying to Mrs. Marko, pending the suit, and at the final hearing, a decree that the money belonged to Marko, and should be applied for the benefit of the plaintiff. But the question whether the gift to the wife was fraudulent could not be tried in the garnishment proceeding. It did not concern the bank that Marko chose to sell his property and turn the proceeds over to his wife.

We have decided the case upon general principles of law, independently of the married woman's act.

But the payment to Mrs. Marko was authorized by *sec. 4627 of Mansfield's Digest*:

"When any deposit shall be made in any savings bank or other institution by any woman, being, or hereafter becoming, a married woman, in her own name, it shall be lawful for the officers or trustees of such bank or institution to pay such depositor such sum or sums as may be due such woman, and the receipt or acquittance of such depositor shall be sufficient legal discharge to the corporation thereof."

Judgment affirmed.

46 542
56 262

46 542
73 179
73 607
74 167
75 570

46 542
81 78
81 79

46 542
86 230

43 542
90 531

HERSHY V. LATHAM.

1. CONSIDERATION: *Relinquishment of dower as consideration for deed.*
A wife's relinquishment of dower, or her cession of any other rights of property, is a sufficient consideration for a settlement upon her by her husband out of his own property.

2. FRAUD: *Burden of proof of.*
It is the general rule that he who alleges fraud in a transaction must prove it; but in a contest between a wife and her husband's creditors for land purchased in her name, a natural presumption arises that the husband furnishes the means of payment, which she must overcome by affirmative proof.

3. PRACTICE IN SUPREME COURT: *Erroneous but harmless instructions.*
An erroneous instruction upon the burden of proof is generally fatal, for this court will not speculate upon the harm it may or may not have done. But where there is no material controversy about the facts, and the judgment is obviously right upon the whole record, it will be affirmed, notwithstanding the erroneous instruction.

4. FRAUDULENT CONVEYANCE: *Participation of grantee in the fraud.*
To avoid a fraudulent conveyance of a debtor proof of the grantee's participation in the fraud is not necessary where the grantee is a voluntary donee; but where he is a purchaser for valuable consideration it is necessary.

5. SAME: *Settlement upon wife for inadequate consideration.*
At law a settlement of an insolvent husband upon his wife for a valuable consideration, where no actual fraud or notice of fraud is imputable to her, will stand good for the whole settlement, though the consideration be grossly inadequate. But in equity the consideration may be weighed, and if found grossly inadequate, the conveyance will be declared partly voluntary, and be ordered to stand as a security for the consideration actually paid.

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

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

The court erred in instructing the jury that the burden of proof was upon appellant to prove the alleged fraud.

The rule is, that transactions between husband and wife, and particularly conveyances from one that is embarrassed to the other, are to be carefully scanned, and that when fraud is charged, the burden is upon the party seeking to uphold such a conveyance to show that it has been honestly made, and upon sufficient consideration. *94 U. S., 580; 53 Wis., 413; 6 Wis., 338; 17 ib., 550; 15 ib., 195; 31 ib., 82; 21 Penn. St., 355; 36 ib., 416; 18 ib., 363; 28 ib., 513; 43 ib., 363; 7 How. Pr., 107; 57 Ga., 235; 60 ib., 82; 53 Md., 292.*

Sanders & Husbands, also for appellant.

The proof shows that the deed was made to Cabell for the property sold to him before the deed was made to plaintiff for the property in controversy, and hence the instructions of the court as to the consideration for the relinquishment of plaintiff's rights were erroneous, because, at most, the only consideration which could in fact have existed was for her relinquishing her *dower* in the property sold to Cabell, and her right to have the property in controversy deeded to her could only depend on the promise of her husband that he would have it so made to her.

The court instructed that the burden was upon appellant to show fraud, and that it would require an actual fraudulent intent to be shown, and that the wife had to participate in that fraud and intent.

When the property was sold to Cabell, and the money paid to the husband of plaintiff, it was his money, and when he took that money and bought the property in controversy, and had the deed made to plaintiff, it was voluntary as to him, and void as to his creditors. *Bennett v. Hurton et al., 33 Ark., 767.*

As to the burden of proof in cases of this kind, see *Wait on Fraud. Conveyances, secs. 291, 300; Lee v. Trigg, 37 Col., 328.*

"Taking in the name of the wife a deed for property purchased and paid for by the husband, who was involved in debt at the time, was said to make a *prima facie* case of fraud against creditor." *Wait's Fraud. Con., sec. 243.*

"A conveyance may be fraudulent as to creditors without any actual intent to defraud even on the part of the grantor, and still more so without the participation of the grantee." *Wait's Fraud. Con., secs. 9–10, 382.*

Collins & Balch, for appellee.

First—The conveyance to appellee is presumed to be a provision for her, and the fraud must be proved. It will not be presumed. *Hershy v. Latham, 42 Ark., 306.* There is no proof of fraud or fraudulent intent on the part of either the appellee or her husband. The burden was on the appellant to prove the fraud.

Second—It is of no moment whether the Cabell place was a homestead or not. Appellee's dower was the same in either event.

Third—The relinquishment of her dower was a sufficient consideration for the conveyance to her, and having paid value she could not be deprived of her property unless she was a party to the fraud, had any been proved, and even in such case the proof should be convincing. *Harvey v. Alexander, 1 Rand. 219; Caldwell v. Bower, 17 Mo., 564.*

Fourth—Latham's creditors lost nothing by the transaction. The dower was not subject to their claim. Appellee's right of dower was valuable. No one buys land without requiring relinquishment of the same. *32 Ohio*

State, 321. "If she might 'release' she could refuse to do so except on such terms as she might name." *32 Ohio St., supra.*

Fifth—It is not claimed the lots were worth more than the dower. Its release was a sufficient consideration for the deed to the lots and the transaction was not fraudulent as to Latham's creditors. *32 Ohio State, supra; Quartes v. Lacy, 4 Munf., 251; Ballard v. Briggs, 7 Pick., 533; Nims v. Bigelow, 45 N. H., 343; 34 Mich. 343; Bump on Fraud. Con., 304; 8 Am. Decisions, 500.*

SMITH, J. This case, when it was here before, went off upon a question of pleading. See *42 Ark., 305.* It was now tried upon the first and fourth pleas set out in the previous report. The substance of those pleas was, that the defendant was owner of the demanded premises by virtue of a marshal's deed made pursuant to a sale under execution against the plaintiff's husband; and that the plaintiff's deed, which was subsequent to the rendition of the judgment under which the defendant purchased, was void as against creditors, the purchase money having been furnished by her husband, who was then insolvent.

It was either proved or admitted that John B. Latham, the plaintiff's husband, in 1867, sold and conveyed certain real estate in Fort Smith to General Cabell for the consideration of $5,000; that Mrs. Latham refused to join in the deed and renounce her dower until her husband agreed to cause the lots now in controversy, for the purchase of which he was negotiating, to be conveyed to her; that the value of these lots was $1,000 or $1,200, and they were paid for with part of the money that was received from Cabell; that the deed to Mrs. Latham was made shortly after she had relinquished dower in the property sold to Cabell; that Latham was insolvent at the time, but his

wife did not know it; that he was, at the date of these transactions, about forty-five years of age, and she about twenty-five; that the judgment, under which the defendant afterwards purchased, had been rendered before that time, and the marshal of the United States had afterwards levied on and sold the lots as the property of John B. Latham; and that Mrs. Latham had no separate property of her own, or means independent of her husband.

The court refused the following prayer of the defendant, to which an exception was reserved:

"The fact of a husband, while insolvent, conveying, or causing to be conveyed, to his wife, real property which was paid for with his money, and no valuable consideration moving between them, is *prima facie* evidence of fraud."

The court then gave, of its own motion, the following charge:

"This is an action by plaintiff against defendant to recover possession of certain city lots mentioned in the complaint, in the city of Fort Smith. The plaintiff alleges that she is the owner and entitled to the possession of said lots. The defendant denies that the plaintiff is the owner and entitled to the possession of said lots, and pleads title in himself. The defendant in his answer alleges that the deed under which plaintiff claims title, was made and contrived by the husband of plaintiff for the purpose of defrauding his creditors, and hindering and delaying them in the collection of their debts.

"It is admitted that by virtue of the deed read in evidence on part of plaintiff, the legal title to the property vested in her. It is also admitted that at the time of the execution of said deed, the husband of plaintiff was insolvent, and that judgment was then pending against him, under which judgment the property was afterwards sold,

purchased by defendant, and deed made to him by the United States marshal for the western district of Arkansas. Defendant, however, contends, that, on account of the insolvency of plaintiff's husband at the time of the execution of the deed to plaintiff, and from the fact of her husband paying the purchase money for the property in controversy, and having the deed made to plaintiff, that a trust arose by virtue of the transaction in favor of the husband of plaintiff, and that his interest was such as to be subject to sale under execution against him.

"The real issue, therefore, for the jury to try is whether or not the deed under which the plaintiff claims was fraudulent as respects creditors of the husband and plaintiff, and the court instructs the jury that the defendant, having 'alleged' fraud in the procurement and making of said deed, the burden of proving fraud is on the defendant; that if the jury find, by a preponderance of the evidence in the case, that the deed under which plaintiff claims was executed, or procured to be executed, by the husband of plaintiff for the purpose and with the intent to defraud his creditors, or to hinder and delay them in the collection of their debts, they will find for the defendant.

"The court instructs the jury that a conveyance by a husband to his wife is presumed to be a provision for her, in which case no trust results; yet this presumption may be repelled by proof, and it is effectually rebutted by proof of actual fraud in the intent of making such a settlement upon the wife. It is the intent that makes a conveyance fraudulent as to creditors, and this intent must be participated in by both parties—by the grantee as well as the grantor. A conveyance is not necessarily void or fraudulent because its effect is to hinder and delay creditors, unless it was a fraudulent contrivance for that purpose, and

the grantee or person to be benefited by the conveyance was privy to the design.

"The court further instructs the jury that if they find from the evidence that the husband of plaintiff, in order to secure the relinquishment of her dower or rights in the property on which they were residing, and which was their actual homestead at the time, agreed to have the deed to the property in controversy in this suit (and for which the husband of plaintiff had verbally contracted already) made to plaintiff, and that the deed was so made at the time, or soon thereafter; that the jury may consider this circumstance, in connection with all the other evidence in the case, in determining whether or not there was a fraud perpetrated by the husband of plaintiff on his creditors by such transaction, and if they find that the deed was intended at the time as a provision for the wife's interest of her dower, or the right she may have had in the home place, as aforesaid, and that the price paid for the lots in controversy was reasonable compensation for her interest in the said home place, which she had so relinquished, they will find for the plaintiff."

The verdict and judgment were in favor of the plaintiff. Counsel for appellant concede that the dispute is not as to the facts, but as to the law of the case.

1. Release of dower as consideration for deed.

However true the rejected prayer may be as an abstract proposition of law, it was inapplicable here. For it assumed that no consideration of any legal estimation supported the grant which was made to Mrs. Latham, but that it was a voluntary post-nuptial settlement by a husband, whose affairs were irretrievably embarrassed. No money, or other thing of value, did pass directly from her to her grantor; nor was this essential. Regarding the husband as the real grantor, or author of the grant, the evidence shows that the material cause, or *quid pro quo*, which in-

duced him to take the conveyance in the name of his wife, was the renunciation of her dower in the property sold to Cabell. Hence, for the purposes of this case, the lots may be considered as paid for by the release of Mrs. Latham's inchoate right of dower in other lands of her husband. Now, we are not aware of any well-considered case which denies that the wife's relinquishment of dower in her husband's lands, or cession by her of any other rights of property, is a sufficient consideration for a reasonable settlement upon her by the husband out of his own property; but the contrary has been frequently adjudged. Thus, in *Clerk v. Nettleship*, *2 Levinz*, *148*, the wife having land as heiress, and the husband being a tradesman and in debt, he promised her that if she would join with him in a sale of the land and permit him to receive the money for the use of his trade, to leave her £400 at his death. They sold and he had the money, and six months after he made an obligation to a stranger, conditioned to pay his wife £300 after his death, and two months later died. And by the direction of Hale, C. J., the jury found the obligation not fraudulent *quoad* creditors; though in law a man cannot make a good promise to his wife, and though the obligation was made so long afterwards. Compare *Lavender v. Blackstone*, *ib.*, *146*—a case of a fraudulent conveyance, where it is said: "The wife did not join in the fine, and therefore continues dowable. But, if she had joined, it might have made the settlement to be upon good consideration, which otherwise is merely voluntary." The point has also been ruled the same way in the following American cases: *Bullard v. Briggs*, *7 Pick.*, *533*; *Nims v. Bigelow*, *45 N. H.*, *343*; *Garlick v. Strong*, *3 Paige*, *chy. 440*; *Quarles v. Lacy*, *4 Munf.* (*Va.*), *251*; *Harvey v. Alexander*, *1 Rand.*, *219*; *Taylor v. Moore*, *2 ib.*, *563*; *Hoot v. Sorrell*, *11 Ala*, *386*; *Powell v. Powell*, *9 Humph.*, *477*; *Ward v.*

Cootley, 4 Metc. (Ky.), 59; Singer v. Welch, 32 Ohio St., 320; Caldwell v. Bower, 17 Mo., 564; Farwell v. Johnston, 34 Mich., 342.

2. FRAUD: Burden of proof.

It is, however, insisted that the court erred in instructing the jury that the burden was upon Hershy to prove the alleged fraud in the transactions between Latham and his wife. The general rule is, *ei incumbit probatio, qui dicit, non qui negat.* At the same time transactions between husband and wife, which may operate to the prejudice of the husband's creditors, are closely scrutinized. The intimacy of that relation and the community of interest between the parties to it afford peculiar facilities for the perpetration of frauds. Purchases in the name of the wife are often resorted to as a cover for the debtor's property, and a device for withdrawing it from the reach of his creditors, and preserving it to his own use. Hence, in a contest between her and those creditors, when she claims as a purchaser, a natural presumption arises, that the husband furnished the means of payment, which she must overcome by affirmative proof. *Wait on Fraudulent Conveyances, secs. 300–1, 308,* and cases cited; *Seitz v. Mitchell, 94 U. S., 580; Keeney v. Good, 21 Pa. St., 355.*

3. Erroneous but harmless instruction

Now, an erroneous instruction upon the burden of proof is commonly fatal; for the court will not speculate upon the harm it may or may not have done. Nevertheless, in this case, there is so little controversy about the real facts, and the judgment is so obviously right upon the whole record, that it must be affirmed, notwithstanding the error in the charge. We mean to say that there is no possible doubt on this record that the lots were conveyed to the plaintiff by her husband's direction and as a recompense for her relinquishment of dower in other lands. The jury could not have returned a different verdict, if they had been properly instructed; or, if they had, it

should have been set aside as contrary to the evidence. *L. R. & Ft. S. Ry. v. Turner, 41 Ark., 161.*

That Mrs. Latham paid a valuable consideration for the conveyance was proved not alone by her own testimony, but by the testimony of a disinterested witness. There was no evidence to the contrary, Hence, the misdirection inflicted no injury upon the losing party and substantial justice has been attained. For, no matter upon whom the *onus probandi* rested, the verdict must have been the same.

4. FRAUDULENT CONVEYANCE: Participation of grantee in the fraud.

It was not improper to tell the jury that, in order to avoid the deed, Latham must have had a fraudulent intent and Mrs. Latham must have participated in such intent. The deed was made upon a consideration deemed valuable in law. And the distinction established by our cases upon the point of the necessity for participation in the fraud is between the *bona fide* purchaser for value on one hand and a voluntary donee on the other. *Dardenne v. Hardwick, 9 Ark, 482; Splawn v. Martin, 17 ib., 146; Hempstead v. Johnston, 18 ib., 141; Christian v. Greenwood, 23 ib., 264; Bertrand v. Elder, ib., 494; Galbreath v. Cook, 30 ib., 417; Erb v. Cole & Dow, 31 Ark., 554; Reeves v. Sherwood, 45 ib, 520.*

5. SAME: Settlement upon wife for inadequate consideration.

We are not at liberty, in this action, to inquire whether the property settled upon Mrs. Latham, was not, out of all proportion, more valuable than the contingent right of dower ceded by her. For no actual fraud, or notice of fraud, being imputable to her, the conveyance stands good for the whole at law. But in equity the consideration may be weighed, and if found grossly inadequate the conveyance will be declared partially voluntary and will be ordered to stand as a security for the consideration actually paid. *1 Am. Lead. Cas., 5th ed., *51,* notes to the case of *Sexton v. Wheaton; Bump Fraud. Conv., 3d ed, 294.*

Affirmed.

46 552
63 373

46 552
186 278

MALPAS v. LOWENSTINE.

1. PAYMENT: *By note on third party. Presumption.*
   The receipt by a creditor from his debtor of a note or bill of a third party is presumed to be for security, but may be as absolute payment of the debt if such be the agreement of the parties.

2. COST: *In actions by attachment.*
   A judgment for defendant and for cost in an action in which he denies the debt, carries the cost of an ancillary attachment as well as in the action. The circuit judge has no discretion to adjust the cost as in equity causes.

3. CIRCUIT COURT: *Power over its judgments.*
   The circuit courts have no power after the expiration of the term to vacate or modify a judgment or final order, except in the mode and for the causes specified in the civil code.

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

Sanders & Husbands, for appellant.

The judgment being for appellant, he, of course, recovered his costs, being the winning party, and the court had no power after the lapse of the term to modify the judgment.

The original judgment had, long before the motion for modification, been fully paid and satisfied, and after that it could neither be modified nor appealed from. *33 Ark., 459; 35 ib., 125; 39 ib., 110; ib., 271.*

The modified judgment and all proceedings had thereon were null and void.

SMITH, J. Lowenstine & Bro. sued Malpas for a debt alleged to be due by contract, and swore out an attach-

ment against his property. The defendant, in his answer, denied the indebtedness, because, as he said, he had transferred to the plaintiffs certain notes of third persons, which they had taken in satisfaction of their demand. He also controverted under oath the ground of attachment. There was a jury trial and a verdict for the defendant, upon which a judgment of *nil capiat* and for costs was entered against the plaintiffs. And a motion for a new trial was overruled.

At an adjourned term of the court the plaintiffs, upon notice of the defendant, moved for a modification and correction of the judgment, to the extent of awarding all costs growing out of the attachment proceeding against the defendant. They alleged that the testimony upon the trial showed that they had realized a portion of their claim, from collaterals in their hands, after the commencement of the action, and that the court had, in fact, sustained the attachment and adjudged the costs thereof against the defendant, but by a clerical misprision the judgment had not been so entered. At a subsequent term the court granted the relief prayed, ordering the defendant to pay all costs which accrued in the action up to a certain date, when, as it appeared, the plaintiffs had received the balance that was due them.

1. PAYMENT: By note on third party. Presumption.

When a creditor receives from his debtor the note or bill of a third party, the presumption is he takes it by way of security. Nevertheless he may take it as absolute payment, if such is the agreement. *Aikin v. Peters, 45 Ark., 313.* The issue raised by the pleadings in the main action was, debt or no debt, at the commencement of the suit. That issue the jury determined in favor of the defendant, and their verdict was approved by the trial court. This carried the costs of the ancillary attachment, as well as of the action. The burden of costs was not subject to

2. Cost in attachments.

be adjusted according to the discretion of the presiding judge, as in equity causes. But the statute provides that, when final judgment goes against the plaintiff, the defendant shall recover costs, and the attachment shall be discharged. *Mansf. Dig. secs. 1043, 378.*

If the court was dissatisfied with the result it should have ordered another trial, unless the defendant would consent that the costs, down to a certain stage in the proceedings, should be taxed to him. But it could not sustain the attachment, and, at the same time, allow the verdict to stand. For judicial proceedings are required to preserve a semblance of consistency. The verdict declared that Malpas owed no debt to Lowenstein & Bro. when he was sued. If this was so, they could have no cause to attach his property.

3. Power to vacate judgments

But, in truth, there is nothing in the record to show that the court did sustain the attachment. And the doings of a court of record can be shown only by its record. Circuit courts have no power, after the expiration of the term, to vacate or modify a judgment or final order, except in the mode and for the causes specified in the civil code. The error complained of was not the mistake of the clerk, but, if there was any, it was in the judgment itself, and nothing existed in the record by which it could be amended. *Badgett v. Jordan, 32 Ark., 154; Turner v. Vaughan, 33 Ark., 454; Leigh v. Armour, 35 ib., 123; Izard County v. Huddleston, 39 ib., 107; Gardenhire v. Vinson, ib., 270; Hocker v. Gentry, 3 Metc. (Ky.), 463; Dodds v. Combs, ib., 28; McManama v. Garrett, ib., 517; Bennett v. Tiermay, 78 Ky, 580; Long v. Eifort, 80 ib., 152.*

The judgment is reversed and cause remanded, with directions to set aside all the orders and proceedings which were made and had subsequent to the rendition of the final judgment in September, 1883.

46 555
54 395
46 555
56 210
46 555
59 479
46 555
58 228
46 555
63 487
46 555
f67 303
67 305
67 307
46 555
74 22
77 6
46 555
f79 81
f80 70
82 337
46 555
85 463

ST. L., I. M. & S. RY. v. GAINES.

1. NEGLIGENCE: *Master and servant.*

The master is not an insurer of the servant's safety, nor does he guarantee that the machinery, tools and instrumentalities he furnishes, may not prove defective. He only undertakes to use reasonable care to prevent injury to his servants.

2. SAME: *Same.*

In an action by a servant against his master for an injury resulting from defective appliances furnished him for his work, he must prove affirmatively, not only that the appliances were defective, but that the master had notice of it, or was negligently ignorant of it. It is not sufficient merely to prove the injury, and that it resulted from a defect in the machinery, but he must further prove that it happened because the master did not exercise proper care in the premises.

3. RAILROADS: *Negligence. Brakeman and car-inspector fellow-servants.*

A brakeman and car-inspector are fellow-servants, and each assumes the risk of the other's negligence in the performance of his services, and the company is not liable to either for the negligence of the other.

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

Dodge & Johnson, for appellant.

First—The master is not an insurer of all the machinery furnished its employes; he is only bound to use ordinary care in providing tools, machinery, etc., and he only stipulates to use reasonable care to prevent them from being defective. He does not warrant the servant's safety, nor guarantee that the appliances may not prove defective. *35 Ark., 614; 44 ib., 529; 3 Wood on Rys., p. 1455; 68 ib., 551.*

The presumption is, that the master has done his duty in furnishing safe and suitable appliances, and when this

is overcome by proof of defects, the further presumption arises that the master had no notice or knowledge of the fact, and was not negligently ignorant of it. *Thompson on Neg., 1053; 16 C. B. (N. S.), 692.* It is not sufficient to show that plaintiff was injured from a defect in the machinery, but he must establish that the injury happened because the master did not exercise proper care in the premises. *Wood on Master and Serv., sec. 382; Sh. & Redf. on Neg., sec. 99; Pierce on Railroads, p. 373; ib., 382; 61 Iowa, 714; 67 Mo., 275; 42 Ala., 716; 89 Ill., 142; 92 Ill., 141; 32 Md., 416; 54 Wis., 260; 119 Mass., 412; 42 Mich., 39; 57 Tex., 507; 21 Cent. Law Jour., p. 53; 42 Wis., 520; 44 ib., 405; 46 ib., 265; 39 N. Y., 468; 50 Iowa, 685; 20 Mich., 105; 33 id., 133; 5 Ohio St., 541.*

The rules of the company forbade employes from uncoupling cars while in motion. He was injured by his own negligence and recklessness. An employe cannot recover for injury from a defect in machinery, unless the employer knew or ought to have known of the defect, and the employe did not know, or had not equal means of knowledge of it. *3 Dillon, C. C., 320; 50 Mo., 304; 29 Conn., 548; 92 Pa. St., 280; 80 Pac. Rep., p. 415; 51 N.Y., 476; Thompson on Neg., 1227; 21 N. W. Rep, 30; 109 Ill., 314.*

Second—A car-inspector is a fellow-servant with the trainmen, and a servant cannot recover for an injury caused by the negligence of a fellow-servant. *46 Mch., 258; 3 Woods, C. C., 313; 22 Hun., N. Y., 291-2; 70 N. Y., 171; 135 Mass., 205; 24 Ala., 21; 119 Mass., 419; 11 A. and E. R. Cases, 185; 8 ib., 175; 12 ib., 228; Wood on Railroad Law, vol. 3, p. 1494.*

Montgomery & Hamby, for appellee.

First—We do not contend that the defendant, as master, was the insurer of all the machinery furnished to its employes, but we do contend and insist, that it was, and is, its duty to furnish its employes with good, safe and secure cars, with good and secure draw-heads attached thereto for the purpose of coupling such cars together, and if it furnishes its employes with a car, the draw-head of which is unsafe and insecure, and such defect could have been known by the exercise of reasonable care and diligence, and by reason of such defective, unsafe and insecure draw-head, an employe is injured and damaged while in the discharge of his duty, and using proper care, the defendant is liable to such employe in damages. *8 Am. and E. Ry. Cases, 85; ib., 119; 39 Ark., 17; 100 U. S., 213; 46 Mo., 163; 44 Ark., 300; Wood Mast. and Serv., secs. 329, 428; Wharton on Neg., secs. 210–211.*

A servant injured in the discharge of his duty is not required to show that he was *entirely* careful, but only to show that he was in the exercise of all the care that could reasonably be expected in view of the circumstances; and the fact that he would not have been injured, if he had not been in an exposed condition, will not debar him from a recovery. He has a right to rely upon it, unless obviously otherwise, that the machinery and appliances of the business are in proper repair and condition, and the question is, whether, if the master had discharged his duty in respect of the instrumentalities of the business, the servant's act would have been negligent? If not, he is not debarred from a recovery, and the question is purely one for the jury. *Wood's Master and Servant, p. p. 760, 914; Herbert v. N. P. Ry. Co., 8 A. and E. Ry. Cases, 85; Ry. Co. v. Carr, 35 Ind. Reps., 510; Hackett v. Middlesex Manf.*

Co., 101 Mass., 101; B. and O. Ry. Co. v. State of Maryland, etc., 33 Md., 542; Cent. Law Journal, 2., p. 384; C. L. J., vol. 4, 431; ib., vol. 6, 275; ib., vol. 9, 38, 156; C., B. and Q. R. R. Co. v. Avery, 109 Ill. Rep., 314.

Nor is the plaintiff bound to prove affirmatively that he was himself free from negligence; it is a defense to be proved by the defendant. *15 Wall., 491; 93 U. S., 291; 24 Ohio St., 631; 76 Penn. St., 631; 46 Texas, 536; Sh. and Redf., on Neg., sec. 99; ib., sec. 13.*

Second—The second instruction given for the plaintiff is certainly the law. It is certainly the duty of the railway company to furnish its employes, running its trains, cars with good, safe and secure draw-heads attached for coupling the cars together, and if it should delegate this duty to another employe, the acts of such employe, as to the duty thus delegated to him, are the acts of the company. *Wood's Master and Servant, p p. 879–882.*

The Supreme Court of Minnesota, in the case of *Tierney v. Minneapolis and St. L. Ry. Co.*, reported in *No. 10, vol. 24, American Law Register*, held that: "It is incumbent upon a railway corporation, in the discharge of its duty as master, not only to provide machinery and instrumentalities for its employes which are suitable and safe, but also to use reasonable diligence to keep them so. Necessarily incident to these obligations is the duty of frequent inspection, and the corporation, acting by its servants in the discharge of such duty, is liable for their negligence." And further: "That negligence on the part of the inspectors in failing to properly discharge their duty, by reason of which plaintiff was injured while attempting to couple a damaged car without notice of its condition, and without fault on his part, might be imputed to the company." (*P. 669.*) We also refer to the authorities cited in this opinion.

The weight of authority, so far as we have been able to search, is that a car-inspector is *not* a fellow-servant with a brakeman working in the employ of the same railroad company. We refer the court to the following cases on this point: *Tierney v. M. and St. L. Ry. Co., supra; King v. Ohio, etc., Ry. Co., 8 A. and E. Ry. Cases, 119; R. R. Co. v. Fort., 17 Wal., 553; Dillon v. R. R. Co., 3 Dillon, 319; Ford v. F. R. R. Co., 110 Mass., 240; C., M. and St. P. Ry. Co. v. Ross, 20 vol. C. L. J., 27; 25 Am. Law Reg., No. 2, p. 148; 108 Ill., 576.*

A servant is not bound to inspect machinery to ascertain whether it is in proper repair or not. *Not only the defects, but the danger must be known to him.* If a servant cannot recover if he has the same *means of information* that the master has, *he would be bound to look for defects, to inspect the appliances of the business*, and would thus be burdened with the duties that legally and properly devolve upon the master, and could seldom recover for injuries resulting from the use of defective machinery. There is no such legal obligations imposed upon him. He is not bound to search for danger, except as to those risks that are patent to ordinary observation; he has a right to rely upon the judgment and discretion of his master, and that he will fully perform his duty toward him. *Wood's Master and Servant, p. p. 749–50.*

SMITH, J. The complaint alleged: That "on December 29, 1882, plaintiff, John Gaines, was in the employ of defendant railroad company as a brakeman; and while at work uncoupling cars on a through freight train, at the town of Malvern, Ark., on said day, by reason of a defective draw-head, he had the middle finger of his left hand so badly mashed that it had to be amputated—to his damage, $5,000."

The answer denied specifically all negligence on defendant's part, and charged contributory negligence on the part of the plaintiff.

The following evidence was then introduced by plaintiff.

The plaintiff stated: "On December 29, 1882, I was braking for Conductor Keeby, in employ of defendant. We left Texarkana that day at noon, on through freight. * * * At Arkadelphia the conductor directed me that on arriving at Malvern to set out of the train five or six cars. When the train stopped at Malvern, I went for the purpose of uncoupling a box car of the *Texas and Pacific Railway Company* from an *Iron Mountain car.* The *T. and P.* car *was numbered 1874*, and was, I believe, empty. It was about the tenth in the train from the engine. There were thirty-six cars in all. I was front brakeman, and it was my duty to uncouple these cars. I went between the two cars and tried to uncouple them while the train was standing still, but the pin was fast.

"I then gave the signal with my lantern to the engineer to back the engine, so as to slack the cars, and stepped again between the two cars. *As the cars backed I caught hold of the pin and attempted to pull it; I raised it about one and a half or two inches, when the end caught, and before I could get it out the draw-heads of the two cars came together, and the draw-head of the T. and P. car was driven in so far that my hand, which was on the pin, was caught between the head of the pin and the draw-head of the T. and P. car, and was crushed and held fast.* I tried, while my hand was so held, to signal the engineer to pull forward, but he misunderstood me, and *continued to back*, shoving backwards the whole train. My hand was held this way nearly five minutes, until the engineer took a turn forward, and I got out. * * * Immediately I got my hand loose, I went to the side of the car, stooped down and swung my lantern

up under the spring of the draw-head to see what was the matter. I saw the spring of the draw-head back of the draw-head on the T. & P. car was broken so as to let the draw-head slip in, and that was the reason my hand was caught between the coupling and the dead-wood.

"*I could not tell whether the break in the spring was new or old.* Had the spring been in good condition the draw-head could not have been driven far enough in to catch my hand between the draw-head and dead-wood. As brakeman it was my duty to couple and uncouple cars, as ordered by the conductor, to set brakes, to watch the couplings, and to look for hot boxes. I did not regard it my duty to go alongside of the train when we stopped, to see that nothing was out of order; I supposed that was the conductor's duty. * * * I had been braking at that time eighteen months, and was then twenty-two years old. * * * I went to the Employes' Hospital at St. Louis, where the hospital surgeon cut off my middle finger, which I have in my pocket (here plaintiff produced his finger and displayed it to the jury). The finger was taken off at the joint next the hand. I suffered greatly at the time of the accident, and for a week or ten days after. I stopped five weeks at the hospital. I did no work until May, when I tried braking again for a month, and on account of the weak and painful condition of my hand I could not keep it up, and had to quit. I was getting $60 per month braking, but now I can only earn $25 per month digging wells in Texarkana. Since leaving the hospital my doctor's bill has amounted to $50. I did not see on car 1874, "B. O.," or any other mark indicating that the car had been inspected and found in bad order at Texarkana. This train was made up at Texarkana, and I think all the cars were empty except one flat-car, which was loaded with cotton."

Witness then showed the manner in which he took hold of the coupling pin at the time, which was by catching his finger around the pin below the head, and holding his hand in a perpendicular position.

J. H. Keeby testified for plaintiff: "In December, 1882, I was conductor on defendant's train. Plaintiff was a brakeman on my train. I did not see the accident to Gaines. I saw him after he had received the injury. *The couplings were good; there were no defects, for I examined the cars after he was hurt.* I have no personal knowledge of the manner of the injury. It was a good, level track. It was an ordinary draw-head, but from the manner it was put in it would slip back to the dead-wood. The dead-wood is a block of wood used for the protection of the car. The The draw-head mentioned above was on the box-car. The dead-wood projected out about six inches from the face of the car. I did not see the manner in which the train was backed in order to make the uncoupling. The condition of the draw-head was not as safe as if it had been in the usual condition. I did not see the draw-head until after the accident. This was a through freight train, and was made up by the yardmaster at Texarkana. I was in the freight office at Malvern when the accident happened.

"The duties of a brakeman are, to stop the train, couple and uncouple cars, set out and take on cars, examine and inspect trains whenever they have an opportunity—to see if anything is out of order—flag and switch and do whatever they are told by the conductor. Plaintiff was uncoupling cars when he was hurt. When hurt, he had been in defendant's employ two or three months, and was a capable and competent man. He had coupled and uncoupled cars frequently before this. The couplings to the cars which plaintiff was uncoupling, were good, for I inspected them ten minutes after the accident. They were

in the usual and ordinary condition. The draw-heads were the ordinary draw-heads used upon all freight cars, and were loose. They work on a spring and play in all directions. They give a little each way, and are made so to enable the cars to follow the curves of the track and the surface of the ground. They must have "give" to break the force of cars coming together. Coupling and uncoupling cars is a dangerous business, and requires care and caution. When performing their work, it is the brakeman's duty doing the work, to signal the engineer. They are supplied with lanterns; plaintiff had one and it was lit. It was a dark night, the night of the accident. It was not raining. I do not remember if it was cloudy or not. It is usual to couple and uncouple cars at all hours of the night, and in all kinds of weather, and this is a part of a brakeman's duty.

"The brakemen have no opportunity to make more than a general examination to see that nothing is out of order as they pass along, their inspection is confined more especially to the wheels. In speaking of couplings, I allude to them as distinct from the draw-heads, and when I say these draw-heads were loose, I do not say that they were in the same condition as the draw-head which caused the injury to plaintiff. Had I known the condition of this one, I would have warned plaintiff that it was loose. When we use the term loose in reference to a draw-head, we do not mean the way it is usually hung. Coupling is more dangerous than uncoupling cars. The draw-head by which plaintiff was hurt belonged to a T. & P. Ry. car, numbered 1874. I do not know that the draw-head was loose prior to leaving Texarkana, it might have been made so after leaving Texarkana, from the weight and jolting of the train. I cannot say where it was done."

J. H. Morgan testified: "Have practiced medicine twenty-five years. From my knowledge, derived from examining health and mortuary reports, I should say that the expectancy of life of men like plaintiff, of same age and constitution, would be from forty-six to fifty years old. A railroad man's expectancy of life would be much less. It has been established at seven years."

F. G. Hentz testified for defendant: "I am foreman in the car repairing department of defendant, and the Texas & Pacific Railway, at Texarkana. Have been in that business fifteen years. My duty, as foreman, is to repair cars. The car inspector inspects the cars on the track, and if in bad order marks them "B. O." on the side. The yard-master then sets them out on the repair track, and I have them repaired. After being repaired, the "B. O." is rubbed out, and "D." put on them."

Pat Callahan testified: "In December, 1882, and for some time prior and subsequent, I was joint yard-master of defendant and the Texas & Pacific Railway Company, at Texarkana. It is my duty to make up trains for both roads. I first examine cars to see if they are in good order; am governed by the car inspector's mark. My custom and instructions are never to put into a train a bad order car. I made up the train going north December 29, 1882. I never heard that any bad order car was put into the said train on that day. I have had experience as a brakeman on defendant's road, and know their duties and instructions as to coupling and uncoupling cars. *It is not their duty, and they are, by the rules of the company, particularly forbidden to uncouple cars while in motion. The instructions require them to wait until the car stops, but brakemen do not always obey the instructions.* The time to pull the pin is when the slack is given sufficient to pull the pin. I know from experience, that it is possible for a brakeman to get

his hand caught between the coupling-pin and the dead-wood while uncoupling cars, simply by negligently catching hold of the pin, and in drawing it, allowing it to slant wrongly. My hand was caught that way once, when there was no defect in the draw-head of the car. The way to take hold of the coupling-pin in uncoupling is, to catch it from above with the fingers around it, holding the hand perpendicular over it."

Connors testified: "Am joint car inspector of defendant's road and the Texas & Pacific Railway Company at Texarkana, and have been since 1878. Luke Hickey and I were both filling that office in December, 1882. We take it alternately, one week in the day time and one week in the night time. Christmas week, 1882, December 29, I watched at night and Hickey in the day time. Our duties as car inspectors are, to inspect thoroughly every car that comes into the yard from either road, looking them all over for defects or injuries, to see whether they are in good condition or need repairs. I look them over, examine draw-heads and springs, and see that springs are not broken or anything out of order. If I find anything out of order, I repair it myself if I can, with the aid of two men that are under me. If not, I mark 'B. O.' on it, to show it is in bad order. The yard-master, on seeing this mark, sets it out on the repair track for repairs. I do not recollect inspecting Texas & Pacific car No. 1874, in December, 1882. *We keep no record of cars inspected and found in good order*, but I do know I inspected all the cars coming in while I was on duty that month, and marked all of those I found in bad order, as above stated. All cars that come in while I am on duty, I inspect carefully, and I did that in December, 1882."

Luke Hickey testified: "I am, and have been, since 1881, car inspector of defendant and the Texas & Pacific Rail-

way Company at Texarkana, jointly with Connors. When he is not on duty I am, and *vice versa*.

"I make my inspection as soon as the cars come in; examine to see that nothing is broken or out of order, and if out of fix and I can repair them with my two men, I do so. If I can not, I mark them 'B. O.' for the yard-master to have them repaired. I do not remember anything about car 1874, but I inspected carefully all cars coming in while I was on duty."

This is all the evidence there was on either side.

The charge of the court was favorable to the plaintiff, and the jury gave him a verdict for $3,500.

The assignments in the motion for a new trial are:

First—The verdict is not sustained by the evidence.

Second—That it is contrary to law.

Third—That it is excessive, and shocks one's sense of justice.

Fourth and fifth—Misdirection of the court.

This action, like all others brought by the servant against his master for personal injuries sustained in the course of his employment, is based on actual negligence in the defendant, or in those who represent it. The negligence here complained of consisted in using a freight car with a defective draw-head. From the testimony adduced in behalf of the plaintiff, it may be doubted whether any serious defect existed in the draw-head, or in any of the appliances connected therewith; and whether the proximate cause of the accident was not the plaintiff's own recklessness in attempting to uncouple the car while it was in motion, contrary to an express regulation of the company, which must have been known to him, as it related to one of his principal duties and he had been in the company's service for some time.

In *Lockwook v. C. and N. Ry. Co., 55 Wisc., 50*, such evidence of contributory negligence on the part of a brakeman, who was killed in the act, was held sufficient to justify a compulsory non-suit in an action for his death.

1. Master's liability to servant for defective tools.

But regarding these matters as settled by the verdict, viz.: That there was in fact such a defect as is alleged, and that the plaintiff was duly careful, the question yet remains whether the defendant is liable on account of such defect. The master is not an insurer of the servant's safety, nor does he guarantee that the machinery, tools and instrumentalities he furnishes may not prove defective. He only undertakes to use reasonable care to prevent such results. *L. R. and F. S. R. Co. v. Duffey, 35 Ark., 602; St. L., I. M. and S. Ry. v. Harper, 44 ib., 529.*

2. Same.

The presumption is that the master has done his duty by furnishing safe and suitable appliances for the performance of his work. And when this is overcome by positive proof that the appliances were defective, the plaintiff is met by a further presumption that the master had no notice of the defect and was not negligently ignorant of it. It is not sufficient to show that the plaintiff was injured, and that the injury resulted from a defect in the machinery; but he must go further and establish the fact that the injury happened because the master did not exercise proper care in the premises. *Shearman & Redfield on Negligence, sec. 99; Thompson on Negligence, 1053; Wood on Master and Servant, sec. 382; Pierce on Railroads, 373, 382; 3 Wood's Railway Law, 1505; St. L., I. M. & S. Ry. v. Harper, supra; K. C., S. & M. R. R. v. Summers, 45 Ark., 295; L. R. & F. S. Ry. v. Townsend, 41 ib., 382; Hayden v. Smithfield Manf'g Co., 29 Conn., 548; DeGraff v. N. Y. & H. R. R. Co., 76 N. Y., 125; E. St. L. P. & P. Co. v. Hightower, 92 Ill., 139.*

The court refused a prayer of the defendant, which correctly stated the law on this subject; and the error was no cured by other directions. There is no proof that the railroad company, or any of its employes, had any knowledge of any defects in the coupling apparatus of the car or its fastenings prior to the accident. The car did not belong to the defendant, but to a connecting carrier. It was duly inspected on the same day the accident occurred and pronounced to be road-worthy by being placed in the train. There is no reason to suppose the car inspector was incompetent or that, on this particular occasion, he performed his duty carelessly. The plaintiff himself could not say whether the break in the spring was recent or of long standing. The spring might have been broken after the train left Texarkana. There is not a particle of evidence that the defendant omitted any duty which it owed to the plaintiff.

Now, notice of the alleged defect, or what amounts to the same thing, the means of knowledge which the company failed to use, was a material fact which was necessarily involved in the verdict. Consequently, as no testimony was given from which the jury could infer that the company knew, or might by reasonable diligence have discovered the defect in time to remedy it and prevent the casualty, the verdict is not supported by sufficient evidence.

3. Car inspector and brakeman fellow servants.

And even had it been shown that the drawhead was loose or broken before the train was sent out, and that the defect was discoverable upon a proper inspection, yet the plaintiff cannot recover for the negligence of his fellow servant. Here, again, the court committed an error to the prejudice of the defendant; for it refused to tell the jury that the car inspector and the brakeman were fellow servants. They are not only employed and paid by the same corporation, but their separate services have an immediate

common object—the moving of the trains. Neither works under the orders or control of the other; and each takes the risk of the other's negligence in the performance of his service. *Randall v. B. & O. R. Co. 109 U. S., 478.*

Car inspectors are not placed in charge of a separate department of the company's business, nor do their duties require any special mechanical skill. They make a general cursory examination of cars, upon arrival at the yard, so as to detect any patent defects. That they are co-servants with the trainmen has been frequently decided. *Hodgkins v. Eastern R. Co., 119 Mass., 419; Mackin v. B. & A. Railroad, 135 ib., 201; Besel v. N. Y. C. & H. R. R. Co., 70 N. Y., 171; Railroad Co.'s v. Webb, 12 Ohio St., 475; Railroad Co. v. Fitzgerald, 42 ib., 318; Railroad v. Foster, 10 Lea. (Tenn.), 351; Smith v. Flint and Pere Marquette Ry., 46 Mich., 258; 3 Woods, 313.*

Indeed, we know of no cases which hold the contrary view, except *Tierney v. M. & St. L. Ry. Co., 33 Minn., 311; S. C. 24 Am. L. Reg., 669*, decided by a divided court, and *Cooper v. Railroad Co., 24 W. Va., 37.*

Atchison, Topeka and Santa Fe R. Co. v. Wagner, 33 Kansas, 660, S. C. 21 Cent. L. Jour., 53, is precisely similar to the present case; the negligence imputed to the railroad company being the use of a passenger coach with a drawbar connected with a defective spring. The following propositions are there announced, which we approve of as sound law:

"1. An employe of a railroad company, by virtue of his employment, assumes all the ordinary and usual risks and hazards incident to his employment. 2. As between a railroad company and its employes, the railroad company is not an insurer of the perfection of any of its machinery, appliances or instrumentalities, for the operation of its railroad. 3. As between a railroad company and its employes,

the railroad company is required to exercise reasonable and ordinary care and diligence, and only such, in furnishing to its employes reasonably safe machinery and instrumentalities for the operation of its railroad. 4. It will be presumed, in the absence of anything to the contrary, that the railroad company performs its duty in such cases, and the burden of proving otherwise will rest upon the party asserting that the railroad company has not performed its duty. 5. And where an employe seeks to recover damages for injuries resulting from insufficiency of any of the machinery or instrumentalities furnished by the railroad company, it will not only devolve upon such employe to prove such insufficiency, but it will also devolve upon him to show either that the railroad company had notice of the defects, imperfections or insufficiencies complained of, or that by the exercise of reasonable and ordinary care and diligence, it might have obtained such notice. 6. And proof of a single defective or imperfect operation of any of such machinery or instrumentalities resulting in injury, will not of itself be sufficient evidence, nor any evidence, that the company had previous knowledge or notice of any supposed or alleged defect, imperfection or insufficiency in such machinery or instrumentalities. 7. As between a railroad company and its employes, the railroad company is not necessarily negligent in the use of defective machinery, not obviously defective, but it is negligent in such cases only where it has notice of the defects, or where it has failed to exercise reasonable and ordinary diligence in discovering them and in remedying them."

And in *Atchison, T. & S. F. R. Co. v. Ledbetter*, decided by the same court, *8 Pacific Rep., 411*, the syllabus is as follows:

"In an action by a yard switchman against a railroad company, in whose employ he had been, for injuries alleged

to have resulted in consequence of a defect in the draw-bar of a car, or in some of its accompanying appliances, *held*: that no recovery can be had against the railroad company except by proof of negligence on its part, and that it devolves upon the plaintiff to prove the negligence, and to prove all the facts which constitute or make apparent such negligence; and therefore, when it was not shown that the railroad company had any knowledge of the defect existing in the draw-bar or in some of its accompanying appliances prior to or at the time of the injury, or that such defect had existed for any considerable length of time, nor what was the nature or character of the defect; that it was obvious or manifest, or could have been discovered by the exercise of reasonable care and diligence, or by any of the tests employed by car inspectors; nor that the car had not been properly inspected by the car inspector at the yard where the injury is alleged to have occurred; *held:* that no negligence is shown on the part of the railroad company and that no cause of action against the railroad company has been proved."

In *Skellenger v. C. & N. Ry. Co., 61 Iowa, 714,* the trial court, after the testimony was all in, tending to prove a state of facts somewhat similar to the present case, directed a verdict for the defendant; and its action was approved on appeal.

The judgment is reversed and the cause remanded for further proceedings.

SYLLABUS INDEX.

ACTION.

See ADMINISTRATION, 8. INTEREST, 2. RAILROADS, 8. TAXES, 6.

Right of, on promise for plaintiff's benefit.

A party may maintain an action on a promise made to another for his benefit. Hecht & Imboden, v. Caughron. 132

ADMINISTRATION.

See FRAUD, 2.

1. *Jurisdiction acquired by service of citation.*

The probate court acquires jurisdiction of the person of an administrator for the settlement of his accounts by service of citation and order of attachment on him. George v. Elms. 260

2. *Judgment of probate court conclusive.*

The adjudication of the probate court in the final settlement of an administrator's accounts as to the amount of his liability, is conclusive evidence against his sureties in an action upon the bond. Ib.

3. *Who must sue for interest of deceased heir.*

The administrator of a deceased heir, and not his widow or heirs, must sue on the administrator's bond for his distributive interest. Ib.

4. *Appointment of administrator. Necessity for.*

The appointment of an administrator by the probate court is an adjudication of the necessity for the appointment, which is conclusive in a collateral issue. Stewart v. Smiley. 373

5. *Lien upon lands for payment of debts not perpetual.*

The charge upon a decedent's lands for payment of his debts is not perpetual. The heirs cannot be forever deterred from the possession of the lands of their ancestor by the neglect of the administrator or creditors to enforce payment of the debts. Ib.

6. *Administrator's right to the lands.*

An administrator has no control of his intestate's lands when not needed for payment of his debts, nor of the rents due from the lessees of his heirs; and cannot collect them as administrator even by consent of the heirs, but only as their agent. Such consent does not make him the tenant's landlord. Ib.

7. *Ancillary administrator, duty of.*

The office and duty of an ancillary administrator is to protect the rights of domestic creditors and pay their claims, to prevent the necessity of their having to follow the estate into a foreign jurisdiction, and to pay over any surplus in his hands, after paying home creditors, to the administrator of the domicile. Green v. Byrne. 453

8. *Administrator de bonis non no claim against former administrator.*

An administrator *de bonis non* cannot call a former administrator to account for money in his hands. He and his sureties are liable only to the heirs, legatees and creditors. Ib.

AFFIDAVIT.

See APPEAL FROM J. P. 1, 2.

AGENCY.

1. *When agent to sell has authority to collect.*

The rule that the authority of an agent to sell goods imports the authority to receive the proceeds of the sale is limited to cases where there are circumstances or appearances which give color to the belief in the purchaser that the authority exists. Meyer, Bannerman & Co. v. Stone & Co. 210

2. *Same.*

An agent to sell goods who has possession of them and delivers them to the purchaser, has authority to collect the purchase price; but if he is merely employed to sell, and has no possession of the goods, he has no authority to receive the price; and payment to him will not discharge the purchaser unless there is a known usage of trade or course of business to justify him in making it. Ib.

3. *Proof of.*

An agency can not be proved by the declarations of the agent *in pais*, in the absence of the party to be affected by them. Turner v. Huff. 222

AMENDMENT.

See APPEAL FROM J. P., 1, 2, 3.

APPEAL FROM J. P.

See PLEADING AND PRACTICE, 5.

1. *Amendment in circuit court. New debt added.*
Upon an appeal from a justice of the peace, the plaintiff may amend his action in the circuit court by adding a claim against the defendant which was not included in the original action before the justice. Birmingham v. Rogers. 254

2. APPEAL: *Affidavit for, before appellant's attorney.*
An affidavit for an appeal from a justice of the peace, made before the appellant's attorney in his capacity of a notary public, is not void. Coleman v. Frauenthal. 302

3. SAME: *Affidavit. Amendment in circuit court.*
An imperfect affidavit for an appeal made by one partner before a justice of the peace may be amended in the circuit court by another. Ib.

APPLICATION OF PURCHASE MONEY.

1. *Duty of purchaser to see to.*
A purchaser from a trustee who knows that the trustee is committing a breach of trust in making the sale, is a party to the breach and is bound to see to the application of the purchase money. Grider v. Driver. 109

ASSIGNMENT.

1. FRAUDULENT. *Withholding property from general assignment.*
Where a failing debtor makes an assignment purporting to convey all his property for the benefit of creditors, but intentionally withholds a valuable part, the assignment is fraudulent and void, as between the assignor and attaching creditors, though the part be withheld for the purpose of applying it to other debts not secured by the assignment, and be actually so applied. Probst & Hilb v. Weldon. 405

ATTACHMENT.

See COST.

1. *Sale of attached land. Filing bond before sale. Proof of attorney's authority to appear.*

In an attachment suit before a justice of the peace against a non-resident, served by warning order, an attorney *ad litem* was appointed by the justice for the defendant, who filed an answer and made defense for him, but judgment was rendered for the plaintiff and the land attached was sold, and the purchaser brought ejectment against the occupant and recovered, and the occupant appealed to the Supreme Court, where it was held that the recital in the justice's record of the attorney's appearance and defense had reference to his authority under the appointment, and did not show jurisdiction of the defendant's person, and that the sale was void for the failure of the plaintiff to file before the sale, the bond required in such cases against defendants only constructively summoned. At the trial, after the appeal, the circuit court refused to allow evidence to prove that the attorney had also been employed by the defendant. *Held*, error: The offered proof did not contradict the justice's record, and the attorney's authority was proveable by parol evidence, and the evidence was material in showing that the justice had jurisdiction of the defendant's person by the appearance through his authorized attorney, and the bond was therefore not necessary to authorize the sale. Visart v. Bush. 153

BAIL BOND.

1. *How enforced.*

The proceeding by *scire facias* to collect the penalty of a forfeited bail-bond is not exclusive of the common law action upon the bond. Either may be pursued; but the proceeding by *scire facias* must be in the court in which the default was made. Littleton v. State. 413

2. *Defenses by bail. Duress.*

It is not necessary to the validity of a bail bond that the accused should sign it, and the relation of principal and surety between him and his bail exists only in a qualified sense, and it is no defense to an action on the bond against the bail, that the accused was illegally in custody at the time it was taken. Ib.

BANKS.

1. *Relations between, and depositors.*

The relation between a bank and a general depositor is not that of bailor and bailee, but of creditor and debtor, the bank becoming the

owner of the deposit and debtor for repayment of it, or any part of it, to the depositor upon demand. Himstedt v. German Bank. 537

2. *Garnishment of. Parties.*

Where there is a general deposit of money in bank by a wife, as her own, the bank becomes her debtor for the amount of the deposit, and not the debtor or bailee of the husband, and cannot be garnished by the attaching creditor of her husband upon the ground that the money was his, fraudulently transferred to her. The remedy is in equity, in which the husband and wife and bank are, all, necessary parties. Ib.

BILL OF EXCEPTIONS.

See PRACTICE IN SUPREME COURT, 1, 2, 3, 7.

1. *What it is.*

A bill of exceptions is a record which is made when signed by the judge and filed by the clerk, and nothing can be inserted in it by the clerk by directions in the bill except writings so identified by the directions that the identity is certain upon comparing the writing with the directions. Lesser v. Banks. 482

CHANCERY PRACTICE.

See REFORMATION OF CONTRACTS, 1.

1. CHANCERY JURISDICTION: *Legal with equitable relief.*

When chancery sets aside a deed for fraud it will also decree possession of the land for the plaintiff, if it is in possession of the defendant, without remitting him to his action at law for its recovery. McGaughey v. Brown. 25

2. STATUTE OF LIMITATIONS: *To actions in equity.*

Courts of equity in cases of concurrent jurisdiction consider themselves bound by statutes of limitations which govern courts of law in like cases, and this rather in obedience to the statute than by analogy. Ib.

COMMON CARRIERS.

See RAILROADS, 2, 3, 4, 5.

1. *Delivery of goods.*

A carrier by water may deliver goods on the wharf, but generally the consignee is entitled to notice of their arrival, that he may remove or

safely store them. Notice, however, may be waived by the previous course of dealing between the parties. Turner v. Huff. 222

2. *Same.*

A carrier by water is not responsible for the loss of goods delivered at the landing-place at which the consignee receives his goods, though there be no warehouse there and the consignee have no notice of their arrival, if it be the uniform usage and course of business of carriers in the same trade to leave goods at the landing-place without notice, and the manner of the delivery conform to the custom of the locality; and this, whether the shipper or consignee knew of the usage or not. Ib.

CONSIDERATION.

1. *Relinquishment of dower as consideration for deed.*

A wife's relinquishment of dower, or her cession of any other rights of property, is a sufficient consideration for a settlement upon her by her husband out of his own property. Hershy v. Latham. 542

CONSTRUCTION OF CONTRACTS.

1. *When doubtful as to honesty or legality.*

When an instrument is susceptible of two probable conflicting constructions, one of which imputes bad faith to either party, and the other would not, or one would render the contract unlawful and the other lawful, the latter construction should be adopted. Gauss Sons v. Orr & Lindsey. 129

CONSTRUCTION OF STATUTE.

See EXEMPTION, 4. MUNICIPAL CORPORATION, 1. STATUTES, 1, 2. TAXES, 4. WITNESSES, 2.

STATUTES: *Proviso. Construction of.*

The office of a proviso is to restrain or modify the enacting clause of a statute; and where the enacting clause is general in its language and objects, and is followed by a proviso, the proviso is construed strictly, and takes no case out of the enacting clause which does not fall fairly within its terms. A proviso carves out of the enacting clause only special exceptions within the words as well as within the reason thereof. McRae, Ad., v. Holcomb. 306

CONTRACTS.

1. *When not void.*

A contract for work is not void because the contractor has previously contracted with another party to do the same work. He only makes himself liable to both parties. Tex. & St. L. Ry. v. Donnelly. 87

2. RELEASE: *Consideration. Contract against public policy.*

An argreement by an attorney at law to release his debtor from his debt on condition that the debtor will give him the collection of a claim sent to him by his correspondent, but in which the debtor had no pecuniary interest as collecting agent or otherwise, is without consideration and not enforceable, though the debtor deliver the claim to the attorney for collection; or, if there be a consideration, the agreement is against the policy of the law which forbids a trustee, agent or bailee, without reward, to use the trust property or subject matter of the agency or bailment, or his relation thereto, for his own private advantage. Mendell & Bro. v. Davies. 420

3. CONTRACTS: *Unlawful, not enforceable.*

Where the ground of a promise on one part, or the thing promised to be done on the other part, is unlawful, the courts will not enforce the contract for either party. Ib.

COST.

1. *In actions by attachment.*

A judgment for defendant and for cost in an action in which he denies the debt, carries the cost of an ancillary attachment as well as in the action. The circuit judge has no discretion to adjust the cost as in equity causes. Malpas v. Lowenstein. 552

COURTS—CIRCUIT.

1. *Fixing terms of. Power of the legislature.*

By act of February 13, 1885, the legislature fixed the terms of the circuit court of Monroe county on the fourth Mondays after the third Mondays in February and August in each year. By act of 3d of April, 1885, it divided Prairie county into two districts, and fixed the terms of one of the districts on the 3d Mondays of March and September in each year. Both counties are in the same judicial circuit, and have the same circuit judge. *Held:* That the time fixed for the spring term of the court in Prairie county being the same fixed for the spring term in Monroe county, the last act repealed the

first and deprived Monroe county of its spring term, and that the repeal was not unconstitutional. Parker v. Sanders, Judge. 229

2. *Power of legislature to reduce terms of.*
The constitution does not prohibit the legislature from reducing the annual term of the circuit courts of any county to one. Ib.

3. *Power over its judgments.*
The circuit courts have no power after the expiration of the term to vacate or modify a judgment or final order, except in the mode and for the causes specified in the civil code. Malpas v. Lowenstine. 552

COURT—PROBATE.

See ADMINISTRATION, 2.

CRIMINAL LAW.

1. *Limit of judgment of removal from office.*
In a proceeding for the removal of an officer from office the judgment extends only to removal—costs following as an incident. No fine or other punishment can be inflicted; and the cost can be collected only by execution—not by imprisonment. State v. Sib Jackson. 137

2. *Taking timber from another's land.*
The statute of 1838 (section 1658, Mansfield's Digest), making it a misdemeanor to carry away any wood or timber that may be lying upon the ground of the owner, is not repealed by the act of March 17, 1883 (Mansfield's Digest, section 1659). State v. Malone. 140

CRIMINAL PLEADING.

1. *Former acquittal.*
A plea of former acquittal of the offense charged is not sustained by proof of acquittal under a former indictment of acts of which the defendant could not have been convicted under the last. McCoy v. State. 141

CRIMINAL PRACTICE.

See BAIL BOND, 1, 2.

1. *Appeal from J. P. Jurisdiction.*
On appeal from a judgment of a justice of the peace in a criminal case, it is too late for the defendant to object in the circuit court to the jurisdiction over his person. Martin v. The State. 38

2. *Change of venue, order for.*

The order for a change of venue in a criminal case, from one justice to another, need not set forth the ground of the removal. That appears from the affidavit therefor, which is part of the record. Ib.

3. *Change of venue before J. P. Jurisdiction.*

It is not necessary to the jurisdiction of a magistrate to whom a cause is transferred, that a supporting affidavit for the change of venue was filed before the change. Ib.

4. *Appeal to circuit court, objection to jurisdiction.*

On appeal to the circuit court an objection to the jurisdiction of the magistrate who tried the cause for want of a supporting affidavit for change of venue to him from another magistrate, is waived by not making the objection before the trial justice. Ib.

5. *On appeal, trial is on merits.*

On appeal to the circuit court, the trial is on the merits, and technical objections to the forms of procedure in the justice's court are futile. Ib.

6. *Separate appeals from J. P. Joint trials in circuit court.*

On trial of two defendants before a justice of the peace upon a charge of assault with a deadly weapon, and also of assault and battery, they were separately tried and convicted; one for assault and battery, and the other for an aggravated assault, and they appealed, giving a joint bond for the fine and cost. *Held:* That the circuit court might try them jointly. Ib.

7. *Verdict, uncertainty of.*

A general verdict of guilty, and a fine of one dollar against a defendant who is charged with an aggravated assault, and also an assault and battery, will be presumed in this court, from the smallness of the fine, to apply to the lowest grade of offense, and is not uncertain. Ib.

8. *Omission to furnish copy of indictment to defendant.*

The omission of the clerk to furnish a defendant indicted for murder with a copy of the indictment before arraignment, is no ground for arrest of judgment. It is ground only for new trial, and is waived by pleading and going to trial without claiming a copy. McCoy v. State. 141

DAMAGES.

See RAILROADS, 4.

1. *What Administrator may sue for.*

Quere: May not the administrator sue for damages which the deceased might have recovered if he had lived, under sec. 5223, Mans. Dig., as

well as the pecuniary damage to the next of kin under secs. 5225, 5226. Tex. & St. L. Ry. v. Orr. 182

2. *For delay in transporting freight.*

The general rule of damages for unreasonable delay in transporting freight is the difference between the value of the property at the time and place it should have been delivered and its value when it was delivered, with interest, after deducting the charges for freight, whether the depreciation in value accrued from a fall of prices or from a physical injury sustained through the negligence of the carrier. St. L., I. M. & S. Ry. v. Phelps. 485

DEEDS.

See CONSIDERATION. EVIDENCE, 4.

DISCOVERY.

See PLEADING AND PRACTICE, 7.

DONATION TITLES.

See TAX SALES, 4.

ESTOPPEL.

1. ESTOPPEL: *Against claim for improvements on land.*

Where a party knows, or ought from the circumstances to know, that one who claims his land under a fraudulent purchase, is in possession and making valuable improvements upon it, and makes no objection nor asserts his rights within a reasonable time, he can not in a suit in equity for the land and rents avoid an allowance for the value of the improvements not exceeding the rents. Grider v. Driver. 109

EVIDENCE.

See AGENCY, 3. ATTACHMENT, 1. PLEADING AND PRACTICE, 1. PRACTICE IN SUPREME COURT, 5. RAILROADS, 9. WITNESSES, 1, 3.

1. EVIDENCE: *Relevancy of.*

Donnelly sued the T. & St. L. R. R. Co. for work done in the construction of the road under an alleged contract with the company.

The company denied the contract, alleging that they had previously contracted with Hibbard for the construction of the road, and that Donnelly was sub-contractor under Hibbard; and on the trial, after proving by parol that they had contracted with Hibbard, they offered to read the contract as evidence, but the court refused it. *Held:* That the issue was whether they had contracted with Donnelly, and that the terms and stipulations of the contract with Hibbard were not relevant to the issue. Tex. & St. L. Ry. v. Donnelly. 87

2. SAME: *Same.*

Donnelly contracted by parol with the chief engineer of a railroad company to build two different sections of the road. Afterwards the contract for building one of the sections was reduced to writing and signed by Donnelly, in which it appeared that he was contracting with Hibbard, to whom the construction of the whole road had been previously contracted by the company. When the original contract was made, the engineer did not disclose Hibbard as his principal; Hibbard paid for the construction of the section embraced in the written contract, and Donnelly sued the company for the construction of the other. The company claimed that the contract was with Hibbard, and not with the company, and upon the trial offered the written contract as evidence, but the court refused it. *Held:* That the written contract was not relevant to the issue—that a subsequently written contract could not control a parol contract previously made in regard to a different subject matter. Ib.

3. WITNESS: *Impeachment of.*

A witness may be impeached by introducing his pleading under oath in another case which is in conflict with his testimony. Ib.

4. DONATION DEEDS: *As evidence of title.*

Donation deeds are *prima facie* evidence of good title in the donees, and that the land they purport to convey had been regularly forfeited by the previous owners. Radcliffe v. Scruggs. 96

5. CRIMINAL EVIDENCE: *Statements of defendant after the crime.*

Evidence of the defendant s statements after the commission of a homicide, which are no part of the *res gestæ*, is not admissible for him. McCoy v. State. 141

6 *Receipt given under protest.*

A receipt is only *prima facie* evidence of what it imports, and may be explained or contradicted by the party signing it; but a settlement and receipt in full of an unliquidated demand, when made with a complete knowledge of all the circumstances, is a bar to a subsequent action upon the demand, although the creditor accepts the amount paid under protest and threats of suit for a balance claimed to be due him. S. & M. R. R. v. Allen. 217

7 *Deposition of dead witness.*

The deposition of a deceased witness is admissible at the trial, though he resided in the county where it was taken and within thirty miles of the place where the court was held. Lawrence v. LaCade. 378

8. *Verified complaint in action on account.*

When a complaint in an action upon an account, refers to the account, which is attached to it, for the several items and their separate value, and alleges that the items are worth the amounts charged and that the defendant is justly indebted to the plaintiff in the amount claimed, and is properly verified, it sufficiently complies with section 2915, Mansfield's Digest, which makes a verified account *prima facie* evidence of its correctness until denied by the defendant under oath, and will authorize a judgment by default for the amount of the account without further evidence. Hershy v. McGreevy & Yantis. 498

9. FRAUD: *Burden of proof of.*

It is the general rule that he who alleges fraud in a transaction must prove it; but in a contest between a wife and her husband's creditors for land purchased in her name, a natural presumption arises that the husband furnishes the means of payment, which she must overcome by affirmative proof. Hershy & Latham. 542

EXEMPTION.

1. *When must be claimed.*

Quere. Can a judgment debtor claim his exemption of attached property after judgment of condemnation in the attachment suit? Richardson v. Adler *et al.* 43

2. *Of partnership property.*

The members of an insolvent firm are not entitled to the exemptions allowed by law, out of the partnership property, after it has been seized to satisfy the demands of the creditors of the firm. Ib.

3. *Right of must exist at commencement of lien.*

The right to exemption as head of a family must exist at the time the creditor's lien attaches. To become a head of a family after an attachment is levied on the property, will not exempt the property from sale under a judgment of condemnation. The judgment lien relates to the levy of the attachment, and perfects the inchoate charge created by the levy, and cannot be displaced by any change in the status of the debtor. Ib.

4. *Construction of sec. 2, art. 9, Constitution of* 1874.

Under sec. 2, art. 9, of the Constitution of 1874, a debtor who is married, though not the head of a family, is entitled to the chattel ex-

emption of $500 therein secured, whether it be the wife or the husband. The provision is for the benefit of all of either sex, who are either married or the heads of families. Mem. & L. R. Ry. v. Adams. 159

5. *Notice of claim of, when waived.*

It is the duty of a judgment debtor who claims exemption of his property from sale to give to the creditor five days' notice of filing the schedule of exemption; but this notice may be waived by the creditor, and *is* waived by his voluntary appearance before a justice, or before the circuit court on appeal, and contesting the right to the exemption. Garrett v. Wade. 493

6. *Notice of filing schedule when waived by creditor.*

When a justice of the peace refuses to issue a supersedeas to restrain the sale of exempted property, on account of the failure of the debtor to give the creditor the five days' notice of filing his schedule, and the debtor appeals to the circuit court and the creditor appears there and resists the right of exemption he thereby waives the required notice. Brown v. Doneghey. 497

FRAUD.

1. TRUST: *Purchase of trust estate by trustee.*

Where one has a duty to perform as vendor and takes an interest by the purchase, the inquiry is not whether there was or was not fraud in fact; the law stamps the act as fraudulent *per se,* and the purchase will be set aside at the instance of the *cestui que trust.* McGaughey v. Brown. 25

2. ADMINISTRATION: *Administrator's purchase of intestate's lands.*

A purchase of an intestate's lands at an administrator's sale, by an agent of the administrator and with his means, who takes the deed in his own name and conveys to the wife of the administrator, is fraudulent; and though not void, the purchase and deeds may be avoided by any one interested in the lands. Ib.

FRADULENT CONVEYANCE.

1. *Participation of grantee in the fraud.*

To avoid a fraudulent conveyance of a debtor proof of the grantee's participation in the fraud is not necessary where the grantee is a voluntary donee; but where he is a purchaser for valuable consideration it is necessary. Horshey v. Latham. 542

2. *Settlement upon wife for inadequate consideration.*
At law a settlement of an insolvent husband upon his wife for a valuable consideration, where no actual fraud or notice of fraud is imputable to her, will stand good for the whole settlement, though the consideration be grossly inadequate. But in equity the consideration may be weighed, and if found grossly inadequate, the conveyance will be declared partly voluntary, and be ordered to stand as a security for the consideration actually paid. Ib.

GARNISHMENTS.

See BANKS, 2.

HUSBAND AND WIFE.

See CONSIDERATION, 1 FRAUDULENT CONVEYANCE, 2.

IMPROVEMENTS.

See ESTOPPEL, 1. TAX SALES, 4.

1. *Rents on, when made by occupant on another's land.*
The occupant of another's land under a void purchase is not chargeable with rents on improvements made by himself, however fraudulent his purchase, except from the time his use and enjoyment of them has compensated him for making them. Grider v. Driver. 109

2. *Compensation for.*
It is only the *bona fide* occupant of another's land who is entitled to mitigate the owner's claim for damages and *mesne* profits, by offsetting the value of his improvements, or to compensation therefor, under the laws of this state. Shaw v. Hill. 333

INJUNCTION.

See JURISDICTION, 2, 3. TAXES, 7.

1. *To restrain deposed pastor and adherents from use of church.*
Where a minister of a congregational church is dismissed by the action of a majority of the church, and he thereafter usurps the pastoral office and attempts to exercise its functions, such majority are entitled to an injunction to restrain him, and to prevent him and his adherents from occupying and using the church without the consent of the majority. Hatchett *et al.* v. Mt. Pleasant Baptist Church *et al.* 291

INSTRUCTIONS.

See PRACTICE IN SUPREME COURT, 11.

1. *Should not be repeated.*

Where the trial court has given the law correctly and with sufficient fullness on all the points arising in the case, it is no error to refuse additional instructions which simply present the same ideas couched in different language. McCoy v. State. 141

INTEREST.

1. *When to be included in verdict.*

In an action upon an account where the prayer is for judgment for the amount of the account, "and for his cost and other relief," interest may be added to the amount found due, from the time it was payable to the time of the trial. Tex. & St. L. Ry. v. Donnelly. 87

2. *When excess paid not recoverable.*

Where the maker of a promissory note payable *in futuro*, with 10 per cent. interest from date, omitting the words "until paid," pays that rate of interest after the maturity of the note, he cannot recover the excess paid over 6 per cent. accruing after maturity. Rector v. Collins. 167

JUDICIAL SALE.

See ATTACHMENT, 1.

JURISDICTION.

See CHANCERY PRACTICE, 1.

1. CHANCERY JURISDICTION: *Conferred by cross-bill.*

If to a bill in equity which contains no matter of chancery jurisdiction, the defendant files a cross-bill founded on matter clearly cognizable in equity, this supplies the defect of jurisdiction, places the court in possession of the whole case, and imposes the duty of granting relief to the party entitled to it,—the original and cross-bill being but one cause. Radcliffe *et al.* v. Scruggs. 96

2. *Injunction of federal process by state courts.*

A state court cannot enjoin the collection of a tax levied pursuant to a mandamus issued by a federal court to enforce the payment of its judgments. Gaines v. Springer. 502

3. *Of federal court to enjoin its judgment. Citizenship.*
A bill filed in a federal court to enjoin the collection of a tax levied in pursuance of its mandamus for payment of a judgment rendered by it would not be an original suit, but ancillary and dependent—supplementary, merely, to the original suit in which the mandamus was issued, and would be maintained without reference to the residence or citizenship of the parties. Ib.

LANDLORD AND TENANT.

See ADMINISTRATOR, 6.

1. LANDLORD AND TENANT, OR CROPPER: *Construction of contract.*
An agreement between a land owner and laborer for the cultivation of a crop by the latter upon the land of the former, will be construed to create the relation of landlord and tenant, unless the intention to make them partners or tenants in common of the crop be clear and unmistakable. [See in the opinion the contract construed in this case.—REP.] Birmingham v. Rogers. 254

LAWS OF OTHER STATES.

See USURY, 4.

LEGISLATURE.

See TAX SALES, 1, 2, 4. TAXES, 7.

LIEN.

See ADMINISTRATION, 5. TAXES, 2. VENDOR AND PURCHASER, 1.

LIQUOR.

1. LIQUOR: *Power of municipality to license sale of.*
No municipal corporation in this state has any authority to deal with the liquor question in any other way than to license, regulate, tax or suppress tippling houses and dram-shops and other places of habitual resort for tippling. Magnolia v. Sharman. 358

MANDAMUS.

See TAXES, 3.

MASTER AND SERVANT.

See NEGLIGENCE, 4, 5.

MORTGAGES.

1. *Certainty in description of debt.*

Though usual, it is not necessary that a mortgage state the amount of the debt to be secured, or that it is evidenced by a note or any other instrument. If it contains a general description, sufficient to embrace the liability intended to be secured, and to put a person examining the records upon inquiry, and to direct him to the proper source for particular information of the amount of the debt, it is sufficiently certain. Curtis & Lane v. Flinn. 70

2. *Evidence: Declarations of mortgagor.*

Neither the mistake of a mortgagor of goods, as to the legal effect of the mortgage, nor his conduct or declarations as to his right to sell them, are admissible against the mortgagees, further than they tend to show his understanding of the intention of the parties at the time of executing the mortgage. Gauss Sons v. Doyle & Co. 122

3. FRAUDULENT CONVEYANCE: *Mortgage.*

Where there is an agreement or understanding between the mortgagor and mortgagee of a stock of goods that the mortgagor may remain in possession of the goods and sell them as his own, the mortgage is as fraudulent and void as to other creditors as if the agreement were expressed in the mortgage; and to arrive at their true meaning, the concurrent acts, surrounding circumstances and subsequent conduct of the parties are taken together for the consideration of the court or jury trying the issue. Ib.

4. *Sales by mortgagor.*

It is against public policy for a mortgagor to remain in possession and sell the mortgaged goods, except as agent of the mortgagee. Ib.

5. FRAUDULENT CONVEYANCE: *Benefit reserved to mortgagor.*

A mortgage of merchandise which authorizes the mortgagor to continue the sale of the goods and reserve any part of the proceeds of sale to his own use is void as against a subsequent mortgage of the goods. Gauss Sons v. Orr & Lindsey. 129

MUNICIPAL CORPORATION.

See LIQUOR, 1.

1. *Power to impound and sell vagrant stock. Construction of statute.*

The statute (*Mans. Dig., sec.* 757), empowering cities and towns "to re-

strain and regulate the running at large of cattle, horses, swine and other animals within the limits of the corporation, and to distrain, impound and sell the same for any penalty imposed by any ordinance or regulation, and all costs of the proceeding," authorizes the passage and execution of an ordinance forbidding the running at large of hogs in the city limits, by causing them to be seized and impounded and sold for the cost and expenses, after due notice of the sale, without further notice to the owner, and though no penalty be prescribed for the violation of the ordinance; and such an ordinance is not objectionable as effecting a forfeiture of the animal "without due process of law." Fort Smith v. Dodson. 296

NEGLIGENCE.

See RAILROADS, 1, 6, 7, 8, 9, 10.

1. *Burden of proof of contributory.*

If the plaintiff, in any case of personal injury, can show negligence on the part of the defendant without at the same time disclosing the inherent weakness of his own case by reason of contributory negligence, then such contributory negligence is matter of defense, in confession and avoidance, and must be established by a preponderance of testimony by the defendant. Tex. & St. L. Ry. v. Orr. 182

2. *Contributory. Conduct of party after the injury.*

That an injured party does not adopt the best remedies, or follow implicitly the directions of his physician, will not excuse a wrongful injury which produces as its direct effect a disease from which death ensues. The law fixes no exact standard here, and it should be left to the jury as to the reasonableness of his conduct, and whether or not the death was caused by the injury. Ib.

3. *Stock falling in pit on neighbor's premises.*

The defendant dug a pit under his cotton gin for a cotton press, near the public highway, and left it unenclosed, and corn and cotton seed scattered about it. The plaintiff's cow fell into the pit and was killed. *Held:* That the defendant was guilty of negligence and must pay the value of the cow; and that the plaintiff was not guilty of contributory negligence in turning his cow out on the commons remote from the gin. Jones & Norris v. Nichols. 207

4. *Master and servant.*

The master is not an insurer of the servant's safety, nor does he guarantee that the machinery, tools and instrumentalities he furnishes, may not prove defective. He only undertakes to use reasonable care to prevent injury to his servants. St. L., I. M. & S. Ry. v. Gaines. 555

5. *Same.*

In an action by a servant against his master for an injury resulting from defective appliances furnished him for his work, he must prove affirmatively, not only that the appliances were defective, but that the master had notice of it, or was negligently ignorant of it. It is not sufficient merely to prove the injury, and that it resulted from a defect in the machinery, but he must further prove that it happened because the master did not exercise proper care in the premises. Ib.

NEW TRIAL.

See PRACTICE IN SUPREME COURT, 2, 3.

1. *Newly discovered cumulative evidence.*

As a general rule newly discovered cumulative evidence presents no ground for a new trial. Tex. & St. L. Ry. v. Orr. 182

PARTIES.

See ADMINISTRATION, 3. TAXES, 3.

PARTNERSHIP.

See EXEMPTION, 2.

PAYMENT.

See PRESUMPTION, 1.

PLEADING AND PRACTICE.

See APPEAL FROM J. P., 1. REVIVOR, 1.

1. EVIDENCE: *Execution of contract sued on.*

When the execution of an instrument sued on and set forth in the complaint is not denied in the answer, it is admitted by the defendant and need not be proved. Hecht & Imboden v. Caughron. 132

2. *Written pleadings before J. P., effect of.*

When a defendant elects to file a written answer before a justice of the peace, or on appeal in the circuit court, he will be held to the issues tendered by his answer. Ib.

3. *General issue, effect of.*

The general issue is not now permissible in practice, but may be accepted by the parties as tendering an issue, and treated as a valid answer; but the scope of the issue will not be extended beyond what the answer obviously intended to make. Ib.

4. TRANSFER OF CAUSES: *Actions originating before J. P.*

The provisions for the transfer of causes have no application to actions originating before justices of the peace. Brewer & Son v. Winston. 163

5. SAME: *When not objected to.*

Error in transferring a cause is waived if the transfer is not objected to. Ib.

6. APPEAL FROM J. P.: *Waives irregularities before justice.*

Tillar, Stanley & Co. sued the defendants before a justice of the peace on a note executed by them to Hopkins as administrator of Harrell. On the day set for trial the administrator was allowed to prosecute the suit, and filed a formal complaint. The defendants appeared and insisted that Tillar, Stanley & Co. were interested, and should be made parties, which was done, and defendants afterwards answered, and judgment was rendered against them and they appealed to the circuit court, and there moved to dismiss the action because Tillar, Stanley & Co. had no interest. They offered to withdraw, and the administrator insisted on prosecuting the action alone, but the court dismissed the action. *Held*: Error. That the filing of the complaint by the administrator was a new action, and after the voluntary appearance of the defendants and appeal to the circuit court, the case was there for trial *de novo* on the merits, and Tillar, Stanley & Co. should have been allowed to retire as parties. Hopkins v. Harper. 251

7. PRACTICE: *Equitable defenses, how and where made.*

A defendant can not now, as under the former practice, let judgment go against him at law upon a legal liability and then enjoin it in equity upon an equitable defense which was known before the judgment. He must make all his defenses, legal and equitable, in the action at law, and, if necessary, transfer the cause to the equity docket. Reeve v. Jackson. 271

8. PRACTICE: *Discovery. Personal examination of party for personal injury.*

Where a plaintiff in an action for personal injuries alleges that they are of a permanent nature, the defendant is entitled, as a matter of right, to have the opinion of a surgeon upon his condition, based upon personal examination; and the court should, upon demand of

the defendant, compel the plaintiff to submit to such examination. But where the evidence of experts is already abundant, the court must exercise its sound discretion in compelling or refusing the examination; and its action is subject to review in case of abuse. Sibley, Rec., v. Smith. 275

9. PLEADING: *Striking from files for scandalous matter.*
When a pleading is replete with irrelevant and scandalous matter the court may properly strike it from the files. Hershey v. McGreevy & Yantis. 498

10. PRACTICE: *Transfer of cause. Errors not excepted to, waived.*
An error of the circuit court in overruling a motion to transfer a cause to the equity docket is waived if not excepted to at the time and saved in a motion for new trial. Cogswell v. McKeogh. 524

11. SAME: *Evidence. Instructions. Errors in.*
Errors in the admission of evidence and in instructions are waived if not excepted to at the time and insisted on in the motion for new trial. Ib.

PRACTICE IN SUPREME COURT.

See PLEADING AND PRACTICE, 9, 10. REVIVOR, 1.

1. *Bill of exceptions.*
An agreed statement of the facts in the trial court must be brought to this court by bill of exceptions, or be otherwise identified as the veritable agreement upon which the case was tried, or it will form no part of the record. Smith v. Hollis. 17

2. *Motion for new trial, when necessary.*
A motion for new trial is as necessary in trials by the court, as in those by a jury; and as well where the facts are agreed on as where they are proved by witnesses; but is not necessary at all, when the errors complained of do not grow out of the evidence or instructions, but appear upon the record itself, without the intervention of a bill of exceptions. Ib.

3. *Same. Judgment inconsistent with facts found.*
When the judgment of the circuit court is inconsistent with the special facts found by the court, this court will reverse it, though no motion for new trial be made, nor bill of exceptions taken in the trial court. Ib.

4. *When judgment of trial court presumed right.*
Where all the facts are not before the appellate court, the presumption is that every fact susceptible of proof which could aid the appellee's

case was established by the evidence. St. Francis County v. Lee County. 67

5 *Allegata and probata must correspond.*

It would be unjust to parties to adjudicate their rights upon issues never made in the court below. A plaintiff cannot recover upon a case not made in his bill. The *allegata* and *probata* must correspond. Radcliffe v. Scruggs. 96

6. *Conclusiveness of verdicts.*

The Supreme Court will not interfere with the verdict of a jury for want of evidence to sustain it, unless there is a total absence of proof on a material point, or the proofs so completely fail to support it that it must have been the result of prejudice or partiality. McCoy v. State. 141

7. BILL OF EXCEPTIONS: *Must contain all instructions.*

Unless the bill of exceptions contain the entire charge of the court, this court will presume that instructions which were refused, though proper in themselves, were properly refused because the jury had already been sufficiently instructed on the points covered by them. Jones & Norris v. Nichols. 207

8. INSTRUCTIONS: *Modification of. Practice in Supreme Court.*

When an instruction is modified and then given, but the record fails to show the modification, or in what form the instruction was finally given, the Supreme Court will presume that as modified it embodied the law. L. R. & Ft. S. Ry. v. Atkins 423

9. *Erroneous but harmless instructions.*

The Supreme Court will not reverse a judgment for an erroneous instruction of the circuit court, where it is apparent that no injury resulted from it to the appellant. St. L., I. M. & S. Ry. v. Phelps. 485

10. *Verdict of jury, when conclusive.*

The verdict of a jury where the evidence is conflicting is decisive in the Supreme Court. Cogswell v. McKeogh. 524

11. *Erroneous but harmless instructions.*

An erroneous instruction upon the burden of proof is generally fatal, for this court will not speculate upon the harm it may or may not have done. But where there is no material controversy about the facts, and the judgment is obviously right upon the whole record, it will be affirmed, notwithstanding the erroneous instruction. Hershey v. Latham. 542

PRESUMPTIONS.

See PRACTICE IN SUPREME COURT, 4. USURY, 4.

1. PAYMENT: *By note on third party. Presumption.*
The receipt by a creditor from his debtor of a note or bill of a third party is presumed to be for security, but may be as absolute payment of the debt if such be the agreement of the parties. Malpas v. Lowenstine. 552

RAILROADS.

See DAMAGES, 1. NEGLIGENCE, 1, 4, 5.

1. *Must keep platforms and grounds in repair.*
As a general rule railroad companies are bound to keep in a safe condition all portions of their platforms and approaches thereto to which the public do or would naturally resort, and all portions of their station grounds, reasonably near to the platform, where passengers or those who have purchased tickets to take passage on the cars, or those debarking from them would naturally or ordinarily be likely to go; and especially by those routes and methods which the company have established by its own customs and practice. Tex. & St. L. Ry. v. Orr. 182

2. *Liabilities as carriers of live stock.*
Carriers of live stock are liable as common carriers and as insurers to the same extent as carriers of merchandise, except as to injuries caused by the animals to themselves or to each other; losses that are caused by their inherent vices and propensities. St. L., I. M. & S. Ry. v. Lesser. 236

3. *Contracts for exemption from liability, etc.*
A common carrier cannot lawfully stipulate for exemption from responsibility for the negligence of himself or his servants, or the insufficiency of his cars for the transportation of the freight deposited in them. Ib.

4. *Damages measured by special contract.*
When the shipper of live stock, in consideration of reduced rates, contracts with the carrier that in case of a total loss of any of the stock, the valuation of any animal should not exceed a specified sum, then in case of a partial injury the damages will be the proportion of that sum the animal was lessened in value by reason of the injury. Ib.

5. *Exemption from liability. Onus of proof.*
Whenever a common carrier seeks to avoid liability for losses on account of a contract limiting his liability, he must prove, as a general

rule, not only that a limited contract was made, but also that the loss in question arose from a cause excepted in the contract. Ib.

6. *Negligence. Injury to employe.*

When a person enters into the employ of another he assumes all the risks ordinarily incident to the business, and cannot recover for injuries resulting therefrom, unless the employer has, or by the exercise of ordinary care would have, knowledge or information that the particular employment is, from extraneous causes known to him, more hazardous or dangerous than it fairly imports, or is understood by the employe to be, and fails to inform the latter of the fact or of the information. In which case he will be liable to the employe for all the consequences resulting to him from the lack of such information. Bauer v. St. L., I. M. & S. Ry. 388

7. *Same.*

A person engaged in the service of a railroad company as car inspector with a full knowledge of the dangers incident to the service, who is injured while in discharge of his duties by an engine of another company running over the same tracks at the station for making up its trains, by lease from his employer, through the negligence of the engineer of the lessee company in running the engine, cannot recover damages from the company employing him. Ib.

8. *Contributory negligence.*

In order for an employe to maintain an action against his employer for negligence he must himself be free from negligence contributing to the injury. Ib.

9. *Contributory negligence. Onus of proof of.*

Contributory negligence is a defense and must be proved by the defendant who alleges it, and therefore holds the affirmative of the issue. L. R. & Ft. S. Ry. v. Atkins. 423

10. *Contributory negligence. Leaving a moving train.*

It is not negligence *per se* for a passenger to leave a moving train. Whether it be so in a particular case depends upon the rapidity of the motion, the fact whether it is day or night, the distance from the car to the ground or surface upon which the passenger alights, the age and vigor of the party, and whether he takes the risk by the command or encouragement of the company's agent in charge of the train, or to escape a greater peril. Ib.

11. *Negligence. Contributory negligence.*

If the employes on a railroad train see a person on the track far enough ahead of the train to get out of the way, and are not aware that he he is deaf, or insane, or from some other cause insensible of the danger, or unable to get out of the way, they have a right to presume that he

will do so, and to go on without checking the speed of the train until they see that he will not do so, when they must give extra alarm by bell or whistle, and if that be not heeded they must stop, if possible, in time to avoid injury to him. But if they know, or have reason from his appearance to believe, that from insanity, drunkenness or other cause he is insensible of the danger, or unable to avoid it, they must presume that he might not, and must use proper care to avoid injuring him, or the company will be liable for the consequences. St. L., I. M. & S. Ry. v. Wilkerson. 513

12. *Contributory negligence. Riding on platform.*

If at the time of an accident by which a passenger is injured he is voluntarily and unnecessarily upon the platform of a running railroad car, when there is room for him inside the car, this is such contributory negligence as will prevent a recovery for the injury. Mem. & L. R. Ry. v. Sallinger. 528

13. *Same.*

Where a passenger who is injured upon a railroad car has so far contributed to the injury by his own want of ordinary caution, that but for such negligence he would have escaped unhurt, he cannot recover for the injury. Ib.

14. *Negligence. Brakeman and car-inspector fellow-servants.*

A brakeman and car-inspector are fellow-servants, and each assumes the risk of the other's negligence in the performance of his services, and the company is not liable to either for the negligence of the other. St. L., I. M. & S. Ry. v. Gaines. 555

RECEIPT.

See EVIDENCE, 6.

REFORMATION OF CONTRACT.

1. *Promissory note.*

Chancery will not reform a promissory note payable *in futuro*, with 10 per cent. interest from date, by adding the words "until paid," though the parties intended it to bear that interest after as well as before maturity, if they omitted the words only because they thought them unnecessary. A contract written as the parties intended it to be written cannot be reformed for their mistake of its legal effect. Rector v. Collins. 167

REMOVAL FROM OFFICE.

See CRIMINAL LAW, 1.

RELEASE.

See EVIDENCE, 6.

1. NOVATION: *When original debtor released.*
A debtor will not be released by the agreement of his creditor to accept another for his debtor unless he specially agrees to release him. Brewer & Son v. Winston. 163

RENTS.

See IMPROVEMENTS, 1.

REPLEVIN.

1. REPLEVIN: *Changed to detinue. Possession and demand before suit.*
When the order of delivery in an action of replevin is quashed and the action is prosecuted as detinue, neither proof of the defendant's possession of the property at the commencement of the suit, nor of demand by plaintiff before suit, is necessary. Hamilton & Co. v. Ford. 245

RESCISSION.

1. FRAUD: *False and fraudulent representation.*
A vendor has no right to rescind and avoid a contract of sale for fraudulent representations of the vendee inducing it, unless the representations were not only false and fraudulent, and made with intent to mislead the vendor, but could have been discovered to be such by reasonable care and diligence of the vendor; and that he not only did rely on them, but had a right to do so, in full belief of their truth. Hamilton & Co. v. Ford. 245

2 *Fraudulent representations of title.*
An honest expression of opinion by a vendor of his title, though erroneous, is not fraud, and affords no ground for rescission of the sale. Fitzhugh v. Davis. 327

3. *Same.*
A misrepresentation in order to affect the validity of a contract must relate to some matter of inducement to the making of the contract, in which, from the relative position of the parties and the means of information, the one must necessarily be presumed to con-

tract upon the faith and trust which he reposes in the representations of the other on the subject of the contract. For if the means of information are alike accessible to both, so that with ordinary prudence or diligence the parties might rely upon their own judgment, they must be presumed to have done so; and if they have not so informed themselves they must abide by the consequences of their own inattention and carelessness. Ib.

4. *For fraud or mistake.*

Where a party desires to rescind a contract for fraud or mistake, he must upon discovery of the facts, at once announce his purpose and adhere to it. If he be silent and continue to treat the property as his own he will be held to have waived the objection, and will be conclusively bound by the contract as if the fraud or mistake had not occurred. Ib.

5. *For mutual mistake.*

The cases in which rescission of executed contracts with warranty has been granted for mutual mistake of both parties as to the vendor's title, show that it was, in the absence of some element of fraud, upon the ground of a total failure of consideration in the want of title to the whole, or a substantial part of the subject matter of the contract, and so rendering compensation in damages impracticable and inequitable. Ib.

6. *Same.*

To entitle a vendee of land who has gone into possession under a deed with general covenants of warranty, to rescind on the ground of *failure of title*, the loss must be such that he is thereby deprived substantially of the benefits of his purchase. If the beneficial enjoyment of his contract be not materially taken away and there is only a partial failure of consideration which can be compensated in damages there is no ground for rescission. Ib.

REVIVOR.

1. REVIVOR: *When to be in name of widow alone. Practice in Supreme Court.*

Upon the death of an intestate whose estate is less than $300, it should be turned over by the probate court to his widow alone and not to her and his children; but where the death occurs during a pending suit in which the intestate was plaintiff and his estate is improperly turned over to the widow and children. the revivor of the suit in their names instead of hers alone, cannot be objected for the first time in the Supreme Court. Lawrence v. LaCade. 378

SALES.

2. SALE OF GOODS: *Delivery, title, fraud.*

Upon the sale and delivery of goods, with the intention of passing the title to the purchaser, the title vests in him, though the sale was procured by his fraud, practiced on the vendor; the fraud rendering the sale not void but only voidable. Hamilton & Co. v. Ford. 245

SETTLEMENT.

See CONSIDERATION, 1. FRAUDULENT CONVEYANCE, 2.

SPECIFIC PERFORMANCE.

1. *Contracts concerning public lands.*

Whittington, by virtue of his claim, occupancy and improvement of a lot in Hot Springs, applied to the commissioners appointed under the act of congress of March 3, 1877, to dispose of the lots there, to purchase it; but afterwards conveyed all his interest in the lot to Mrs. Southerland, who was his tenant upon it, with the agreement that she should apply to purchase, and if successful would, for a sum agreed on, reconvey a designated part of it to him; and she bound herself by bond for title to perform the agreement; but after she had purchased and obtained title to the lot she refused to execute it, and he filed his bill in equity for its performance. *Held:* That parties in possession of government land may make valid contracts concerning the title, formed upon the hypothesis of a future acquisition of title, unless restricted by congress, and that the contract was based on a valid consideration, and should be enforced. Southerland v. Whittington. 285

STATUTES.

See CONSTRUCTION OF STATUTES. TAX SALES, 5.

1. *Unconstitutional, to be disregarded by executive officers.*

Officers of the executive department are not bound to execute a statute which, in their judgment, is unconstitutional. Their primary allegiance is due to the constitution, and if there be a conflict between the two the constitution, and not the statute is the law. L. R. & Ft. S. Ry. v. Worthen, Col. 312

2. *Unconstitutionality of. Decision by executive officers.*

Executive officers incur peril by deciding for themselves, in advance of the courts, the unconstitutionality of a statute; but they are also liable to damages if they execute a statute which violates the constitution. Ib.

3. *Unconstitutional in part.*

When a statute is divisible and only a part of it is repugnant to the constitution, that part is rejected and the balance upheld. Ib.

STATUTE OF FRAUDS.

1. *Parol contracts not to be performed in a year.*

A parol contract for personal services for a longer period than one year is within the statute of frauds and no action can be maintained on it; and if the employe enter upon its performance and is afterwards discharged, the employer is liable only for his wages for the time he served. And it makes no difference that a contract for more than a year is subject to determination sooner on a given event. Meyer v. Roberts. 80

STATUTE OF LIMITATIONS.

See CHANCERY PRACTICE, 2. TAX SALES, 3.

1. *As against trusts.*

The rule that the statute of limitations will not bar a trust applies only to express and positive trusts, and not to them where circumstances exist which raise a presumption of the extinguishment of the trust, or where there is an open denial or repudiation of the trust brought home to the knowledge of the parties in interest which requires them to act as upon an asserted adverse title. McGaughey v. Brown. 25

2. *As against an administrator.*

The statute of limitations will commence against an action for the frauds of an administrator from the time of his discharge by the probate court. Ib.

3. *Suspended by fraud.*

Fraud in obtaining title to property will not suspend the operation of the statute of limitations against an action to set aside the title any longer than it is concealed from the knowledge of the plaintiff. Ib.

4. *Married women.*

Married women are not excepted from the operation of the statute of limitations as to judicial sales. Ib.

5. *Fraudulent allowances by administrator.*

The statute of limitations will set in against an action in equity by creditors to set aside an administrator's settlement for fraud in allowing and paying an illegal claim and thereby diminishing their own *pro rata*, from the time the settlement is approved by the probate court. Ib.

6. *On administrator's bond.*

A cause of action does not accrue on an administrator's bond until his accounts are finally settled in the probate court, and an order made by the court directing him to pay the amount found due to the parties entitled to it. George v. Elms. 260

7. *Tacking disabilities.*

The disability of a married woman to sue terminates at her death, and the statute of limitation then begins to run, and can not be postponed for her infant heirs by tacking their disability to hers. Dowell v. Tucker. 438

8. *When available by demurrer.*

As a rule the statute of limitations cannot be availed of by demurrer to the complaint in an action at law, unless the complaint shows that sufficient time had elapsed to bar the action, and the non-existence of any ground of avoidance. Ib.

9. *Trover. Conversion by bailee.*

An action in the nature of trover cannot be maintained against a bailee for hire or his assignee, until the term of hire expires, and the statute of limitations does not run against the owner of the property until then, unless the bailee or assignee does some act with the property inconsistent with his right as bailee, and amounting to an abandonment of it. This would be a conversion for which the action might be brought immediately, and from which time the running of the statute will date.

[In this case the defendant purchased the property from the bailee, and used it as his own before the term expired; but the action was not brought for more than three years after the purchase, but less than three after the term. *Held:* Barred.—REP.] Chapman v. Hudson. 489

10. *Same. Removal of property.*

The removal or concealment of property to avoid its recovery by an action of replevin, will not postpone the commencement of the statute of limitations against an action of *trover* for conversion of the property. Ib.

SWAMP LANDS.

1. SWAMP LANDS: *What are? Decision of Interior Department.*

Whether lands selected as swamp and overflowed are of that character is a question of fact; and the decision of the Interior Department of the government rejecting the selection is final and conclusive that they are not. Smith v. Hollis. 17

TAXES.

1. *When lands subject to.*

Lands entered in the proper land office of the United States become subject to taxation from the issuance of the certificate of entry and payment of the purchase price, without regard to the issuance of the patent. Smith v. Hollis. 17

2. *Lien of on personal property.*

The taxes assessed on personal property are a lien on the property which follows it into whosesoever hands it may be found, without regard to the ownership when assessed, or when seized for sale. But the taxes of each class of personal property are a lien only upon the property of that class, the whole taxes of each class being a lien upon every item of that class. Bridewell v. Morton, Col. 73

3. *Must be appropriated to purpose for which collected. Mandamus.*

When taxes are levied and collected in United States currency for payment of a particular debt of the county to another county, the currency must be applied to the debt and cannot be withheld by tendering in payment the county warrants or bonds of the creditor-county, or a judgment recovered against it; and the treasurer of the debtor-county will be compelled by mandamus to pay the currency.

The county court of the debtor-county is not a proper party defendant to the petition for mandamus. Lee County v. Phillips County. 156

4. *Legislature, no power to discriminate.*

The legislature cannot discriminate between different classes of property in the imposition of taxes. Its only discretion is in the ascertainment of values so as to make them equal and uniform throughout the state. L. R. & Ft. S. Ry. v. Worthen *et al.* 312

5. *On railroads. Construction of statute.*

So much of section 5649, Mansfield's Digest, as excludes "embankments, tunnels, cuts, ties, trestles or bridges" from assessment by the state board of railroad commissioners, is unconstitutional, and the board should disregard it and include them in the assessment. Ib.

6. *Illegal paid, when recoverable.*

An illegal tax paid to a municipal corporation under threats and compulsion may be recovered from the corporation by the party paying it. Magnolia v. Sharman. 358

7. *Appeals from board of equalization. Construction of statute.*

All that is necessary for a "party" to "appeal" to the county court from the action of the county board of equalization of taxes is to apply to the court for the correction of its errors. The words "party" and "appeal" are not used in the statute in their technical sense. The

board is not a court; it has no parties before it, can render no judgment nor grant any appeal. Prairie County v. Mathews. 383

8. *Illegal, may be enjoined.*

A court of equity has jurisdiction under the constitution to enjoin the collection of an illegal tax, when such injunction will prevent a multiplicity of suits. Little Rock v. Prather. 471

9. TAXATION. *Of occupations, trades, etc.*

The legislature has authority under the constitution to delegate to cities the power to tax occupations. Ib.

10. INJUNCTION: *Against taxes in part illegal.*

A sale of property for taxes which are illegal in part will not be enjoined where there is no offer to pay the part which is legal. Bridewell v. Morton, Col. 73

TAX SALES.

1. *Power of legislature.*

The legislature cannot enact a statute which will transfer one man's land to another under the guise of a tax sale for non-payment of taxes when there has been no assessment or levy of taxes. Nor can it prescribe any period within which the owner must make his objections for such fundamental defects, he remaining in possession and being, in the instance supposed, in no default for not paying his taxes. Radcliffe v. Scruggs. 96

2. *Same.*

The legislature has power to cure any illegality or irregularity in a tax sale which consist in a mere failure to observe some requirement imposed, not by the constitution, but by the legislature itself, and the non-observance of which does not deprive the former owner of any substantial rights. And it may limit the time within which objections for such failure must be made or be barred. Ib.

3. *Limitation of action against.*

The limitation prescribed by sec. 138, Act of April 8, 1869, to actions to test the validity of tax sales, begins to run from the day the property is stricken off by the officer making the sale. All technical objections to the sale not actually prejudicial to the former owner must be made in two years or be barred. Ib.

4. *Failure to make improvements.*

Upon the failure of a donee under a donation deed to make the required improvements on the land, it reverts to the state. And perhaps no individual can have such interest in the matter as to entitle him to be heard when he complains of the fraud against the state. Ib.

5. *Act of* 1879 *unconstitutional.*
The act of 1879, "to provide for the redemption of delinquent lands," is unconstitutional, and deeds made under it are void. Shaw v. Hill 333

TAX TITLES.

1. TITLE: *Government entries. Tax titles, etc.*
In 1860 A entered and paid for the land in controversy at the proper government land office. It had been selected but not confirmed to the state, as swamp land. In 1878 the commissioner of the general land office at Washington canceled A's entry as erroneously made, and refunded to him his entrance money; but before the cancellation the land had been taxed in A's name, and sold for the taxes and purchased by B; and after the cancellation B received the tax deed for it. Afterward, in 1882, the commissioner of the general land office at Washington set aside the selection of the land as swamp land, and thereafter C entered it under the homestead laws of the United States, and took possession of it, and B sued him in ejectment for it. *Held:* That the mere selection of the land as swamp land did not withdraw the land from sale, and the land not being swamp land (as must be assumed), A's entry was valid, and the land thereafter became subject to taxation, and the cancellation of A's entry and return of his purchase money did not impair the intervening tax purchase of B. Smith v. Hollis. 17

TRESPASS.

See CRIMINAL LAW, 2.

TRUST.

See APPLICATION OF PURCHASE MONEY, 1. FRAUD, 1.

USURY.

1. *Taking new note for principal and interest of old one.*
It is not usury to add the interest on several notes to the principal, and then add to this sum the interest on it at 10 per cent. per annum for one year, and then take a new note for this last sum payable one year after date, with interest at 10 per cent. per annum after maturity, in payment of the old notes. Grider v. Driver. 50

2. *Selling property on credit.*

It is not usury for one to sell property on a credit for a higher price than he would have sold for cash, with legal interest added; but if the sale be really made on a cash estimate and time be given to pay the same, and an amount is assumed to be paid greater than the cash price with legal interest would amount to, this is an agreement for forbearance that is usurious. Ib.

3. *Relief in equity.*

A plaintiff will not be relieved in equity from a usurious contract except upon condition that he pays the principal and legal interest. Ib.

4. *Presumption of laws of another state.*

Although it will be presumed in many cases, in the absence of a contrary showing, that the laws of other states are the same as our own, the presumption will not be indulged where our laws impose a penalty or work a forfeiture as in the case of usury. Ib.

5. *When contract for excessive interest is not.*

A contract to pay at a future day a sum larger than the actual debt and lawful interest, but dischargeable by payment of the true debt and interest before the day, is not usurious, unless a mere shift to avoid the usury laws; but the excess will be held a penalty for failing to pay the true debt and lawful interest within the time limited, against which equity will grant relief.

APPLICATION:

Jeffery & Co. executed to Chaffe & Sons on the 5th day of September, 1878, their note for $2,154.33, due January 5, 1879, with interest at 10 per cent. from date until paid, in settlement of account. On the same day Jeffery also executed his individual note to Chaffe & Sons for $3,000, due eight months after date, with interest at 8 per cent. per annum from maturity until paid, and also executed a mortgage on land, reciting that it and the last note were executed as collateral security for the firm note, and providing that if Jeffrey & Co. should not pay the first note by the maturity of the last, the land should be sold for payment of the last note. To a complaint to forclose this mortgage for the amount of the first note the defendant pleaded that the mortgage and note it secured were usurious and void. *Held:* That the two notes were but one transaction, and in the absence of proof that it was the intention to secure to the creditor unlawful interest, the excess of the last note over the actual debt and interest will be held but a penalty for failing to pay the first within the time limited, and not a contract for usurious interest; and the mortgage will be foreclosed for the amount of the true debt and interest. Chaffe v. Sanders. 364

VENDOR AND PURCHASER.

See RESCISSION, 1, 2, 3, 4, 5, 6.

1. *Lien for purchase money. Waiver.*

Richardson sold and conveyed to Green, in trust for his wife, a tract of land, and for part of the purchase price Green executed to Richardson his note, on which Richardson recovered judgment, and afterwards filed a bill in equity to inforce his lien upon the land for payment. *Held:* That neither the acceptance of Green's personal note, nor the recovery of judgment on it, was a waiver of the lien—that Green was not a stranger to the purchase, the taking of whose note would be a presumed waiver of the lien. Richardson v. Green. 267

VENUE—CHANGE OF.

See CRIMINAL PRACTICE, 2, 3, 4.

WILLS.

1. *Probate of, how contested. Statute repealed.*

Sections 6525, 6526, *Mansfield's Digest*, for contesting in the circuit court the probate or rejection of wills by the probate court were repealed by the subsequent provisions of the civil code upon the same subject. Dowell v. Tucker. 438

WITNESS.

1. *Defendant in criminal case.*

A defendant in a criminal case who becomes a witness for himself, is subject to the same liabilities on cross-examination as any other witness. His character for veracity may be impeached, though his good character may not have been previously put in issue, and his testimony may be contradicted by proof of his prior inconsistent statements. McCoy v. State. 141

2. *Parties in actions for or against deceased parties.*

The provision in the constitution of 1874 which prohibits parties in actions by or against administrators, executors or guardians from testifying as to transactions or statements of the testator, intestate or ward, applies only to the parties to the record, and does not exclude one who has an interest in the result, but is not a party to the record. McRae, Adm'r, v. Holcomb. 306

3. *Of transactions with a deceased party.*

When the widow and heirs, and not the administrator of an intestate, are the parties to an action, the testimony of the adverse party of transactions with the deceased is admissible. The widow and heirs are not within the proviso of section 2, schedule to the constitution of 1874. Lawrence v. LaCade. 378

ANALYTICAL INDEX.

A

ACTION,
one may sue on promise to another for his benefit, 133.
what damages to a decedent his administrator may sue for, 133.
when settlement of unliquidated demand bars further action, 217.
on bail bond may be by complaint and summons or *sci. fa.*, 413.
sci. fa. on bail bond must be in court of the default, 413.

ADMINISTRATION,
jurisdiction for settlement of administrator's account acquired by probate court by service of citation on him, 260.
appointment of administrator is conclusive of necessity for, in collateral issue, 373.
lien on decedent's lands for payment of debts is not perpetual, 373.
administrator has no right to lands or rents unless needed for debts, 373.
widow entitled to the whole estate when not over $300, 378.

ADMINISTRATOR,
his purchase of intestate's land is fraudulent, and voidable by any one interested, 25.
judgment of probate court against, conclusive against his sureties, 260.
of deceased heir must sue on administrator's bond for his interest, 260.
office and duty of ancillary, 453.
de bonis non, cannot sue former, for money in his hands, 453.

AFFIDAVIT,
made before affiant's attorney as notary public not void, 302.
for appeal from J. P. amendable in circuit court, 302.

AGENCY,
when agent to sell goods has authority to collect price, 210.
cannot be proved by declarations of agent in absence of party affected by them, 222.

AMENDMENT,
appeals from J. P. amendable in circuit court by adding new debt, 254.

APPEAL FROM J. P.,
waives irregularities before J. P. Trial is on merits, 251.
amendable in circuit court by adding new debt, 254.
not transferable to equity docket, 163.
affidavit for, made before affiant's attorney as N. P. not void, 302.
by one partner, amendable in circuit court by another, 302.

APPLICATION OF PURCHASE MONEY,
purchaser from fraudulent trustee knowing his fraud must see to, 109.

ARREST OF JUDGMENT,
failure to furnish defendant copy of indictment no ground for, 142.

ASSIGNMENT,
withholding property from general, fraudulent though for honest purpose, 405.

ATTACHMENT,
can exemption be claimed after condemnation of attached property? 43
judgment lien in, relates to levy of the writ, 43

ATTORNEY,
his authority to appear for party provable by parol, 153.

B

BAIL BOND,
action on, may be by complaint at law or *sci. fa.*, 413.
sci. fa. on, must be in court where default is, 413.
need not be signed by the prisoner, 413.
duress of prisoner no defense to his sureties on bond, 413.

BANKS,
are debtors, and not bailees, of general depositors, 537.
cannot be garnished by creditor of husband for deposit of wife, 537.

BILL OF EXCEPTIONS,
agreed statement of facts must appear in, or not noticed in Supreme Court, 17.
none necessary where judgment inconsistent with facts found by the court, 17.
must contain all instructions, 207.
what it is, and what may be inserted by the clerk, 482.

C

CHANCERY PRACTICE,
in vacating a deed for fraud chancery will also decree possession when necessary, 25.
in concurrent jurisdiction chancery bound by statute of limitations as law courts, 25.
chancery will not relieve from usury except on payment of principal and legal interest, 50.
will not reform contract because its legal effect is not as intended, 167.

COMMON CARRIERS,
delivery of goods by: when consignee entitled to notice of delivery, 222.
measure of damages for delay in transporting freight, 485.

CONSIDERATION,
unlawful, for promise, renders promise void, 420.
release of dower, good, for settlement on wife, 542.

CONSTRUCTION OF CONTRACT,
as to whether parties are landlord and tenant or landowner and cropper, 254.

CONSTRUCTION OF STATUTES,
sec. 2, art. 9, constitution 1874, construed, 159.
757 Mansf. Dig. (impounding stock) construed, 296.
office of a proviso in a statute, 306.
sec. 5649 Mansf. Dig. (exempting railroad embankments, etc., from taxation) is unconstitutional, 312.

CONTRACTS,
with different parties for same services bind contractor to both, 88.
when a promise, or the consideration for it is unlawful, it is void, 420.

COST,
in ancillary attachment, follows principal judgment when for defendant. 552.
court has no discretion to adjust, at law as in chancery, 552.

COUNTY,
debt of, must be paid in currency when currency was collected for it, 156.

COURTS—CIRCUIT,
power of legislature in fixing terms of, 229.
legislature may reduce terms of, to one in each year, 229.
cannot adjust cost at law as in chancery, 552.
have no power over judgments after the term except as provided in code, 552.

CRIMINAL EVIDENCE,
statements of prisoner which are no part of *res gestæ*, not admissible, 142.
defendant-witness in criminal case is impeachable as other witnesses, 142.

CRIMINAL LAW,
judgment of removal from office extends only to removal—not to fine or imprisonment, 137.
and the cost can be collected only by execution, 137.
sec. 1658 Mansf. Dig. (the timber act) not repealed by sec. 1659, 140.

CRIMINAL PLEADING,
FORMER ACQUITTAL: plea of, not sustained by acquittal under former indictment of acts not included in last, 141.

CRIMINAL PRACTICE. See VENUE, CHANGE OF,
jurisdiction of J. P. in criminal case over person of defendant cannot be objected to on appeal, 38.
on appeal from J. P. trial is on the merits, 39.
defendants may be tried jointly on separate appeals from J. P., 39.
when grade of offense will be presumed from smallness of fine, 39.
omission to furnish defendant copy of indictment no ground for arrest of judgment, 141.
and is waived by going to trial without demanding it, 142.
sci. fa. on bail bond must be in court of the default, 413.

D

DAMAGES,
what, to a deceased, his administrator may sue for, 182.
party claiming, for bodily injury must submit to personal examination, 275.
rule of, for delay in transporting freight, 485.

DEEDS. DONATION,
are *prima facie* evidence of good title and regular forfeiture by previous owners, 96.

DONATION TITLES,
upon failure of donee to make required improvements the land reverts to state, 97.

E

EVIDENCE. SEE CRIMINAL EVIDENCE.
relevancy of (special facts), 87.
witness impeachable by conflicting testimony in another case, 88.
donation deeds are *prima facie*, of good title, etc., 96.
declarations of mortgagor as to his right to sell the goods in his possession, 122.
private agreement for mortgagor to retain possession and sell goods, provable by acts and circumstances, 122.
failure to deny execution of instrument sued on admits it, 132.
parol, of attorney's authority sufficient, 153.
of contributory negligence is upon party pleading it, 182.
receipt is only *prima facie*, not conclusive, 217.
when settlement of unliquidated demand is conclusive, 217.
declarations of agent are not evidence of agency, 222,
deposition of dead witness is admissible, 378.
verified complaint setting out account is *prima facie*, of the account, 498.
of fraud: *onus* of, in contest between wife and husband's creditors, 542.
receipt of note of third party by creditor, presumed to be for security, 552.

EXEMPTION,
whether it can be claimed after condemnation of attached property, quere? 43.
none to partner out of partnership property, 43.
none to head of family who was not so at commencement of the lien, 43.
either wife or husband entitled to $500, though not head of family, 159.
notice of claim of, when waived by plaintiff, 493, 497.

F

FORMER ACQUITTAL,
must be of acts of which party could be convicted under last indictment, 141.

FRAUD,
onus of proof, in contest between wife and husband's creditors, 542.

FRAUDULENT CONVEYANCE,
when proof of grantee's participation in the fraud is necessary, 542.
settlement on wife innocent of fraud, for inadequate consideration is not, 542.
but if grossly inadequate, will be good in equity only *pro tanto*, 542.

FRAUDULENT REPRESENTATIONS,
misrepresentation of title, if honest, is not fraudulent, 337.

G

GARNISHMENT,
banks are not garnishable by husband's creditor for wife's deposit, 537.

H

HUSBAND AND WIFE,
release of dower to his vendee is good consideration for settlement on her, 542.

I

IMPROVEMENTS,
On failure of donee from state to make, the land reverts to state, 97.
when owner of land estopped to disallow improvements made on his land, 109.
occupant on another's land not chargeable with rents on his own improvements, 109.
only *bona fide* occupant can set off, against rents, 333.

INJUNCTIONS,
none against taxes illegal in part, without offer to pay the legal, 73.
judgments at law for equitable defenses, 272.
to restrain deposed pastor and adherents from use of church, 291.
illegal taxes may be enjoined, 471.
none by state court to enjoin collection of taxes under federal mandamus, 502.
by federal court to enjoin its judgment is not new suit, 502.

INSTRUCTIONS,
same in substance should not be repeated, 142.
modified, presumed in S. C. correct, if modification not in bill of exceptions, 423.

INTEREST,
may be charged on account from time it is due, 88.
chancery will not reform contract as to, when etc., 167.
when excess over contracted rate paid, cannot be recovered, 167.
excessive when not usurious, 364.
regarded as penalty and relievable, 364.

J

JURISDICTION,
of J. P. in criminal case over person of defendant cannot be objected to in circuit court on appeal, 38.
CHANCERY, may be conferred by cross bill when none in original bill, 96.
acquired by probate court over administrator for settling his accounts by service of citation, 260.

L

LANDLORD AND TENANT,
construction of contract as to whether parties are, or joint owners of crop, 254.

LANDS: See SWAMP LANDS,
are subject to taxes from date of entry and payment, 18.

LAWS OF OTHER STATES,
not presumed as ours which inflict penalties, 50.

LEGISLATURE,
may reduce terms of circuit court to one a year, 229.

LIENS,
of judgment in attachments relates to levy of writ, 43.
of taxes on personal property follows it in hands of purchaser, 73.
taxes on each class of personal property are lien only on that class, 73.
for purchase money; waiver by taking note, 267.
of creditors on lands of deceased for payments of their debts is not perpetual, 373.

LIQUOR,
power of municipality to license sale of, 358.

M

MANDAMUS,
when will issue to county treasurer to compel payment of county debt in currency, 156.

MARRIED WOMEN,
are not excepted from statute of limitations as to judicial sales, 26.

MASTER AND SERVANT,
injury to servant; negligence; contributory negligence, 388.
master is not insurer of servants' safety, 555.
nor guarantor of tools furnished him, 555.
proof necessary for servant against master for defective tools, 555.

MORTGAGE,
description of debt; what certainty necessary, 67.
acts and declarations of mortgagor, when evidence, 122.
agreement for mortgagor to retain possession and sell avoids mortgage, 122.
such agreement provable by acts and circumstances, 122.

MOTION FOR NEW TRIAL,
is as necessary in trials before court as before jury, 17.
not necessary when the errors appear on record without bill of exceptions, 17.

MUNICIPAL CORPORATION,
may impound and sell vagrant stock, 296.
collecting illegal tax by coercion must repay it, 358.

N

NEGLIGENCE,
when contributory, is a defense, defendant must prove it, 182.
contributory: conduct of plaintiff after the injury, 182.
stock falling in pit on neighbor's premises, 207.
contributory: *onus* of proof of, is on pleader, 423.
when debarking from moving train is, 423.

NEW TRIAL,
None for newly discovered accumulative evidence, 182.

NOVATION,
debtor not released by, unless specially so agreed, 164.

NEW TRIAL. See MOTION FOR NEW TRIAL.

P

PARTIES,
one may sue on promise to another for his benefit, 133.
to mandamus to compel county treasurer to pay county debt, 156.
administrator of a deceased heir must be plaintiff for his interest in estate, 260.

PARTNERS.
have no exemption in partnership property, 43.

PAYMENT,
by note on third party—presumption, 552.

PLEADING,
failure to deny execution of instrument sued on admits it, 132.
general issue, effect of, 132.
a written answer before J. P. confines defendant to issue tendered by it, 132.
equitable defenses must be pleaded in actions at law, 272.
that principal was illegally in custody when bail bond was taken, is no defense to bail, 413.
scandalous, may be stricken from the files, 499.

PRACTICE IN CIRCUIT COURT,
appeals from equalization boards; what necessary, 383.
scandalous pleading may be stricken from files, 499.
error in refusing motion to transfer is waived if not excepted to, 524.
as to evidence and instructions, waived if not excepted to, 524.
jurisdiction of J. P. in criminal case over person of defendant cannot be objected to on appeal, 38.
instructions should not be repeated, 142.
appeals from J. P. not transferable to equity docket, 163.
errors in transferring to the other docket are waived if not objected to, 163.
on appeal from J. P. trial is on merits, and irregularities before J. P. waived, 251.
new debt may be added in circuit court, 254.
equitable defenses must be pleaded in actions at law, not afterwards by injunction, 272.
party suing for personal injury must submit to personal examination, 275.
revivor; when should be in name of widow alone, 378.
PRACTICE IN SUPREME COURT,
agreed statement of facts not noticed unless in bill of exceptions, 17.
motion for a new trial when necessary, 17.
not necessary when errors appear on record without bill of exception, 17.
judgment inconsistent with facts found by the circuit judge will be reversed, without motion for new trial or bill of exceptions, 17.
uncertainty of verdict—grade of offense presumed from amount of fine imposed, 39.
when judgment of trial court presumed right, 67.
cause determined upon allegations and proof below, 96.
when verdict of jury conclusive, 142.
modified instructions, when presumed correct, 420.
will not reverse for erroneous instructions which were harmless, 485, 542.
verdict of jury, when conclusive, 524.
PRESUMPTION,
grade of offense presumed from fine imposed by verdict, 39.
laws of another state not presumed as ours which inflict penalties, 50.
when judgment of trial court presumed right, 67.
modified instructions presumed correct, 420.
PUBLIC LANDS,
parties in possession may contract for future sale of, 285.

R

RAILROADS,
must keep platforms and grounds at depots in repair, 182.
their liabilities as carriers of live stock, 236.
cannot contract for exemption from liability for negligence of themselves, servants, or for defective cars, 236.
damages against, measured by special contract, 236.
exemption from liability—*onus* and character of proof, 237.
injury to employe; negligence; contributory negligence, 388.
contributory negligence; *onus* of, is on pleader, 423.
when leaving moving train is, 423.
measure of damages for delay in transporting freight, 485.
negligence; duty of engineer when person on track, 513.

RAILROADS,
contributory negligence; riding on platform, 528.
not insurer of employe's safety, 555.
nor guarantor of tools, etc., furnished him, 555.
proof necessary for servant against, for defective tools, etc, 555.
brakeman and car inspector are fellow servants, 555.
not responsible to either for negligence of the other, 555.

REFORMATION OF CONTRACT,
none where contract is written as intended, but in mistake of legal effect, 167.

RELEASE,
debtor not released by novation unless expressly so agreed by creditor, 164.
when consideration for is against public policy, void, 420.

REMOVAL FROM OFFICE,
judgment of, extends only to removal and cost, not to fine or imprisonment, 137.
and cost can be collected onty by execution, not by imprisonment. 137.

REPLEVIN,
when changed to detinue, proof of possession and demand before suit unnecessary, 245.

RESCISSION,
misrepresentation of title, if honest, no ground for, 337.
for fraud or mistakes must be prompt on discovery and adhered to, 337.
when can be had for mutual mistake, 337.

REVIVOR,
must be in name of widow alone when deceased's estate is less than $300, 378.

S

SPECIFIC PERFORMANCE,
of personal contracts for sale of public lands, 285.

STATUTES: See CONSTRUCTION of STATUTES,
unconstitutional, to be disregarded by executive officers, 312.
unconstitutional in part, is void *pro tanto* if divisible, 312.
so much of sec. 5649, Mans. Dig. as excludes "embankments, tunnels, cuts, ties, trestles or bridges" from taxes is unconstitutional, 312.
appeals from boards of equalization; statute construed, 383.

STATUTE OF FRAUDS,
parol contract for services for more than one year is within, 80.
and discharged servant can recover only for services performed, 80.
such contract void though determinable within the year, 80.

STATUTE OF LIMITATION,
when begins against bonds for hire, 489.
concealment of property to avoid replevin will not postpone against trover, 489.
in concurrent jurisdiction chancery courts bound by, 25.
when the rule that statute will not bar a trust applies, 25.
will run against administrator's frauds from time of his discharge by probate court, 26.
not suspended by fraud any longer than it is concealed, 26.
married women not excepted from, as to judicial sales, 26.

STATUTE OF LIMITATIONS,
will begin as to fraudulent allowances by administrator from approval of his settlement, 26.
runs against action on administrator's bond from settlement in probate court and order to pay, 260.
as to married women begins at her death against her heirs, 438.
when available by demurrer, 439.

SWAMP LANDS,
decision of Interior Department is conclusive of character of lands, 18.

T

TAXES,
lands are subject to from date of entry and payment, 18.
lien of, on personal property follows it in the hands of the purchaser, 73.
in part illegal, not enjoined without offer to pay the legal, 73.
of each class of personal property are lien only on that class, 73.
collected in currency must be paid to the debt for which levied, 156.
legislature has no power to discriminate between different classes of property, 312.
exemption of embankments, etc., of railroads is unconstitutional, 312.
illegal, collected by threats, etc., are recoverable, 358.
appeals from equalization boards; what necessary, 383.
illegal, may be enjoined to prevent multiplicity of suits, 471.
collection of, under federal judgment, not enjoinable by state court, 502.

TAX SALES,
legislature cannot sell land for taxes without assessment or levy, 96.
nor prescribe statutes of limitations to the owner in such case who is in possession, 96.
what irregularities, etc., legislature may cure, 96.
the limitation to actions on of sec. 138, Act of April 8, '69, runs from day of sale, 97.
under act of 1879, and deeds under it, are void, 333.

TRANSFER OF CAUSE,
none to equity docket in cases originating before J. P., 163.
error in, is waived if not objected to, 163.

TRESPASS,
sec. 1658, Mans. Dig. (the timber act), not repealed by sec. 1659, 140.

TRUSTEE,
purchase by trustee of interest in trust estate is fraudulent *per se*, 25.
and purchase set aside at instance of *cestui que* trust, 25.

U

USURY,
taking new note for principal and interest of old one, 50.
when selling property for above cash prices and 10 per cent is and is not, 50.
not relieved in equity except on payment of principal and legal interest, 50.
presumption as to laws of other states, 50.
when contract for excessive interest is not, 364.
will be held a penalty, 364.

V

VENDOR AND PURCHASER,
lien for purchase; when not waived by taking note, 267.
vendor's misrepresentation of title, if honest, no ground for rescission, 337.

VENUE—CHANGE OF,
the order for, from one justice to another, need not state grounds of removal, 38.
justice of peace to whom venue is changed, in criminal cases, has jurisdiction without a supporting affidavit for the change, 38.
and on appeal in circuit court the objection is waived if not made before the justice, 38.

VERDICT,
uncertainty; presumption of grade of offense from amount of fine, 39.
may include interest on account from its maturity, 88.
when conclusive in Supreme Court, 142, 524.

W

WIDOW,
is, alone, entitled to estate of deceased husband when not over $300, 378.

WITNESS,
is impeachable by his conflicting testimony in another case, 88.
defendant, in criminal case is impeachable, 142.
only parties to the record in actions for or against deceased parties are excluded, 306.
where only widow and heirs, and not administrator, are the parties, sec. 2, schedule const. does not apply, 378.

WILLS,
probate of, must be contested as provided in civil code, 439.

Ex. H. A. A.

ERRATA.

On page 178, second line from bottom, read "Rousmanier" for "Rousmanius."

On page 439, in caption to Syllabus, read "available" for "avoidable."

On page 471, in second line, first paragraph of Syllabus, read "prevent" for "present."

7122 049